

The First Quadrimester of the Trump Presidency: Legal & Ethical Implications for Reproductive Health

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“For that reason, in future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.”

~ Justice Clarence Thomas’ concurring opinion in *Dobbs v. Jackson Women’s Health Organization et al.*, referring to the right of married persons to obtain contraceptives; the right to engage in private consensual sexual acts; and the right to same-sex marriage

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Dobbs and the Current State of Abortion Access

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Case Law Before *Dobbs*

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Griswold v Connecticut, 381 U.S. 479 (1965)

- Right to privacy recognized in contraception case

Roe v Wade, 410 U.S. 113 (1973)

- Building on right to privacy, adopted trimester framework in abortion case

Planned Parenthood v Casey, 505 U.S. 833 (1992)

- Adopted undue burden analysis for abortion cases

Whole Woman's Health v. Hellstedt, 579 U.S. 582 (2016)

- Struck down Texas law imposing requirements on abortion providers & clinics

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The Political Climate Leading to *Dobbs*



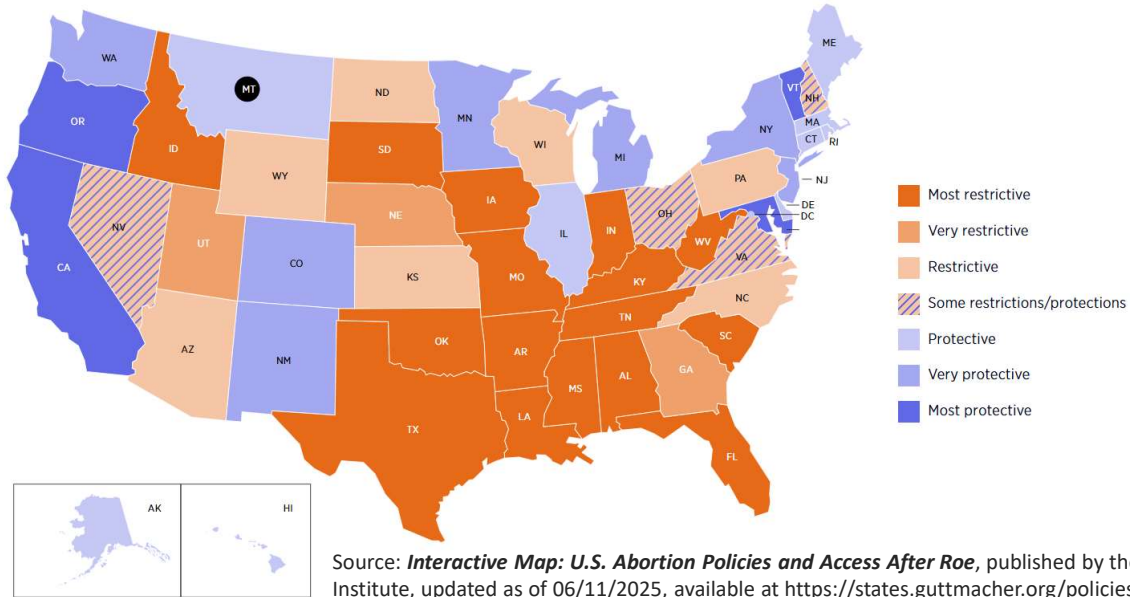
- Vacancy on the Supreme Court during President Obama's last year
 - Obama appointee would tip the ideological balance of the Court
 - Republican Senators blocked the Obama appointee
- Trump's 2016 campaign vowed to appoint Justices who would overturn *Roe*
- During his first term, President Trump appointed three Justices, tipping the ideological balance of the Court: Roberts, Kavanaugh, Coney Barrett
- Seeing an opportunity, conservative state legislatures enacted laws directly violating *Roe*

The *Dobbs* Opinion



- *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022)
- In a 6-3 decision, reversed both *Roe* and *Casey*
 - 3 of the deciding votes were from Justices appointed during Trump's first term
- Concluded that the Constitution, "properly understood," does not confer a right to obtain an abortion; including the provision on which defenders of *Roe* and *Casey* chiefly rely – the Due Process Clause
- Left to the states to limit or ban abortion

