SCOTUS Ruling on Abortion Requires Careful Board Consideration

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Abortion: A Divisive Issue That Boards Reflexively Avoid

Hospital Boards Should Not 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 their health care organization and providers.
- Abortion law and politics has become a very local matter that varies widely from state to state and has disparate impact on hospitals.

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, and community reactions 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.

One Year After Dobbs - Vast Changes to the Abortion Legal Landscape

- 21 States ban or severely restrict abortion. These laws typically impose criminal liability on health care professionals performing abortions, with penalties including professional sanctions, 1-year to life imprisonment, and fines up to $100,000. per violation.
- 17 states have codified abortion rights into law and ballot initiatives in California, Michigan, and Vermont enshrined abortion rights into their state's constitutions.
- More than forty lawsuits were filed to challenge abortion restrictions in at least 22 states over the last year.
- More than three hundred legislative proposals have been introduced at the state or federal level.

(Source: JAMA Health Forum. 2023; 4(8))

The Ongoing Impact of the Dobbs Ruling: Seven Areas Needing Board Consideration & Discussion:

1) How to track the volatility in federal statutes & regulations and state statutes & regulations and prepare expectations for compliance.
2) Consider risk management strategies given the greater risks of Provider liability post-Dobbs.
3) Assessment of the strategic impact on hospital services lines.
4) How to anticipate and address the impact on practitioner staffing, retention, and well-being.
5) Appraisal of medical records confidentiality policies.
6) Review how graduate medical educational programs may be affected.
7) Evaluation of the significance of abortion rulings 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 have implemented or are seeking to implement full or near-full bans on abortion, which may impede access to other reproductive services. Court rulings and public referendums also impact the status of state laws on abortion.
- Some states have sought 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 tracks 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 are seeing 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 state laws which prohibit abortion under any or most circumstances?**

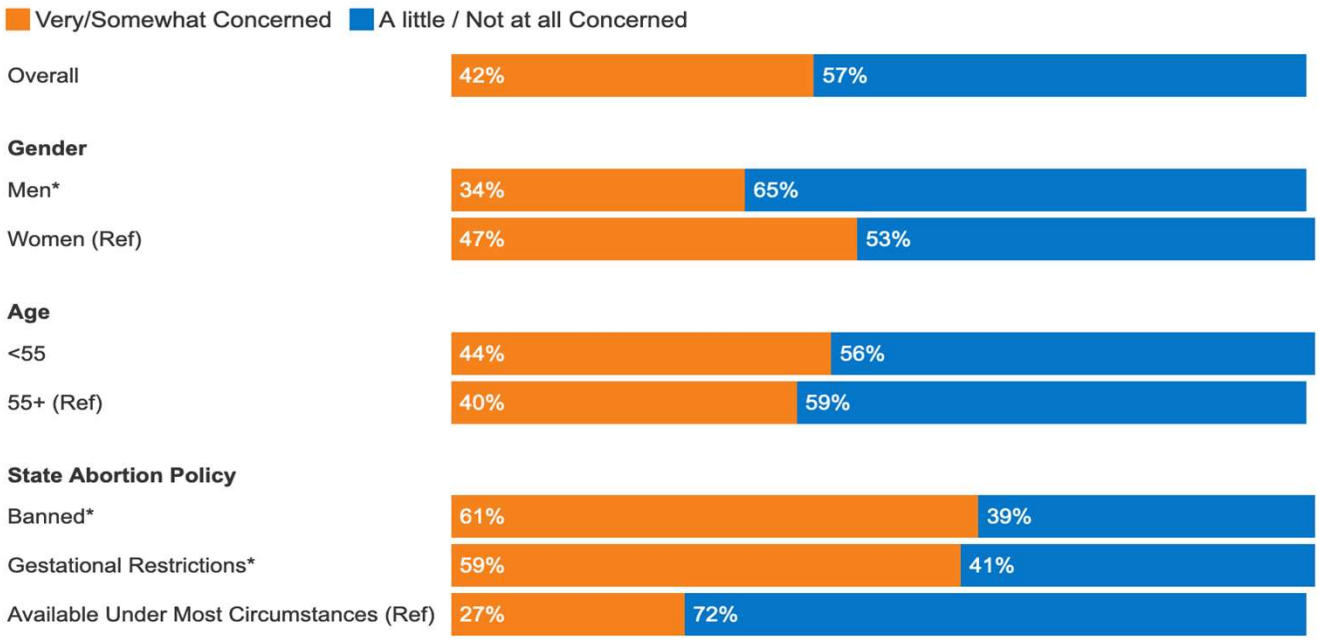
Provider Liability Post-Dobbs: What Is Your Risk?

