LEGAL SERVICES

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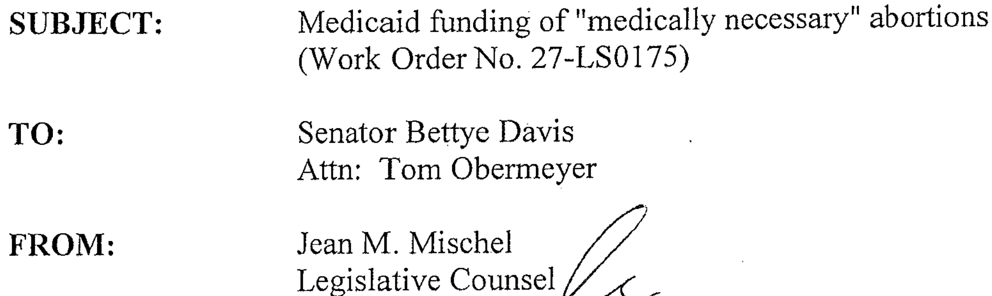
M E M O R A N D U M November 18, 2010

SUBJECT: Medicaid funding of "medically necessary" abortions
(Work Order No. 27-LS0175)

TO: Senator Bettye Davis
Attn: Tom Obermeyer

FROM: Jean M. Mischel
Legislative Counsel



You have asked about the meaning of "medical necessity" as it relates to medical assistance (Medicaid) funding of abortions. State and federal statutes fail to define the phrase, although the concept forms the basis for coverage of all services under the jointly funded Medicaid program and is defined for purposes other than abortion services in regulation.

Despite a federal exclusion for most abortion services known as the "Hyde Amendment," upheld by the United States Supreme Court, the Alaska Supreme Court in 2001 specifically held that the equal protection guarantee under our state constitution requires the state to cover medically necessary abortion services, as it does for all other medical services covered under state Medicaid funding. The standard for "medical necessity" in Alaska appears to be similar for all Medicaid services and includes services that are broader than life saving services but less than elective services, as discussed below.

FEDERAL LAW DRAWS A DISTINCTION BETWEEN ABORTION SERVICES FUNDING AND OTHER TYPES OF COVERED SERVICES

The federal purpose of the Medicaid program established the medical necessity standard under 42 U.S.C.S. § 1396-1 as follows:

> For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of *necessary medical services*, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this title. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for medical assistance.

(Emphasis added.) Since 1976, Congress has prohibited, either by an amendment to the annual appropriations bill for the United States Department of Health and Human Services, or by joint resolution, the use of any federal funds to reimburse the cost of abortions under the Medicaid program except under certain specified circumstances. The "Hyde Amendment" provides that:

> [N]one of the funds provided by this joint resolution shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service.

Pub. L. 96-123.

After the passage of the Hyde Amendment, federal courts wrestled with questions about whether state and federal governments are required to pay for an indigent woman's exercise of a fundamental constitutional right when a "medically necessary" abortion is involved. In several close decisions, the U.S. Supreme Court determined that the federal constitution does not require public financial support of the right to choose an abortion in cases that do not involve rape or incest or a threat to the mother's life. Beal v. Doe, 432 U.S. 438 (1977); Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980); Webster v. Reproductive Health Services, 492 U.S. 490 (1989). It is instructive to note the trial court definition in the McRae case of the phrase "medically necessary" for purposes of abortion funding was "a professional judgment for the physician that may be exercised in the light of all factors--physical, emotional, psychological, familial and the woman's age--relevant to the well-being of the patient."

The federal courts ruled in these cases that governments are not required to provide money to assist in the exercise of constitutional rights; governments are only prohibited from placing obstacles in the way of exercising those rights. Withholding funding, said the federal courts, is not an obstacle to the indigent woman who seeks an abortion. Her poverty may be an obstacle, but the government did not create the poverty. She is still free to have an abortion, but not with public money. The federal courts suggested other private money might be available. In light of these federal decisions, it is clear that public funding for abortions, even when "medically necessary," is not required under the federal constitution.

