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**State Regulation of
Telemedicine Abortion and
Court Challenges to Those
Regulations**

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In February 2018, an article appeared in Cosmopolitan Magazine (Cosmo) lauding the practice of telemedicine abortion.¹ The article described the process of meeting with a nurse for blood testing and an ultrasound at a “local health clinic” before a video-chat with a doctor.² The doctor, via video conferencing, would then determine if a patient is “a good candidate” for telemedicine abortion – which Cosmo described as an “early pregnancy termination via two small pills.”³ Cosmo describes the doctor approving the administration of the abortion-inducing drugs, the patient taking the first pill in the office while the doctor – via video – and the nurse – in the room – watch.⁴ Then the patient takes the second dose at home “later.”⁵ Then Cosmo skips over the entire actual abortion and a variety of potential side effects and simply states: “[a]fter a day or two, you’re no longer pregnant.”⁶

States have begun to regulate the practice of telemedicine abortion. In this paper, I review statutes in 19 states regulating the practice of telemedicine abortion. I then review litigation involving those regulations.

State Regulations of Telemedicine Abortion

According to the Guttmacher Institute, 19 states require a physician to be physically present with the patient in the office in order to initiate a medication abortion, also known

¹ Jennifer Garson Uffalussy, Planned Parenthood Will Launch 10 New Video-Chat Abortion Locations in 2018, COSMOPOLITAN MAGAZINE, Feb. 6, 2018 <https://www.cosmopolitan.com/politics/a15949012/planned-parenthood-announces-abortion-video-chat-telemedicine/>.

² *Id.*

³ *Id.*

⁴ *Id.*; but see. What can I expect if I take the abortion pill?, PLANNED PARENTHOOD, available at <https://www.plannedparenthood.org/learn/abortion/the-abortion-pill/what-can-i-expect-if-i-take-abortion-pill> (last visited Apr. 17, 2018) “Some people feel nauseous or start bleeding after taking mifepristone, but it’s not common.”

⁵ *Id.*; but see. What can I expect if I take the abortion pill?, PLANNED PARENTHOOD, available at <https://www.plannedparenthood.org/learn/abortion/the-abortion-pill/what-can-i-expect-if-i-take-abortion-pill> (last visited Apr. 17, 2018) “You’ll use the misoprostol 6-48 hours after you take the first pill... This medicine causes cramping and bleeding to empty the uterus. For most people, the cramping and bleeding usually starts 1-4 hours after taking the misoprostol. It’s normal to see large blood clots (up to the size of a lemon) or clumps of tissue when the abortion is happening. ... The cramping and bleeding can last for several hours.”

⁶ *Id.*; but see. What can I expect if I take the abortion pill?, PLANNED PARENTHOOD, available at <https://www.plannedparenthood.org/learn/abortion/the-abortion-pill/what-can-i-expect-if-i-take-abortion-pill> (last visited Apr. 17, 2018) “You’ll have a lot of bleeding and cramping after you take the second medicine at home.”; and see. Genvra Pittman, Medical abortions are safe: study, REUTERS, Dec. 20, 2012 <https://www.reuters.com/article/us-medical-abortions-are-safe-study/medical-abortions-are-safe-study-idUSBRE8BJ1CW20121220> “One limitation, the study team noted, is that not all women checked back after the abortion or had follow up medical records available - so it’s possible more complications could have occurred that weren’t recorded.”; and see. How safe is the abortion pill? PLANNED PARENTHOOD, available at <https://www.plannedparenthood.org/learn/abortion/the-abortion-pill/how-safe-is-the-abortion-pill> (last visited Apr. 17, 2018) (listing side effects including “blood clots” and “heavy bleeding from your vagina that soaks through more than 2 maxi pads in an hour, for 2 or more hours in a row.”).

as a chemical abortion or abortion via RU-486.⁷ Guttmacher lists the states that have these statutes but does not cite specifically to the individual state statutes, requiring one to examine each state's codes to determine what the statutes themselves state.⁸ I provide that additional research and analysis here.

Statutes and regulations governing the practice of telemedicine abortion vary widely in their methods of ensuring a doctor's presence. Here is a brief overview of how the law works in each of the 19 states identified in the Guttmacher list.⁹

Alabama

Alabama's statute requires that a physician be physically present to prescribe and administer abortion-inducing drugs.¹⁰

Arizona

Arizona's legislation prohibits telemedicine abortion of any kind and, in 2011, changed the state's definition of "abortion" with regard to abortion clinic regulations to include "any means" of pregnancy termination which brought the statute in conformity with the state's definition of "abortion" in its regulations of the practice.¹¹ Arizona also has regulations which list requirements before an abortion may be performed, including a follow-up within 21 days of a medication abortion and ensuring that any drugs used to induce abortion are administered with guidance from the Food and Drug Administration (FDA).¹² The state regulations also require that a physician estimate gestational age.¹³

⁷ Fact Sheet: Medication Abortion, THE GUTTMACHER INSTITUTE, Feb. 1, 2018, available at <https://www.guttmacher.org/state-policy/explore/medication-abortion>.

