

Why I Don't Trust the Indiana Health Department to Enforce Abortion Laws

By Tom Borek

2/14/2016

Introduction

Federal law as interpreted by the U.S. Supreme Court requires the State of Indiana to allow abortion under certain circumstances but gives the state a good deal of leeway in deciding how to regulate the procedure. The Indiana legislature has responded by permitting abortion but regulating it for the safety and well-being of the mothers. Accordingly, abortions may only be performed by licensed professionals, and surgical abortion facilities must be licensed as well. Abortions cannot generally be performed without the informed consent of the mother, and to that end abortionists must provide expectant mothers with certain information, orally and in writing, at least 18 hours before the procedure begins. The required information even includes a statement that "human physical life begins when a human ovum is fertilized by a human sperm." Overall, the Indiana laws are about as "Pro-Life" as state laws can be without running afoul of the Supreme Court's directives.

Dr. Ulrich "George" Klopfer, director of the South Bend abortion clinic known as the Women's Pavilion has been flouting Indiana abortion statutes and regulations for many years. Although his lawbreaking has been a matter of public record, law enforcement efforts have been feeble.

Governor Mike Pence and Attorney General Greg Zoeller are Republican political figures who assert that they are strongly "Pro-Life." They and many others who report to them are responsible for enforcing the laws regulating abortion. I have no desire to attack them personally. I do not know who within the Pence/Zoeller administration are responsible for the extraordinarily timid and ineffective efforts to enforce the laws with regard to Dr. Klopfer and his clinic. I can only guess as to the reasons for their ineffectiveness. Nonetheless, I am utterly convinced that trusting the State's law enforcement agencies to effectively and appropriately prosecute the doctor and his clinic would be extremely foolish and irresponsible. The factual basis for my opinion follows.

2006-2014: Eight Years of Broken Promises

The Health Department only inspects ("surveys") abortion clinics once every two years. In August 2006, it surveyed the Women's Pavilion, reported 22 pages of violations, and demanded that the doctor promise to do better. The doctor promised to do better and was permitted to operate until July 2008 when the Department conducted another survey, reported 27 pages of violations, and demanded that the doctor promise to do better. The doctor promised to do better and was permitted to operate until August 2010 when the Department conducted another survey, reported 54 pages of violations, and demanded that the doctor promise to do better. The doctor promised to do better and was permitted to operate until July 2012 when the Department conducted another survey, reported 13 pages of violations, and demanded that the doctor promise to do better. The doctor promised to do better and was permitted to

operate until October 2014, when the Department conducted another survey, reported 48 pages of violations, and demanded that the doctor promise to do better.

Then the pattern changed – not because the Department got tired of broken promises – but because the doctor got tired of making them. When the Department gave the doctor ten days to submit his promises, he ignored them. When the Department gave the doctor five days to submit his promises, he ignored them. Eventually, on January 27, 2015, the Department (reluctantly?) filed an action to close the clinic for failing the inspection and refusing to promise to improve. By March 2015, however, the Department reported to the Administrative Law Judge that no trial would be necessary. The doctor had promised to do better.

2014-2015: Avoiding Investigation by Any Means Necessary

Advocates from The Life Center (the “TLC Advocates”) perform two functions whenever the Women’s Pavilion is open for business: (1) They offer help and hope – alternatives to abortion – to abortion-minded women entering or leaving the clinic, and (2) they closely monitor and record the clinic’s activities and the comings and goings of the patients. Because of their monitoring function, they were in a position to learn and observe that Dr. Klopfer was aborting fetuses without the informed consent of their mothers, that is without making the disclosures required by statute 18 hours in advance of the procedure.

The First Investigation: Slow and Incompetent

On November 28, 2014, a TLC advocate spoke to a woman, when she entered and when she left the clinic. The woman said that it was her first visit to the clinic and that she had her chemical abortion during that first visit. On December 2, 2014, the advocate got the same story from another woman. That same day, with the assistance of TLC Legal, the advocate filed a complaint with the Health Department and the Attorney General’s office regarding these violations. She specifically noted that the woman who spoke to her on November 28, 2014, was someone she knew personally.

In my opinion, the Department’s response to this complaint was slow and incompetent. First, the Department did not even begin its investigation until January 28, 2015 – nearly two months after the complaint was filed. As every law enforcement official knows, the earlier the investigation begins the greater the chance of success. The later the investigation begins, the more chance that evidence will disappear and memories will fade. Second, the investigation did not include the basics: finding the witnesses and talking to them. No one from the Department ever spoke to the Advocate about her observations. No one from the Department even asked for the name and phone number of the first mother who was personally known to the Advocate. My best guess (based upon information described below) is that the Department did not even assign a woman to call the clinic to ask about scheduling an abortion without a prior counseling appointment. Third, the Department did not get around to notifying the Advocate that the January 28 investigation had been inconclusive until April 27, 2015. At that time, the Department reported that the advocate’s claims could neither be proven nor disproven.

Meanwhile, a TLC Advocate did what the Department wouldn't: she called the clinic on November 21, 2014, and on December 17, 2014, and asked whether an abortion could be scheduled without a prior appointment. Each time, Klopfer's staff told her that a chemical abortion could be initiated at the time of the first visit. Early in 2015, another advocate made a similar call, got the same answer, and made an audio recording of the conversation. Two complaints were filed (on February 9 and April 2, 2015) and the Department was notified of the availability of the audio tape.

