



**WSSFC 2023**

**Substantive Law Track – Session 7**

**Advising Licensed  
Medical Professionals in a  
Post-*Dobbs* World**

***Presented By:***

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## About the Presenters...

**Diane M. Welsh** is a Partner at Pines Bach LLP, prior to joining Pines Bach LLP, she served as Chief Legal Counsel for the Wisconsin Department of Health Services and as assistant attorney general at the Wisconsin Department of Justice. Diane is an experienced litigator, having handled matters ranging from administrative hearings to judicial appeals, she's litigated hundreds of cases before the Wisconsin Court of Appeals and the Wisconsin Supreme Court. She's served as a United States Supreme Court Fellow with the National Association of Attorneys General and has practiced in the United States Supreme Court, the Seventh Circuit Court of Appeals, federal district courts, state courts, and the Division of Hearings and Appeals. Diane is an active member of the community and has served on the Board of Directors for the Wisconsin Democracy Campaign, Domestic Abuse Intervention Services, and Wisconsin Women in Government. She is currently a member of the Dean's Advisory Board for the University of Wisconsin-Whitewater College of Letters and Sciences.

**Leslie A. Freehill** is a partner at Pines Bach LLP, where she practices in the areas of civil litigation, administrative law, and appeals. She is counsel of record for three Wisconsin physicians who, along with the Wisconsin Attorney General, are challenging Wisconsin's 1849 statute currently impacting reproductive healthcare in Wisconsin, and she frequently presents on the topic of reproductive rights in the state. She is a graduate of the University of Wisconsin Law School, and also holds a Master of Science degree from UW-Madison. Prior to joining Pines Bach, she served as a staff attorney for the Dane County Circuit Court.

**Advising Licensed Professionals Post-*Dobbs***  
**What is the current law regarding abortion in Wisconsin?**

State Bar of Wisconsin  
Wisconsin Solo & Small Firm Conference  
October 21, 2023

Diane Welsh and Leslie Freehill, Pines Bach LLP

I. Reproduction and the U.S. Supreme Court, U.S. Constitution

A. *Griswold v. Connecticut* (1965). Supreme Court struck down a Connecticut anti-contraception law on the ground that it intruded on the right to marital privacy. “Zones” of personal privacy are fundamental to the concept of liberty under “the protected penumbra of specific guarantees of the Bill of Rights.”

B. *Roe v. Wade* (1973). The Supreme Court concluded that constitutional rights to privacy and liberty protected a woman’s right to terminate her pregnancy. Majority acknowledged that while “the Constitution does not explicitly mention any right to privacy,” a number of prior decisions had found “a guarantee of certain areas or zones of privacy.” Grounded in several amendments to the Bill of Rights and the 14th Amendment guarantee of liberty—marriage, contraception, family relationships, and child-rearing.

C. *Doe v. Bolton* (1973). The Supreme Court largely restated and fleshed out its ruling in *Roe*. The majority determined that state regulations that could create procedural obstacles to abortion – such as the requirement that an abortion be performed in a hospital or be approved by two doctors – violate a woman’s right to terminate her pregnancy.

D. *Planned Parenthood v. Danforth* (1976). The Supreme Court ruled that state law that required the patient’s husband’s consent to obtain an abortion was unconstitutional.

E. *Harris v. McRae* (1980). The Supreme Court upheld the Hyde Amendment, which limits public funding for abortions.

F. *Webster v. Reproductive Health Services* (1989). The Supreme Court upheld the constitutionality of a Missouri statute barring public facilities from being used to conduct abortions and prohibited public health workers from performing abortions unless the life of the pregnant patient was at risk. It also defined life as beginning at conception and directed physicians to perform fetal viability tests in some instances.

C.J. Rehnquist stated that the law’s declaration that life begins at conception does not contradict *Roe* because the declaration is contained in the statute’s preamble and thus should have no real impact on access to abortion. The majority also held that prohibiting the use of government workers or facilities to perform abortions is acceptable because the right to an abortion established in *Roe* does not include the right to government assistance

in obtaining one. The majority also ruled that the requirement of viability testing at 20 weeks is constitutional, although the justices offered different reasons for this ruling.

G. *Hodgson v. Minnesota* (1990) The Supreme Court struck down law requiring minors to notify both parents before obtaining an abortion. Must have option for judicial bypass of parental consent laws.

H. *Planned Parenthood v. Casey* (1992) The Supreme Court reverses prior ruling preventing any state involvement prior to end of first trimester. Instead, allows states to enact laws if they do not create an “undue burden” or place “substantial obstacles” on women’s access to abortion.

I. *Stenberg v. Carhart* (2000) The Supreme Court struck down a Nebraska ban on partial birth abortion.

J. *Gonzales v. Carhart and Gonzales v. Planned Parenthood Federation of America* (2007) The Supreme Court upheld federal ban on partial birth abortion.

K. *Whole Woman’s Health v. Hellerstedt* (2016) Supreme Court further clarified the “undue burden” standard and the Court’s role in disputes over the constitutionality of abortion restrictions. *Casey’s* “undue burden” test remains the proper standard for determining the legality of an abortion restriction — but the process of evaluating such restrictions requires balancing the burdens the law imposes with the benefits it may confer.

