

# Texas

***Danco Laboratories, LLC v. Alliance for Hippocratic Medicine, ET AL.*, No. 22A901; *Food and Drug Administration, ET AL. v. Alliance for Hippocratic Medicine, ET AL.*, No.22A902** (S. Ct., April 21, 2023) Applications for Stays are granted. The order issued by the Northern District of Texas on April 7, 2023 (staying FDA approval of mifepristone) is stayed pending disposition of the appeal to U.S. Court of Appeals, 5<sup>th</sup> Cir.

***Food and Drug Administration, ET AL. v. Alliance for Hippocratic Medicine, ET AL.*, No.22A902** (S. Ct., April 17, 2023) (April 7, 2023 Order of U.S. District Court, N.D. Texas), case no. 2:22-cv-223 is administratively stayed until April 21, 2023 at 11:59 p.m.)

***Alliance for Hippocratic Medicine, v. United States FDA*, No. 23-10362**, (Ct. App. 5<sup>th</sup> Cir. April 12, 2023) Court granted defendant's motion in part by issuing a stay to the District Court order which stayed FDA's September 28, 2000 approval of mifepristone. The Court denied defendant's motion in part as to the District Court order staying FDA's 2016 REMS changes and subsequent actions for medication abortion pending appeal.

***Alliance for Hippocratic Medicine v. United States FDA*, No. 2:22-CV-223-Z, 2023 U.S. Dist. LEXIS 61474** (N.D. Tex. Apr. 7, 2023) plaintiffs seek preliminary and permanent injunctions ordering FDA to withdraw approval for the medication abortion drug mifepristone used in conjunction with misoprostol. Court granted plaintiff's motion in part holding the FDA's September 28, 2000 approval of mifepristone and subsequent changes to its approval are stayed. Further, the Court stayed its order for seven days to allow the federal government to appeal the decision.

***Zurawksi v. State of Texas*, No. D-1-GN-23-000968** (Dist. Ct., Travis County), (March 6, 2023), Plaintiffs' Original Petition for Declaratory Judgment and Application for Permanent Injunction seeking clarification of the state's abortion ban's emergency medical exception (codified at Tex. Health & Safety Code §§ 170A.001-002 and Tex. Health & Safety Code §§ 171.002(3), 171.203-205) and to allow a physician to use their good faith judgement for use of the exception.

***Choice v. Paxton*, No. 1:22-CV-859-RP, 2023 U.S. Dist. LEXIS 47611** (W.D. Tex. Feb. 24, 2023) granting plaintiffs' preliminary injunction (in part) preventing five local prosecutors in Texas from enforcing pre-*Roe* laws criminalizing abortion including extraterritorial abortions.

## Motion for Preliminary Injunction

Plaintiffs' focus their challenge on three sets of Texas statutes: (1) Sections 170A, et seq. of the Health and Safety Code ("H.B. 1280") (2) former Articles 1191, 1192, 1193, 1194, and 1196 of the Texas Penal Code (the "pre-*Roe* abortion laws"), and (3) the Texas Heartbeat Act, commonly called "S.B. 8." (Am. Compl., Dkt. 60, at 22-25).

Plaintiffs seek injunctive relief prohibiting prosecutors from seeking civil or criminal penalties for abortions obtained outside the State of Texas. Preliminary injunction (Dkt. 6) is granted in part to preliminarily enjoin local (five prosecutors named in lawsuit) prosecutors from enforcing pre-*Roe* laws (criminalizing abortion including abortions obtained outside of Texas). The court denied plaintiffs' claims under H.B. 1280 (Trigger Ban), and S.B. 8 (civil liability for violating six-week abortion ban by anyone performing an abortion or by aiding or abetting a pregnant individual) against District and County Attorney Defendants. Plaintiff's claims against Paxton are dismissed.

(AG lacks authority to enforce pre-*Roe* laws.)

#### Motion to Dismiss

Paxton's motion to dismiss (Dkt. 110) is granted. Paxton argues plaintiffs lack standing and do not state a claim of relief protected by the Constitution, a right to aid or fund out-of-state abortions. Court finds that H.B. 1280 does not confer enforcement authority for out of state abortion upon the Texas Attorney General.