The Second Investigation: Lots of Evidence and Admissions

The Department was now aware of indisputable audio evidence of the clinic's intent to systematically violate the informed consent law. Nonetheless, it did not interview the woman who made the tape nor did it make any other effort to preserve her testimony or to prepare her to testify at trial. Instead, it sent someone to visit the clinic on June 3, 2015. The investigator immediately found ten instances in which the doctor had aborted fetuses without the informed consent of the mothers, and obtained Dr. Klopfer's casual admission that this was his regular practice. His admission was particularly important because he was well aware of the requirements of the informed consent law: months earlier, the Medical Licensing Board had formally accused him of violating the rule seven times at his clinic in Fort Wayne, Indiana. This evidence would have been difficult, if not impossible, for the Department to ignore or minimize. Had the Department tried to do so, TLC would certainly have made the audio recording available to the media and the Department's embarrassment would have been substantial.

On June 26, based upon this evidence alone, the Department both moved to revoke the clinic's license and refused to renew the license beyond June 30, 2015. The clinic appealed and trial was set for November 4, 2015.

Refusing to Investigate "Redundant" Claims

During the period from June 26 to November 4, one might have expected that the doctor would make absolutely sure that his clinic complied with the law in every way. One might have thought that the doctor would prepare to tell the trier of fact that he had changed his procedures, and that he would never again abort a fetus without the informed consent of its mother. But he didn't. He continued to conduct abortions without the required disclosures 18-hours in advance. The TLC advocates identified 38 such illegal abortions conducted between June 30 and October 28, 2015, and filed 10 complaints describing the circumstances in detail. This was powerful new evidence of the doctor's incorrigible criminal tendencies and of his contempt for the law. Nevertheless, the Department refused to investigate any of them on the grounds that the complaints were "redundant."

A Department official later justified this by saying that a single violation of the 18-hour rule would be sufficient for the Administrative Law Judge to revoke the clinic's license, and that evidence of additional violations was, therefore, unnecessary and unhelpful. As an attorney with 24 years practicing before courts and administrative tribunals in several states, I find this

theory bewildering. Every attorney I've ever worked with or argued against would have handling things differently. Every one would have tried to establish as many violations as possible because evidence of 38 additional violations after being notified of the Health Department's action against him, (1) makes the clinic's guilt more certain and obvious to the Judge thereby increasing the odds of a positive outcome, (2) shows the need for a greater remedy: a permanent shut-down rather than a suspension, a fine or a warning, and (3) shows that the doctor's application for a new license ought to be denied. In addition, every one of those attorneys would have known that additional violations are not "redundant:" they are "cumulative."

Refusing to Investigate Claims because the Clinic is Unlicensed

At some point in late October or early November 2015, the Health Department and the Clinic reached an agreement. The clinic would give up its license for a period of 90 days. At the end of the 90 days, the doctor, presumably chastened by the experience, would be permitted to reapply. The initial paperwork was signed by the doctor on November 2, 2015.

After signing this agreement, one might think that the doctor would be extremely careful to follow the law, and in particular to provide all his future patients with the required disclosures 18 hours before any procedure. But it was not to be. The agreement allowed him to remain open for three more days before his 90-day time-out. He used those days (November 4-6) to conduct another 11 abortions without the informed consent of the mothers – without the required disclosures 18-hours in advance.

On November 27, 2015, two TLC advocates filed complaints with the Health Department and the Attorney General's office describing the 11 violations in detail. One might have expected that the state officials would take immediate action. After all, the doctor's unlawful conduct immediately following the state's enforcement action was a clear indication that the state's enforcement action was ineffective: that the threat of a 90-day time-out would not deter his unlawful behavior. The Department might have conducted an expedited investigation and warned the doctor that future lawbreaking would result in swift and sure punishment, and that his lawlessness would be considered in ruling on any future application for a clinic license anywhere in the state. Instead, however, the Department decided not to conduct any investigation at all on the grounds that the clinic was unlicensed (by the time the complaints were filed) and that the Department has no jurisdiction over unlicensed clinics.

When I first heard this argument – that the Department could not investigate the clinic because it did not have a license – I thought it was nonsense, and nothing I've learned since has changed my mind. The Attorney General and the Health Department have joint legal responsibility to insure that no one in this state operates an abortion clinic without a license, and that no one operates a clinic in which the right of informed consent is denied. In connection with that responsibility, they certainly have the power to investigate. If the state had no power to investigate and enforce the law with respect to unlicensed clinics, then anyone could open an

unlicensed clinic, and conduct illegal abortions every day of the week. Surely our pro-life legislators did not intend that outcome.

The Doctor's Behavior

Most of this memorandum is devoted to a description of the actions and inactions of the Health Department and the Attorney General's office that lead me to distrust the system. The actions of Doctor Klopfer, however, give us additional cause for concern. In 2014, Dr. Klopfer had to defend himself and his Fort Wayne clinic against charges that he was providing abortions without informed consent – and specifically that he was failing to provide the required disclosures 18 hours in advance of abortion procedures. He was prepared by his excellent attorneys for a deposition on the subject, and at the deposition he was questioned extensively about his legal responsibilities with respect to these issues. His answers demonstrated his thorough knowledge of the rules.

Why then, would the doctor commit the violations in South Bend in late 2014 and throughout 2015? Why would he admit that it was his policy to violate the law? Why would he feel free to violate the law in full view of the TLC advocates on November 4 and 6, 2015, immediately after signing an agreement with the Health Department attorneys? Perhaps he is insane. Perhaps he unconsciously wants to be caught and prevented from doing his grisly business.

I believe, however, that the most likely reason for the doctor's behavior is that he, because of his long experience and confidential communication with state officials, is convinced that they have no intention of permanently closing the only surgical abortion clinic in St. Joseph county.

Conclusion

My mind is open. If someone can show me another way of interpreting the above facts, I shall consider it. If someone can show me a provision in the law that justifies the government's behavior, I shall learn and grow. For now, however, I am not in a position to trust that the State will take appropriate action to enforce the law with respect to Dr. Klopfer and the Women's Pavilion.