L. *Dobbs v. Jackson Women’s Health* (2022) U.S. Constitution does not confer a right to abortion

1. *Roe* and *Casey* overruled

2. State legislatures can decide whether and under what circumstances abortions are legal--“We therefore hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives.”

3. Rational basis standard applies to abortion restrictions

4. Dicta indicates majority would also reject a challenge under the Equal Protection Clause

## II. Evolution of Wisconsin Abortion Law

A. No laws criminalized abortion at the time Wisconsin gained statehood in 1848

B. Earliest abortion statutes enacted 1849

1. Applied only to a “quick” child

2. Expanded to pre-quickened pregnancies in 1858

C. 1955: Three separate criminal abortion statutes consolidated with the creation of Wis. Stat. § 940.04

- D. 1970: *Babbitz v. McCann*, 310 F. Supp. 293, Eastern District of Wisconsin declared § 940.04's criminalization of abortion of an embryo that has not quickened to violate a woman's U.S. constitutional right to privacy
- E. 1985: "Abortion Prevention and Family Responsibility Act" (1985 Wisconsin Act 56)
1. Borne out of a bipartisan Special Committee on Pregnancy Options.
  2. Establishes that a woman who obtains an abortion may not be prosecuted, Wis. Stat. § 940.13
  3. Prohibits the performance of abortions post viability, except to preserve the life or health of the woman, Wis. Stat. § 940.15
- F. 1994: *State v. Black*, 188 Wis. 2d 639 (1994) Relationship of Wis. Stat. § 940.04 and § 940.15 analyzed by the Wisconsin Supreme Court
1. Concerned the application of section § 940.04(2)(a) to a criminal defendant accused of killing his unborn child by assaulting his pregnant wife, five days prior to due date.
  2. Defendant argued § 940.04(2)(a) could not be enforced against him because "it was impliedly repealed when the legislature enacted § 940.15 in response to *Roe v. Wade*," and because the title evidenced its intent to apply only to "consensual medical abortions."
  3. Court held that § 940.04(2)(a) not impliedly repealed by 940.15. Statute cannot be used to charge for a consensual abortive type of procedure. By its own terms it cannot apply to a mother.
  4. Any attempt to apply § 940.04(2)(a) to a physician performing a consensual abortion prior to viability would be unconstitutional under *Roe v. Wade*.
  5. Any attempt to apply it to a physician performing a consensual abortion after viability would be inconsistent with the newer § 940.15 which limits such action and establishes penalties for it.
- G. 1997: Wis. Stat. § 940.16 enacted, imposing criminal penalties on anyone performing partial-birth abortion between fertilization and delivery.
- H. 2011 Wisconsin Act 217: Repealed §§ 940.04(3) and (4), which had imposed criminal penalties on a pregnant woman for obtaining an abortion
- I. 2011: Wis. Stat. § 253.105 enacted, imposing a Class I felony on physicians who violate various provision applying to medication abortions.
- J. Various other abortion laws enacted since *Roe v. Wade*:
1. 1985: Wis. Stat. § 69.186, annual reporting requirements
  2. 1985: § 253.10, informed consent requirements
  3. 1991: § 48.375, minor consent requirements

4. 1995: § 253.10, 24-hour waiting period and additional informed consent requirements
5. 1997: § 69.186, additional reporting requirements
6. 1997: § 940.16 ban on “partial-birth abortion”
7. 2011: § 253.105 medication abortion requirements, informed consent requirements
8. 2013: § 253.095, admitting privileges to a hospital within 30 miles; currently enjoined, *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 94 F. Supp. 3d 949 (2013), affirmed, 738 F.3d 786 (7th Cir. 2013)
9. 2013: § 253.10, requiring ultrasound
10. 2015: § 253.107, 20-week ban
11. 2015: § 253.10, additional informed consent requirements

### III. Current Status of Wisconsin Law

- A. 1949 Ban, Wis. Stat. § 940.04 never removed from statutes
  
- B. No legislative enactments post-*Dobbs*
  
- C. *Kaul v. Urmanski*, Dane County 2022-CV-1954
  1. In denying DA Urmanski’s motion to dismiss, court ruled that Wis. Stat. § 940.04 applied to feticide, not consensual abortions.
  2. Dispositive motions have been fully briefed; awaiting decision.