#### **Tex. Health & Safety Code § 170A.001. Definitions.**

In this chapter:

- (1) "Abortion" has the meaning assigned by Section 245.002.
- (2) "Fertilization" means the point in time when a male human sperm penetrates the zona pellucida of a female human ovum.
- (3) "Pregnant" means the female human reproductive condition of having a living unborn child within the female's body during the entire embryonic and fetal stages of the unborn child's development from fertilization until birth.
- (4) "Reasonable medical judgment" means a medical judgment made by a reasonably prudent physician, knowledgeable about a case and the treatment possibilities for the medical conditions involved.
- (5) "Unborn child" means an individual living member of the homo sapiens species from fertilization until birth, including the entire embryonic and fetal stages of development.

#### **Tex. Health & Safety Code § 170A.002. Prohibited Abortion; Exceptions.**

- (a) A person may not knowingly perform, induce, or attempt an abortion.
- (b) The prohibition under Subsection (a) does not apply if:
  - (1) the person performing, inducing, or attempting the abortion is a licensed physician;
  - (2) in the exercise of reasonable medical judgment, the pregnant female on whom the abortion is performed, induced, or attempted has a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that places the female at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced; and
  - (3) the person performs, induces, or attempts the abortion in a manner that, in the exercise of reasonable medical judgment, provides the best opportunity for the unborn child to survive unless, in the reasonable medical judgment, that manner would create:
    - (A) a greater risk of the pregnant female's death; or
    - (B) a serious risk of substantial impairment of a major bodily function of the pregnant female.
- (c) A physician may not take an action authorized under Subsection (b) if, at the time the abortion was performed, induced, or attempted, the person knew the risk of death or a substantial

impairment of a major bodily function described by Subsection (b)(2) arose from a claim or diagnosis that the female would engage in conduct that might result in the female's death or in substantial impairment of a major bodily function.

**(d)** Medical treatment provided to the pregnant female by a licensed physician that results in the accidental or unintentional injury or death of the unborn child does not constitute a violation of this section.

**Tex. Health & Safety Code § 171.012. Voluntary and Informed Consent.**

**(a)** Consent to an abortion is voluntary and informed only if:

**(1)** the physician who is to perform or induce the abortion informs the pregnant woman on whom the abortion is to be performed or induced of:

**(A)** the physician's name;

**(B)** the particular medical risks associated with the particular abortion procedure to be employed, including, when medically accurate:

**(i)** the risks of infection and hemorrhage;

**(ii)** the potential danger to a subsequent pregnancy and of infertility; and

**(iii)** the possibility of increased risk of breast cancer following an induced abortion and the natural protective effect of a completed pregnancy in avoiding breast cancer;

**(C)** the probable gestational age of the unborn child at the time the abortion is to be performed or induced; and

**(D)** the medical risks associated with carrying the child to term;

**(2)** the physician who is to perform or induce the abortion or the physician's agent informs the pregnant woman that:

**(A)** medical assistance benefits may be available for prenatal care, childbirth, and neonatal care;

**(B)** the father is liable for assistance in the support of the child without regard to whether the father has offered to pay for the abortion; and

**(C)** public and private agencies provide pregnancy prevention counseling and medical referrals for obtaining pregnancy prevention medications or devices, including emergency contraception for victims of rape or incest;

