

# SCOTUS Ruling on Abortion Requires Careful Board Consideration

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# Abortion: A Divisive Issue That Boards Reflexively Avoid



## Hospital Boards Cannot Dodge Discussions Involving Abortion

- Board members have a fiduciary duty to promote the mission of their institutions – missions which typically focus on addressing the health needs of their communities (including reproductive health needs.)
- Board members have a duty to understand the law and the responsibilities it imposes on their hospitals and providers.
- It is impossible for a hospital board to undertake effective strategic planning without understanding the implications of abortion law and abortion politics for health care organizations and providers.

# How To Discuss Abortion Related Matters

- Agree that “abortion” will not be taboo language in relevant discussion by the Board regarding hospital matters.
- Agree *not* to discuss whether any particular position regarding abortion is ethical, moral, or a religious imperative. Agree to limit conversation to the ramifications for the hospital and medical community of laws & regulations relating to abortion.
- If necessary, seek a ‘neutral’ facilitator for these conversations.
- Utilize legal counsel to help inform these discussions. Choose this legal counsel carefully (e.g. whether to use internal or external counsel).

# How To Discuss Abortion Related Matters

- Where possible and to the degree reasonable, limit participation in these conversations to Board members or invited experts.
- Carefully review and approve associated Board minutes before they are released.
- Discuss a communication plan to relay to the community how the Board is engaging with issues relating to abortion.

# Dobbs, State Health Officer of the Mississippi Department of Health v. Jackson Women's Health Organization

- U.S. Supreme Court ruling issued June 24, 2022.
- Overturned the Supreme Court rulings in Roe v. Wade and Planned Parenthood of Southeast PA v. Casey.
- Ruling eliminated a national right to abortion before viability that had been US law for past half century.
- The Supreme Court majority turned issues of abortion and reproductive rights back to each of the fifty states. This decision has left individuals, families, states, regulators, hospitals and health systems, doctors, and others in a state of uncertainty that will not be resolved for years or decades.

## Areas Needing Board Attention & Discussion: The Ongoing Impact of the Dobbs Ruling

- Planning how to track the volatility in federal statutes & regulations and state statutes & regulations;
- Addressing the impact on practitioner staffing, retention, and well-being;
- Determining the hospital stance on legal support of its privileged practitioners;
- Evaluating the impact on hospital services lines and hospital finances;
- Considering the hospital's position on protection of personal health information and hospital data;
- Impact on hospital population health initiatives.

# Hospital Boards need to track state actions carefully:

This task should be relegated to legal counsel who should regularly update the board on abortion-related legislative and regulatory activity that impacts hospital mission, services, and personnel.

- Many states will continue seeking avenues to implement full or near-full bans on abortion, which often may impede access to other reproductive health services.
- Some states will seek to protect or expand access to abortion services, including privacy protection for reproductive health information and immunities for individuals facing criminal prosecution or civil litigation arising from conduct in other states.
- Health systems with hospitals in more than one state or which treat patients from multiple states will need to track laws across several jurisdictions.



## Boards Will Need Legal Counsel To Educate Them On 'Conflict of Laws'

**Conflict of laws questions will regularly emerge due to states' fundamentally opposed positions on abortion access.**

For example, while certain states have adopted so-called "bounty hunter" laws to support enforcement of abortion bans against citizens who seek such services outside their home state, some states have prohibited in-state actors, such as judicial officers, from assisting other states with abortion-related arrests, investigations, and litigation.

# Boards Will Need Legal Counsel To Educate Them On 'Conflict of Laws'

**Dobbs has resulted in complicated preemption issues between state and federal law.**

- For example, with respect to medication abortion we will see litigation regarding whether the Federal Food, Drug, & Cosmetics Act overrides state laws from barring, limiting access to, or making it more difficult to access FDA approved abortion drugs, such as mifepristone and misoprostol.
- Another example is HHS' July 2022 guidance letter to providers, clarifying its position that abortion is a treatment necessary to stabilize a pregnant patient in an emergency such as an ectopic pregnancy. Does this guidance on the federal EMTALA law override a state law which prohibits abortion?

