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The Reversal of Roe v. Wade: Implications for Healthcare Boards

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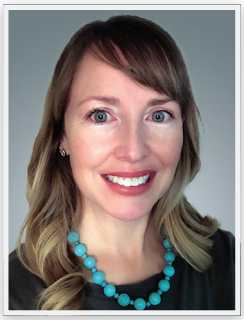

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The U.S. Supreme Court has effectively removed the constitutional right to an abortion and returned the issue to the states, creating a complex and shifting patchwork legal system as states redefine legal healthcare. The ramifications for healthcare providers are significant in every state. Boards will need to think quickly about any need to take action and plan for both the intended and unintended impacts on their institutions. The turmoil in the provider community has already begun. State and local policies are being adopted and proposed that tread (or potentially tread) on patient and provider privacy. The Supreme Court ruling and subsequent state actions will impact practices regarding a range of clinical conditions, from family planning to the treatment of some medical emergencies. Hospitals will need to consider the changed landscape on a multitude of additional fronts including: approaches to patient communication and information sharing, patient counseling, a changed liability environment, new patient and practitioner safety concerns, workforce stress and burnout, as well as impacts on practitioner recruitment and retention, service line offerings, and hospital finances. There are also implications for hospitals that train medical students, residents, fellows, and/or advanced practice practitioners, or that sponsor other specialized programs. Additionally, this decision impacts the hospital's role in population health as it will adversely impact the health of communities, especially those with poor and/or high-risk populations.

The task for healthcare boards now is to look proactively at all of the potential implications from this dramatic ruling, which upends half a century of established law and practice. Most members of the general public have yet to understand the depth and scope of the impacts on women's health, family health, and community health.

Some states have already enacted legislation as a result of this decision and many others will follow, compelling boards to begin exploring these issues promptly. The time is now to partner with your senior executives, legal counsel, and most importantly, your medical staff to fully understand the options that need consideration. This article presents some of the issues that we believe need thoughtful deliberation by hospital directors. We recognize that the environment in which these discussions occur will differ significantly depending on factors like a hospital's geographic location, its relationship to a health system, whether it has a religious affiliation or is subject to local governmental oversight, its range of current services, and the make-up of the population it serves. We also acknowledge that many board members will find these conversations uncomfortable. Nevertheless, as fiduciaries for their institutions, board members are responsible for understanding the full scope of issues unleashed by *Dobbs v. Jackson Women's Health Organization* and must plan accordingly.

State Laws Are Different and Nuanced

First and foremost, your board must be well briefed on the legislative changes and legal updates particular to your state. Health systems operating in multiple states will need to determine how to track and operate within regions that have different restrictions and exceptions. Understanding how your state's laws are written and how they will be enforced will be critical to planning and decision making. Furthermore, many state restrictions will be challenged in court and hospitals will need to track such litigation. While the Dobbs ruling may appear straightforward, it has created a morass of legal questions around numerous concerns,[1,2] and these will take years of litigation to reach clarity. Therefore, boards will require regular updating from counsel as the legal landscape continues to change.

In many states, a growing number of providers are choosing to no longer provide a full range of reproductive

1 For example, will federal laws preempt some state restrictions on abortion? Does FDA authorization for physicians to prescribe medication to induce abortions override state bans? Can states ban out-of-state travel for an abortion? Can a state ban self-insured employer health plans (covered under ERISA) from paying for out-of-state abortions? Can professional liability carriers refuse to cover a provider who performs an abortion to save a woman's life or well-being if this action is considered illegal in the state performed?

2 Centers for Medicare & Medicaid Services (CMS), "Reinforcement of EMTALA Obligations Specific to Patients Who Are Pregnant or Are Experiencing Pregnancy Loss (Updated July 2022)," July 11, 2022.

healthcare.[3] They consider this approach safer than trying to determine what will be considered legal under shifting or unclear legislative initiatives or changing court rulings. Many patients will choose to receive care in states other than their own for similar reasons. Providing as much clarity as possible from legal resources will help providers and patients make informed choices.

Privacy and Law Enforcement's Access to Data

Boards must learn how HIPAA will play a role in law enforcement activities.[4] Since HIPAA permits providers to disclose PHI where "required by law" and to law enforcement, women seeking an abortion cannot be assured that their "private" health information will remain out of reach of prosecutors or the public. In states where abortion is criminalized, providers may face conflicting obligations; for example, a responsibility to maintain the confidentiality of communications with their patients, and a legal requirement to comply with court orders, subpoenas, or other summons. Even in states where abortion remains legal, providers may face challenging privacy issues, such as whether to produce medical records to law enforcement in a patient's home state when a patient has traveled to the physician's state for purposes of obtaining an abortion.