ALASKA LAW REQUIRES A MORE UNIFORM BUT INEXACT STANDARD FOR STATE MEDICAID FUNDING OF ALL TYPES OF SERVICES COVERED, INCLUDING ABORTION SERVICES

In the early 1990's, the state attempted to adopt the federal distinction for funding of abortion services and disregarded the general medical necessity definition adopted in regulation for other types of services. In a direct challenge to the state regulation that provided only for public funding of abortion services to preserve the life of the mother or

in cases of rape or incest, the Alaska Supreme Court held that the state must pay for medically necessary abortions for participants in the Medicaid program as it does for other types of services. State v. Planned Parenthood of Alaska, Inc., 28 P.3d 904 (Alaska 2001). The Alaska Supreme Court determined then that the "rape, incest, and to prevent the death of the mother" restrictions of the Hyde Amendment are too narrow to satisfy the requirements of the Alaska state constitution.

The Alaska constitution has been consistently interpreted to provide broader protections than the federal constitution. For instance, in Valley Hospital Ass'n v. Mat-Su Coalition for Choice, 948 P.2d 963, 969 (Alaska 1997), the Alaska Supreme Court held that "reproductive rights are fundamental . . . [and] include the right to an abortion." Later, in State v. Planned Parenthood of Alaska, Inc., 28 P.3d 904 (Alaska 2001), the Alaska Supreme Court, although basing its decision on due process considerations rather than the privacy clause used by the lower court, came to the same conclusion the lower court had. The conclusion was that if the state Department of Health and Social Services (DHSS) restricted abortion coverage for Medicaid-eligible women to only those covered by the exceptions in the Hyde Amendment, it would result in unconstitutional implementation of Medicaid in Alaska.

There is language in the Planned Parenthood of Alaska, Inc. case (cited above; see 28 P.3d at 913) strongly suggesting that the Alaska Supreme Court considers women who carry their pregnancy to term to be similarly situated with women who have an abortion (in that they are both exercising their constitutional freedom of reproductive choice). If the court continues to hold that position when faced with a renewed public abortion funding challenge, there is a possibility that the court will find that the state may not be able to burden the right to abortion services under the state Medicaid program unless a similar burden is placed on medical services to continue a pregnancy, and in the absence of comparable burdens on continuation of a pregnancy the state cannot burden the right to abortion services.

The consequence of having a more broadly interpreted right to public funding of abortions for Medicaid recipients in Alaska than what is allowed under federal law is that DHSS must cover some Medicaid abortions with 100% state money (no federal match).[1] The federal government does not prohibit states from using their own funds.

Over the years, language has appeared in Alaska budget acts that purport to prohibit DHSS from using any of its appropriated money for abortions outside the scope of the

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[1] Alaska is reportedly not alone in using purely state funds for some Medicaid abortions that the federal government will not fund. I do not have an up-to-date list and I have not double-checked the cases cited, but the ACLU says that 17 states fund abortions outside the Hyde Amendment restrictions, 4 voluntarily and 13 under court order. I have attached the relevant information, as reported by the ACLU, excerpted from http://www.aclu.org. I cannot vouch for the accuracy of the ACLU website, but if you require further information about public funding of abortions in other states, please let the office know.

Hyde Amendment. However, DHSS has been under court order to continue to pay for medically necessary abortions and has complied with the state attorney general's advice to do so.[2]

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[2] For instance, with regard to the 2007 fiscal year operating budget, the attorney general wrote the following:

> This year's budget, as did the prior four years' budgets, contains the following language regarding abortion funding:
>
> > No money appropriated in this appropriation may be expended for an abortion that is not a mandatory service required under AS 47.07.030(a). The money appropriated for Health and Social Services may be expended only for mandatory services required under Title XIX of the Social Security Act and for optional services offered by the state under the state plan for medical assistance that has been approved by the United States Department of Health and Human Services . . . .
>
> [citation omitted]. As we opined before, this language is intended to prevent expenditures from these appropriations for therapeutic or medically necessary abortions. DHSS, however, is under a superior court order to operate its Medicaid program in a constitutional manner by providing payment for them. That superior court order has been upheld by the Alaska Supreme Court, which specifically rejected an argument that the separation-of-powers doctrine precluded the superior court from ordering the state to pay. State, Dept. of Health & Social Services v. Planned Parenthood of Alaska, 28 P.3d 904 (Alaska 2001). Thus, the DHSS is faced with a ruling from the state's highest court that the limit on payment for abortion services results in the operation of the Medicaid program in an unconstitutional manner, while DHSS is ostensibly without the money available to pay for services to operate the program legally. . . . Five years ago, the plaintiffs in the Planned Parenthood case asked the superior court to clarify how similar budget restrictions impacted its judgment. The superior court, three days after the supreme court affirmed the judgment, issued an opinion ordering the DHSS not to comply with the restrictions. To date, therefore, DHSS has obeyed the superior court's order and we must advise DHSS to continue to obey it; i.e., to continue to pay for these medically necessary abortions, until such time as a court reverses the order that is now in effect.

2007 Alas. AG LEXIS 21, 7 - 8.

According to DHSS, the money used for Medicaid abortions not covered by the Hyde Amendment (i.e., abortions for which the federal government will not contribute federal money), comes from the appropriation made by the legislature to DHSS for Medicaid.[3]

Other attempts to narrow the definition of "medical necessity" for purposes of abortion services funding have similarly failed. In 2002, for example, the Alaska Legislature passed and the governor vetoed a bill (SB 364, 22nd Legislature) that added a new section to AS 47.07 to provide that the state Medicaid program may only pay for medically necessary abortions and for abortions to terminate pregnancies resulting from rape or incest. The bill prescribed what is a medically necessary abortion and established requirements for submitting claims for payment for abortions. (See SB 364, attached). That bill provided as follows:

> (b) A claim for payment for a medically necessary abortion that is submitted to the department must be accompanied by a written certification by the treating physician that the abortion is medically necessary to treat a serious
>
> (1) adverse physical condition of a pregnant woman that
>
> (A) either is caused by the pregnancy or would be significantly aggravated by continuation of the pregnancy; and
>
> (B) would seriously endanger the physical health of the woman if the pregnancy were not terminated by an abortion; or
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> (2) psychological illness of a pregnant woman who requires medication for treatment of the illness if
>
> (A) the medication required to treat the illness would be highly dangerous to the fetus; and
>
> (B) the health of the woman would be endangered if the mediation was not taken during pregnancy.

Since the bill was vetoed and the definition of "medical necessity" for purposes of abortion services funding contained in former 7 AAC 43.140(a) was held to be unconstitutional in 2001 and has recently been repealed but not reenacted, the state currently lacks a clear definition of the phrase as it applies to abortion services. The repealed regulatory definition provided that:

> (a) Payment for an abortion will, in the department's discretion, be covered under Medicaid if the physician services invoice is accompanied by certification that the (1) life of the mother would be endangered if the pregnancy were carried to term; or (2) pregnancy is the result of an act of rape or incest.

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[3] If the physician submitting the Medicaid claim for costs associated with an abortion does not provide the information that would allow DHSS to document to the federal government that a particular abortion falls within the Hyde Amendment exceptions, then DHSS does not seek a federal match for the costs associated with that abortion.

What remains in the regulations for abortion services funding are the terms "elective" and "therapeutic" (a term that appears to be used as a substitute in the regulations for "medical necessity"), defined in 7 AAC 47.290, along with the general concept of "medically necessary" for all covered services under 7 AAC 105.100.

For general relief funding,[4] 7 AAC 47.290 provides as follows:

> . . .
>
> (7) "elective abortion" means a procedure, other than a therapeutic abortion, to terminate a pregnancy;
>
> (8) "therapeutic abortion" means the termination of a pregnancy;
>
> (A) certified by a physician as medically necessary to prevent the death or disability of the woman, or to ameliorate a condition harmful to the woman's physical or psychological health; or
>
> (B) that resulted from actions that would constitute a crime of sexual assault under AS 11.41.410 - 11.41.425, a crime of sexual abuse of a minor under AS 11.41.434 - 11.41.440, or the crime of incest under AS 11.41.450.

