OPINION NO. 94-094

Syllabus:

1. R.C. 2317.56(B)(1) requires that, at least twenty-four hours prior to the performance or inducement of an abortion, a physician must inform the pregnant woman, verbally or by other nonwritten means of communication, of various listed items. R.C. 2317.56(B)(1) does not require that an in-person meeting occur between the physician and the pregnant woman at that time.

2. The words "verbally or by other nonwritten means of communication" in R.C. 2317.56(B)(1) refer to all types of nonwritten communication, including videotaped or audiotaped physician statements.

3. The provision of information to a pregnant woman by a physician "in an individual, private setting" and the opportunity to ask questions under R.C. 2317.56(B)(2) need not occur at least twenty-four hours prior to the performance or inducement of the abortion.

To: Joseph A. Steger, President, University of Cincinnati, Cincinnati, Ohio
By: Lee Fisher, Attorney General, December 30, 1994

You have requested an opinion concerning the provisions of R.C. 2317.56 that govern the notification of a patient prior to the performance or inducement of an abortion. Your questions are these:

1. Does R.C. §2317.56(B)(1) require an in-person meeting with a physician?

2. Does the phrase "verbally or by other nonwritten means of communication" in R.C. §2317.56(B)(1) include the use of videotaped or audiotaped physician statements?

3. Must the provision of information by a physician "in an individual, private setting" and the opportunity for the patient to ask questions under R.C. §2317.56(B)(2) occur twenty-four hours prior to the performance or inducement of the abortion?

R.C. 2317.56

R.C. 2317.56 requires that a pregnant woman be given various types of information before an abortion is performed. It prescribes the type of consent that is required and contains provisions dealing with potential civil liability or disciplinary action of a physician who fails to comply with its provisions. Your questions concern the following statutory language:

> (B) Except when there is a medical emergency or medical necessity, an abortion shall be performed or induced only if all of the following conditions are satisfied:
>
> (1) *At least twenty-four hours* prior to the performance or inducement of the abortion, *a physician informs* the pregnant woman, *verbally or by other nonwritten means of communication*, of all of the following:
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> (a) The nature and purpose of the particular abortion procedure to be used and the medical risks associated with that procedure;
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> (b) The probable gestational age of the embryo or fetus;
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> (c) The medical risks associated with the pregnant woman carrying her pregnancy to term.
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> (2) *A physician provides* the pregnant woman with the information described in division (B)(1) of this section *in an individual, private setting and gives her an adequate opportunity to ask questions* about the abortion that will be performed or induced; ....

R.C. 2317.56(B) (emphasis added). You have not asked about a situation in which there is a medical emergency or medical necessity for an abortion, and this opinion does not consider such a situation.

Judicial Construction of R.C. 2317.56 and Similar State Laws

The constitutionality of R.C. 2317.56 has been challenged on several grounds, the principal argument being that the statute places an undue burden on a woman's right to choose whether to bear a child. In *Preterm Cleveland v. Voinovich*, 89 Ohio App. 3d 684, 627 N.E.2d 570 (Franklin County), *motion to certify overruled*, 68 Ohio St. 3d 1420, 624 N.E.2d 194 (1993), the Franklin County Court of Appeals upheld the facial constitutionality of that statute and related provisions under the United States Constitution and the Ohio Constitution. In *Preterm Cleveland v. Voinovich*, however, the opinion of the court makes no direct finding with respect to the issues you have raised concerning the precise requirements of R.C. 2317.56(B)(1) and (B)(2). Instead the language used by the court in summarizing R.C. 2317.56(B)(1) and (2) merely restates the language of the statute. *See* 89 Ohio App. 3d at 695, 627 N.E.2d at 577-78.