U.S. Abortion Access – Current Status



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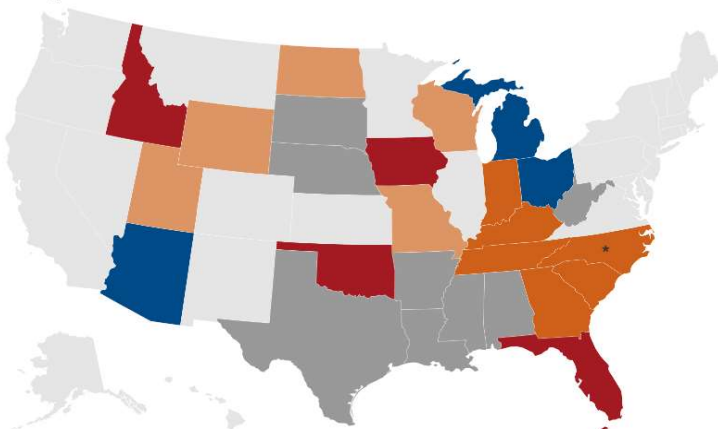
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Status of Abortion Litigation in State Courts, as of June 6, 2025

Status of Litigation

- Concluded, ban in effect
- Concluded, ban permanently blocked
- Ongoing, ban in effect
- Ongoing, ban temporarily blocked
- None, abortion banned
- None, abortion legal



Note: On 1/5/2023, the Idaho Supreme Court ruled that the state constitution does not protect the right to abortion. On 9/7/2022, the Michigan Court of Claims blocked enforcement of the 1991 abortion ban, finding it violated the state constitution. The state had filed an appeal, but dismissed it on 12/14/2022. In the November 2022 elections, voters in Michigan passed a ballot measure amending the state constitution to explicitly protect reproductive freedom, which includes the right to abortion.
* Providers have filed a challenge to North Carolina's 12-week LMP, which is currently in effect, in federal court.

Get the data • Embed • Download PNG

KFF

- Abortion providers and advocates in many states have brought cases challenging state laws
- Cases generally contend that abortion laws violate the state constitution or another state law

Source: *State and Federal Reproductive Rights and Abortion Litigation Tracker*, April 17, 2025, KFF, available at [State and Federal Reproductive Rights and Abortion Litigation Tracker | KFF](https://www.kff.org/state-and-federal-reproductive-rights-and-abortion-litigation-tracker/) (visited June 15, 2025)

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HIPAA's Reproductive Health Final Rule & State Privacy Laws



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HIPAA's Reproductive Health Final Rule



- Limits use or disclosure of reproductive health care PHI under HIPAA
 - Cannot be used in connection with civil, criminal, or administrative investigations related to reproductive health care where care was lawful under the circumstances in which it was provided
 - Requires a signed attestation from requestors for certain requests (health oversight, judicial & administrative proceedings, law enforcement, & coroners/MEs)
 - Requestor must confirm that PHI is not being disclosed for a prohibited purpose

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Legal Challenges to Reproductive Health Final Rule



Purl, MD et al. v. U.S. Department of Health and Human Services (N.D. Texas, 2024)

- Preliminary injunction prohibiting enforcement specific to plaintiffs
- OCR note on 05/12 – Final Rule is under review but “no imminent action...is expected”

State of Texas v. U.S. Department of Health and Human Services (N.D. Texas, 2024)

- Texas AG filed suit alleging HIPAA & Final Rule limit the state’s investigative capabilities
- HHS requested all dates be held in abeyance to allow HHS to evaluate their position

State of Tennessee et al. v. U.S. Department of Health and Human Services (E.D. TN, 2025)

State of Missouri et al. v. U.S. Department of Health and Human Services (E.D. MO, 2025)

- TN and MO filed suit against OCR; joined by 14 other states
- HHS filed motion to dismiss in both cases based on no showing of harm/lack of standing

State Privacy Laws Protecting Reproductive Health



- California’s Confidentiality of Medical Information Act (CMIA)
 - Protects reproductive and sexual health information
 - CA Civil Code section 56 *et seq.*
- State of Washington legislation (HB 1469, amends several statutory sections)
 - Safeguards reproductive health care services and gender-affirming treatment