For state funding under Medicaid, 7 AAC 105.100 describes "covered services" to include the general concept of "medically necessary" with cross-references to specified types of services as follows:

> The department will pay for a service only if that service
>
> (1) is identified as a covered service in accordance with AS 47.07, 7 AAC 43, and 7 AAC 105 - 7 AAC 160;
>
> (2) is provided to an individual who is eligible for Medicaid under 7 AAC 100 on the date of service;
>
> (3) is ordered or prescribed by a provider authorized to order or prescribe that service under applicable law;
>
> (4) is provided by a person who is enrolled as a Medicaid provider or rendering provider under 7 AAC 105.210, or otherwise eligible to receive payment for services under 7 AAC 43 and 7 AAC 105 - 7 AAC 160;
>
> *(5) is medically necessary as determined by criteria established under 7 AAC 43 and 7 AAC 105 - 7 AAC 160 or by the standards of practice applicable to the provider;*
>
> (6) has received prior authorization from the department, if prior authorization is required under 7 AAC 43 or 7 AAC 105 - 7 AAC 160; and

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[4] Like the Medicaid program, the general relief program is designed to meet "medical needs." While some abortions are termed "elective" by some observers, they still meet a medical need, as determined by the physician who performs the abortion procedure. Distinguishing among types of abortions in the general relief program would infringe the same privacy and equal protection interests as courts have determined are infringed when abortion funding restrictions are imposed under the Medicaid program.

(7) is not specifically excluded as a noncovered service under 7 AAC 43 or 7 AAC 105 - 7 AAC 160.

(Emphasis added.) The phrase "medically necessary" is defined for purposes of mental health services and other purposes such as vision, hearing, and dental screening funding under Medicaid as follows:

7 AAC 43.486. Medical necessity determinations for mental health rehabilitation services
(a) The division will, in its discretion, periodically review the recipient's clinical record to determine whether the services requested are medically necessary. A medically necessary mental health rehabilitation service is a service designed to

(1) screen recipients for the presence of a mental or emotional disorder;

(2) assess the nature and extent of the mental or emotional disorder and its impact upon the recipient's ability to meet the demands of daily living, social, occupational, or educational functioning;

(3) diagnose the mental or emotional disorder;

(4) treat the mental or emotional disorder;

(5) provide rehabilitation for the mental or emotional disorder;

(6) prevent the relapse or deterioration of the recipient's condition due to the mental or emotional disorder.

(b) In making its determination as to whether the proposed services are medically necessary, the division will consider the following:

(1) the recommendations of the referring physician, mental health professional clinician, or interdisciplinary team organized under 7 AAC 43.470 that prescribed, ordered, recommended, or approved the service;

(2) the recipient's diagnosis and level of functioning;

(3) the risk of danger from the recipient to self or other individuals;

(4) the appropriateness of the level of care and the need for inpatient or residential care;

(5) whether the intervention targets specific symptoms and behavioral and social dysfunction, and logically derives from the assessments and diagnosis;

(6) whether the proposed services in the individualized treatment plan are consistent with generally accepted community-based treatments and practices for the treatment of the specific symptoms and behavioral and social dysfunction;

(7) whether the recipient agrees with the referring physician, mental health professional clinician, or interdisciplinary team under (1) of this subsection that the focus of the treatment will be the symptoms and behavioral and social dysfunction targeted for intervention;

(8) the extent to which past and current treatment has been successful in treating the symptoms and behavioral and social dysfunction;

(9) if the recipient is under 21 years of age, whether the recipient has, as indicated by the American Psychiatric Association's Diagnostic

and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, dated 2000, an Axis V Global Assessment of Functioning (GAF) rating at admission of 50 or less, or the recipient has an Axis V Global Assessment of Functioning (GAF) rating at admission of more than 50, but exhibits specific mental, behavioral, or emotional disorders that place the recipient at imminent risk for out-of-home supervision or protective custody of state or local authorities; the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, dated 2000, is adopted by reference;

