

LEGAL ISSUES IN OBSTETRICS

(It's all about liability)

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NOVEMBER 3, 2023

- “One of the great liabilities of history is that all too many people fail to remain awake through great periods of social change. Every society has its protectors of status quo and its fraternities of the indifferent who are notorious for sleeping through revolutions. Today, our very survival depends on our ability to stay awake, to adjust to new ideas, to remain vigilant and to face the challenge of change.”

Martin Luther King, Jr.

CONFLICTS:

- None

LEARNING OBJECTIVES:

- Review the history and effects of liability reform in Texas and its impact on patient care.
- Review common causes of medical lawsuits or Board complaints.
- Review important issues in the termination of Patient/Physician relationships.
- Review laws in the State of Texas pertaining to abortion.

PROFESSIONAL LIABILITY

- i.e., Malpractice

1970s

- Rise in Personal Injury/Plaintiff's claims industry in the legal world
- Unexpected outcome = "Someone has to pay"
- "Fault" less important than "Outcome"
- Large jury awards for Non-Economic Damages, "Pain and Suffering"

PROFESSIONAL LIABILITY INSURANCE

- Claims outcomes were bad
- Many carriers limited their business or left the State
- From 1971-1976, premiums increased as much as 600 percent

Article 4590i (1977)

Medical Liability Insurance and Improvement Act

Key provision was \$500,000 Damage Cap

Protections did not last long:

- \$500,000 Damage Cap ruled unconstitutional
- Statute of limitations periods were extended
- Requirements for expert reports were abandoned or limited

1990s

- Carriers again limiting business
- Left the State
- Went out of business

Effect was decreased access to care

- “No Neurosurgeons in the Valley”

TEXAS ALLIANCE FOR PATIENT ACCESS (TAPA - 2001)

- Alliance formed by TMLT and other insurance carriers, insurance defense attorneys and appellate counsel.
- Spent several years developing legislative proposals to present to the Legislature to improve the liability climate in Texas

2003

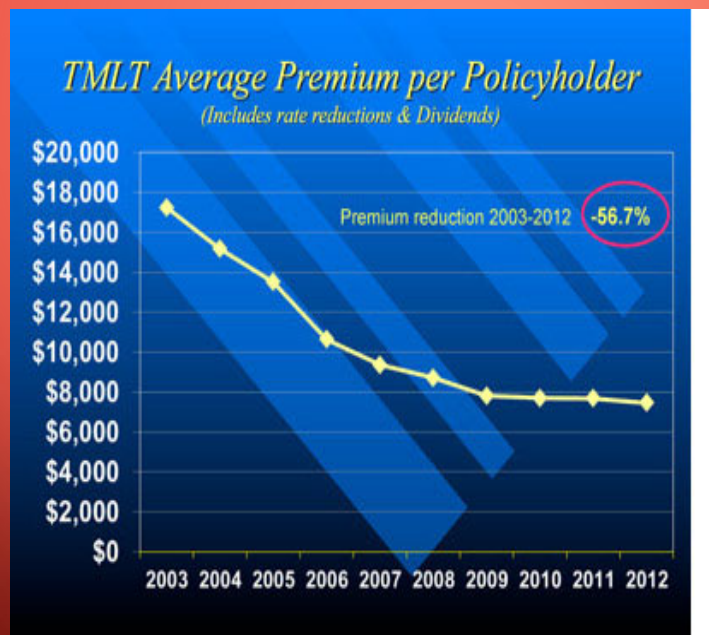
- Governor Rick Perry promises to support major tort reform

HB 4 (2003)

- \$250,000 Cap on non-economic damages
- Also passed legislation proposing this Cap as a State Constitutional amendment:
 - Proposition 12

PROPOSITION 12

- Presented to voters September 2003
- Liability insurance premiums have decreased dramatically since
- Collective premium savings since 2004 amount to \$1.9 BILLION
- Number of new physician license applications and approvals has tripled
- Med Mal lawsuit filings have decreased over 50% in most counties
- Patient access to care has INCREASED DRAMATICALLY



THE PROBLEM:

- This is old news
- As of last Legislative session, only 4 Senators and 10 Representatives who cast votes on HB 4 remain in office.
- Every session, bills are introduced to diminish the effects of Proposition 12
 - Index the Cap to Inflation/Cost of Living
 - Dismantle the tort reforms of HB 4 and Proposition 12



5 THINGS THAT GET PHYSICIANS SUED OR REPORTED TO THE MEDICAL BOARD



COMMUNICATION

- Failing to listen
- Failing to communicate clearly/effectively
- Failing to spend adequate time with patients

DOCUMENTATION

- EMR templating issues
- “Cut and Paste” errors
- Inconsistencies and Contradictions
- Failing to document patient interactions

FOLLOW UP

- Failing to order tests or consults
- Failing to follow up on tests or consults

REFERRALS

- Failure to refer
- Failure to track referrals

MEDICATION ERRORS

- Wrong dosage
- Wrong medication
 - “Sounds Like”
- Allergic Reactions

HOW TO TERMINATE PATIENT/PHYSICIAN RELATIONSHIP WITHOUT ABANDONMENT

ABANDONMENT

- A patient may have a cause of action for abandonment when “without reasonable notice to the patient, a physician unilaterally discontinues treatment at a time when continued medical treatment is necessary.”