The court in *Preterm Cleveland* principally relied upon the United States Supreme Court's decision upholding a somewhat different Pennsylvania statutory scheme in *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992). *Preterm Cleveland,* 89 Ohio App. 3d at 696, 627 N.E.2d at 578. *Planned Parenthood* references findings of fact made by the District Court that delays of much more than a day may ensue "because the waiting period requires that a woman seeking an abortion make at least two visits to the doctor." *Planned Parenthood*, 112 S. Ct. at 2825. Unlike R.C. 2317.56, however, the statutory language at issue in *Planned Parenthood* does not include a reference to information given "by other nonwritten means of communication" and

does not contain any provision similar to R.C. 2317.56(B)(2).[1] Thus, the Court's determination in *Planned Parenthood* that the Pennsylvania statute required "at least two visits to the doctor" cannot be taken as governing the quite distinct statutory interpretation of R.C. 2317.56.

This observation is reinforced by the decision in *Fargo Women's Health Organization v. Schafer*, 18 F.3d 526 (8th Cir. 1994), which construed a North Dakota statutory scheme similar to the Pennsylvania law considered in *Planned Parenthood*.[2] There the court concluded that the

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[1] The relevant language of the Pennsylvania statute considered in *Planned Parenthood* states:

> "(a) General Rule. -- No abortion shall be performed or induced except with the voluntary and informed consent of the woman upon whom the abortion is to be performed and induced. Except in the case of a medical emergency, consent to an abortion is voluntary and informed if and only if:
> "(1) At least 24 hours prior to the abortion, the physician who is to perform the abortion or the referring physician has orally informed the woman of:
> "(i) The nature of the proposed procedure or treatment and of those risks and alternatives to the procedure or treatment that a reasonable patient would consider material to the decision of whether or not to undergo the abortion.
> "(ii) The probable gestational age of the unborn child at the time the abortion is to be performed.
> "(iii) The medical risks associated with carrying her child to term...."

Planned Parenthood, 112 S.Ct. at 2833 (Appendix) (quoting 18 P.A. Const. Stat. Ann. §3205 (1990)).

[2] The relevant portions of North Dakota law state:

> 5. "Informed consent" means voluntary consent to abortion by the woman upon whom the abortion is to be performed provided that:
> a. The woman is told the following by the physician who is to perform the abortion, by the referring physician, or by the physician's agent, at least twenty-four hours before the abortion:
> (1) The name of the physician who will perform the abortion;
> (2) The particular medical risks associated with the particular abortion procedure to be employed including, when medically accurate, the risks of infection, hemorrhage, danger to subsequent pregnancies, and infertility;
> (3) The probable gestational age of the unborn child at the time the abortion is to be performed; and
> (4) The medical risks associated with carrying her child to term.

3A N.D. Cent. Code §-02.1-02 (1991).

statute mandated only one personal visit to the clinic. The court premised this conclusion in part on its observation that in "today's society, these words ['told' or 'informed'] do not necessarily connote a face-to-face verbal exchange," and that such information could instead be provided over the telephone. *Id.* at 531. Even so, the North Dakota provisions are less explicit in this regard than is Ohio law, for they use the word "told" rather than the words "inform[ ] ... verbally or by other nonwritten means of communication," and do not include language that is analogous to R.C. 2317.56(B)(2).

As an initial matter, therefore, it appears that *Preterm Cleveland* does not resolve the questions you have asked, and the federal courts that have considered these same questions in the context of other state laws have taken different views depending on the specific provisions of the statutes at issue. Thus, the question of how R.C. 2317.56 is properly construed is primarily a matter of pure statutory construction.

Nonetheless, these federal decisions raise one further consideration that is also pertinent here, which is that constitutional concerns loom behind the proper construction of these statutes. In *Planned Parenthood*, for example, the Supreme Court determined that on the record before it and in the context of a facial challenge, a 24-hour waiting period did not create an undue burden. *Id.* at 2826. There remains the possibility that a different record would support a different conclusion, or that particular as-applied challenges to the statute would demonstrate that an "undue burden" exists in individual cases. *See, e.g., Planned Parenthood*, 112 S. Ct. at 2845 (Blackmun, J., concurring in part and dissenting in part) (predicting that in a large fraction of the cases, the evidence will show that these regulations operate as a substantial obstacle to a woman's choice to undergo an abortion); *Fargo Woman's Health Organization v. Schafer*, 113 S. Ct. 1668, 1669 (1993) (O'Connor, J., concurring in denial of stay) (reiterating same inquiry); *see also Casey v. Planned Parenthood*, 14 F.3d 848, 860-62 (3d Cir. 1994) ("a future 'as applied' challenge to the Pennsylvania Act would be possible").