Emergency Medical Treatment and Labor Act (EMTALA)

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EMTALA: Abortion as Stabilizing Treatment

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U.S. v. Idaho; Moyle v. U.S. (9th Circuit)

- Biden Administration DOJ lawsuit challenging Idaho's Defense of Life Act (IDLA) as preempted by EMTALA
- After the Supreme Court dismissed cert. as "improvidently granted" and the Ninth Circuit heard oral argument, the Trump Administration dismissed its challenge

St. Luke's Health System v. Labrador (US District Court, District of Idaho)

- Federal court granted request for preliminary injunction by Idaho's largest health system to prevent enforcement of IDLA against St. Luke's & its providers (03/20/25)
- St. Luke's argues EMTALA preemption; discovery must be completed by 01/13/26

CMS Memo (Re: EMTALA preemption of state abortion laws)

- On 05/29/25, CMS rescinded its 2022 memo, "does not reflect the policy of this Administration," stated it would continue to enforce EMTALA

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Mifepristone and Birth Control



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Attempted Challenges to FDA's Approval of Mifepristone



Food & Drug Admin v. Alliance for Hippocratic Med. (602 U.S. 367) (2024)

- Challenge to FDA's approval asserting FDA's actions were "arbitrary and capricious"
- US Supreme Court concluded physicians' claims lacked standing

Missouri et al. v. U.S. Food & Drug Admin. et al. (U.S. District Court, ND TX)

- MO, ID, and KS challenged FDA's approval based on alleged violations of the APA, FDCA, and Comstock Act
- On May 7, 2025, DOJ dismissed the case on procedural grounds; could be an attempt to protect FDA's greater drug approval authority

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Potential Trump Administration Actions re: Mifepristone



Trump Administration Actions

- Trump's DOJ dismissed Missouri *et al.* v. FDA
- FDA Commissioner to reconsider policy on safety of mifepristone
- HHS Secretary also to review safety of mifepristone

Comstock Act

- Anti-obscenity, anti-vice law passed by Congress in 1873
- Bans sending "obscene" articles via U.S. mail and other common carriers
- "Obscene" materials include pornography, birth control (and information about birth control), and any article, instrument, substance, etc. that can be used to produce an abortion
- Has not been used in decades, thought to apply to items mailed for "unlawful" abortions

State Shield Laws



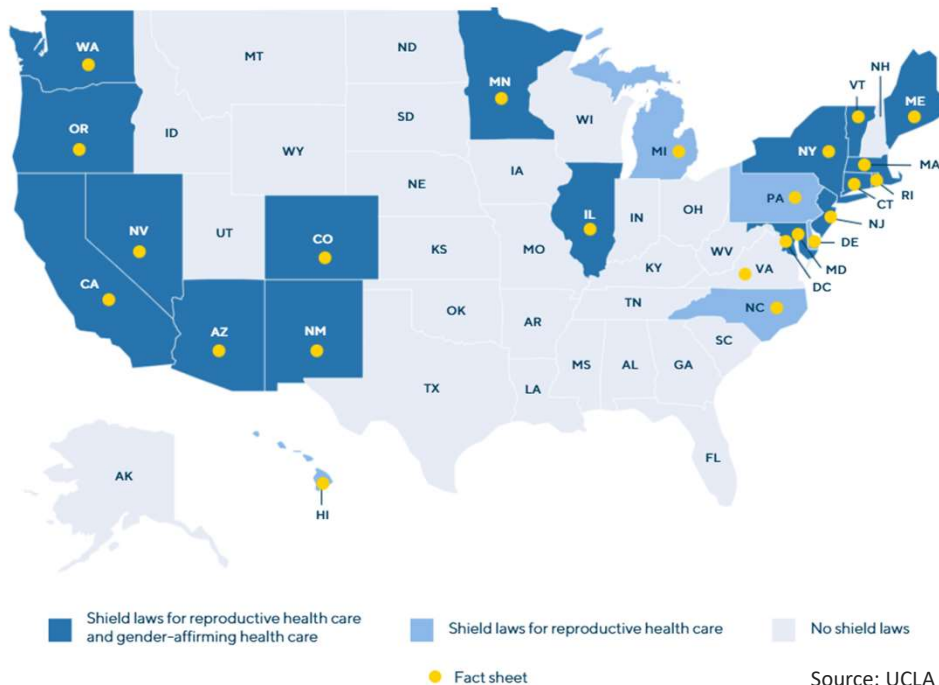
State Shield Laws – Enforcement Across State Lines