"The *Dobbs* decision and the fast-changing landscape of abortion law and access places medical providers at a crossroads. Split between their ethical, and legal obligations, personal beliefs, and potential liability to themselves and their businesses, providers are faced with confusion and doubt on how to navigate the evolving regulatory landscape. This gray area leaves room for consequential and potentially dangerous interpretations that health care providers are not prepared to make. "

American Health Law Association/Health Care Liability and Litigation Practice Group.

Over Half of OBGYNs Practicing in States Where Abortion is Banned Report Being Concerned About Their Legal Risk When Making Decisions About Patient Care & Necessity for Abortion

How concerned, if at all, are you about your own legal risk when making decisions about patient care and necessity of abortion



NOTE: *Statistically significant difference (p<.05) from reference (Ref) group for very/somewhat concerned. Totals may not sum to 100% due to rounding.
Fielded March 17, 2023 – May 18, 2023.
Available under most circumstances: AK, CA, CO, CT, DC, DE, HI, IL, MA, MD, ME, MT, NM, MN, MI, NH, NJ, NV, NY, OR, VA, PA, RI, VT, WA, WY.
Gestational restrictions: AZ, FL, GA, IA, IN, KS, NC, ND, NE, OH, SC, UT.
Banned: AL, AR, ID, KY, LA, MO, MS, OK, SD, TN, TX, WI, WV.
Abortion is now banned in ND but had gestational restrictions for most of the field period.
SOURCE: KFF 2023 National OBGYN Survey. • PNG

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Legal Risks Fall Into Several Categories

General Civil Liability or Disciplinary Action

- Indiana doctor faces backlash after performing a legal abortion on a ten-year-old rape victim. Investigated by state AG and referred for disciplinary action.
- Minnesota pharmacist being sued for refusing to provide patient with the morning-after pill prescribed by her doctor. Complaint argues the pharmacist violated Minnesota's Human Rights Act and seeks punitive and monetary damages.
- On May 1, 2023, CMS announced it was investigating two hospitals (one in Kansas/one on Missouri) for purported EMTALA violations because they did not provide "necessary stabilizing care" to a patient who presented to those hospitals because hospital policies prohibited physicians from performing an abortion.

Areas of Post-Dobbs Liability

Malpractice Liability

- For providers in states that restrict or ban abortions, failure to provide medically necessary abortion related services could amount to malpractice.
- Providing abortion services in states that bar these procedures could potentially nullify a provider's malpractice insurance coverage.

Employment Liability

- Hospitals must be careful when selecting employer-sponsored health plans
- Hospitals must be careful about expenses paid if an employee travels out of state for an abortion
- Hospitals must carefully consider terminations when acts of "conscience" are claimed