# Boards Must Consider The Implications of the Chilling Effect of Dobbs

Variability in state laws, complexity in conflicts of law and interstate enforcement of such laws, and the general fear of criminal prosecution will likely continue to have a chilling effect on providing reproductive health services in many states. Provider uncertainty over what is permissible and legally safe medical care may result in delays in treatment even when services are medically necessary, for fear of violating their state's abortion laws. Some states' laws are unclear as to what qualifies as an emergency medical condition or what the process is to qualify for any legally permissible rape or incest exceptions.

# How Can Hospitals Support Their Practitioners

- Provide regular updates to clinical staff on hospital's understanding of the evolving legal environment and implications for practitioner's decision-making and actions;
- Discuss with medical staff and physician leaders the implications of Dobbs on medical practice and hospital policies and promote appropriate ongoing dialogue;
- Regularly discuss with the medical staff the hospital's position on the provision of contentious reproductive health services;
- Where the hospital has a position on particular services it will offer, determine whether the hospital will provide legal support in the event a practitioner is charged with civil or criminal liability;
- Offer counseling for practitioners making emotionally distressing clinical decisions;

# Discuss with Physician Leaders Potential Changes To Medical Staff Documents

- Do Delineation of Privileges forms need changes in areas like ob-gyn and family practice?
- Should changes be considered in medical staff bylaws? (For example, membership requirements that would exclude practitioners with convictions for violation of restrictive abortion laws).
- Are there clinical practice guidelines that need to be modified or eliminated (in policies and in EHRs)?

# How Can Hospitals Support Their Practitioners

- Track efforts to pressure state medical boards to take licensing actions against practitioners who provide patient's information regarding abortion or who make out-of-state referrals;
- Inform physicians of the impact of potential insurance restrictions on their medical staff membership – in particular, exclusions from Medicaid;
- Prepare security personnel for potential conflicts with patients or their families;
- Understand the implications of changing state laws on medical staff development planning and staffing needs.

## Boards Already Facing Manpower Challenges Must Consider Whether Dobbs Will Make Things Worse

- Hospitals in abortion ‘expansion’ states may need to ramp up staffing to accommodate out-of-state patients and referrals;
- Hospitals in states that have highly restrictive abortion laws – especially where criminalization of providers is being pursued – may find increasing difficulty in the retention and recruitment of practitioners who provide reproductive health or emergency room services;
- Filling graduate medical education spots in abortion-restrictive states may become more difficult, further undermining the ability to recruit high caliber practitioners in these jurisdictions.

# Board Position on the Protection of Health Information

- HIPAA provides only nominal protection to reproductive health information.
- Hospitals must think through various scenarios in which health information might be demanded from third parties (without patient consent). For example:
  - Demands for hospital pharmacy information showing when, to whom, and for whom mifepristone or misoprostol has been prescribed.
  - Information on patients who have tested positive for pregnancy.
  - Information on patients diagnosed with miscarriages.
  - Information on patient out-of-state referrals.
  - Information on patients undergoing in vitro fertilization or other assisted reproductive techniques.



# Addressing Concerns Over PHI

- Should you plan to “segment” reproductive health data just as is commonly done for drug, alcohol, and behavioral health records within EHRs and other information systems?
  - Meet with gynecology/obstetrics service line clinicians along with IT teams to fully understand how reproductive documentation is captured and woven into practice and enterprise EHRs
  - Engage medical staff and compliance/privacy teams to hear their concerns relating to segmenting reproductive health data within the EHR
  - Work with IT staff to tag each data element and document related to reproductive health contained within EHRs and other systems.