⁸ *Id.*

⁹ Though not included in Guttmacher's List, Virginia has a statute that could be considered to be a telemedicine abortion physical presence requirement in their Physician-Only Law. Va. Code Ann. § 18.2-72. That statute has been challenged as part of a larger challenge to Virginia's statutes concerning abortion in *Falls Church Medical Center v. Oliver*, the complaint for which is available at <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/VA%20Trap%20Complaint%20FINA%20L.PDF>. See also Andrea Gonzales-Ramirez, Reproductive Rights Groups Are Challenging Virginia & Indiana's Abortion Restrictions, REFINERY 29, June 21, 2018 <https://www.refinery29.com/2018/06/202510/abortion-restrictions-lawsuit-virginia-indiana-2018>.

¹⁰ Ala. Code § 26-23E-7.

¹¹ Ariz. Rev. Stat. § 36-3604; Ariz. Rev. Stat. § 36-3604; see. Ariz. Rev. Stat. § 36-2151 (definition of abortion as referred to in Ariz. Rev. Stat. § 36-3604).

¹² Ariz. Admin. Code § R9-10-1508.

¹³ Ariz. Admin. Code § R9-10-1508.

Arkansas

Arkansas requires that abortion-inducing drugs be provided by a physician.¹⁴ The statute also requires that a physician physically examine a patient because of the dangers of taking abortion-inducing drugs in cases of ectopic pregnancy.¹⁵ Another statute requires that a physician be physically present in the room in order to administer abortion-inducing drugs.¹⁶

Indiana

Indiana's method expanded the definition of abortion clinic to include clinics that provide medication abortions, thereby subjecting those facilities to the state code sections having to do with surgical abortion clinics.¹⁷ Indiana further specifies in its overall abortion statutes that the physician must "examine a pregnant woman in person before prescribing or dispensing an abortion inducing drug."¹⁸ That same section of code goes further to specify that the physician's examination cannot be performed through "use of telehealth or telemedicine services."¹⁹

Iowa

Guttmacher includes Iowa on its chart but shows the law as permanently enjoined and therefore does not count the law in its list of 19 states. However, I will discuss the Iowa litigation in the next section, so I review the now-enjoined Iowa law here.

Iowa's regulation went through the state's Board of Medicine. The Board enacted an administrative rule that established standards for prescribing the drug. Those standards included requiring a physical examination by a physician, physical presence for administering the drug, and physical presence at a follow up appointment.²⁰

Kansas

Kansas's statute states simply, "No abortion shall be performed or induced by any person other than a physician licensed to practice medicine in the state of Kansas."²¹ The

¹⁴ Ark. Code Ann. § 20-16-1504.

¹⁵ Ark. Code Ann. § 20-16-1504.

¹⁶ Ark. Code Ann. § 20-16-603.

¹⁷ Indiana Code 16-18-2-1.5(a)(2).

¹⁸ Indiana Code 16-34-2-1(a)(1).

¹⁹ *Id.*

²⁰ Iowa Administrative Code rule 653-13.10(2)-(4).

²¹ Kan. Stat. Ann. § 65-4A,10.

statute further elaborates to require that abortion-inducing drugs be administered in the physical presence of the prescribing physician and that the physician “make reasonable efforts” to ensure a follow up within 12-18 days.²² There is pending telemedicine legislation in the Kansas House which has a provision stating that the legislation does not modify any current statutes relating to abortifacients or abortions.²³

Louisiana

Louisiana’s legislation requires all abortions to be “performed or induced” by licensed physicians and that the physician be “in the same room and in the physical presence” of the woman to whom the medications are to be prescribed.²⁴

Michigan

Michigan’s statute requires the physical presence of a physician as well as a physical examination by a “physician or an individual licensed and qualified by education and training” prior to a medication abortion and specifically prohibits the use of “other means including, but not limited to, an internet web camera, to diagnose and prescribe a medication abortion.”²⁵ This statute also requires 24-hour waiting period, specifies what documents must be included in that notice, and that the physician must “personally and in the presence of the patient” explain the procedure and confirm that there has been no coercion.²⁶ The state also requires any abortion-inducing drug to be provided only with a written prescription and makes the unlawful selling of abortion-inducing drugs by anyone other than the prescribing physician a misdemeanor.²⁷

Mississippi

Mississippi’s legislation makes unlawful the selling of abortion-inducing drugs by anyone other than a physician.²⁸ This statute also relies on the concern about ectopic pregnancies to require that the drug be administered in the presence of a physician.²⁹ That same physician must provide follow-up care within 14 days or have a signed contract with another physician to do so.³⁰

²² Kan. Stat. Ann. § 65-4A,10.

