

Issues Outline Draft #1 for March 1, 2024 Meeting

XX-000X Overarching Reproductive Law

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I. ISSUES

May a California attorney ethically engage in conduct associated with their client who is seeking abortion care or other reproductive health care, in a state where such care is illegal to provide?

II. AUTHORITIES

Rules of Professional Conduct (RPC) 1.2.1, 1.13, 8.3, 8.4, 8.5
Business and Professions Code (BP) 805.9, 2253, 2746.6, 2761.1, 3502.4, 6049.1, 6067, 6068, 6101-6106
COPRAC Formal Opinion No. 2020-202

III. POTENTIAL HYPOTHETICAL¹

Attorney, who is a State Bar of California licensee, is domiciled in a state that has restrictive reproductive health care laws. In Capacity One, Attorney has an organization as their client (Organization). In a Capacity Two, Attorney has an individual as their client (Individual).

Capacity One: High-Ranking Officer of Organization engages Attorney in a conversation in which High-Ranking Officer is seeking advice associated with abortion care. Through privileged communications (in-person and digital), Attorney learns High-Ranking Officer needs abortion care and helps High-Ranking Officer in that pursuit. Ultimately, may Attorney help High-Ranking Officer travel to another state to legally seek abortion care?

Due to High-Ranking Officer's circumstances, Attorney would like to provide legal advice related to health care benefits to those employees that include abortion care and/or funds to facilitate travel to procure abortion care. May Attorney provide legal advice related to abortion care and/or funds to facilitate travel for employees of Organization?

¹ Opinion request included the following hypotheticals: **(1)** An attorney who is a member of the California Bar is domiciled in a restrictive state, such as Texas, working in an in-house counsel position at a national company, and helps a woman travel to another state to seek abortion care. Absent this opinion, the attorney would be subject to discipline by the California bar for breaking a Texas law (due to choice of law); **(2)** An attorney who is a member of the California Bar in California has a client domiciled in a restrictive state such as Texas, who has retained the attorney on another matter. Through privileged or non-privileged communications, the attorney learns the client needs abortion care and helps the client in that pursuit; **(3)** An attorney who is a member of the California Bar helps a non-client domiciled in a restrictive state such as Texas seek an abortion in California (or another more protective state) in violation of state law; **(4)** An attorney who is a member of the California Bar engages in digital communications with a client or non-client in a restrictive state, such as Texas, in furtherance of seeking abortion care; **(5)** An attorney who is a member of the California Bar is disciplined by the Bar of another state due to violating anti-aiding and abetting statutes in a restrictive state; **(6)** An attorney who is a member of the California Bar represents a corporation or entity with employees in a restrictive state such as Texas provides legal advice regarding his/her/their client's intention to provide health care benefits to those employees that include abortion care and/or funds to facilitate travel to procure abortion care.

Capacity Two: Individual, represented by Attorney, engages Attorney in a conversation in which Individual is seeking advice associated with abortion care. May Attorney advise individual on the restrictions related to abortion care in the state and help Individual travel to another state to legally seek abortion care?

IV. ANALYSIS

A. Attorney Obligations to Comply with the Law: BP 6067, 6068, & 6049.1; RPC 1.2.1, RPC 1.13, RPC 8.3, 8.4, & 8.5

BP 6067 states that every California attorney must take an oath “to support the constitution of the United States and the Constitution of the State of California. Furthermore, BP 6068(a) states is the duty of an attorney “to support the Constitution and laws of the United States and of this state.”

RPC 1.2.1 discusses advising or assisting in violation of the law. Specifically, RPC 1.2.1(a) states that a lawyer “shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule or ruling of a tribunal.” Moreover, RPC 8.4(a) states it is professional conduct for a lawyer to violate these rules or the State Bar Act, knowingly assist, solicit, or induce another to do so, or do so through the acts of another. Also, RPC 8.4(b) considers it professional misconduct for a lawyer who “commit[s] a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.”

RPC 1.13 discuss an organization as client. In representing an organization, when a lawyer knows a constituent acts, intends to act, or refuses to act in a manner that may result in some sort of violation of law and is likely to result in substantial injury to the organization, the lawyer shall proceed as reasonably necessary to protect the interests of the organization. This may include referring the matter to the highest authority in the organization, which might ultimately result in withdrawing from representation.