Areas of Liability Post-Dobbs

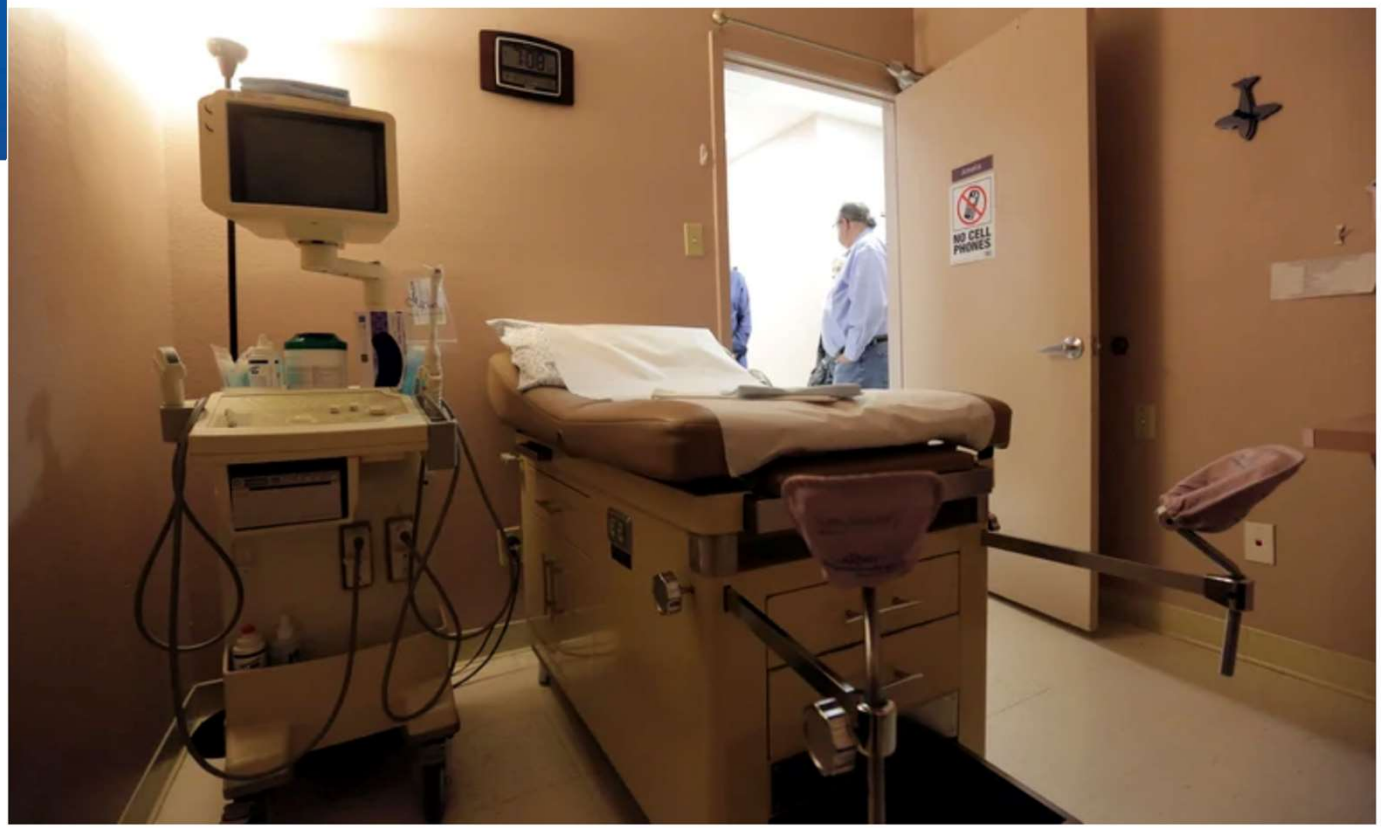
Criminal Liability

The Dobbs decision allows states to criminalize providers for performing abortion services or aiding or abetting an abortion. Several states have done so, and more are expected to follow suit.

Many hospitals and physicians have decided the safest course of action is to refuse to perform even apparently permissible procedures.

Boards Need To Assess Impact on Service Lines

- Will market share be increased or decreased or stay the same as a result of state abortion restrictions or expansions? For example:
  - Will patients migrate to ob-gyn practitioners and hospitals 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 service lines become less competitive or viable because of patient choices or staffing challenges?
  - Examples include service lines addressing reproductive health care/ maternal-fetal medicine, neonatal services, cancer, rheumatology, primary care, and emergency medicine.



Idaho hospital halts obstetrical care as abortion laws become stricter

Officials at Sandpoint-based Bonner General Health said Idaho's legal and political climate was partly to blame.

Boards Need To Assess Impact on Service Lines

- 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 prohibitions on abortion from the moment of fertilization.

Will Physicians Avoid or Leave Areas That Jeopardize Their Ability to Practice As They Believe is Appropriate?

- Data will be scarce in the short-term, but hospitals should re-examine their medical staff development plans with this possibility in mind.

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 proposed – 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.