The same point was underscored in *Fargo*, where the court held that the statutory scheme did not constitute an undue burden on the exercise of the pregnant woman's rights in part because it determined that the statute mandated only one personal visit to the clinic. The court further observed: "Should the Attorney General or courts ultimately interpret the statute as requiring more than one in-person visit to the medical facility before a woman may obtain an abortion, the facial validity analysis will be entirely different." *Fargo*, 18 F.3d at 532. The same point also would obtain in particular as-applied challenges to the provisions of R.C. 2317.56. Thus, a relevant canon of statutory construction that comes into play in these circumstances is that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of [the legislature]." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988).

R.C. 2317.56(B)(1) Does Not Require an In-Person Meeting with a Physician, and R.C. 2317.56(B)(2) Does Not Require that the Provision of Information in an Individual, Private Setting with an Opportunity for Questions Must Occur at Least Twenty-Four Hours Prior to the Abortion Procedure

Your first and third questions concern the time at which a pregnant woman must meet with a physician and the manner in which the physician must provide the woman with information prior to the abortion procedure. You have asked whether R.C. 2317.56(B)(1) requires an in-person meeting with a physician and whether the provision of information and

opportunity for questions required by R.C. 2317.56(B)(2) must occur at least twenty-four hours prior to the performance or inducement of the abortion.

R.C. 2317.56(B)(1) provides that, at least twenty-four hours prior to the performance or inducement of an abortion, a physician must inform the pregnant woman of various matters relating to the woman's pregnancy and the proposed procedure. R.C. 2317.56(B)(1) does not state that the physician must meet with the woman at that time. Instead, it states that the physician must inform the woman of the specified items "verbally or by other nonwritten means of communication." If that communication can take place without an in-person meeting -- as, for example, through a telephone conversation -- then the requirements of R.C. 2317.56(B)(1) can be met without an in-person meeting between the physician and the pregnant woman.[3]

R.C. 2317.56(B)(2), in contrast, requires that the physician provide the pregnant woman with the information described in R.C. 2317.56(B)(1) "in an individual, private setting" and also requires that the physician give the woman an adequate opportunity to ask questions about the abortion procedure. That provision does not specify when the required event must occur.

Had the General Assembly intended to require a face-to-face meeting between the physician and the pregnant woman at least twenty-four hours prior to the abortion procedure, it could have so stated. R.C. 2317.56(B)(1) sets forth the twenty-four hour time period but requires only the giving of information "verbally or by other nonwritten means of communication." R.C. 2317.56(B)(2) requires "an individual, private setting" with an opportunity to ask questions, thereby suggesting that an actual meeting may be required, but it imposes no mandate that this event occur at least twenty-four hours prior to the abortion procedure. These provisions are contained in separate divisions of the Revised Code, and there is no indication that they are to be construed to refer to the same event.

The requirement that information be provided at least twenty-four hours in advance of an abortion procedure appears also in R.C. 2317.56(B)(3), with reference to notification of the name of the physician who is scheduled to perform or induce the abortion and copies of various informational materials published by the Department of Health. The fact that the twenty-four hour requirement appears in division (B)(1) and division (B)(3) but not in division (B)(2) indicates that the event required by division (B)(2) need not take place at least twenty-four hours prior to the abortion procedure. Further, the fact that R.C. 2317.56 permits the information referenced in division (B)(3) to be provided "in person, by telephone, by certified mail, return receipt requested, or by regular mail evidenced by a certificate of mailing" establishes that the pregnant woman is not required under that division to visit the site of the abortion at least twenty-four hours prior to the procedure, and is consistent with the conclusion that the information referenced in R.C. 2317.56(B)(1) might also be provided without a personal meeting with the physician.