COMMON REASONS FOR DISMISSING PATIENTS:

- Noncompliant with treatment plan
- Failure to keep appointments
- Abusive, inappropriate or rude behavior
- Non-adherence to the policies of the practice
- Prescription fraud or drug-seeking
- Filing a lawsuit or board complaint
- Failure to pay outstanding balance

SPECIAL CIRCUMSTANCES

- Pregnant patients after 28 weeks gestation
- Rural physicians
- Physician groups
- During litigation or Board complaint process
- Provider contract requirements

STEPS IN DISMISSAL PROCESS

- Counsel the patient – more than once
- Document this in the medical record
- Inform Patient that termination is the next step
- Provide payment plan for unpaid balances
- Document payment issues only in billing portion of chart
- Send warning letter that failure to pay may result in termination

ENSURE THAT:

- Patient is not in an acute phase of care
- Patient is given appropriate notice
- Patient has time and opportunity to find another physician
- Any steps required by contract, State law or Board rules are followed

DISMISSAL LETTER

- On office letterhead
- By First Class Mail and Certified Mail, Return Receipt Requested
- State that the patient/physician relationship will terminate in a specified time period and recommend that Patient find another physician.
- Describe how Patient can find another physician
- Include an Authorization for Release of Records
- Avoid inflammatory statements
- Keep copies

WHAT IS A REASONABLE TIME?

- Physician specialty
- Size of the community
- Availability of other physicians
- Any State law requirements
- REMAIN AVAILABLE UNTIL THE END OF THE TIME PERIOD

DON'T FORGET TO:

- Inform office staff, especially scheduler, about the dismissal and the effective termination date
- Add Alert to Patient's chart in EMR

WHEN PATIENT ESTABLISHES CARE WITH NEW PROVIDER:

- Keep all transfer documentation in Patient's chart
- Copy and send medical record promptly
- Waive copying charges

SPECIAL CIRCUMSTANCES:

- If in a Group, dismissal letter should clearly state that relationship is ending with both the Physician and the Group
- If Patient terminates, send formal written confirmation letter
- If dismissed Patient is seen while on-call, send follow-up letter that relationship remains terminated

LAWS PERTAINING TO ABORTION IN THE STATE OF TEXAS

- Multiple laws in different portions of the State Civil Statutes and Penal Code

1854 GENERAL LAWS OF TEXAS, AN ACT SUPPLEMENTAL TO “ACTS CONCERNING CRIMES AND PUNISHMENTS”

- This Act made it a criminal offense to attempt to “procure the miscarriage of any woman being with child.”

1856 “OLD CODE”: PENAL CODE ARTICLES 531-536

- In 1856, the Legislature formally codified the Penal Code. It contains provisions related to abortions slightly expanded from the 1854 Act.

1858 GENERAL LAWS OF TEXAS: ATTEMPT AT ABORTION CRIMINALIZED

- This bill amended a provision to the abortion statutes criminalizing attempts at abortion.

1879 PENAL CODE: ARTICLES 536-541

- The abortion statutes were renumbered in the 1879 edition, but remained substantively the same.

1895 PENAL CODE: ARTICLES 641-646

- The abortion statutes were renumbered in the 1895 edition, but remained substantively the same.

1907 GENERAL LAWS OF TEXAS: HB 140

- This bill added a definition of “abortion” to the existing statutes.

1911 PENAL CODE: ARTICLES 1071-1076

- The abortion statutes were renumbered in the 1911 edition, but remained substantively the same, with the addition of the new language added in 1907.

1925 PENAL CODE: ARTICLES 1191-1196

- The abortion statutes were renumbered in the 1925 edition, but remained substantively the same.

1974 PENAL CODE: ARTICLES 4512.1-4512.6

- In 1973, the Legislature approved a reorganization of the Texas Penal Code. Some statutes that were not repealed but did also not make it into the new Penal Code were instead moved to the Revised Civil Statutes.

TEXAS REVISED CIVIL STATUTES 4512.1-4512.6

- Current location of the “1925” abortion laws.

ROE V. WADE (1973)

- Held that states could only regulate abortion in varying degrees according to the stage of the pregnancy.
- Under this ruling, states could impose some restrictions to protect maternal health in the second trimester and only completely ban abortion during the third trimester.

