MEMORANDUM

To: **Board of Juvenile Court Judges**

From: **Brent Johnson, General Counsel**

Re: **Abortion Bypass Procedure**

Date: **July 26, 2006**

The comment period for the Abortion Bypass Procedure rules and forms has ended. Attached to this memorandum you will find copies of the comments received. I will summarize the comments below. We have received comments from individuals who you can fairly state are on both sides of the abortion issue. The rules and forms do not completely satisfy either side which is often an indication that we have achieved an appropriate balance. However, based on the comments, there may be a need to make some changes.

1. David Cook

   - Mr. Cook is against both HB 85 and Rule 60. Mr. Cook states that minors are never mature and therefore the law is fundamentally flawed.

   - Mr. Cook is also against the secrecy of the proceedings and the automatic granting of a petition if action is not taken within a certain time.

2. Paul Wake

   - The rule creates substance and procedure beyond that contemplated by HB 85.

   - The phrase "three judicial days" should be changed to business days and the extension of time should not be 24 hours, but one business day.

   - The definition of minor should be consistent with the changes in the Utah Code.

- The appellate rule discusses forms being available at the juvenile court, but Rule 60 does not contain such a reference.

- HB 85 does not contemplate that a minor will be given a private place to complete the forms and therefore the provision should be struck. HB 85 also does not state that a minor may file in any county and that a filing fee may be waived and so those should be struck.

- There is no statutory provision for the taxpayers to support abortion by minors by paying for private counsel.

- The hearing should not be closed to those who might have an interest in the abortion, such as parents and the putative father.

- Instead of allowing a clerk to "authorize" a abortion, the minor should be permitted to appeal a failure to act in time.

- A minor should not be allowed to appear by telephone.

3. Kristin Brewer

   - The procedure should be changed to permit appointment of a guardian ad litem only if the minor is found incompetent.

4. James McCormick

   - Parents should be given notice of the petition and the hearing.

5. Hollis Hunt

   - There is no need for an expedited procedure and the proposed expedited procedures are another form of "judicial activism."

6. ACLU

   - A petitioner should be allowed to use a pseudonym or to use only initials on the petition.

   - The forms should be available on the website.

   - A petitioner should be allowed to file in person, by mail or fax.

   - The rule and forms should specially state that a minor has a right to an attorney.

- A GAL should not be appointed unless a minor is found mentally incompetent.
- The forms and the procedure should be changed to allow a minor to request a longer time for the hearing.
- The rule should be amended to specifically state that the order will be hand-delivered to the minor and her attorney.
- The "deemed granted" language should account for any continuances requested by the minor.
- There should be specific language "sealing" the case file.
- The appeal time should run from when the minor receives the order, and not when it is entered.
- The appellate rule should also allow filing by pseudonym or initials.
- A notice of appeal should be deemed filed if it is mailed within the time frame.
- The appellate rule should specify that a minor's attorney will receive a copy of the appellate court's order.
- The appellate court file should also be specifically "sealed."
- The rule should be amended to mandate appointing an attorney on appeal.
- The minor's name should not be found on the caption of the petition.
- The word "abortion" should be omitted from the caption of the pleadings to help protect confidentiality.
- The forms should be amended to mandate appointment of an attorney and to address the above GAL issue.
- The statute does not require informed "written" consent before filing a petition and that requirement should be omitted.
- Clarify on the form that providing an address is optional.
- Omit the provision on listing the people who can attend the hearing; the minor may not know all of the individuals at the time of filing the petition.

- The minor should not be required to list best interests, because a minor may not know all the reasons at the time of filing the petition.

Sarah Spencer has reviewed the ACLU's comments and has prepared a memorandum on her research. In the event that you have not received this memorandum, I am including this with the packet. The following is my general response to some of the comments that I think warrant the most discussion, although we will have further discussion at the meeting.

- The question of whether the rule goes beyond HB 85 is a tough one. The two most difficult issues are the notice to other interested persons and the language automatically approving a petition if a hearing is not held. I believe that the provisions in the rule are the most constitutionally sound. To remove the provisions may subject us to a legal challenge; to keep the provisions may subject us to legislative criticism.

- The issue of giving the parents and father notice have been debated before and I don't know that any of the comments changes the conclusion previously reached.

- The language about judicial days and 24 hours should be made consistent.

- The issue on appointing attorneys and GALs is difficult and has also been much discussed. The current language is discretionary. There may be many cases in which an attorney is not necessary as it will be evident that the minor is capable of consent or abortion is otherwise in her best interest and therefore counsel is not required. It may be best to leave this language as discretionary to appease both those who object to taxpayer money funding court appointed attorneys and those who will want attorneys appointed when necessary.

- I am not convinced that a minor must be allowed to file under a pseudonym or using initials. There has been some confusion in the case law as to whether both confidentiality and anonymity must be guaranteed. Confidentiality must definitely be provided, but anonymity is less certain. The case cited by the ACLU involved a court at which the records were not protected from the public and therefore it was suggested that anonymity be provided. In our situation we have rules and procedures in place to protect the confidentiality of the minor and therefore a pseudonym or initials may not be necessary.

- I think it would be appropriate to allow a minor to request time longer than the three days for a hearing. The rule should also be amended to change the "deemed granted" language to accommodate any continuances.

- There should be a provision in the rules which classifies these records. The appropriate place is probably the records access rules where these files could be specifically considered "sealed."

- The question of whether the appeal time should run from when the minor receives the order or from when the order is entered is difficult. In many, if not most, cases a minor might be hand-delivered an order before the order is officially entered into the case history. The appeal time therefore might be longer under the current language.

- I think the minor should still be required to list best interests in the petition because the court may need some preliminary information about best interests.

- It is true that the statute does not require "written" informed consent prior to filing a petition and a hearing. It is possible that a minor might have given oral informed consent prior to a petition, and will subsequently sign a written consent before the abortion is performed. The written consent is certainly the best evidence of consent. The difficulty with oral consent is that this is not a contested proceeding and the only testimony will be that of the minors. On the other-hand, the primary issue for the court is whether the minor is capable of giving informed consent. It is somewhat curious as to why the Legislature required the minor to give informed consent prior to a court determination that the minor is capable of giving such.