RPC 8.3(a) states that “a lawyer shall, without undue delay, inform the State Bar, or a tribunal with jurisdiction to investigate or act upon such misconduct, when the lawyer knows of credible evidence that another lawyer has committed a criminal act...” However, RPC 8.3(c) discusses that for purposes of this rule, “‘criminal act’ as used in paragraph (a) excludes conduct that would be a criminal act in another state, United States territory, or foreign jurisdiction, but would not be a criminal act in California.”

RPC 8.5 states that a lawyer may be subject to the disciplinary authority of both California and another jurisdiction for the same conduct. Specifically, for any conduct that occurs that is not in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the lawyer’s conduct occurred or the rules of the jurisdiction where the predominant effect occurs will be applied to the conduct.

BP 6049.1 discusses a basis for reciprocal discipline based on attorney misconduct occurring in another jurisdiction. Specifically, BP 6049.1(b) outlines affirmatives defenses of an attorney who have been “found culpable of professional misconduct in a proceeding in another jurisdiction conducted as specified in subdivision (a).” The proceeding shall consider the following: “(1) The degree of discipline; (2) Whether, as a matter of law, the licensee’s culpability determined in the proceeding in the other jurisdiction would not warrant the imposition of discipline in the State of California under the laws or rules binding upon licensees of the State Bar at the time the licensee committed misconduct in such

other jurisdiction, as determined by the proceedings specified in subdivision (a); and (3) Whether the proceedings of the other jurisdiction lacked fundamental constitutional protection.”

B. Protections for Medical Workers and Health Facilities for Abortion-Related Care in California: Assembly Bill 2626 (Modifying BP 2253 & 3502.4 / Adding 2746.6 & 2761.1) and BP 805.9 & 2253

AB 2626 was approved by Governor Newsom on September 27, 2022, and became effective immediately as emergency legislation. Through several statutory changes enacted by this bill, medical licensing boards cannot take disciplinary action against physicians, surgeons, nurse practitioners, nurse midwives, and physician assistants for performing abortions, provided they are done legally under the California’s Reproductive Privacy Act. In addition, this bill prevents a medical licensing board from suspending/revoking licenses or denying licensure applications if someone was disciplined/convicted in another state solely for legally performing abortions in that state. (See BP 2253, 2746.6, 2761.1, & 3502.4.)

Effective January 1, 2024, as it relates to health facilities, BP 805.9(a) states that a “health facility licensed pursuant to Chapter 2 of Division 2 of the Health and Safety Code shall not deny staff privileges to, remove from medical staff, or restrict the staff privileges of a person licensed by a healing arts board in this state on the basis of a civil judgment, criminal conviction, or disciplinary action imposed by another state if that judgment, conviction, or disciplinary action is based solely on the application of another state’s law that interferes with a person’s right to receive sensitive services that would be lawful if provided in this state.” In addition, BP 2253(a) states that a “Failure to comply with the Reproductive Privacy Act (Article 2.5 (commencing with Section 123460) of Chapter 2 of Part 2 of Division 106 of the Health and Safety Code) constitutes unprofessional conduct.”

C. Case Law

In Dobbs v. Jackson Women’s Health Organization (2020) 142 S. Ct. 2228, Jackson Women’s Health Organization filed suit challenging the constitutionality of Mississippi’s Gestational Age Act, passed in 2018. This act prohibits abortions after 15 weeks except for medical emergencies or severe fetal abnormalities. In addition, the act also subjects licensees to various penalties (included suspension) if they provide abortion care to patients. Effectively overturning *Roe v. Wade*, the Supreme Court of the United States held that a law regulating abortion is subject to a rational-basis review of the law’s constitutionality under the Fourteenth Amendment. In other words, this ruling provides states much more deference to regulate abortions, thereby lessening heightening protection previously had under the Fourteenth Amendment.