State Shield Laws

- Laws that protect patients, providers, and others in states where abortion is legal, from out-of-state civil, criminal, and administrative enforcement
- 22 states and D.C. have reproductive health shield laws
- 8 of those protect telehealth (CA, CO, ME, MA, NY, RI, VT, and WA)

Dr. Maggie Carpenter – NY physician facing charges in TX and LA – case of first impression

- Physician is licensed in NY; prescribed mifepristone via telemedicine to patients in TX and LA
- Texas: AG filed civil suit and obtained injunction and \$100,000 CMP against physician; NY refused to enforce based on NY's shield laws
- Louisiana: A grand jury indicted Dr. Carpenter and her company for criminal abortion; NY is refusing to extradite based on NY's shield laws



Fetal Personhood & In Vitro Fertilization (IVF)



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Fetal Personhood



- *Roe v. Wade* in 1973 stated that “person” did not include the unborn for the purposes of individual rights such as equal protection under the law
 - Prompted a nationwide push to grant more rights to fetuses
 - Today, more than 1/3 of states consider fetuses “people” at some point during conception
 - *Dobbs* did not address the “personhood” question, opening the door to application of previously dormant laws & passage of new laws
 - TX HB 1280: Abortion “trigger law” passed in 2021 in anticipation of *Dobbs* defines “unborn child” as “individual living member of the homo sapiens species from fertilization until birth”
 - US HR 722: Life at Conception Act (introduced 01/24/2025)

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Fetal Personhood Debate Leads to Questions re: In Vitro Fertilization (IVF) (among other things)

LePage v. Center for Reproductive Medicine (02/16/24)

- Alabama Supreme Court:
 - 2/16/24 – decision that frozen embryos treated same as children
- Alabama Legislature:
 - 2/27/24 – Immediate response to decision - SB 159 introduced to protect IVF providers from civil/crim liability for embryo loss/damage
 - 3/6/24 – AL Governor signed bill
- Many states and the federal government are questioning how fetal personhood relates to IVF embryos

Fetal Personhood & IVF – Various State Approaches

Louisiana: RS 9:129

- Treats embryos as persons
- RS 9:130 – IVF patients can renounce their parental rights of embryos

Colorado: HB 22-1279

- Embryos are *not* persons

Arizona (25-318.03) and **Missouri** (SB 1145)

- AZ statute that outlines how embryo custody is awarded; MO proposed legislation (no longer active)

Texas: *Antoun vs. Antoun*

- Frozen embryos are treated as property subject to a contractual agreement

The Trump Administration and IVF



EO 14216: Expanding Access to In Vitro Fertilization (02/18/2025)

- Implemented to make IVF treatment more accessible and affordable
 - IVF costs are \$12-\$25K per cycle, often requires multiple cycles
 - Often not covered by health insurance
- Directs Asst to President for Domestic Policy to make recommendations for protecting IVF access & reducing cost
 - 90-day required policy recommendations not made as of 06/16/2025

Elimination of CDC Assisted Reproductive Technology Surveillance Team

- Tracked IVF effectiveness, provided IVF resources, & conducted research
- Eliminated as part of DOGE layoffs

FACE Act & The Hyde Amendment



Freedom of Access to Clinic Entrances (FACE) Act of 1994



- Safeguards abortion centers, etc. => illegal to:
 - harm, threaten, or interfere with reproductive health services or
 - damage a facility
- Jan. 2025 DOJ memo instructed prosecutors:
 - only enforce the law in “extraordinary circumstances” and
 - no new FACE prosecutions permitted w/o authorization
- Individual Cases:
 - Trump dismissed charges in 3 pending FACE Act cases and
 - Trump pardoned 23 individuals that were convicted of FACE Act violations

