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TESTIMONY BEFORE THE FEDERAL AND STATE AFFAIRS COMMITTEE OF THE KANSAS HOUSE CONCERNING HOUSE BILL 2319

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Thank you Chairman Barker, Vice-Chairman Highland, Ranking Member Ruiz, and other members of the Committee.

My name is Jonathan R. Whitehead. I am an attorney in the Kansas City-area. For more than a decade, my practice has centered on litigation involving nonprofit organizations. I have been asked to address HOUSE BILL 2319 from the perspective of an attorney who is familiar with the legal and policy goals of "informed consent".

In short, I believe Kansas women deserve to know all the significant facts about their surgeon or physician before an abortion, so that they can decide if the doctor is right for them. As I explain below, H.B. 2319 closes loopholes so that women, not clinics, make an informed choice about their physician.

I. INFORMED CONSENT ABOUT PROVIDERS & K.S.A. § 65-6709.

An important part of "informed consent" is that the patient knows material facts about procedure and the *practitioner* responsible. In Kansas, informed consent requires a doctor to disclose all "significant facts within his knowledge which are necessary to form the basis of an intelligent consent by the patient to proposed ... treatment."[1] Doctors who fail to make the required disclosures can be sued for malpractice or battery, if they cause harm.[2]

In 1997, the legislature enacted K.S.A. § 65-6709. That statute requires voluntary and informed consent prior to an abortion, and establishes the minimum information necessary to establish informed consent for an abortion in Kansas.

The 1997 version of K.S.A. § 65-6709(1)(A)(1) attempted to give women information about their provider, by requiring a 24-hour disclosure of the "name of the physician" who will perform the abortion. With the name of the provider, women could

[1] *Natanson v. Kline*, 186 Kan. 393, Syl. ¶ 4 (1960).
[2] *Id.*

then seek out independent information on the provider's education, experience, availability and any disciplinary actions.

Since 1997, the law, medical ethics, and technology have advanced, while K.S.A. § 65-6709(1)(A)(1) has stayed relatively the same. In short, the disclosures provided to women in Kansas have moved from leading edge to obsolete. H.B. 2319 responds to these developments by requiring specific information about the provider(s) to be given to women, in a legible format, at least 24 hours prior to any non-emergency abortion.

II. Since 1997, Legal & Medical Ethics have imposed a greater duty to disclose material facts about healthcare providers.

Since 1997, the trend among doctor and physician groups is to become more explicit about the unethical practice of treating doctors as fungible, without giving enough information to patients.[3] This risk is elevated in some "team" practices. The term "ghost surgery" has arisen to describe procedures made without adequate disclosure and informed consent about the specific providers.

In one case that received media attention, a New Hampshire woman went to a triple board-certified surgeon, but her heart surgery was performed by a less experienced doctor, resulting in permanent heart damage. "I sought the rock star, and I got the opening act," she told media. Thankfully, the attitude that led to ghost surgery has become dated, and most doctors now recognize the ethical duty to provide relevant information about the procedure *and the physician(s) responsible for conducting the procedure.*

Since K.S.A. § 65-6709 was adopted in 1997, medical organizations have only made this ethical rule more explicit. Dunn's article reports: "[i]n the Statement on Principles, the [American College of Surgeons] states that the patient should be informed when the attending surgeon will not be an active participant at the surgical field. Kocher notes that the patient's surgeon should be the person with whom the patient discusses the planned procedure and who participates in signing of the consent form. The physician is then 'obligated to utilize his personal talents' during the surgery as required by the consent. These duties and responsibilities cannot ethically be delegated to another."[4]

The intent of K.S.A. § 65-6709 was to make sure that the patient knew the physician and could research the physician. Abortion providers in Kansas routinely fail to

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[3] See Debra Dunn, "Ghost Surgery: A Frank Look at the Issue and How to Address It" AORN J 102 (December 2015) 603-613. AORN, Inc, 2015. http://dx.doi.org/10.1016/j.aorn.2015.10.003; freely available at https://www.aorn.org/websitedata/cearticle/pdf_file/CEA15548-0001.pdf (last accessed February 3, 2017).

