

'Sea Change In The Law': Inside One Firm's Post-Roe Practice

By Jeff Overley

Law360 (August 16, 2022, 11:22 PM EDT) -- The U.S. Supreme Court's nullification of the constitutional right to abortion has ushered in "transformative" changes for health care attorneys and become one of the rare events to which entirely new practice groups can be devoted, the leaders of a boutique health firm's post-Roe v. Wade practice told Law360.

California-based associates Andrea L. Frey and Stephanie Gross, co-chairs of the Reproductive Health Practice Group at Hooper Lundy & Bookman PC, shared their perspective during an interview about the formation, focus and future of the practice, which debuted roughly two weeks after the high court's historic decision on June 24 in *Dobbs v. Jackson Women's Health Organization*.



Andrea L. Frey

Hooper Lundy, which has several offices in the Golden State and others in Boston, Denver and Washington, D.C., is among a sizable and growing number of firms — including fellow specialty firms as well as full-service firms in BigLaw — where newly assembled teams are chaperoning health care clients through turbulent times. In the 50 days since *Dobbs* became the law of the land, new regulations, legislation and litigation regarding abortion rights and birth control access have sprouted from coast to coast.



Stephanie Gross

The upheaval might be just a small taste of things to come as a world without Roe takes shape, which likely helps to explain why firms are gearing up for long-term counseling on reproductive health topics. Those topics are vast and varied, spanning digital health, workplace issues at hospitals and pharmacies, the privacy of personal medical records concerning pregnancy, new compliance obligations underlying health care reimbursement, and potential criminal charges against individuals and organizations involved in abortion care.

Law firms that have announced new teams focused on *Dobbs*' aftermath are taking similar but distinctive approaches; some have established resource centers for clients, some have created task forces, and some, such as Hooper Lundy, have formally built practice groups.

This interview has been edited for length and clarity.

[Andrea and Stephanie, first off, why did your firm establish this group?](#)

Gross: The Dobbs opinion coming down was clearly a totally transformative event in the health care space. As a health care law firm that represents health care providers, we knew we needed to really get on top of this and help our provider clients understand what was going to change for them, because it is ushering in a whole new regulatory landscape — a dimension of regulation that just didn't exist before, at least not nearly to the extent that we're starting to see now.

We have all sorts of clients that are affected: hospitals and physicians, of course, but also pharmacies, fertility providers, academic medical centers, as well as telehealth providers and digital health companies. So, a group of us got together, and we realized that our clients were facing a ton of questions that didn't really exist days before. And as states started enacting new laws or dusting off old ones, we realized that our clients were facing this whole new regulatory regime, and one that intersects in all sorts of ways with the existing health care regulatory regime.

This isn't just about looking at abortion restrictions on their own, but looking at how they might intersect with obligations under [the Emergency Medical Treatment and Labor Act], or the telehealth rules, or privacy rules, just to name a few. So, we rolled up our sleeves and decided that we needed a way to analyze the issues and share information quickly with our clients. And establishing this practice group was going to be the best way to organize ourselves so that we could get our clients meaningful insight as quickly and effectively as possible.

Frey: We already have this superstrong interdisciplinary team at [Hooper Lundy] that covers all these various aspects of health law. And so it really was about bringing together a core group of folks, with varied subject matter expertise within health law, who could really serve as point persons for issues that come up for clients navigating the complexities in this post-Dobbs landscape.

Would you talk more about the group's membership? There are about 30 members, so it seems like there's considerable interest.

Frey: As soon as the Dobbs decision was released, a ton of folks were circulating insights and strategizing implications for our clients across the provider spectrum, from hospitals and health systems to digital health providers. We pretty quickly mobilized, and the managing partner, Mark Reagan, put together a call for attorneys across the firm that afternoon after the decision was released.

From there, it really was an organic process [among] the folks who were part of that session and thinking through how we could best serve clients, and it led to the formation of this group.

Steph and I are some of the many folks at the firm who are passionate about this, but it really is such a broad, multidisciplinary team of folks who have subject matter expertise to really help on these issues.