In Whole Women’s Health v. Jackson (2021) 141 S. Ct. 2228, plaintiffs filed action requesting declaratory and injunctive relief to prevent Texas Senate Bill 8 (SB 8) from taking effect on September 1, 2021. SB 8 authorizes private civil actions against persons who, absent a medical emergency, performed an abortion or aided and abetted the performance of an abortion if the fetus had a detectable fetal heartbeat. In addition, plaintiffs filed a pre-enforcement action against various state officials associated with SB 8. Ultimately, the Supreme Court of the United States ruled that a pre-enforcement challenge under the Federal Constitution may proceed past the “motion-to-dismiss” stage against certain named defendants, such as private defendants detailed in SB 8.

D. Synthesis Of Applicable Authority as it Relates to Capacity 1

At issue is whether Attorney violates any ethical standards by assisting High-Ranking Officer who is seeking abortion care, which may include providing legal advice related to abortion care and/or funds to facilitate travel for employees of Organization.

In Capacity 1, Attorney does have a duty to abide by BP 6067 and 6068(a), by supporting the Constitution of the United States and laws of the United States. This does implicate states who do have more restrictive laws related to abortion, such as those described in *Dobbs* and *Jackson*. In addition, a violation of RPC 1.2.1 may be found where Attorney counsels or assists High-Ranking Officer in seeking abortion related care through some medium of correspondence or even aiding High-Ranking Officer to travel to another state to legally seek abortion care. A similar analysis could be applied in relation to whether Attorney can provide legal advice related to abortion care and/or funds to facilitate travel for employees of Organization.

While RPC 8.3(a) does require that a lawyer report a criminal act when another lawyer knows of credible evidence that the criminal act has occurred, RPC 8.3(c) states that a “criminal act” used in RPC 8.3(a) excludes conduct that would be a criminal act in another state. As a result, if another attorney learned of Attorney’s actions, there may not be a required report duty incumbent on the discovering attorney.

If Attorney provides legal advice related to abortion care and/or funds to facilitate travel for employees of Organization, Attorney may also have conflicting duties with the Organization. If said actions should have reasonably been known to have been a violation of a law in that state and the actions are likely to result in substantial injury, RPC 1.13 discusses Attorney may need to consult with higher authorities within Organization.

It should be noted that California has several laws enacted that support various health care facilities and the people employed at such facilities. Assembly Bill 2626, as enacted, provides protections for legal abortion providers from disciplinary actions by medical boards. BP 805.9(a) further clarifies that medical staff shall not deny privileges on the basis of a judgment issued by another state’s law that interferes with a person’s right to receive abortion related care that is otherwise lawful in California. Unlike RPC 8.3(c), RPC 1.2.1 does not explicitly state whether the rule applies to an out-of-state law or not.

BP 6049.1 discusses a basis for reciprocal discipline and subdivision (b) describes affirmative defenses an attorney who has been found to be at issue in another jurisdiction. The Office of Chief Trial Counsel will weigh several factors as described at the page three.

Lastly, one can draw comparisons between COPRAC Formal Opinion No. 2020-202, and the current fact pattern. This opinion discusses how a lawyer is permitted to advise and assist a client in interpreting and complying with California cannabis law, even though the client’s conduct may conflict with federal law. Applying this opinion in relation to Capacity 1, Attorney may ethically be permitted to discuss the legal consequences, validity, and scope of the relative law concerning High-Ranking Officer’s question. However, Attorney must inform the client of the conflict between state laws, including any potential for criminal liability. In addition, Attorney may also need to advise High-Ranking Officer on potential impacts concerning the lawyer-client relationship.

Ultimately, it is unclear as to whether the Office of Chief Trial Counsel will find any violations due to the various conflicting law previously discussed.

159 **E. Synthesis of Applicable Authority as it Relates to Capacity 2**

160 Similar to Capacity 1, may Attorney assist Individual to legally seek abortion care, including by providing
161 legal advice and travel funds to seek such care.

162 Other than RPC 1.13, the same analysis discussed in relation to Capacity 1 will apply. Ultimately, it is
163 unclear as to whether the Office of Chief Trial Counsel will find any violations due to the various conflict
164 law previously discussed.