PLANNED PARENTHOOD V. CASEY (1992)

- Upheld Roe v. Wade
- Created a new standard for courts to use in evaluating the constitutionality of abortion laws: “undue burden” placing a “substantial obstacle” in the path of a woman seeking an abortion prior to viability.
- Overturned Roe’s “trimester” structure, instead allowing states to regulate abortion once the fetus was “viable,” able to survive outside the womb.

HB 30, 76TH REGULAR SESSION (1999)

- Required parental notification, or court order, for minors seeking abortion.

HB 15, 78TH REGULAR SESSION, WOMAN'S RIGHT TO KNOW ACT (2003)

- Requires abortion provider to discuss specific medical risks and sources of support with the patient, and gives the patient the right to review informational materials published by the state on these topics.

HB 15, 82 REGULAR SESSION – SONOGRAM REQUIRED (2011)

- Must – Provide sonogram at least 24 hours prior to abortion
- Display the sonogram so the patient can see it
- Describe the images on the sonogram; and
- Make the heartbeat audible so that the patient can hear it
- Some limitations when pregnancy results from assault, incest, the patient is a minor, or the fetus has an irreversible medical condition

HB 2, 83RD LEGISLATURE, 2D CALLED SESSION ADMITTING PRIVILEGES AND “PRE-BORN PAIN ACT” (2013)

- Required abortion providers to have admitting privileges at a hospital within 30 miles
- Heightened abortion clinic standards to “ambulatory surgical center” standards
- Prohibited abortions after 20 weeks post-fertilization age

WHOLE WOMAN'S HEALTH V. HELLERSTEDT (2016)

- Struck down admitting privileges and “surgical center” standards
- Retained 20 weeks post-fertilization limit

HB 3994, 84TH REGULAR SESSION (2016)

- Imposed stricter requirements for proof of age that a physician must obtain from a minor, and made process for obtaining a court order instead of parental notification more difficult.

SB 8, 85TH REGULAR SESSION (2017)

- Prohibits “partial birth abortions” and “dismemberment abortions”
- Requires burial or cremation of fetal tissue

WHOLE WOMAN’S HEALTH V. SMITH (2018)

- Held SB 8 unconstitutional and prevented its enforcement

HB 1280, 87TH REGULAR SESSION – THE TRIGGER LAW (2021)

- Contains “trigger” provision that would ban abortion 30 days after:
 - The issuance of a judgment by the US Supreme Court overturning Roe v. Wade;
 - The issuance of any other judgment by the US Supreme Court giving the states the power to prohibit abortion; or
 - The adoption of an amendment of the US Constitution given the power to prohibit abortion to the states.
- Allows a minimum \$100,000 fine.
- Contains a license revocation provision and fines under the TMB.

SB 4, 82ND LEGISLATURE, 2ND CALLED SESSION (2021)

- Prohibits abortion-inducing medicine from being delivered by mail, delivery service, or courier
- Requires a physician to examine a patient seeking a medical abortion in person
- Prevents a physician from prescribing abortion-inducing medicine for a pregnancy with gestational age of more than 49 days
- Imposed numerous reporting requirements for any provider and facility that sees a patient who has any of a long list of possible complications that may have been the result of an abortion

SB 8, 87TH REGULAR SESSION – TEXAS HEARTBEAT ACT (2021)

- Prohibits abortion after a fetal heartbeat is detected, with limited exceptions for “medical emergencies”
- Creates “civil enforcement” allowing any person other than a state or local governmental employee or officer to sue anyone involved in (1) providing an abortion or (2) intending to provide an abortion, or (3) “aiding and abetting” the provision of an abortion after the detection of a fetal heartbeat, with penalties of a minimum of \$10,000 per offense plus costs and attorney’s fees.

WHOLE WOMAN’S HEALTH V. JACKSON (2021)

- US Supreme Court declined to hear emergency challenge to Texas Heartbeat Act, allowing it to go into effect

DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION (2022)

- Reversed *Roe v. Wade* as wrongly decided, states there is no implied right to abortion in the US Constitution.

HB 3058, 88TH REGULAR SESSION (2023)

- Establishes an “affirmative defense” against civil and criminal liability under the Texas Trigger Law for performing an abortion if physician can prove they “exercised reasonable medical judgment in providing medical treatment to a pregnant woman in response to (1) an ectopic pregnancy at any location, or (2) pre-viable premature rupture of membranes.
- Note that this bill DOES NOT CLEARLY ADDRESS whether this exception applies to the trigger Law’s mandatory license revocation, nor does it provide a defense to private, civil lawsuits under the Texas Heartbeat Act.

REFERENCES:

- Available on request