²³ 2018 Kan. HB 2512.

²⁴ La. Rev. Stat. Ann. § 40:1061.10; ¶ 40:1061.11.

²⁵ Mich. Comp. Laws Serv. § 333.17017.

²⁶ Mich. Comp. Laws Serv. § 333.17015(3),(6).

²⁷ Mich. Comp. Laws Serv. § 750.15.

²⁸ Miss. Code Ann. § 41-41-107.

²⁹ Miss. Code Ann. § 41-41-107.

³⁰ Miss. Code Ann. § 41-41-107.

Missouri

Missouri's statute specifically requires a physician be present in the room "[w]hen RU-486 (mifepristone) or any drug or chemical is used for the purpose of inducing an abortion" and includes a reasonable efforts provision to ensure follow-up.³¹

Nebraska

Nebraska's legislation requires a licensed physician to perform an abortion and makes unlawful performance a class VI felony.³² This statute also specifically requires a physician to be present in the room with the patient when using abortion-inducing drugs and makes failing to do so a class IV felony.³³

North Carolina

The North Carolina law begins with a premise that all abortions are unlawful³⁴ and then permits certain abortions performed by a licensed physician "in a hospital or clinic certified by the Department of Health and Human Services to be a suitable facility for the performance of abortions" if performed before 20 weeks.³⁵

North Dakota

North Dakota's statute regulates abortion-inducing drugs rather than the provision of the drugs or telemedicine in general.³⁶ This statute requires that the drug be "administered by or in the same room and in the physical presence of" the prescribing physician.³⁷

Oklahoma

The statute Oklahoma enacted requires administration "in the same room and in the physical presence of" the prescribing physician and uses the same ectopic pregnancy

³¹ Mo. Rev. Stat. § 188.021.

³² Neb. Rev. Stat. Ann § 28-335.

³³ Neb. Rev. Stat. Ann § 28-335.

³⁴ See N.C. Gen. Stat. §§ 14-44, 14-15. (making the destruction of an unborn child and the production of a miscarriage per se illegal).

³⁵ N.C. Gen. Stat. § 14-45.1.

³⁶ N.D. Cent. Code § 14-02.1-03.5.

³⁷ N.D. Cent. Code § 14-02.1-03.5.

concern to justify physical examination requirements.³⁸ The state also requires the prescribing physician to be “physically present, in person, in the same room as the patient when the drug or chemical is first provided to the patient.”³⁹

South Carolina

Unlike several other statutes, South Carolina regulates telemedicine specifically and requires that telemedicine not be used “for the purpose of prescribing medication when an in-person physical examination is necessary for diagnosis.”⁴⁰ This statute specifically prohibits providing both abortion-inducing drugs and “lifestyle medications including, but not limited to, erectile dysfunction drugs.”⁴¹

South Dakota

South Dakota’s legislation uses another approach and requires an in-person pre-scheduling meeting. The legislation lists the required determinations a physician must make before the physician may schedule an abortion, including: written consent, assessing coercive factors, sex-selection, advising of risk, and the necessary records.⁴²

Tennessee

Tennessee’s statute specifically requires all abortions *of any type* to be performed in the physical presence of the physician.⁴³

Texas

In Texas, the state regulates distribution of an abortion-inducing drug, requiring that it be provided by a physician in compliance with FDA protocol.⁴⁴ It also requires documentation of the physical examination including “gestational age and intrauterine location of the pregnancy” and further requires that the physician follow the dosing recommendations of the “American Congress of Obstetricians and Gynecologists Practice Bulletin as those guidelines existed on January 1, 2013.”⁴⁵ Additionally, there is an

³⁸ Okla. Stat. tit. 63, § 1-729a.

³⁹ Okla. Stat. tit. 63, § 1-729.1.

⁴⁰ S.C. Code Ann. § 40-47-37.

⁴¹ S.C. Code Ann. § 40-47-37.