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Training Location Preferences of U.S. Medical School Graduates Post Dobbs v. Jackson Women's Health Organization Decision

"Similar to the trend seen for all residency applicants, the decrease in unique U.S. MD senior OB/GYN applicants year over year was highest in states with complete bans (-10.5%) and lowest (-5.3%) in states without restrictions"

GRAHAM CENTER POLICY ONE-PAGER

Family Medicine Residency Applications Declined More Precipitously in States With Abortion Restrictions

PDF Print Comments

ALISON HUFFSTETLER, MD, GRACE WALTER, MD, AND KENDAL ORGERA, MPH, MPP

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Family medicine residency applicants desire a robust curriculum when selecting a residency training location.[1] Residency curricula are required to include family planning and counseling in pregnancy,[2] and may include abortion training.[3] State legislative efforts that restrict the patient-physician relationship and prevent discussions concerning the full scope of reproductive care have an impact on residency applications.[4] In 2023, the number of senior medical students applying for family medicine residencies declined by 7.4% in states with abortion bans compared with a 3.6% decrease in states where abortion is legal (*Figure 1*[5]).

Many Physicians Feel 'Between a Rock and a Hard Place'

Many physicians report moral distress resulting in burnout because they feel "gagged" from making recommendations they believe are medically appropriate or necessary. They feel compromised because the risk posed by sharing abortion information in states with bans is largely untested.

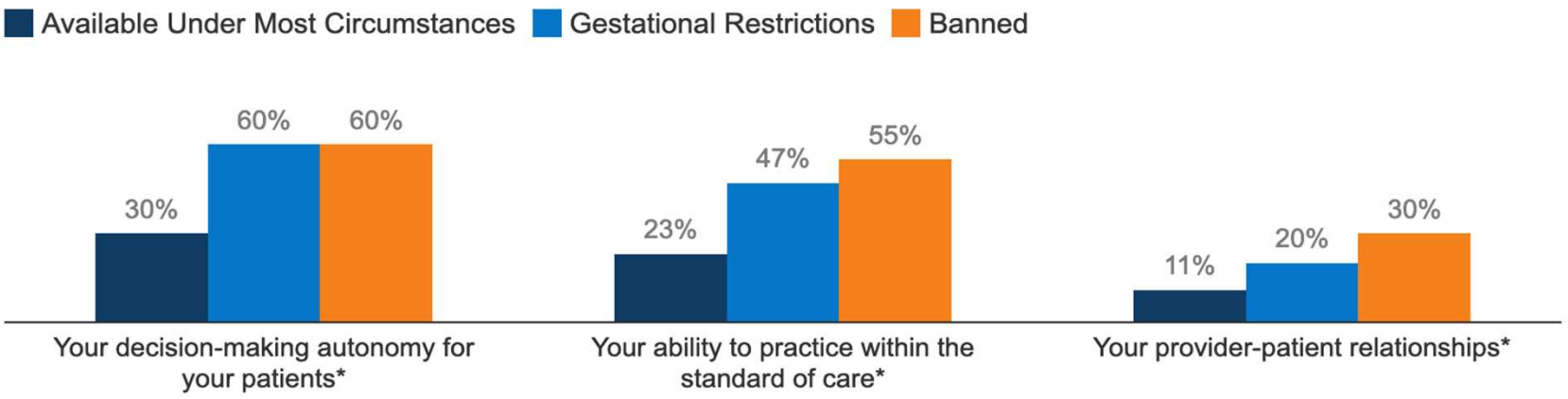
The AMA Code of Ethics states, "When physicians believe a law violates ethical values or is unjust … ethical responsibilities should supersede legal duties." After Dobbs, the AMA issued a report citing this passage and adding, "Guidance throughout the Code underscores physicians' duty of fidelity to patient and to promote access to care, as well as responsibility to support informed decision making in keeping with patients' individual goals and preferences as autonomous moral agents."

At its November 2022 meeting, the AMA amended Ethics Opinion 4.2.7 on abortion, deleting the phrase "under circumstances which do not violate the law" in its description of when it is ethical to perform abortions.