(10) the extent to which a less restrictive or intrusive alternative treatment is not available;

(11) the extent to which a less expensive alternative is not available;

(12) the extent to which the units of service requested are no more than are necessary to meet the treatment or rehabilitation needs of the recipient;

(13) the extent to which the duration of services requested are no more than are necessary to reach the recipient-approved goals outlined in the individualized treatment plan;

(14) if the requested services are intended to prevent the relapse or deterioration of a mental disorder, the extent to which social functioning is improved through interventions provided as active treatment, targeted in specific therapeutic goals, and included in the individualized treatment plan;

(15) the likelihood that the recipient will benefit from any therapy provided on the same day as the recipient has received crisis intervention services.

(c) Payment for services determined not to be medically necessary under this section is subject to recovery under 7 AAC 105.260.

The limitation on abortion services funding is, as for other Medicaid covered services "medical necessity," a phrase that is not clearly defined in Alaska. The regulations that pertain to other types of covered services provide some guidance. Because the right to state funding for medically necessary abortions under the current state Medicaid program is protected by the Alaska constitution, the term "medically necessary abortion" has acquired a constitutional component of unknown scope. The relatively few Alaska cases involving abortion rights do not provide guidance as to how broadly the term "medically necessary abortion" is to be construed. There is a possibility that the Alaska courts may find that there are additional situations other than those described in the vetoed bill that fall within the scope of a medically necessary abortion and thus must be covered under the state Medicaid program.

What follows is a brief overview of how other states have handled the issue after the federal exception was rejected under those state's constitutional protections.

CASE LAW FROM STATES OTHER THAN ALASKA

Other states have dealt with the issue of state funding of abortion services in various ways. After the federal decisions of the 1970's that upheld restrictions on public abortion funding, courts in a number of states were required to analyze the issue under their own laws and constitutions to see if they supported the same conclusion. In contrast with the federal decisions, several state decisions determined that funding for abortions could not be singled out under public assistance programs. See Moe v. Sec'y of Admin. and Fin., 417 N.E.2d 387 (Mass. 1981); Comm. to Defend Reproductive Rights v. Myers, 625 P.2d 779 (Cal. 1981); Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982); Planned Parenthood Ass'n v. Dep't of Human Res., 663 P.2d 1247 (Or. App. 1983), affirmed at 687 P.2d 785 (Or. 1984); and Doe v. Maher, 515 A.2d 134 (Conn. Super. 1986); contra, Fischer v. Dep't of Pub. Welfare, 502 A.2d 114 (Pa. 1985).

Except for the Pennsylvania case, these state courts weighed the private and state interests involved with abortions and struck a different balance than the federal courts. They considered the state's desire to save money, state policies to promote childbirth, state claims that poor women can still choose to find private money to fund their abortions, state interests in protecting unborn life, and state arguments that they are not required to provide money for the exercise of constitutional rights. Most of these arguments had been successful in federal courts. Not so in the state courts of Massachusetts, California, New Jersey, Oregon, and Connecticut.

In Moe v. Secretary of Administration and Finance, supra, the highest state court in Massachusetts determined that the Massachusetts constitution afforded a greater degree of protection for the right to choose an abortion than the federal constitution.[5] In upholding the right of Medicaid recipients to have their abortions paid for, the court observed:

> [T]he Legislature need not subsidize any of the costs associated with child bearing, or with health care generally. However, once it chooses to enter the constitutionally protected area of choice, it must do so with genuine indifference. It may not weigh the options open to the pregnant woman by its allocation of public funds; in this area, government is not free to "achieve with carrots what [it] is forbidden to achieve with sticks." (citation omitted). We are therefore in agreement with the views expressed by Justice Brennan, writing in dissent to Harris v. McRae, [when he wrote] "In every pregnancy, [either medical procedures for its termination, or medical procedures to bring the pregnancy to term are] medically necessary, and the poverty-stricken woman depends on the Medicaid Act to pay for the expenses associated with [those] procedure[s]. But under [this restriction], the Government will fund only those procedures incidental to childbirth. By thus injecting coercive financial incentives favoring childbirth into a decision that is constitutionally

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[5] Moe, 417 N.E.2d at 400.