165 **F. Other Relevant Authorities**

166 **BP Code 6101-6106**

- 167 • **BP 6101**: Conviction of Crimes Involving Moral Turpitude
 - 168 ○ Defines any conviction of a felony or misdemeanor, involving moral turpitude,
 - 169 constitutes a cause for disbarment or suspension. If Attorney is convicted of a felony or
 - 170 misdemeanor resulting from Capacity 1 or 2, it could be interpreted as a crime involving
 - 171 moral turpitude.
- 172 • **BP 6102**: Conviction of Crime-Suspension and Disbarment Procedure
 - 173 ○ Defines procedures associated with disbarment procedure. If Attorney's actions are
 - 174 interpreted as meeting BP 6101, this code dictates procedures for disbarment.
- 175 • **BP 6103**: Sanctions for Violation of Oath or Attorney's Duties
 - 176 ○ Defines a willful disobedience or violation of a court order may constitute causes for
 - 177 disbarment or suspension. Attorney's actions in Capacity 1 or 2 could be interpreted to
 - 178 be in violation of the Oath. In addition, Attorney would need to abide by any court
 - 179 order associated with Capacity 1 or 2.
- 180 • **BP 6106**: Moral Turpitude, Dishonesty or Corruption Irrespective of Criminal Conviction
 - 181 ○ Defines the commission of any act involving moral turpitude, dishonesty, or corruption,
 - 182 whether the act is committed in a professional capacity or otherwise, may constitute
 - 183 cause for disbarment or suspension. Even if not convicted of felony or misdemeanor,
 - 184 Attorney's actions related to Capacity 1 or 2 have the potential to be considered an act
 - 185 of moral turpitude.

186 **PROTECTING PEOPLE FROM OTHER STATES' ABORTION BANS:**

- 187 • **Senate Bill 345 (Effective 01/01/2024)** by Senator Nancy Skinner (D–Berkeley) improves
188 protections for providers against the enforcement of other states' laws that criminalize or limit
189 reproductive and gender affirming health care services.
- 190 • **Senate Bill 487 (Effective 01/01/2024)** by Senator Toni Atkins (D–San Diego) provides additional
191 safeguards for California abortion providers to participate in the Medi-Cal program, regardless
192 of enforcement activities in another state, if the conduct is legal under California law.
- 193 • **Assembly Bill 1707 (Effective 01/01/2024)** by Assembly member Blanca Pacheco (D–Downey)
194 protects health care providers and facilities in California from state licensing actions against
195 them based on the enforcement of hostile laws that restrict abortion and gender affirming care
196 in another state.

199 **PROTECTING REPRODUCTIVE HEALTH INFORMATION:**

- 200 • [Assembly Bill 254](#) (Effective 01/01/2024) by Assemblymember Rebecca Bauer-Kahan (D–
201 Orinda) protects reproductive and sexual health digital data included in personal health tracking
202 applications.
- 203 • [Assembly Bill 352](#) (Effective 01/01/2024) by Assemblymember Rebecca Bauer-Kahan (D–
204 Orinda) enhances privacy protections for electronic medical records related to abortion, gender
205 affirming care, pregnancy loss, and other sensitive services, closing a major loophole in privacy
206 protections for people traveling to California for abortion and gender affirming care.

207 **PROTECTING PATIENTS & PROVIDERS:**

- 208 • [Assembly Bill 571](#) (Effective 01/01/2024) by Assemblymember Cottie Petrie-Norris (D–Laguna
209 Beach) prohibits an insurer from refusing to provide malpractice insurance to a provider on the
210 basis of them offering abortion, contraception, or gender affirming care that is lawful in
211 California but unlawful in another state.
- 212 • [Assembly Bill 1720](#) (Effective 01/01/2024) by Assemblymember Rebecca Bauer-Kahan (D–
213 Orinda) clarifies that ultrasounds and similar medical imaging devices must be offered in
214 licensed facilities or by licensed providers, protecting against unscrupulous uses.

215 **EXPANDING REPRODUCTIVE HEALTH CARE WORKFORCE:**

- 216 • [Assembly Bill 1646](#) (Effective 01/01/2024) by Assemblymember Stephanie Nguyen (D–Elk
217 Grove) facilitates guest rotations in medical residency programs in California for residents who
218 can no longer receive the proper training due to their program being in a state with restrictions
219 or bans.
- 220 • [Senate Bill 385](#) (Effective 01/01/2024) (Atkins, D – San Diego) allows physician assistants to
221 provide abortion care, after receiving training and in compliance with protocols.