**(3)** the physician who is to perform or induce the abortion or the physician's agent:

**(A)** provides the pregnant woman with the printed materials described by Section 171.014; and

**(B)** informs the pregnant woman that those materials:

**(i)** have been provided by the commission;

- (ii) are accessible on an Internet website sponsored by the commission;
  - (iii) describe the unborn child and list agencies that offer alternatives to abortion;  
and
  - (iv) include a list of agencies that offer sonogram services at no cost to the pregnant woman;
- (4) before any sedative or anesthesia is administered to the pregnant woman and at least 24 hours before the abortion or at least two hours before the abortion if the pregnant woman waives this requirement by certifying that she currently lives 100 miles or more from the nearest abortion provider that is a facility licensed under Chapter 245 or a facility that performs more than 50 abortions in any 12-month period:
- (A) the physician who is to perform or induce the abortion or an agent of the physician who is also a sonographer certified by a national registry of medical sonographers performs a sonogram on the pregnant woman on whom the abortion is to be performed or induced;
  - (B) the physician who is to perform or induce the abortion displays the sonogram images in a quality consistent with current medical practice in a manner that the pregnant woman may view them;
  - (C) the physician who is to perform or induce the abortion provides, in a manner understandable to a layperson, a verbal explanation of the results of the sonogram images, including a medical description of the dimensions of the embryo or fetus, the presence of cardiac activity, and the presence of external members and internal organs;  
and
  - (D) the physician who is to perform or induce the abortion or an agent of the physician who is also a sonographer certified by a national registry of medical sonographers makes audible the heart auscultation for the pregnant woman to hear, if present, in a quality consistent with current medical practice and provides, in a manner understandable to a layperson, a simultaneous verbal explanation of the heart auscultation;
- (5) before receiving a sonogram under Subdivision (4)(A) and before the abortion is performed or induced and before any sedative or anesthesia is administered, the pregnant woman completes and certifies with her signature an election form that states as follows:

#### ABORTION AND SONOGRAM ELECTION

- (1) THE INFORMATION AND PRINTED MATERIALS DESCRIBED BY SECTIONS 171.012(a)(1)-(3), TEXAS HEALTH AND SAFETY CODE, HAVE BEEN PROVIDED AND EXPLAINED TO ME.
- (2) I UNDERSTAND THE NATURE AND CONSEQUENCES OF AN ABORTION.
- (3) TEXAS LAW REQUIRES THAT I RECEIVE A SONOGRAM PRIOR TO RECEIVING AN ABORTION.
- (4) I UNDERSTAND THAT I HAVE THE OPTION TO VIEW THE SONOGRAM IMAGES.
- (5) I UNDERSTAND THAT I HAVE THE OPTION TO HEAR THE HEARTBEAT.

(6) I UNDERSTAND THAT I AM REQUIRED BY LAW TO HEAR AN EXPLANATION OF THE SONOGRAM IMAGES UNLESS I CERTIFY IN WRITING TO ONE OF THE FOLLOWING:

\_\_\_ I AM PREGNANT AS A RESULT OF A SEXUAL ASSAULT, INCEST, OR OTHER VIOLATION OF THE TEXAS PENAL CODE THAT HAS BEEN REPORTED TO LAW ENFORCEMENT AUTHORITIES OR THAT HAS NOT BEEN REPORTED BECAUSE I REASONABLY BELIEVE THAT DOING SO WOULD PUT ME AT RISK OF RETALIATION RESULTING IN SERIOUS BODILY INJURY.

\_\_\_ I AM A MINOR AND OBTAINING AN ABORTION IN ACCORDANCE WITH JUDICIAL BYPASS PROCEDURES UNDER CHAPTER 33, TEXAS FAMILY CODE.

\_\_\_ MY UNBORN CHILD HAS AN IRREVERSIBLE MEDICAL CONDITION OR ABNORMALITY, AS IDENTIFIED BY RELIABLE DIAGNOSTIC PROCEDURES AND DOCUMENTED IN MY MEDICAL FILE.

(7) I AM MAKING THIS ELECTION OF MY OWN FREE WILL AND WITHOUT COERCION.

(8) FOR A WOMAN WHO LIVES 100 MILES OR MORE FROM THE NEAREST ABORTION PROVIDER THAT IS A FACILITY LICENSED UNDER CHAPTER 245, TEXAS HEALTH AND SAFETY CODE, OR A FACILITY THAT PERFORMS MORE THAN 50 ABORTIONS IN ANY 12-MONTH PERIOD ONLY:

I CERTIFY THAT, BECAUSE I CURRENTLY LIVE 100 MILES OR MORE FROM THE NEAREST ABORTION PROVIDER THAT IS A FACILITY LICENSED UNDER CHAPTER 245 OR A FACILITY THAT PERFORMS MORE THAN 50 ABORTIONS IN ANY 12-MONTH PERIOD, I WAIVE THE REQUIREMENT TO WAIT 24 HOURS AFTER THE SONOGRAM IS PERFORMED BEFORE RECEIVING THE ABORTION PROCEDURE. MY PLACE OF RESIDENCE IS:\_\_\_\_\_..