> guaranteed to be free from governmental intrusion, [this restriction] deprives the indigent woman of her freedom to choose abortion over maternity, thereby impinging on the due process liberty right recognized in Roe v. Wade."[6]

In Committee to Defend Reproductive Rights v. Myers, supra, the highest court in California made a determination similar to Massachusetts'. The court noted that the state had no constitutional obligation to provide medical care to the poor or to fund the exercise of all constitutional rights, but held:

> Once the state furnishes medical care to poor women in general, it cannot withdraw part of that care solely because a woman exercises her constitutional right to choose to have an abortion.[7]

In Right to Choose v. Byrne, supra, the highest court in New Jersey also came to a similar conclusion, using an equal protection analysis. The court struck down a restrictive abortion funding statute, stating:

> [T]he Legislature need not fund any of the costs of medically necessary procedures pertaining to pregnancy. . . . Once it undertakes to fund medically necessary care attendant upon pregnancy, however, government must proceed in a neutral manner. Given the high priority accorded in this State to the rights of privacy and health, it is not neutral to fund services medically necessary for childbirth while refusing to fund medically necessary abortions. . . . The statute affects the right of poor pregnant women to choose between alternative necessary medical services. No compelling state interest justifies that discrimination, and the statute denies equal protection to those exercising their constitutional right to choose a medically necessary abortion.[8]

In Planned Parenthood Ass'n v. Department of Human Resources, supra, the court struck down an Oregon Medicaid regulation that would have restricted funding of abortions, saying:

> [I]t is difficult to understand the rational basis for denying one medically necessary surgical procedure to a pregnant woman solely because it involves an abortion while, at the same time, funding all other medically necessary services relating to pregnancy.[9]

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[6] Id. at 402.

[7] Myers, 625 P.2d at 798 and footnote 31 accompanying the text.

[8] Byrne, 450 A.2d at 935 - 936.

[9] Planned Parenthood, 663 P.2d at 1255.

In Doe v. Maher, supra, a Connecticut court struck down a state Medicaid regulation that prohibited funding for medically necessary abortions, saying:

> This court is unable to reconcile the mandate and logic of the United States Supreme Court in Roe v. Wade . . . with the McRae . . . decision. Medicaid reimbursement funds are made available for all the health care costs of women, including the medical costs necessary to carry the fetus to term, but not for the medically necessary abortion. Surely, this constitutes infringement on the right to an abortion. . . . In adopting the regulation, . . . the state has ceased to preserve its neutrality at least under our state constitution. . . . And since that one exception also is a subject of a woman's constitutional rights, the regulation impinges upon those constitutional rights to the same practical extent as if the state were to affirmatively rule that poor women were prohibited from obtaining an abortion.[10]

In each of the state cases quoted in this section, the state court struck down an abortion funding restriction that would have been upheld by a federal court. These cases clearly demonstrate that state courts can find independent state grounds to strike down an abortion restriction that might be upheld in federal court. Unfortunately, the cases do not provide a standard definition of "medical necessity" for purposes of all covered services.

CONCLUSION

The concept of "medical necessity" provides the baseline for Medicaid and other types of public funding of covered health care services. Under the federal law, the United States Supreme Court upheld an exemption for coverage of abortions services that was narrower than the standard for all other types of covered services. Many states, including Alaska, found an equal protection and liberty interest violation in drawing a distinction among various types of service coverage.

Current Alaska legislation and regulations defer to the treating physician to determine whether a service is medically necessary for the physician's patient under the applicable standard of practice for most covered services, including abortion services.

If I may be of further assistance, please advise.

JMM:ljw
10-418.ljw

Attachements

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[10] Doe, 515 A.2d at 151 and 152.