[4] *Id.*, *citing* Statements on Principles. American College of Surgeons. FACS.org. https://www.facs.org/about-acs/statements/stonprin and Kocher MS, *Ghost surgery: the ethical and legal implications of who does the operation.* J Bone Joint Surg. 2002;84(1):148-150 (last accessed February 3, 2017).

make available the kind of information consumers might expect concerning the specific doctor(s) at a facility. This is inconsistent with the intent of the existing law, and falls woefully short of the current medical and ethical expectations.

III. H.B. 2319 WOULD PROVIDE WOMEN WITH MATERIAL AND RELEVANT INFORMATION ABOUT ACTUAL PROVIDERS.

As addressed above, an obvious goal of K.S.A. § 65-6709(1)(A)(1) was to give a woman a chance to consider and research the physician performing the abortion. For a woman facing uncertainty, it is critically important that she have the best opportunity to understand facts that might be relevant to her choice.

Instead of recognizing K.S.A. § 65-709 as a starting point for giving informed consent, some providers have treated it like a procedural hurdle, churning out online forms that aren't specific to the patient, procedure or physician. H.B. 2319 would require specific information about the physician(s), their training, and a link to any disciplinary proceedings by a professional board.

Because technology has made it possible to link online information quickly, it is unfair to make patients guess about how to search for obviously relevant information like disciplinary proceedings. While many patients might know that physicians are regulated, fewer will know to search for terms like "Kansas State Board of Healing Arts," and even fewer will navigate several additional steps to conduct a search for each potential surgeon or physician. The costs of collecting and disclosing obviously relevant information to patients is vanishingly small.

In 2000, the Federation of State Medical Boards adopted a report identifying several items of information that *should* be provided on-line and publicly about doctors in order to increase consumer choice and awareness.[5] These recommended minimums include:

- Name
- Gender
- License number
- License status
- License type
- License original issue date
- License renewal date
- Business address / practice location
- Age / birthdate
- Medical school

[5] https://www.fsmb.org/Media/Default/PDF/FSMB/Advocacy/2000_grpol_Physician_Profiling.pdf (last accessed February 3, 2017).

- Medical school graduation year
- Medical degree
- Postgraduate training
- Type of practice
- Board certifications
- Criminal convictions
- Malpractice history
- State Board discipline
- Discipline by other states
- Hospital actions

The FSMB identified other information as relevant to patient choice, but difficult for the state board to collect and verify, like Hospital Affiliations.[6] But, obviously, there is little cost to the physician's office to identify Hospital Affiliations.

As you can see, the information required in H.B. 2319 is similar to the information that the Federation of State Medical Boards already agrees is related to patient choice. Other information required under H.B. 2319, such as whether or not the physician is a resident of Kansas is relevant with respect to whether or not the physician will be reasonably available for post-operative emergencies or ongoing care. If the physician is travelling a circuit, he or she may regularly be unavailable for post-operative care, and it is important to disclose to the patient any backup plans.

It has been more than 15 years since that report, and the time has obviously passed to hope that clinics voluntarily meet these standards. It is reasonable for patients to receive this information prior to service from the physician, rather than expect patients to hunt down this information about several potential surgeons elsewhere. The information required under H.B. 2319 is already easily available, it is consistent with standards recommended by those in the profession, and it does not impose any substantial burden to require women to receive this information from their proposed doctor.

Conclusion

Kansas women deserve to know the significant facts about their surgeon before an abortion, so that they can decide if the doctor is right for them.

For the reasons described above, I believe H.B. 2319 is a laudable step toward full and informed consent by women in Kansas who are considering an abortion. Given the development of the law and technology since 1997, the information it requires is reasonable. I encourage the Committee to recommend passages of the bill.

Thank you for your consideration of this testimony.

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[6] *See* Section V of the FSMB report, above.