# Addressing Concerns Over PHI

- Refresh Release of Information Policies and Procedures
  - Reevaluate release of information (ROI) process to see if reproductive health documents can be suppressed and if so, under what situations it is legal to do so. If data is released inappropriately, there may be potential for it to be used against both the patient and the provider.
  - Consider when and how reproductive data could be redacted from a medical record that has been legally requested or disclosed. How should the redaction occur? Who would be responsible?
  - Review ROI workflow to determine if a new step is needed to ensure reproductive information is removed prior to release, to the extent legally permitted. There will be instances where this data cannot be redacted or removed, such as when the whole record is requested to be released by the patient or under a subpoena or court order.

## Boards Need To Assess Impact on Service Lines

- Will market share be increased or decreased as a result of state abortion restrictions or expansions? For example:
  - Will patients migrate to ob-gyn practitioners where reproductive choices are not restricted?
  - Post-Dobbs there was an uptick of requests for vasectomies and tubal ligations in abortion-restrictive jurisdictions.
- Will some reproductive services need to be eliminated? For example:
  - Most modern assisted reproductive technologies, such as in vitro fertilization, were developed in the era of a federally recognized constitutional right to abortion. Common practices around IVF are almost certainly prohibited in at least 12 states with enforceable total prohibitions on abortion from the moment of fertilization.

# Boards Need To Assess Impact on Service Lines

- Will some service lines need to be curtailed?: For example:
  - Oncology service lines that treat adolescents and young adults.
- Will some services lines need to be strengthened? For example:
  - Psychiatric and social services as rates of depression, child and spousal abuse, and substance abuse are expected to increase post-Dobbs.

# Boards Must Consider the Impact of Dobbs on Hospital Finances

- Likely increase in expenditures for legal counsel
- Likely increase in expenditures for recruitment and retention of physicians and APPs
- The financial impact of expansion or reduction/elimination of particular services or service lines

# Considerations Regarding Telemedicine

- Providing some medical advice regarding reproductive health matters to patients in abortion-restrictive states may violate state laws.
  - Currently less than 25% of states have regulations that permit both telehealth and abortion.
- Prosecutors in abortion-restrictive states may seek telehealth medical records.

# Considerations Regarding Telemedicine

- Prescribing medications with abortifacient effects or side effects may be illegal in the patient's state but not the provider's state.
  - Some states are passing TRAP laws- Targeted Regulations of Abortion Providers – which set up onerous state reporting and registration requirements for providers, pharmacies, suppliers, and manufacturers of abortion-inducing medication – with fines in the millions of dollars.

# Planning Communication With Patients

- What is “informed consent” if practitioners are limited in the medical treatment options they can discuss with patients?
- Should emergency rooms in some states have signs indicating that in some cases they may not legally offer timely options to save a women’s life or prevent serious morbidity?
- Should hospitals publish to patients their position(s) on reproductive health services?
- Should hospital patient waiver, disclosures, or ‘patient rights’ publications discuss when the hospital might breach patient privacy to comply with anti-abortion statutes, requests by state investigators or prosecutors, or judicial bodies?



## Take Away Recommendations:

- Assure the Board has adequate legal counsel or other resources to keep it closely informed about changing developments relating to reproductive health;
- Assure that management has established a mechanism for dialogue regarding reproductive health restrictions with practitioners in the specialties of ob-gyn, family medicine, and emergency medicine;
- Bolster counseling and EAP services to adequately support practitioners in distress;
- Have legal counsel oversee a review of documents (e.g. clinical pathways and protocols, medical staff bylaws and credentialing policies, service listings on websites) to avoid legal repercussions;

## Take Away Recommendations

- Plan if and how your organization will protect the reproductive health data and information of patients;
- Inject the impact of abortion restrictions into the planning of service line strategies and operations;
- Look at employee health benefits to see if changes should be considered?
- Assess your 'risk management' positions on various medical services and treatment options;
- Dedicate regular periodic agenda time at Board meetings to discuss the concerns raised in this presentation.