EO 14182: Enforcement of Hyde Amendment



- Hyde Amendment enacted in 1976
 - Prohibits use of federal funds (including Medicaid) for abortion services, with limited exceptions (e.g., rape, incest, etc.)
 - 17 states cover abortion care for Medicaid beneficiaries using **state** funds
- 1/24/25 - President Trump issued a broad directive to “prevent federal funding for elective abortion and end the use of federal taxpayer dollars to fund or promote elective abortion”

ABA Model Rules of Professional Conduct



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Rule 1.1: Competence



1.1

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation.

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Rule 1.2: Scope of Representation & Allocation of Authority Between Client & Lawyer



1.2(b)

A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

1.2(d)

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.

Rule 1.7: Conflict of Interest: Current Clients



1.7(a)

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Rule 1.13: Organization as Client



1.13(a)

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

1.13(f)

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

Rule 1.16: Declining or Terminating Representation



1.16(b)(2)

A lawyer may withdraw from representing a client if the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent.

1.16(b)(4)

A lawyer may withdraw from representing a client if the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

Rule 2.1: Advisor



2.1

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Rule 8.4: Misconduct



8.4(c)

It is professional misconduct for a lawyer to:

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation

Hypotheticals



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Scenario #1



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Scenario #1



- You represent an abortion clinic in State A, which allows abortions up to 15 weeks gestation.
- State B (a contiguous state), bans abortion at all stages of pregnancy with very limited exceptions. It is not unusual for residents of State B to seek reproductive health care at your client's facility in State A.
- Desperate Housewife ("DH"), a resident of State B, just found out she is 6 weeks pregnant. She already has three children and after the third was diagnosed with a medical condition that makes it risky for her to maintain a pregnancy.

Scenario #1 (cont'd)



- DH makes an appointment for a telemedicine visit at an abortion clinic operated by Dr. Pruh Joyce in State A the next week. During the visit, Dr. Joyce prescribes abortion medication and mails it to DH.
- DH experiences complications and presents at a local hospital in State B, which is required to report information about abortion complications, including the source of abortion care, to State B's Department of Health. Based on that, State B's District Attorney investigates Dr. Joyce for violating State B's abortion law and for practicing medicine without a license in State B.
- Dr. Joyce seeks your legal advice in this matter and specifically wants to know if she should continue to provide these services in other states where she is not licensed.

Scenario #1 (cont'd)



Relevant Statutes

- State B – Definition of Abortion

- (1) “Abortion” means the act of using or prescribing an instrument, a drug, a medicine, or any other substance, device, or means with the intent to cause the death of an unborn child of a woman known to be pregnant. The term does not include birth control devices or oral contraceptives. An act is not an abortion if the act is done with the intent to:
 - (A) save the life or preserve the health of an unborn child;
 - (B) remove a dead, unborn child whose death was caused by spontaneous abortion; or
 - (C) remove an ectopic pregnancy

Scenario #1 (cont'd)



Relevant Statutes

- State B – Prohibition of Abortion

- (1) A person may not knowingly perform, induce, or attempt an abortion.
- (2) The prohibition under Subsection (1) does not apply if:
 - (a) The person performing, inducing, or attempting the abortion is a licensed physician; and
 - (b) 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.

Scenario #1 Discussion



Substantive Laws

1. Which type of shield laws could apply here?
 - a. Civil/criminal investigation
 - b. Extradition and arrests
 - c. Search warrants and subpoenas/medical records
 - d. Professional discipline
2. What other laws could apply?
 - a. HIPAA reproductive health laws
 - b. Telemedicine
 - c. Comstock Act

Scenario #1 Discussion



Rules of Professional Conduct

1. Which Rules could apply to this scenario?
 - a. Rule 1.1 – Competence – make sure experienced in all relevant substantive issues
 - b. Rule 1.2(d) – Scope of Representation – Should you counsel client not to continue the conduct?
 - c. Rule 1.7 – Conflict of Interest – Will the representation of Dr. Joyce be directly adverse to the clinic? Depends on how the clinic is organized/ structured (See 1.13)
 - d. Rule 1.13 – Organization as Client – How is the clinic structured? Is Dr. Joyce effectively the same as the corporate entity?