\_\_\_\_\_.

SIGNATURE

\_\_\_\_\_.

DATE;

(6) before the abortion is performed or induced, the physician who is to perform or induce the abortion receives a copy of the signed, written certification required by Subdivision (5); and

(7) the pregnant woman is provided the name of each person who provides or explains the information required under this subsection.

(a-1) During a visit made to a facility to fulfill the requirements of Subsection (a), the facility and any person at the facility may not accept any form of payment, deposit, or exchange or make any financial agreement for an abortion or abortion-related services other than for payment of a service required by Subsection (a). The amount charged for a service required by Subsection (a) may not exceed the reimbursement rate established for the service by the executive commissioner for statewide medical reimbursement programs.

**(b)** The information required to be provided under Subsections (a)(1) and (2) may not be provided by audio or video recording and must be provided at least 24 hours before the abortion is to be performed:

**(1)** orally and in person in a private and confidential setting if the pregnant woman currently lives less than 100 miles from the nearest abortion provider that is a facility licensed under Chapter 245 or a facility that performs more than 50 abortions in any 12-month period; or

**(2)** orally by telephone on a private call or in person in a private and confidential setting if the pregnant woman certifies that the woman currently lives 100 miles or more from the nearest abortion provider that is a facility licensed under Chapter 245 or a facility that performs more than 50 abortions in any 12-month period.

**(c)** When providing the information under Subsection (a)(3), the physician or the physician's agent must provide the pregnant woman with the address of the Internet website on which the printed materials described by Section 171.014 may be viewed as required by Section 171.014(e).

**(d)** The information provided to the woman under Subsection (a)(2)(B) must include, based on information available from the Office of the Attorney General and the United States Department of Health and Human Services Office of Child Support Enforcement for the three-year period preceding the publication of the information, information regarding the statistical likelihood of collecting child support.

**(e)** The department is not required to republish informational materials described by Subsection (a)(2)(B) because of a change in information described by Subsection (d) unless the statistical information in the materials changes by five percent or more.

**(f)** The physician who is to perform the abortion, or the physician's designee, shall in person hand to the pregnant woman a copy of the informational materials described by Section 171.014:

**(1)** on the day of the consultation required under Subsection (a)(4) for a pregnant woman who lives less than 100 miles from the nearest abortion provider that is a facility licensed under Chapter 245 or a facility in which more than 50 abortions are performed in any 12-month period; or

**(2)** before any sedative or anesthesia is administered to the pregnant woman on the day of the abortion and at least two hours before the abortion if the woman lives 100 miles or more from the nearest abortion provider that is a facility licensed under Chapter 245 or a facility in which more than 50 abortions are performed in any 12-month period.

## ***Sec. 171.0124. Exception for Medical Emergency.***

A physician may perform an abortion without obtaining informed consent under this subchapter in a medical emergency. A physician who performs an abortion in a medical emergency shall:

- (1) include in the patient's medical records a statement signed by the physician certifying the nature of the medical emergency; and
- (2) not later than the 30th day after the date the abortion is performed, certify to the department the specific medical condition that constituted the emergency.

[Tex. Health & Safety Code § 171.0124](#)

### **Tex. Health & Safety Code § 171.018. Offense.**

A physician who intentionally performs an abortion on a woman in violation of this subchapter commits an offense. An offense under this section is a misdemeanor punishable by a fine not to exceed \$10,000. In this section, "intentionally" has the meaning assigned by [Section 6.03\(a\), Penal Code](#).

### **Tex. Health & Safety Code § 171.063. Distribution of Abortion-Inducing Drug.**

(a) A person may not knowingly give, sell, dispense, administer, provide, or prescribe an abortion-inducing drug to a pregnant woman for the purpose of inducing an abortion in the pregnant woman or enabling another person to induce an abortion in the pregnant woman unless:

- (1) the person who gives, sells, dispenses, administers, provides, or prescribes the abortion-inducing drug is a physician; and
- (2) except as otherwise provided by Subsection (b), the provision, prescription, or administration of the abortion-inducing drug satisfies the protocol tested and authorized by the United States Food and Drug Administration as outlined in the final printed label of the abortion-inducing drug.

