Navigating Legal Risks When Providing Essential Reproductive Care Post-Roe

The overturning of Roe v Wade has led to extensive and understandable confusion among clinicians. Particularly in states where abortion is now banned or severely restricted, clinicians question what reproductive care they may legally provide, their reporting obligations in relation to that care, and how to document that care to best protect themselves and their patients. To meet their continuing ethical duty to their patients to do no harm, clinicians therefore may benefit from some general context and guidance. As attorneys who specialize in abortion law, we regularly advise clinicians on how to weigh their legal risks against the risks to their patients’ health and lives when providing essential care.

Generally, there are 2 main groups of patients seeking care in states where abortion has been banned or severely restricted. The first group of patients have self-managed their abortion and may interact with the health care system afterward to seek additional information or to receive follow-up care.1 Under every state’s law, an “abortion” is the termination of a pregnancy with embryonic or fetal cardiac activity. Thus, if such a pregnancy does not have embryonic or fetal cardiac activity, it is completely legal to provide any necessary follow-up care for retained pregnancy tissue, including an aspiration procedure or the medications mifepristone and misoprostol. If the patient has a continuing pregnancy, it is also legal to provide information regarding out-of-state abortion care.

The second group of patients are those receiving abortions that fall within the legal exceptions to abortion bans for serious or life-threatening health risks, severe fetal conditions, or rape and incest (although the care provided in those circumstances is already severely narrowed).2 It is legal for clinicians to provide care to both categories of patients. Despite an apparent widespread belief to the contrary,3 no current law requires clinicians to elicit reportable information regarding abortion care from their patients. Currently no state’s abortion ban explicitly criminalizes the patient who receives an illegal abortion regardless of how she accessed care, and there is no state law that requires clinicians to report such patients to law enforcement or child welfare agencies. This is true even if a patient presenting with a continuing pregnancy chooses to self-manage her abortion again.

Nonetheless, some emergency department or other clinicians who interact with patients who have self-managed their abortion are reporting their patients to law enforcement.4 From 2000 to 2020, the organization If/When/How “identified 61 cases [across 26 states] of people criminally investigated or arrested for allegedly ending their own pregnancy or helping someone else do so.”1 Such practices conflict with clinicians’ duty of confidentiality and other ethical obligations to their patients.3 Clinicians also should be mindful of how to document the essential reproductive health care they provide. Just like treatments for a miscarriage or nonviable pregnancy, treatment after self-managed abortion should be coded as procedural “treatment of a missed abortion” or “incomplete spontaneous abortion” (using Current Procedural Terminology codes such as 59820, 59812, or 59821).5,6 Although some have suggested that this care should instead be coded as an abortion, such coding would be inaccurate and would do nothing to mitigate any purported legal risks for clinicians; indeed it may increase their risks. Such an approach also subjects patients to grave risk of criminalization, particularly Black women, individuals from other racial and ethnic minority groups, and people with low income, who are disproportionately targeted by both clinicians and law enforcement when it comes to their reproductive choices.1

Clinicians have always faced legal risks. However, the current legal landscape is complex, particularly in states where abortion is banned or restricted. Clinicians grappling with difficult questions regarding risk and liability should consult a lawyer. We encourage clinicians with legal questions—including those in states with bans or restrictions—to contact the Abortion Defense Network,7 which is operated by organizations with expertise in this area, including ours, and connects clinicians and others navigating the evolving post-Roe world with qualified, values-aligned lawyers.

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REFERENCES