⁴² S.D. Codified Laws § 34-23A-56.

⁴³ Tenn. Code Ann. § 63-6-241.

⁴⁴ Tex. Health & Safety Code § 171.063.

⁴⁵ Id.

emergency-contract requirement and a MedWatch reporting requirement for “a serious adverse event.”⁴⁶ The Texas regulation also requires that an abortion be performed by “a physician licensed to practice medicine in this state.”⁴⁷

West Virginia

West Virginia regulates telemedicine abortion as part of its overall telemedicine statute which is very focused on the doctor-patient relationship.⁴⁸ The regulation of telemedicine abortion is included in the “prescribing limitations” section of the statute wherein the prescription of “any drug with the intent of causing an abortion” is prohibited via telemedicine making the physical presence of the physician a virtual requirement in order to prescribe any abortion-inducing drugs.⁴⁹

Wisconsin

Wisconsin’s statute requires a physical examination by and physical presence of the prescribing physician in order to provide abortion-inducing drugs.⁵⁰

Court Challenges to State Regulations of Telemedicine Abortion

In this section, I provide an overview of court challenges to telemedicine abortion regulations. There have been several challenges to statutes that require the physical presence of a doctor in order to administer abortion-inducing drugs. While some of the litigation is still pending, there have been varied rulings on the validity of the states’ physical presence requirements. In at least one court, the requirement was held to be an undue burden and in another it was held not to be an undue burden based on the population of women seeking telemedicine abortions. Some courts were reluctant to approach the issue at all and instead sidestepped the issue of undue burden entirely. Courts also varied as to the assessment of whether patient safety was served by the physical presence requirements. In different states, it was held both that the physical presence of a physician had no bearing on patient safety and that it was necessary to ensure patient safety.

Arizona

In Planned Parenthood Ariz., Inc. v. Am. Ass'n of Pro-Life Obstetricians &

⁴⁶ Id.

⁴⁷ Tex. Health & Safety Code § 171.003 .

⁴⁸ W. Va. Code § 30-3-13a

⁴⁹ Id. at (g)

⁵⁰ Wis. Stat. Ann. § 253.105.

Gynecologists, 227 Ariz. 262, 257 P.3d 181 (Ct. App. 2011), the court found that the legislature was able to establish that the physical presence of a physician is more effective than a non-physical consult and that the necessity of a physician’s consultation had been established.

Arkansas

In Planned Parenthood v. Jegley, 864 F.3d 953 (8th Cir. 2017), the preliminary injunction granted by the district court was found to be improper because the Abortion-Inducing Drugs Safety Act’s requirements were not established to be an undue burden for a large enough population of “women seeking medication abortions in Arkansas.”⁵¹

Idaho

In Idaho, the state settled a case with Planned Parenthood and repealed its law prohibiting telemedicine abortions.⁵²

Indiana

Indiana’s physical presence statute has been challenged as part of a broader challenge to Indiana’s abortion statutes in litigation initiated in June of 2018.⁵³

Iowa

In Iowa, the Iowa State Supreme Court in Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Med., 865 N.W.2d 252 (Iowa 2015) found that the Board of Medicine rule violated the federally established “undue burden” standard and emphasized that the record of the case “reveals only minimal medical justification for the challenged aspects of this rule.” Since the court found that the rule violated the federal constitutional standard, it also found that it was a violation of the Iowa constitution. This case noted that: “[o]nce the FDA approves a drug, the FDA does not prohibit physicians from using the drug in a different manner than the label provides.” The rule was enacted in part because “physicians who

⁵¹ Planned Parenthood v. Jegley, 864 F.3d 953 (8th Cir. 2017).

⁵² Eric Wicklund, Idaho to End Telehealth Restrictions for Abortions, MHEALTH INTELLIGENCE, Jan. 24, 2017 <https://mhealthintelligence.com/news/idaho-to-end-telehealth-restrictions-for-abortions>; Eric Wicklund, Idaho Revises Anti-Abortion Telemedicine Legislation, MHEALTH INTELLIGENCE, Mar. 22, 2017 <https://mhealthintelligence.com/news/idaho-revises-anti-abortion-telemedicine-legislation>.