(b) A person may provide, prescribe, or administer the abortion-inducing drug in the dosage amount prescribed by the clinical management guidelines defined by the American Congress of Obstetricians and Gynecologists Practice Bulletin as those guidelines existed on January 1, 2013.

(c) Before the physician gives, sells, dispenses, administers, provides, or prescribes an abortion-inducing drug, the physician must examine the pregnant woman and document, in the woman's medical record, the gestational age and intrauterine location of the pregnancy.

(d) The physician who gives, sells, dispenses, administers, provides, or prescribes an abortion-inducing drug shall provide the pregnant woman with:

- (1) a copy of the final printed label of that abortion-inducing drug; and
- (2) a telephone number by which the pregnant woman may reach the physician, or other health care personnel employed by the physician or by the facility at which the abortion was performed with access to the woman's relevant medical records, 24 hours a day to request assistance for any complications that arise from the administration or use of the drug or ask health-related questions regarding the administration or use of the drug.

(e) The physician who gives, sells, dispenses, administers, provides, or prescribes the abortion-inducing drug, or the physician's agent, must schedule a follow-up visit for the woman to occur not more than 14 days after the administration or use of the drug. At the follow-up visit, the physician must:

(1) confirm that the pregnancy is completely terminated; and

(2) assess the degree of bleeding.

(f) The physician who gives, sells, dispenses, administers, provides, or prescribes the abortion-inducing drug, or the physician's agent, shall make a reasonable effort to ensure that the woman returns for the scheduled follow-up visit under Subsection (e). The physician or the physician's agent shall document a brief description of any effort made to comply with this subsection, including the date, time, and name of the person making the effort, in the woman's medical record.

(g) If a physician gives, sells, dispenses, administers, provides, or prescribes an abortion-inducing drug to a pregnant woman for the purpose of inducing an abortion as authorized by this section and the physician knows that the woman experiences a serious adverse event, as defined by the MedWatch Reporting System, during or after the administration or use of the drug, the physician shall report the event to the United States Food and Drug Administration through the MedWatch Reporting System not later than the third day after the date the physician learns that the event occurred.

#### **Tex. Health & Safety Code § 171.065. Criminal Offense.**

(a) A person who intentionally, knowingly, or recklessly violates this subchapter commits an offense. An offense under this subsection is a state jail felony.

(b) A pregnant woman on whom a drug-induced abortion is attempted, induced, or performed in violation of this subchapter is not criminally liable for the violation.

(c) Conduct constituting an offense under this section may also be the basis for an administrative violation under Section 171.064.

#### **Tex. Health & Safety Code § 171.101. Definitions.**

In this subchapter:

(1) "Partial-birth abortion" means an abortion in which the person performing the abortion:

(A) for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus, deliberately and intentionally vaginally delivers a living fetus until:

(i) for a head-first presentation, the entire fetal head is outside the body of the mother; or

(ii) for a breech presentation, any part of the fetal trunk past the navel is outside the body of the mother; and

(B) performs the overt act described in Paragraph (A), other than completion of delivery, that kills the partially delivered living fetus.

(2) "Physician" means an individual who is licensed to practice medicine in this state, including a medical doctor and a doctor of osteopathic medicine.



**Tex. Health & Safety Code § 171.102. Partial-Birth Abortions Prohibited.**

(a) A physician or other person may not knowingly perform a partial-birth abortion.

(b) Subsection (a) does not apply to a physician who performs a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy.

**Tex. Health & Safety Code § 171.151. Definition.**

In this subchapter, “dismemberment abortion” means an abortion in which a person, with the purpose of causing the death of an unborn child, dismembers the living unborn child and extracts the unborn child one piece at a time from the uterus through the use of clamps, grasping forceps, tongs, scissors, or a similar instrument that, through the convergence of two rigid levers, slices, crushes, or grasps, or performs any combination of those actions on, a piece of the unborn child’s body to cut or rip the piece from the body. The term does not include an abortion that uses suction to dismember the body of an unborn child by sucking pieces of the unborn child into a collection container. The term includes a dismemberment abortion that is used to cause the death of an unborn child and in which suction is subsequently used to extract pieces of the unborn child after the unborn child’s death.

