Annals of Health Law

Volume 11
Issue 1 *2002*

Article 1

2002

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Annals of Health Law

ANNALS OF HEALTH LAW

VOLUME 11 2002

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ARTICLES

Taking a Closer Look At The Managed Care Class Actions: Impact Litigation As An Assist to the Market ..... KATHY L. CERMINARA, J.D., L.L.M., J.S.D. 1

Professor Cerminara examines the use of class action lawsuits to empower individuals to challenge health care decision-making. The article begins by noting the benefits of class actions which provide strength in numbers and a far-ranging impact by challenging policy decisions and encouraging corporate responsiveness. Professor Cerminara concludes that class actions are but one step in the process of empowering individuals and decreasing their resentment of the lack of process currently within the health care system.

Information Is The Key to Patient Empowerment ..... ROBERT JOHN KANE, J.D. 25

Mr. Kane's paper examines the role of patients to ensure that they have both the knowledge and power to direct their health care choices. The evolving health care market place is discussed to emphasize the increased importance of individual involvement in health decision making. A checklist sets forth questions which a patient should ask of herself and of her provider before entering into health care decisions.

Competition Law's Role in Health Care Quality ..... JOHN V. JACOBI, J.D. 45

Professor Jacobi's essay analyzes the various regulatory responses that are available to the government when crises in quality of care occur. These responses range from complete government involvement, i.e. "command and control" regulation, to a limited caretaker role in maximizing market forces. In responding to the recent IOM Report on human error in medical care, Professor Jacobi looks back to the 1986 IOM Report that revealed the crisis of care going on in nursing homes as well as the more recent controversy involving managed care. Following his analysis of the varied governmental approaches to these issues, Professor Jacobi concludes that both the unfettered use of command and control regulation and the more limited remedies of market maintenance are inadequate in the face of medical error. He argues instead that limited but forceful governmental regulation should be predicated on understanding the limitations of professionalism and market forces, in order to fully protect patients who are at risk.

The Government's Role in Health Care Delivery ..... LINDA RENEÉ BAKER, M.A. 73

As Secretary of Illinois' largest agency, the Department of Human Services, Secretary Baker provides a thorough overview of the role her agency plays in the ongoing health and welfare of the citizens of Illinois. Her contention that government should play a critical role in health care delivery is buttressed by the DHS' role as a funding agent, its contributions of staff and systems, and the direct role it plays in the pursuit of truly public health care. Secretary Baker effectively demonstrates the complexities and disparities that still exist in health care by discussing an inter-generational study of one poor family documented in Chicago. She concludes, however, that while such disparities and injustices in health care delivery do exist, they can be overcome by the effective use and cooperation of state governmental agencies that are committed to that goal.

When Self-Regulation, Market Forces, and Private Legal Actions Fail: Appropriate Government Regulation and Oversight is Necessary to Ensure Minimum Standards of Quality in Long-Term Health Care ..... ALEXANDER D. EREMIA, J.D., L.L.M. 93

Mr. Eremia's paper discusses market forces, professional self-regulation, and private litigation individually and collectively as methods of maintaining and improving quality of care. He determines that whether separately or in conjunction, these three paradigms have not been successful agents in this regard. By analyzing the regulatory framework and oversight provided by the federal government in the long-term care industry, Mr. Eremia argues persuasively that despite its occasional inadequacies, regular and consistent oversight and regulation by the government is imperative in order to effect meaningful and systemic improvements in the provision of quality care.

The Legal Liability Regime: How Well Is It Doing In Assuring Quality, Accounting For Costs, and Coping With an Evolving Reality In The Health Care Marketplace? ..... JAMES F. BLUMSTEIN, L.L.B. 125

Professor Blumstein's timely article deals with two competing paradigms that provide the poles in the spectrum of legal liability regimes. The "professional" or "scientific" model of liability assumes a rigidly normative approach to medical practice while the second more recent paradigm reflects the principles of marketplace economics in considering cost and resource availability to determine quality of care standards. Professor Blumstein concludes that the traditional approach to determining legal liability is being eroded by both the economics of managed care and the recent emphasis on systemic management of health care to promote patient safety, and that the traditional regime will have to "bend" in order to remain legally viable.

Health Care Quality Information Liability & Privilege ..... SHARON KING DONOHUE, J.D. 147

As the General Counsel for the National Committee for Quality Assurance, which accredits health plans and measures outcome performance, Ms. Donohue is in a unique position to comment on the use of such data in litigation against health plans and providers. After reviewing the growing tide of class-action lawsuits in this area, she argues that such information should be protected under the common law privilege of self-critical analysis, extended to third parties, because such privilege would protect and encourage quality assessment. Ms. Donohue further argues that the sharing and

reporting of this information on a system-wide level will allow plans and providers to make visible headway in improving the care provided to patients, and that this benefit to all consumers clearly justifies the creation of a federal privilege to combat the abundance of state-level lawsuits against plans and providers that attempt to base liability on third-party accreditation and outcome performance data.

The Business Associate Brain Teaser: A Look at Problems Involving The Business Associate Regulations Under The Health Insurance Portability and Accountability Act of 1996 ..... RANDI HEITZMAN, J.D. 159

Ms. Heitzman addresses in her article the impact of the Administration Simplification statute of the Health Insurance Portability and Accountability Act of 1996 on the protection of health information by third parties to health care transactions. These regulations were enacted, in part, to increase consumers' trust in the health care system. However, their impact on business associates that come into contact with the health care entities has been a source of contention and confusion since they were drafted. This article concludes that the current regulations are too ambiguous and complex to achieve the goals of protection of privacy and Congress' goal of simplifying administration.

Paradigms Revised: Intersex Children, Bioethics & The Law ..... LAURA HERMER, J.D. 195

Ms. Hermer explores the controversy surrounding the management of intersex infants and children in America. Her focus on the areas of medical malpractice and informed consent leads her to the conclusion that contrary to some recommendations, a moratorium on cosmetic genital and sex assignment surgeries for infants and children is not warranted. Rather, providers should focus on offering parents with complete information, referrals to support groups and forthright discussions on the dearth of information available.