Gross: I'll just add that with this topic, there's been tons of national attention. There are tons of headlines every day from your publication, and from really every publication that lawyers are reading and that our clients are reading. And so there's coverage, and there's awareness of what's going on, both in the states that are seeking to restrict abortion and in those that are taking or continuing a more permissive stance.

Where we really see ourselves providing a different service for our clients is that we can really dig in and provide in-depth analysis. And we can identify or anticipate issues that others might not be able to, simply because they don't have the breadth of expertise that we have.

The members of our practice group work on medical staff issues. They work on licensing and certification for all types of providers. They work on scope of practice issues, digital health, telehealth, privacy, graduate medical education — there are just so many topics that come up when you're thinking through the implications here. And it's really an exercise in issue-spotting, which is every lawyer's favorite game — favorite throwback to law school — and that's really what it takes to get past the superficial level here, and past the headlines, and to figure out the implications for our clients.

Andrea, you specialize in digital health. How might Dobbs affect that space?

Frey: For our digital health providers, the post-Dobbs issues focus on a couple of different areas. For example, with telehealth and the ability to prescribe medication abortion across state lines, what are the implications of trigger laws? Even pre-Dobbs, some states had already prohibited providers from prescribing medication abortion via telemedicine. That's really coming to the fore with these post-Dobbs trigger laws that have gone into effect.

Another issue that's come up is, if a California provider prescribes medication abortion to a patient sitting in California, and that patient then goes home, takes the medication in their home state, and maybe has some sort of complication or wants to talk to the provider. Thinking through the aftercare implications, are there impacts on the provider who's licensed in one state and maybe has a telehealth license in another state?

And then another issue is some of these state laws being broad enough to potentially cover emergency contraceptives. So, again, that's another aspect where telehealth and the ability to prescribe remotely may get impacted post-Dobbs.

Obviously, I could go on, and another big area for digital health clients is around privacy implications. And this is for any provider, frankly, if they are providing abortion services, or reproductive health services generally. Once law enforcement or [another government entity] subpoenas records, or makes it part of state law to provide information about patients who've received reproductive health services, how do you comply with your obligations under both federal and state privacy laws to ensure that the patient is protected? I'd say those are the big buckets that we're helping digital health providers with in terms of navigating the post-Dobbs landscape.

Stephanie, you work with providers on a number of issues. What are you watching after Dobbs?

Gross: I help providers with a range of compliance issues, and this is just adding a whole new layer to it — one that can be really tricky to navigate, especially if federal and state law might not line up in any clear way. We might not know what it looks like to comply with both federal and state law, or with brand-new state laws and other laws on the books. So, it's just a tricky exercise in compliance, which is what we are accustomed to doing as health care lawyers, because there are so many different areas of compliance that health care providers have to be cognizant of.

So, the Dobbs decision adds a whole new layer to all of our work. A lot of my practice centers on relationships between providers and their payers. And a lot of that will come down to compliance, ultimately, because the payers condition their payment on compliance. That's a basic principle you see again and again. Working through these questions, and figuring out what they mean, is going to have implications across the board, and payment is no exception.

Another area that I want to highlight is [the Emergency Medical Treatment and Labor Act]. That's really

an area of expertise of our colleague Alicia Macklin. EMTALA has really been in the headlines lately as emergency departments in states that are taking steps to restrict access to abortion are working through what it means to comply with state law restrictions, when EMTALA sets its own obligations, and the U.S. Department of Health and Human Services has issued its own guidance about what it means to comply with EMTALA.

Frey: With the state of Idaho, [the U.S. Department of Justice] is basically saying that its near-total ban on abortion directly conflicts with EMTALA.

Gross: Yes, those are the kinds of issues that providers have to navigate.

How does formally creating a group help your clients? Does it signal that the firm is committed to monitoring and analyzing not just Dobbs itself, but also its fallout in statehouses and courts?

Gross: That's all exactly right. The firm already has all the expertise across our attorneys to analyze, respond to and give our clients guidance on what's changing out there in the wake of Dobbs.