Scenario #2



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Scenario #2



- Since helping Dr. Joyce out with her legal troubles in State B related to prescribing mifepristone via telemedicine, you have continued to represent her abortion clinic.
- Now she has received a subpoena from a District Attorney in State B requesting access to her clinic's abortion records of another resident of State B who traveled to State A and obtained an abortion at Dr. Joyce's clinic.
- The subpoena has been domesticated locally and otherwise complies with HIPAA's subpoena requirements and relevant State A laws, except that it does not include the required attestation consistent with HIPAA's Reproductive Health requirements.
- Dr. Joyce asks you if she is required to comply with the subpoena and turn over the records. You see this as an opportunity to take a stand against the conservative effort to interfere with abortion rights, particularly in light of the pending multi-state lawsuit challenging provisions of the HIPAA Reproductive Health Rules, including the attestation requirement. Thus, you encourage Dr. Joyce to refuse to comply with the subpoena.

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Scenario #2 Discussion



Substantive Laws

1. HIPAA Reproductive Health Rules
 - a. Uncertainty due to pending multi-state lawsuit
 - b. Potential for government non-enforcement
 - i. What would non-enforcement look like?
 - ii. Can OCR force providers to disclose records?
2. Relevant state medical record laws
 - a. HIPAA Preemption?
3. Shield Laws

Scenario #2 Discussion



Rules of Professional Conduct

1. Which rules would be applicable to this scenario?
 - a. Rule 1.7 – Conflict of Interest – Will the representation of Dr. Joyce be directly adverse to the clinic? Depends on how the clinic is organized/ structured (See next rule)
 - b. Rule 1.13 – Organization as Client – How is the clinic structured? Is Dr. Joyce effectively the same as the corporate entity?
 - c. Rule 2.1 – Advisor – When rendering advice, a lawyer may refer not only to law but to other considerations, including moral, social and political factors that may be relevant to the client's situation, BUT still must exercise independent professional judgment.

Scenario #3



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Scenario #3



- You are in-house counsel for Big City Health System, which operates an acute care facility in State A. The facility is faced with a tricky patient care issue. A patient, who was 10 weeks pregnant, was admitted to the ICU after a traumatic brain injury and has been declared brain dead consistent with state law. The fetus is being kept alive through continuation of pharmacological and mechanical support of the patient.
- Hospital is located in State B, which prohibits abortion with very limited exceptions. State B also has a law that prohibits the removal of life support from a pregnant woman. However, the patient's husband, who is the attorney-in-fact under the patient's DPOA, does not want his wife to be an incubator for the fetus.
- Hospital staff and the attending physician are understandably reluctant to remove support from the patient due to the pregnancy and the continued presence of a fetal heartbeat. The hospital's CEO has contacted you for advice and guidance.

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Scenario #3 (cont'd)



Relevant Statutes

State B – Definition of Abortion

- (1) “Abortion” means the act of using or prescribing an instrument, a drug, a medicine, or any other substance, device, or means with the intent to cause the death of an unborn child of a woman known to be pregnant. The term does not include birth control devices or oral contraceptives. An act is not an abortion if the act is done with the intent to:
 - (A) save the life or preserve the health of an unborn child;
 - (B) remove a dead, unborn child whose death was caused by spontaneous abortion; or
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Scenario #3 (cont'd)



Relevant Statutes

State B – Prohibition of Abortion

- (1) A person may not knowingly perform, induce, or attempt an abortion.
- (2) The prohibition under Subsection (1) does not apply if:
 - (a) The person performing, inducing, or attempting the abortion is a licensed physician; and
 - (b) 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.

