New Federal Rules and Proposed State Laws: At the Edge of Roe v. Wade

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The latest chapter in the perpetual cultural clash over women’s abortion and reproductive rights is a new federal rule written by the Bush administration for the Department of Health and Human Services (HHS) just after the 2008 Presidential election. The right to enact new federal rules at the end of an administration’s time in office is a privilege of being in power which both Democratic and Republican Presidents have exercised, and the new rule is a prime example. The new rule took effect immediately despite the fact that the Presidency and the U.S. government’s approach to women’s reproductive rights were clearly going to shift one month later.

The final version of the rule is designed to significantly broaden conscience clause protection for more health care workers, hospitals and insurers who refuse to provide care to patients seeking abortion-related services for moral or religious reasons, as well as to expand the types of care this protection will apply to. The potential impact of this new federal rule is vast, although efforts to undo this last-minute federal regulation are already underway at the time of this writing.

The New Federal Rule

Federal law already prohibited health care providers and organizations from discriminating against many individuals who refuse to provide abortions or birth control. Indeed, there had been no published data or public outcry that health care workers’ moral concerns were not already being adequately addressed by existing federal and state laws which extended conscience clause protection to health care workers who did not want to participate in sterilization or abortion procedures. The rule issued on December 19, 2008 by HHS significantly broadened, however, the ability of health care workers, hospitals, and insurers to refuse abortion, sterilization, or other women’s health-related care

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3 New Federal Abortion Rule, supra note 1.
5 In 1973 Congress passed the Church Amendment to protect the conscience rights of hospitals and health care providers from forced involvement in abortion. The Amendment provides that any recipient of federal funds in various federal health programs will not require hospitals or individuals to participate in abortion procedures if their objection to participation is based on moral or religious grounds. The Amendment also forbids requiring participation in abortion procedures a condition of employment. In 1976 Congress passed the Hyde Amendment to the 1976 Labor/HEW Appropriations Bill to protect the consciences of taxpayers who object to having their tax dollars pay for abortion-related services. Some version of this Amendment has been passed every year since 1976.
6 New Federal Abortion Rule, supra note 1.
services for moral or religious reasons. Secretary of HHS Michael O. Leavitt stated that “This rule protects the right of medical providers to care for their patients in accord with their conscience.”

The rule became effective on January 21, 2009 and contained several provisions which greatly expanded the range of potential health care institutions to which the conscience clause now applies. The rule now covers more than half a million health care entities including hospitals, pharmacies, physicians’ offices, medical and nursing schools, diagnostic laboratories, nursing homes, and insurers, and gives all of these institutions and the personnel employed there much greater leeway in deciding whether participation in a broad range of activities related to a woman’s reproductive care violates their conscience. There is no limit on the percentage of their job which must be concerned with abortion-related activities for this new rule to apply. The law also requires that all entities must certify in writing that they will comply with this new federal rule or risk loss of federal funding if they either fail to certify that they will comply or actually fail to comply.

The new rule also differs from previous federal conscience clause law in that it applies to more than just abortion or sterilization services, i.e. to more than just actions directly related to performing an abortion or sterilization. The scope of new conscience clause protection encompasses the provision of information and counseling about such services, scheduling patients for these health care services, or referring patients elsewhere for such services. In effect, the new federal rule would allow a medical secretary who found the counseling about such medical services to be morally objectionable to refuse to schedule a patient for a doctor visit if the reason for the visit was to discuss a referral for abortion or sterilization.

The States Have Been Busy As Well

Health care provider conscience clause laws are already on the books in many states, including Texas, and some of these laws already provide a great deal of latitude to health care workers (physicians, nurses, operating room and clinic personnel) who do not want to participate in abortion procedures or provision of abortion services for either religious or moral reasons. In some cases these state laws provide even greater leeway than the new federal rule does.

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7 Id.
8 Id.
9 Id.
10 Id.
11 Id.
12 Id.
13 TEX. OCC. CODE § 103.001 et seq (A physician, nurse, staff member, or employee of a hospital or other health care facility who objects to performing or participating, directly or indirectly, in an abortion procedure may not be required to perform or participate, directly or indirectly, in an abortion procedure).
Such proposed state conscience clause laws generally do not directly challenge the core holding of *Roe v. Wade*, as did the Nebraska law against partial-birth abortion, but they are clearly intended to make it progressively more difficult, for women to obtain an abortion, as are the newly enacted federal rules. These individual state efforts to chip away indirectly at the protective edges of the penumbra of reproductive rights established by *Roe v. Wade* will likely continue. And, absent a direct challenge to the fundamental reproductive rights established in *Roe v. Wade*, most of these state laws will likely remain in effect unless challenged in federal court as unduly burdensome on pregnant women seeking abortion. The range of potential state efforts to discourage abortion is vast, and includes everything from proposed anti-abortion license plates to detailed managing of what physicians must discuss and show to patients before they can proceed with a pregnancy termination.

A recently proposed Texas law referred to the House State Affairs Committee of the Texas State Legislature illustrates this trend. The proposed Texas legislation would, among other things, require pregnant women desiring abortion to: (1) be required to look at a real-time ultrasound of their fetus the day of the planned abortion; (2) listen to a physician provide a verbal explanation of the results of the ultrasound images, describe the dimensions of the embryo or fetus as well as the presence of cardiac activity; (3) listen to a statement that having an abortion will increase their risk of developing breast cancer even though there is good medical evidence that this statement is scientifically incorrect; and (4) listen to the fetal heart for a length of time and in a manner identical to that for a routine antenatal pregnancy visit.

**Administrative Law Remedies for Undoing the New Federal Rule**

Overturning a newly enacted federal rule is not as easy as it sounds; rescinding the rule will not be easy procedurally or politically. Although newspapers such as *The New York Times* have commented in their editorial pages that “the [new] administration should suspend enforcement and craft a new rule,” it turns out that the administrative law remedies available to a new President under the Administrative Procedures Act (APA) are limited. It is much easier to allow a newly proposed rule to wither and die on the administrative law grapevine than it is to overturn a new rule which has taken effect.

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16 H.B. No. 36, (81 Reg. Sess., 2009, Tex). [A BILL TO BE ENTITLED AN ACT RELATING TO INFORMED CONSENT TO AN ABORTION].
17 *Id.*
18 *Id.*
19 *Id.*
20 *Id.*
21 *Id.*
22 *Id.*
Attempting to simply not enforce a new rule is one possibility but will almost certainly result in a successful challenge in federal court. There are only two real remedies available to the new White House: (1) work with Congress to pass new legislation which would overturn the federal rule; or (2) go through the entire formal rulemaking process again. Neither option is speedy, and neither may be particularly palatable given the recent fighting over the economic stimulus package and an understandable desire to avoid the distraction of a fight over abortion so soon after the election. The realization that there is never a good time to engage in a heated battle over abortion for any administration may have been part of the out-going administration’s agenda as well. On the other hand, the Obama administration has indicated that it will not back down from contentious issues such as abortion either even though it would prefer to focus on the economy rather than divisive social issues. Even some leading Republicans have indicated, at least in the context of the stem cell controversy, that they aren’t in the mood for it either.\footnote{Eric Cantor, \textit{Stem Cell Research Just a Distraction from the Economy,} \textsc{The HuffingtonPost}, March 24, 2009, \textit{available at} \url{http://www.huffingtonpost.com/2009/03/08/eric-cantor-stem-cell-res_n_172867.html?view} (last accessed March 24, 2009).}

\textit{Health Law Perspectives} (April 2009), available at: \url{http://www.law.uh.edu/healthlaw/perspectives/homepage.asp}