Higher Shares of OBGYNs in States With Abortion Bans and Limits Say Their Decision Making Autonomy and Ability to Practice Within Standard of Care Have Worsened Since *Dobbs*

Share who say that based on their clinical experience, since *Dobbs* Decision, the following have **worsened**:

OBGYNs practicing in states where abortion is:



NOTE: *Estimates for gestational restrictions and banned are statistically different from estimates for available under most circumstances (p<.05).
Fielded March 17, 2023 – May 18, 2023.
Available under most circumstances: AK, CA, CO, CT, DC, DE, HI, IL, MA, MD, ME, MT, NM, MN, MI, NH, NJ, NV, NY, OR, VA, PA, RI, VT, WA, WY.
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Abortion is now banned in ND but had gestational restrictions for most of the field period. Most of the other responses that are not shown were "had no impact."
SOURCE: KFF 2023 National OBGYN Survey • PNG

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Case Example

Deborah Dorbert asked to terminate her pregnancy after learning her fetus had Potter's syndrome and was certain to die. Her doctor told her she was "too late" because of Florida's abortion ban and hospital attorney advised an abortion could not be performed at the hospital. No other options were offered the patient who subsequently endured many agony filled months before delivering a baby that died within minutes.

Dorbert said, "The thing that scared us [about having an abortion in another state] was we didn't know if we'd go to jail… We couldn't let anything happen to us because we have another child". She also said she and her husband "didn't have the money to travel".

Her doctor could have referred this family to a free legal helpline such as *If/When/How*, whose attorneys would have confirmed that travel posed no legal risk to Dorbert. Or he could have provided information about funds which will help patient's pay for abortion care. When this case was reported in the press, the original sponsor of the abortion law in Florida said the law was never intended to prevent an abortion of a fetus with Potter's syndrome.

Webinar Series at National Academy of Sciences, Engineering, and Medicine

The Impact of the Dobbs Decision on Cancer Care: A Virtual Webinar Series

Case Discussion

- A state law bans abortion except in cases of serious risk of substantial and irreversible impairment of a major bodily function
- Hospital counsel interprets the narrow exception to exclude clinical situations such as terminating a pregnancy to safely initiate cancer treatment
- Violation of the law is a felony, and the doctor must affirmatively prove that the circumstance met the legal exception in a criminal prosecution

Case Discussion

A 32-year-old woman and mother of a toddler who lives in a state with such a 6-week abortion ban presents with a new diagnosis of acute lymphoblastic leukemia. She is approximately 11 weeks pregnant with her second planned pregnancy. The chemotherapy needed to treat the leukemia is toxic to a developing fetus, but without such treatment, the patient is unlikely to survive.

Ethics Team suggests referral of patient to another state. Physician's attorney believes such a referral will put the doctor at risk of imprisonment and the hospital attorney concurs. The Ethics Team recommends the hospital have a referral policy.

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;

How Can Hospitals Support Their Practitioners

- Prepare security personnel for potential conflicts with patients or their families, or with members of the public;
- Strengthen efforts to prevent workplace violence directed at clinical staff;
- Understand the implications of changing state laws on medical staff development planning and staffing needs.

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 should be modified or eliminated (in policies and in EHRs)?

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 your hospital consider "segmenting" within EHRs and other information systems reproductive health data, just as is commonly done for drug, alcohol, and behavioral health records?
  - 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.

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. When should it occur, if at all? How should the redaction be implemented? Who would be responsible?
- Review ROI workflow to determine if a new step is desired or 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.

Take Away Recommendations:

- Dedicate regular periodic agenda time at Board meetings to discuss the concerns raised in this presentation. Set expectations for discussion parameters. Consider working with organizations like Braver Angels (formerly Better Angels) to make discussions more respectful and constructive.

- Assure the Board has adequate legal counsel or other resources to keep it closely informed about changing developments relating to reproductive health.

- Consider creation of a task force to provide clarity for the institution and its medical staff on how and when any state exceptions on abortion may apply.

Take Away Recommendations:

- If your hospital does not provide abortion related services, make policies clear for all patients. This may prevent prospective patients from seeking care at your institution and avoid the need to deny services at the point of care.

- If your hospital performs abortions, create clear protocols for employed practitioners who decline to perform abortion-related services and determine what options are available before deciding to terminate a practitioner for this refusal.

- Assure that management has established a mechanism for dialogue regarding reproductive health restrictions with practitioners in the specialties of ob-gyn, family medicine, cancer, and emergency medicine.

Take Away Recommendations

- 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.
- 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 and consideration of any GME programing.

"No good deed goes unpunished" Final Thought & Anecdote

Discussions relating to abortion may feel like a 'no-win' proposition destined to generate contention and division.

Be kind to one another and be role models for civil and constructive dialogue.