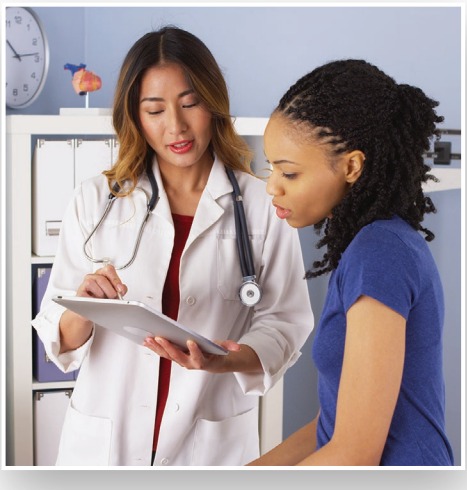
Metadata is everywhere and is not (yet) protected by a federal law. While a House subcommittee is working to advance the American Data Privacy and Protection Act, it may become political currency in the current polarized environment.[5] The majority of data that could be made available to law enforcement is not healthcare data and therefore not protected by HIPAA or by traditional medical ethics practices (e.g., GPS location-tracking data, apps that track purchases including prescriptions, period-tracking apps, data that tracks searches for health information on the Internet, etc.). Many hospital Web sites track patient activity in order to better conduct triage and help patients navigate their system.[6] HIPAA also might not be a limiting factor if law enforcement or individual states determine that patient data regarding abortion is no longer protected under HIPAA.

Hospitals and physicians that may be compelled to provide patient data to law enforcement agencies should work closely with knowledgeable counsel and proactively plan their legal and ethical responses. Some may want to carefully rethink their digital strategies if such data can be used against the interests of patients. (Security and privacy related to digital healthcare overall is currently an area requiring further attention.)

Service Offerings and Financial Impacts

Given the new legal and political risks associated with selected medical practices, the board and management will need to carefully review the services offered and the financial impacts that may result from shifts in medical practice. For example, some institutions may find it no longer feasible to provide services such as infertility treatments, non-elective or elective abortions, some contraceptive options, or selected telehealth consultations. Other services may need to be cut back if it becomes difficult to recruit or retain providers who don't want to practice reproductive medicine in a hostile state environment. There may also be increased unforeseen demand for some services. For example, since the Supreme Court's ruling many urologists have seen a marked uptick in the number of men seeking vasectomies and ob-gyn physicians have reported increased demand for tubal ligations.[7] In addition, many experts project increased demand for psychiatric and social services as rates of depression, child and spousal abuse, and substance use disorders are expected to increase in the wake of this ruling (see below).

Hospitals will need to plan for consequences that may be both financial and operational. The diminution in volume or elimination of some services may reduce revenue while increases in vasectomies, tubal ligations, and pregnancy-related health problems may increase revenue. The costs of



practitioner recruitment and retention may increase. More money may need to be budgeted for legal expenses. In some states, payers may no longer be willing to pay for abortions or other women's healthcare. On the operational side, changes in service offerings or the availability of physicians may necessitate planning to facilitate patient transfers to other institutions for emergency care. Investment in psychiatric and social services may need to be increased as demand grows.

Health Equity

It is largely anticipated that this ruling will have a disparate impact on ethnic minority families and those in lower income brackets. Some are anticipating an increase in domestic violence and see the likelihood of more women and children living in poverty. This new environment will also impact mental health. Boards should be discussing this in the context of their duty of obedience to the charitable mission and integration of new efforts with ongoing population health activities and programs addressing social determinants of health. Boards may wish to consider ramping up SDOH programs with community partners to address poverty, access to affordable mental healthcare, childcare, domestic violence, and so forth.

Workforce Well-Being

With a workforce still in crisis from the impacts of COVID, the Supreme Court's

3 KQED Forum, "How Abortion Care Is Adapting to a Post-Roe America," National Public Radio, July 7, 2022.
4 Jessica Kim Cohen, "HHS Issues HIPAA Guidance After Abortion Ruling," *Modern Healthcare,* June 30, 2022.
5 Arent Fox Schiff, "Moving Closer to a Federal Data Privacy Act: House Subcommittee Advances American Data Privacy and Protection Act to Full Committee," July 5, 2022.
6 Xiufen Yu, et al., "Got Sick and Tracked: Privacy Analysis of Hospital Websites," Concordia University, Montreal, Canada.
7 Meena Venkataramanan, "Men Rush to Get Vasectomies After Roe Ruling," *The Washington Post,* June 29, 2022.