### ***Resources:***

**Guttmacher Institute: State Policies on Abortion** <https://www.guttmacher.org/united-states/abortion/state-policies-abortion>

**KFF Women’s Health Policy** <https://www.kff.org/womens-health-policy/>

**If/When/How Reproductive Justice Lawyers Network**  
<https://www.ifwhenhow.org/reproductive-justice-lawyers-network/>

**A History of Key Abortion Rulings of the U.S. Supreme Court**, Pew Research Center  
<https://www.pewresearch.org/religion/2013/01/16/a-history-of-key-abortion-rulings-of-the-us-supreme-court/>

**Roe v. Wade and Supreme Court Abortion Cases**, Brennan Center for Justice, Brennan Center  
<https://www.brennancenter.org/our-work/research-reports/roe-v-wade-and-supreme-court-abortion-cases>

**Timeline of Important Reproductive Freedom Cases Decided by the Supreme Court**, ACLU  
<https://www.aclu.org/other/timeline-important-reproductive-freedom-cases-decided-supreme-court>

**Advising Licensed Professionals in a Post-*Dobbs* World**  
**Overview of Disciplinary Process**  
Diane Welsh and Leslie Freehill, Pines Bach LLP  
October 21, 2023

- I. Department of Safety and Professional Services, Overview
  - A. Regulate most health care professionals: physicians, chiropractors, nurses, physician assistants, midwives, among others.
  - B. Authority derives from Wis. Stat. ch. 440.03.
  - C. Responsible for ensuring safe and competent practice of licensed professionals.
  - D. For physicians, unprofessional conduct is set forth in Wis. Admin. Code § 10.03, and includes:
    - 1. Dishonesty and character offenses
    - 2. Direct patient care violations—including “Departing from or failing to conform to the standard of minimally competent medical practice which creates an unacceptable risk of harm to a patient or the public whether or not the act or omission resulted in actual harm to any person.” Med 10.03(2)(b)
    - 3. Law violations, adverse action, and required reports to the board, including “a violation or conviction of any laws or rules of this state, or of any other state, or any federal law or regulation that is substantially related to the practice of medicine and surgery.” Med 10.03(3)(i); see also Table 10.01 (permitting discipline for committing certain violent felonies).
  - E. For nurses, the rules of conduct are set forth in Wis. Admin. Code § N 7 and include:
    - 1. “Violating or aiding and abetting a violation of any law substantially related to the practice of nursing or being convicted of any crime substantially related to the practice of nursing.” N 7.03(2)
    - 2. “Departing from or failing to conform to the minimal standards of acceptable nursing practice that may create unnecessary risk or danger to a patient's life, health, or safety. Actual injury to a patient need not be established.” N 7.03(6)(c)
- II. The Complaint Process, handled by the Division of Legal Services & Compliance
  - A. Sources of Complaints
    - 1. Referral from another state agency
    - 2. Initiated by the agency (e.g., news reports)
    - 3. Complaint filed by patient or third party

- B. What next?
1. Screening, which could lead to closure, referral to another agency, or opening an investigation
  2. Investigation, Wis. Stat. §§ 440.03(3m), (3q), (5)
  3. Potential for closure, proposed settlement (e.g., administrative warning, educational order, discipline)
  4. Formal Complaint
    - a. Notice, Answer, Discovery Wis. Admin. Code §§ SPS 20.06-2.09, 2.13
    - b. Hearing before administrative law judge, Division of Hearings and Appeals, Wis. Admin. Code §§ SPS 2.10, 2.15
    - c. ALJ issues a proposed decision, which may be accepted, rejected or modified by licensing board. Wis. Admin. Code § SPS 2.10(a)
    - d. Reviewable by the Circuit Court, appellate courts
- C. Also potential for summary suspension
1. Third party (informal) complaint (Wis. Admin. Code § SPS 2.035) or DSPS discovery of an arrest or criminal charges
  2. Petition for Summary Suspension (Wis. Admin. Code § SPS 6.04)
  3. Notice to Licensee (Wis. Admin. Code § SPS 6.05)
  4. Probable cause finding => summary suspension, Wis. Admin. Code § SPS 6.06--not an evidentiary hearing
  5. Formal disciplinary proceedings must be brought within 10 days of summary suspension, entitling licensee to full discovery and due process rights above Wis. Admin. Code § SPS 6.10
  6. Following summary suspension, licensee may request a hearing to show cause, which is a due process hearing, Wis. Admin. Code § SPS 6.09
  7. If DSPS does not show — by a preponderance of the evidence — that suspension should be continued, license is restored immediately. Wis. Admin. Code § SPS 6.09(4) and (5)
- D. Potential implications of DSPS Complaint and Investigation?
1. Closure or dismissal
  2. Administrative warnings
  3. Remedial education orders
  4. Reprimand
  5. License suspension (with or without conditions (e.g., monitoring) or a stay)
  6. Revocation
  7. Surrender
  8. Costs



E. DSPS Orders are available online at [DSPS Orders and Disciplinary Actions \(wi.gov\)](http://dsps.wi.gov)

Resources:

[Department of Safety and Professional Services](http://dsps.wi.gov): dsps.wi.gov

Wis. Stat. [chapter 440](#)

[Wis. Admin. Code SPS 2](#), Procedures for Pleadings and Hearings

[Wis. Admin. Code SPS 6](#), Summary Suspensions and Limitations

[Wis. Admin. Code SPS 8](#), Administrative Warnings

[Wis. Admin. Code Med 10](#), Unprofessional Conduct, physicians

[Wis. Admin. Code, N 6](#), Standards of Practice for RNs and LPNs

[Wis. Admin. Code, N 7](#), Rules of Conduct , nurses