**Tex. Health & Safety Code § 171.152. Dismemberment Abortions Prohibited.**

(a) A person may not intentionally perform a dismemberment abortion unless the dismemberment abortion is necessary in a medical emergency.

(b) A woman on whom a dismemberment abortion is performed, an employee or agent acting under the direction of a physician who performs a dismemberment abortion, or a person who fills a prescription or provides equipment used in a dismemberment abortion does not violate Subsection (a).

**Tex. Health & Safety Code § 171.153. Criminal Penalty.**

(a) A person who violates Section 171.152 commits an offense.

(b) An offense under this section is a state jail felony.

***Sec. 171.201. Definitions.***

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In this subchapter:

(1) “Fetal heartbeat” means cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac.

(2) “Gestational age” means the amount of time that has elapsed from the first day of a woman’s last menstrual period.

(3) “Gestational sac” means the structure comprising the extraembryonic membranes that envelop the unborn child and that is typically visible by ultrasound after the fourth week of pregnancy.

(4) “Physician” means an individual licensed to practice medicine in this state, including a medical doctor and a doctor of osteopathic medicine.

(5) “Pregnancy” means the human female reproductive condition that:

(A) begins with fertilization;

(B) occurs when the woman is carrying the developing human offspring; and

(C) is calculated from the first day of the woman's last menstrual period.

(6) "Standard medical practice" means the degree of skill, care, and diligence that an obstetrician of ordinary judgment, learning, and skill would employ in like circumstances.

(7) "Unborn child" means a human fetus or embryo in any stage of gestation from fertilization until birth.

[Tex. Health & Safety Code § 171.201](#)

### ***Sec. 171.203. Determination of Presence of Fetal Heartbeat Required; Record.***

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(a) For the purposes of determining the presence of a fetal heartbeat under this section, "standard medical practice" includes employing the appropriate means of detecting the heartbeat based on the estimated gestational age of the unborn child and the condition of the woman and her pregnancy.

(b) Except as provided by Section 171.205, a physician may not knowingly perform or induce an abortion on a pregnant woman unless the physician has determined, in accordance with this section, whether the woman's unborn child has a detectable fetal heartbeat.

(c) In making a determination under Subsection (b), the physician must use a test that is:

(1) consistent with the physician's good faith and reasonable understanding of standard medical practice; and

(2) appropriate for the estimated gestational age of the unborn child and the condition of the pregnant woman and her pregnancy.

(d) A physician making a determination under Subsection (b) shall record in the pregnant woman's medical record:

(1) the estimated gestational age of the unborn child;

(2) the method used to estimate the gestational age; and

(3) the test used for detecting a fetal heartbeat, including the date, time, and results of the test.

[Tex. Health & Safety Code § 171.203](#)

### ***Sec. 171.204. Prohibited Abortion of Unborn Child with Detectable Fetal Heartbeat; Effect.***

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(a) Except as provided by Section 171.205, a physician may not knowingly perform or induce an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child as required by Section 171.203 or failed to perform a test to detect a fetal heartbeat.

(b) A physician does not violate this section if the physician performed a test for a fetal heartbeat as required by Section 171.203 and did not detect a fetal heartbeat.

(c) This section does not affect:

(1) the provisions of this chapter that restrict or regulate an abortion by a particular method or during a particular stage of pregnancy; or

(2) any other provision of state law that regulates or prohibits abortion.

[Tex. Health & Safety Code § 171.204](#)

### ***Sec. 171.205. Exception for Medical Emergency; Records.***

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(a) Sections 171.203 and 171.204 do not apply if a physician believes a medical emergency exists that prevents compliance with this subchapter.

(b) A physician who performs or induces an abortion under circumstances described by Subsection (a) shall make written notations in the pregnant woman's medical record of:

(1) the physician's belief that a medical emergency necessitated the abortion; and

(2) the medical condition of the pregnant woman that prevented compliance with this subchapter.

(c) A physician performing or inducing an abortion under this section shall maintain in the physician's practice records a copy of the notations made under Subsection (b).

[Tex. Health & Safety Code § 171.205](#)