⁵³ Complaint at 21, Whole Women’s Health Alliance v. Hill, No. 1:18-cv-1904, 2018 S.D. Ind., available at <https://rewire.news/wp-content/uploads/2018/06/1-Complaint-1.pdf> (last visited Jun. 27, 2018); Holly V. Hayes, Constitutionality of Indiana abortion laws challenged in new law suit, INDY STAR, Jun. 21, 2018 <https://www.indystar.com/story/news/politics/2018/06/21/indiana-abortion-laws-constitutionality-challenged-lawsuit/723223002/>.

prescribe and administer abortion-inducing drugs using telemedicine are inconsistent with the protocols approved by the U.S. Food and Drug Administration (FDA) and the manufacturer of the drugs.” The court specifically found that “the weight of the record evidence indicates that a pelvic examination prior to administering the mifepristone does not provide any measurable gain in patient safety.” Because of this, the legislation was permanently enjoined and is not in effect.

North Dakota

In North Dakota, a divided state Supreme Court held that the enacting legislation did not violate the state constitution in MKB Mgmt. Corp. v. Burdick, 2014 ND 197, 855 N.W.2d 31. The challenged provisions included the definition of “abortion-inducing drug”, FDA compliance requirements, and the physical presence requirement.⁵⁴ The state Supreme Court reversed the district court’s finding that the FDA compliance requirements effectively banned all medication abortions.⁵⁵ The challenge to the physical presence requirement was over whether misoprostol was an abortion-inducing drug.⁵⁶ The state contended that it was not an abortion-inducing drug because “it does not cause or induce the death of an unborn child”; the Court agreed misoprostol did not fit within the statutory definition of “abortion-inducing drug” but “recognize[d] the FDA final-printed-label protocol requires misoprostol to be administered orally at the clinic two days after mifepristone.”⁵⁷

Mississippi

Mississippi currently has pending litigation challenging a recently enacted bill banning telemedicine abortions.⁵⁸

Conclusion

While Cosmo’s article does outline what telemedicine abortion is, it fails to recognize that abortion is a different kind of medical procedure from any other type of medical procedure. It is one of the few procedures undergone for reasons that may not be

⁵⁴ MKB Mgmt. Corp. v. Burdick, 2014 ND 197, ¶ 47, 855 N.W.2d 31, 48.

⁵⁵ MKB Mgmt. Corp. v. Burdick, 2014 ND 197, ¶ 47, 855 N.W.2d 31, 48.

⁵⁶ MKB Mgmt. Corp. v. Burdick, 2014 ND 197, ¶ 50, 855 N.W.2d 31, 49.

⁵⁷ MKB Mgmt. Corp. v. Burdick, 2014 ND 197, ¶ 50, 855 N.W.2d 31, 49.

⁵⁸ Sarah McCammon, Reproductive Rights Advocates Challenge Dozens of Mississippi Abortion Restrictions, NPR, Apr. 9, 2018 <https://www.npr.org/2018/04/09/600805507/reproductive-rights-advocates-challenge-dozens-of-mississippi-abortion-restricti>; Dwayne Harmon, Clinic widens challenge of MS abortion restrictions, NEWBURGH GAZETTE, Apr. 10, 2018 <http://newburghgazette.com/2018/04/10/clinic-widens-challenge-of-ms-abortion-restrictions/>.

medical.⁵⁹ Further, it's a procedure with many very serious potential complications that are understandably concerning.⁶⁰ These types of procedures risk not only the lives of these potential mothers, but they end lives before they have a chance to emerge from the womb. The justification for these procedures constitutionally is a woman's privacy in making the decision in consultation with her doctor.⁶¹

The most famous abortion decision, *Roe v. Wade*, and abortion advocates generally, emphasize the value of privacy within the physician-patient relationship.⁶² That relationship loses the essential element of privacy when it leaves the solitude of a consultation room and loses the essential element of trust where the relationship is as brief and informal as the one described in *Cosmo's* article. It is sound policy for states to protect women in these relationships with their physicians, and it is reasonable for states to seek to protect the unborn lives being destroyed in these procedures.

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⁵⁹ Considering Abortion, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/abortion/considering-abortion> (last visited June 15, 2018); What facts about abortion do I need to know?, PLANNED PARENTHOOD <https://www.plannedparenthood.org/learn/abortion/considering-abortion/what-facts-about-abortion-do-i-need-know> (last visited June 15, 2018).

⁶⁰ How Safe is an in-clinic abortion?, PLANNED PARENTHOOD, (last visited June 15, 2018); How safe is the abortion pill?, Planned Parenthood, (last visited June 15, 2018).

⁶¹ *Roe v. Wade*, 410 U.S. 113, 156, (1973).

⁶² *Id.*; Noah Feldman, Doctors have the right to perform abortions, BLOOMBERG VIEW, May 23, 2018, <http://www.chicagotribune.com/news/opinion/commentary/ct-abortion-roe-v-wade-doctors-20160523-story.html>.