Dobbs decision is already having major impacts on the emotional well-being of your workforce. In their roles as both caregivers and patients, members of the hospital workforce are facing new challenges that may undermine their well-being.

Healthcare organizations are themselves diverse communities, and your workforce may be made up of people with drastically different positions on this issue. If your workforce is starkly divided, friction may result that might not have existed previously. Your employees might not understand all of the potential implications of this decision. The board's role is to ensure that its workforce is educated by asking the CEO and senior leadership questions about how this is being handled. Aligning the workforce to the mission and focusing on education and process may help minimize division. Employees may need additional avenues to have safe and candid conversations. Partnering with and supporting the CEO and C-suite to enhance workforce support will be key.

Medical Education

Academic institutions have raised concerns about what will happen to the quality of women's overall healthcare if abortion and related procedures are no longer taught in all ob-gyn residency programs. Evidence shows that physicians who are knowledgeable about abortion care and the various circumstances/treatments for pregnancies that become dangerous to the woman's health provide better care overall.[8]

Influx of Travelers in States Providing Abortion

For states that will continue to make abortion available, boards may need to ask themselves how to handle the anticipated influx of people traveling to these locations to receive abortion services. Beyond having providers available, what are some other unforeseen complications of this that boards need to think about up front and prepare for? Will such travel increase use of the emergency room? Will there be an opportunity to ramp up other reproductive services such as in vitro fertilization or family planning clinics?

Advocacy

Governing boards will have their hospitals take different positions regarding advocacy for women's health needs. Many healthcare organizations have spoken out forcefully expressing their concerns about the Supreme Court's decision to end federal protection for women's health privacy and medical autonomy; others have remained silent. Some boards have more latitude to undertake advocacy than others and many will not wish to be drawn into the political dialogue becoming ubiquitous throughout the country.

At this point, critical discussion needs to happen in the boardroom as boards ask themselves what their role is in the advocacy arena to influence policy, existing laws, and new laws. This should occur as part of a broader task to develop a philosophy about the hospital's role in local and national advocacy.

Communication

Boards need to ask their C-suite and physician leaders what messages, if any, the organization needs to present to the public, their workforce, and other stakeholders. There may be many new areas in which patient education and information needs to be updated. Given the increased role of state and local governments (and in some states, private citizens) in the personal decision making of patients, many hospitals will find it necessary to increase their efforts to communicate with the public. Such communication can be used to clarify for patients how the services the hospital has historically offered may change, how the hospital will treat their health information, and how it will cooperate with local law enforcement. Some hospitals will see an imperative to provide women more education about the impacts of pregnancy on their health and what options are available for family planning.

Addressing Practitioner Concerns

Many of the hospital's privileged practitioners will have serious concerns about their professional well-being in the face of new legal uncertainties. They will want to know if the board and management have their backs if they "do the right thing" to protect the health of their patients. Will the hospital help them with legal costs to defend their actions against prosecutors or "deputized" private citizens? Will it help them fight possible actions by regulators who want to withdraw their license to practice? Will it provide professional liability coverage if private carriers refuse to defend care that could be deemed illegal under a state's statute?

Looking Forward

We can only begin to project the cascade of consequences that will emerge in the wake of *Dobbs v. Jackson Women's Health.* But thinking ahead is a crucial responsibility for boards, many of which already spend too little time deliberating mission and strategy.[9] This may be the time for hospitals with dormant ethics committees to give them new life and purpose. If the Supreme Court makes future rulings that further undermine patient autonomy, privacy, and established medical practice as some of the Justices have advocated, hospitals will need to be prepared.

There is an opportunity for organizations to move quickly through the reaction phase of this Supreme Court decision and fast-forward innovation around community partnerships, ramp up SDOH efforts, improve maternal health, and engage in proactive family planning. We urge our members to set aside significant time, whether at the next several board meetings, or a special retreat, to discuss these issues and ask the hard questions. Whether answers may become clear or not, beginning this process now will better position your organization to make the decisions it will inevitably face.

The Governance Institute thanks Todd Sagin, M.D., J.D., National Medical Director, Sagin Healthcare Consulting, and Kimberly A. Russel, FACHE, CEO, Russel Advisors, for contributing to this article. *They can be reached at tsagin@saginhealthcare.com and russelmha@yahoo.com.*

8 Ariel Bleicher, "Preparing for a Post-Roe America: What Happens Once Abortion Is Illegal in Half the Country?" *UCSF Magazine,* Summer 2022.

9 Kathryn Peisert and Kayla Wagner, *Advancing Governance for a New Future of Healthcare,* 2021 Biennial Survey of Hospitals and Healthcare Systems, The Governance Institute.