The only portion of R.C. 2317.56(B)(1) that might be construed as meaning that personal contact is required is the portion stating that the information must be provided "verbally or by other nonwritten means of communication." If verbal or nonwritten communication were limited

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[3] This opinion does not consider whether a particular type of communication is best suited to enable a physician to carry out each of the responsibilities imposed by R.C. 2317.56(B)(1). Issues of this sort relate to questions of medical practice, which are not appropriately addressed in an Attorney General's opinion. *See, e.g.*, 1994 Op. Att'y Gen. No. 94-052, at 2-260 to 2-261.

to communication made in person -- for example, through speaking or sign language -- then a personal meeting would be required. It does not appear, however, that the term "verbal[ ] or ... other nonwritten means of communication" can reasonably be construed so narrowly.

Verbal communication, in its common sense, refers to words that are oral rather than written. *See, e.g., Webster's New World Dictionary* 1577 (2nd college ed. 1978). "[V]erbally or by other nonwritten means of communication" means that the communication may not be in writing, but it cannot reasonably be construed as requiring that the communication must be in person. *See, e.g., Fargo*, 18 F.3d at 531 ("[i]n today's society, [the] words ["told" or "informed"] do not necessarily connote a face-to-face verbal exchange").

Read literally, the provisions of R.C. 2317.56(B)(1) thus require that a pregnant woman must receive certain information from a physician at least twenty-four hours in advance of undergoing an abortion. The plain language of R.C. 2317.56(B)(2) requires that the pregnant woman receive that same information from a physician in an individual, private setting, with an opportunity to ask questions. The provision of information at least twenty-four hours in advance must be made "verbally or by other nonwritten means of communication," but need not occur in a face-to-face meeting. The provision of information in an individual, private setting with an opportunity for questions need not occur at least twenty-four hours prior to the abortion procedure.

The Language "Verbally or by Other Nonwritten Means of Communication" in R.C. 2317.56(B)(1) Includes the Use of Videotaped or Audiotaped Physician Statements

Your second question is whether the term "verbally or by other nonwritten means of communication" in R.C. 2317.56(B)(1) includes the use of videotaped or audiotaped physician statements While the statute does not expressly mention videotaped or audiotaped physician statements, the phrase "by other nonwritten means of communication" is broad and general language which appears to encompass any means of communication that is not written. "Written," in its common sense, means "put down in a form to be read; not spoken or oral." *Webster's New World Dictionary* 1642 (2d college ed. 1978). Videotapes and audiotapes are not forms that can be read. Instead, they make use of spoken or oral language and constitute nonwritten means of communication. *See Random House Dictionary of the English Language* 298 (unabridged ed. 1973) (defining "communication" to include: "the imparting or interchange of thoughts, opinions, or information by speech, writing, or signs" and "a document or message imparting news, views, information, etc.").

When the language of R.C. 2317.56(B)(1) is given its ordinary meaning, *see* R.C. 1.42, the words "verbally or by other nonwritten means of communication" may reasonably be construed as including all nonwritten means of conveying information. Videotaped and audiotaped physician statements are thus included as means of communication permitted under R.C. 2317.56(B)(1).

Conclusion

For the reasons discussed above, it is my opinion, and you are advised:

1. R.C. 2317.56(B)(1) requires that, at least twenty-four hours prior to the performance or inducement of an abortion, a physician must inform the pregnant woman, verbally or by other nonwritten means

of communication, of various listed items. R.C. 2317.56(B)(1) does not require that an in-person meeting occur between the physician and the pregnant woman at that time.

2. The words "verbally or by other nonwritten means of communication" in R.C. 2317.56(B)(1) refer to all types of nonwritten communication, including videotaped or audiotaped physician statements.

3. The provision of information to a pregnant woman by a physician "in an individual, private setting" and the opportunity to ask questions under R.C. 2317.56(B)(2) need not occur at least twenty-four hours prior to the performance or inducement of the abortion.