Scenario #3 (cont'd)



Relevant Statutes

State B – Life-Sustaining Treatment for Pregnant Patients

- (1) Pregnant Patients. A person may not withdraw or withhold life-sustaining treatment from a pregnant patient.
- (2) “Life-Sustaining Treatment” means treatment that, based on reasonable medical judgment, sustains the life of a patient and without which the patient will die. The term includes both life-sustaining medications and artificial life support, such as mechanical breathing machines, kidney dialysis treatment, and artificially administered nutrition and hydration.

Scenario #3 Discussion



Substantive Laws

1. State B’s laws?
 - a. “Life support”?
 - b. Definition of abortion - Intent
2. Other legal issues?
 - a. Fetal personhood
 - b. Conscientious objection
 - c. DPOA laws – what decisions entitled to make?
 - d. Futility of care

Scenario #3 Discussion



Rules of Professional Conduct

1. Which rules would be applicable to this variation on the scenario?
 - a. Rule 1.2(d) – Scope of Representation – Attorney shall not counsel a client to perform an act that atty **knows** is criminal.
 - b. Rule 1.16(b)(2) & (4) – Declining or Terminating Representation – Atty may w/draw if
 - reasonably believes the client will persist in action that **reasonably believes** is criminal OR
 - Considers the client’s intended action repugnant
 - c. Rule 2.1 – Advisor – When rendering advice, a lawyer may refer not only to law but to other considerations, including moral, social and political factors that may be relevant to the client’s situation, BUT still must exercise independent professional judgment.
 - d. Rule 8.4 – Professional Misconduct – If atty gives advice based on personal beliefs rather than independent professional judgment, she will have engaged in dishonesty, fraud, deceit and misrepresentation.

Scenario #4



Scenario #4



- You represent an IVF clinic in State C, which recently recognized fetal personhood. Because frozen embryos obtained through the IVF process are still deemed “property” under the laws of State C, the clinic has been able to operate with few restrictions related to the disposition of unused frozen embryos. Though State C’s laws prohibit destruction or discarding of embryos, disposition through an embryo transfer into the patient’s womb at an “inopportune” time when pregnancy is unlikely to occur is permitted.
- Because it is not uncommon for couples to divorce before using their frozen embryos or simply stop paying storage fees and effectively abandon their embryos, the clinic CEO is concerned about the developments in other states that are extending the concept of fetal personhood to embryos. She is worried about the possibility that State C will adopt such legal precedent, which would significantly affect the clinic’s ability to continue its operations.
- The CEO is thinking about getting out of the IVF business before it’s too late and she has asked you if she can legally ship all the embryos her clinic currently stores to an IVF friendly state, preferably one that has no restrictions on destruction of embryos and thus would be more likely to accept them.

Scenario #4 Discussion



Substantive Laws

1. Fetal personhood vs. embryonic personhood
2. Current or projected state laws protecting IVF operators
3. Consent/authorization from parents
 - a. IVF contract
 - b. Custody issues
4. Laws prohibiting transfer
 - a. Does intent of transfer matter?

Scenario #4 Discussion



Rules of Professional Conduct

1. Which rules would be applicable to this variation on the scenario?
 - a. Rule 1.2(d) – Scope of Representation – Attorney shall not counsel a client to perform an act that atty **knows** is criminal.
 - b. Rule 1.16(b)(2) & (4) – Declining or Terminating Representation – Atty may w/draw if
 - reasonably believes the client will persist in action that **reasonably believes** is criminal OR
 - Considers the client’s intended action repugnant
 - c. Rule 2.1 – Advisor – Atty shall exercise independent professional judgment (not follow personal beliefs)
 - d. Rule 8.4 – Professional Misconduct – If atty gives advice based on personal beliefs rather than independent professional judgment, she will have engaged in dishonesty, fraud, deceit and misrepresentation.

Final Thoughts



Practice Challenges – Surviving the Term

1. Who is your client?
 1. Role of physician
 2. Who is the decision-maker?
2. Preparation
 - a. Keeping up with the latest laws/gather resources
 - b. Foster relationships with stakeholders
 - c. Pre-drafted email responses
 - a. To whom do you send?
 - b. Atty-client privilege waiver?
 - c. Focus on wording of statute
3. Legal ethics

Questions

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QUESTIONS?