This practice group organizes us and makes it possible for us to do that even more effectively and even more quickly. It gives us the ability to share information and insights internally, and to get ideas from colleagues who have other areas of expertise, or have been focusing on the implications of a particular change for providers in states that are restricting abortion, versus states that are permissive toward abortion. That interdisciplinary [framework] and sharing of perspectives, all of that is really helpful to helping each one of us serve our clients better. And that allows us to put out alerts for our clients that keep them informed on what's happening across the country.

Frey: You've basically already hit the nail on the head — it's definitely a more formal effort in terms of creating the practice group. I would just add that the intent behind it is that there's a lot of moving pieces right now at both federal and state levels. And so keeping track of everything really does require a team of dedicated attorneys making sure we are fully keeping up with all the changes, and also that we have this built-out group of folks we can go to within the firm to strategize and think through ways for clients to mitigate risk. So, certainly, it's really helpful to have that team already built out here internally.

Gross: I'll add one more thing. Launching the practice group, and announcing to our clients that we were organizing in this way, also put us in a great position because they are coming to us more now to share their experiences, and they're coming to us more with their questions. Having this central spot for our existing provider clients, and the new ones that are coming to us, to share information with us makes us better-informed and better-equipped to analyze issues. That's why you form a practice area in any legal subject.

Is there any difference between a practice group, as opposed to a task force or resource center?

Frey: The practice group has an external focus, whereas a task force [at our firm] is kind of an internal team; the practice groups are what we represent to clients as to various areas within health law that we are specializing in and able to serve clients, whereas the task forces are more like internal working groups that we [use] to think through various [developments] or updates in health care law.

Gross: We think that this issue isn't going away anytime soon. And when our firm started a COVID-19 task force, everybody thought that would be a shorter-lived topic than it turned out to be. But this is just

a sea change in the law that creates a whole new layer of state and perhaps federal regulation; it creates a whole new subject area in which we need to build expertise. We thought that it made sense to establish a practice group for that reason.

You mentioned existing and new clients. For legal advice related to Dobbs, are you mainly expecting to work with current clients, or also with new ones?

Frey: I certainly think both. We've had a couple new clients come to us specifically looking for advice and counsel related to post-Dobbs issues. But we've also had a ton of existing clients ask for advice navigating this space. So, I think it will be a mixture of both. And by acknowledging that we have formed the Reproductive Health Practice Group, it's definitely brought more of both existing and new clients seeking advice in that area.

What are one or two examples of especially interesting questions you've heard post-Dobbs?

Gross: We already touched on the EMTALA questions that the courts in Idaho are grappling with. There's quite a lot of interest around that, and what the courts are going to say about how EMTALA interacts with state restrictions. That's a hot topic.

Frey: Another hot topic is medication abortion and emergency contraception. Thinking through the ability of the [U.S. Food and Drug Administration], for example, to preempt state laws that narrow the ability of providers to prescribe those medications within their state or via telehealth. That's another question that's come up as well.

How does the nationwide landscape of policy and litigation look right now compared to your expectations when Dobbs came down?

Gross: I think it's more complicated than anyone expected. And that's because health care law is so complicated. We're equipped to work through those issues, but it definitely takes all the people that we brought to the table to work through them.

Frey: We're pretty used to working in the gray area. But for me, navigating the post-Dobbs landscape really is significant; I feel like the risks are higher for a lot of our clients because of the states with laws that have criminal implications for individuals who engage in activities that are considered abortion. That's a lot higher when you're talking about individuals being at risk of criminal penalties. And so navigating that gray area certainly feels more fraught.

We touched on this, but what are your expectations for how long this practice group might be needed?

Frey: It's going to take years to work through. A lot of this is determined by the political parties in various states, and who knows where things will go. So, at least for now, I see the practice group sticking around for the foreseeable future — for years to come.

Gross: I totally agree with that. As long as the law is changing, we'll be here.

--Editing by Emily Kokoll and Jay Jackson Jr.

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