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Foreword

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The years 1992 and 1993 will stand out as a time of excitement and uncertainty for the health law community. With campaign promises of a "reformed" healthcare system and then the transition to a new, Democratic administration, considerable energy has been expended on prognostications of how the winds of federal policy and regulation will shift. Overshadowing the normal uncertainties of a political transition is the Clinton administration's commitment to effect a major overhaul of the American healthcare system. As the president's taskforce of 500 scholars, practitioners, politicians, and others went through its paces, speculations and rumors about the nature of the reform plan abounded. Amidst the uncertainties, the provider community sought advice from their counsel about how their current and future operations might fare in the face of the latest plan or acronym favored by the Washington reformers.

There was a strong temptation in publishing the second volume of the *Annals of Health Law* to focus extensively on the pending health reform. Unfortunately, the timing of this volume did not make that possible. As yet, no plan has been introduced, and, when that eventuality occurs, it is likely that the twists and turns of the political and legislative process will produce a final product far different from that proposed. From the academic standpoint, the only certainty in national health reform is that, whatever the outcome, the floodgates of legal and public policy analyses will open, and countless library shelves and computer megabytes will be filled. Undoubtedly, the *Annals* will join the chorus of health reform commentators, but as a yearly publication, we have the luxury of letting the ink dry.

One section of this volume is devoted to an issue that is highly relevant to the current debates on national health reform, namely the issue of healthcare rationing. While those in the political arena cannot use the "R" word, the reality of any reform is that costs will dictate the need for limitations on the supply side. Policy makers may come up with numerous rationalizations and novel terminology for limiting health services, trying to distinguish such policies from rationing; but ultimately, such distinctions will only be an exercise in semantics and obfuscation.

After an introduction to the concept of healthcare rationing,

four articles, based upon presentations at the Institute for Health Law's Third Annual Comparative Health Law Conference, explain various facets of the healthcare rationing issue. This conference was underwritten in part by a grant from the Canadian Embassy. Two of the articles in this area explore the nature of health care in a constitutional context. The presentation by Ken Wing analyzes whether Americans have a fundamental right to health care based upon constitutional principles. The article by Hester Lessard explores the distinction in Canadian constitutional law between public and private activity, and demonstrates how such a distinction is central to understanding health rights by analyzing the issue of access to abortion. The article by Murray Brown explores how the Canadian provincial health system has placed increasing pressure on providers to ration health care in the face of serious fiscal limitations. John Tingle probes the issue of whether an individual patient can successfully challenge government cost-cutting measures, under the British National Health Service, that restrict access to certain services.

As noted, lack of clarity over health reform has created uncertainties; but in the interim, the $800 billion healthcare industry carries on, and its current complexities continue to fuel the health law field. One critical area of health law practice concerns the wide range of employment law issues facing health practitioners. In view of the fact that over 10 million Americans are employed in the healthcare industry, a myriad of legal issues concerning work relationships must be confronted. In this volume, two articles concerning various aspects of the law and the healthcare workplace are presented. The Christine Cooper article on sexual harassment will afford attorneys and their clients practical suggestions for establishing a policy to deal with this all too common problem. Bruce Stickler and Patricia Mehler explore the ramifications of the National Labor Relations Board's *Electromation* decision and provide advice on how employers can maintain effective Employee Participation Programs.

Related to the sexual harassment article is the piece by Clifton Perry and Joan Kuruc. This article reviews the problems of psychotherapists having sexual relations with their patients and reviews the courts' and legislatures' responses to this serious problem.

Antitrust and tax law are two key areas of health law practice that we plan to feature annually in this publication. This issue's antitrust article by Toby Singer and Helen-Louise Hunter ad-

dresses the Justice Department's recent attempts to impose criminal liability on violators of the antitrust laws in the healthcare field. The tax article by Thomas Hyatt examines recent developments concerning charitable tax exemption, with a focus on the Seventh Circuit *Living Faith* decision and an IRS determination letter concerning integrated health systems. Finally, this volume inaugurates a new section, which presents overview articles on health policy or management issues of relevance to the practicing health lawyer. The initial piece in this new section by Irene Fraser presents an overview of ambulatory care, an area that will continue to increase in importance as the government struggles to identify more cost-effective delivery models.

I would like to thank the National Health Lawyers Association, our co-sponsors, for their continued assistance with the *Annals of Health Law*. Of course, I am indebted to our authors for writing interesting and timely articles, and to our peer reviewers for their helpful insights. Without the work of our senior editor, Jennifer Schima, and the Institute for Health Law's Associate Director, Marilyn Hanzal, this volume would not be a reality. Finally, I am happy to report that the health law enterprise at Loyola University Chicago is now entering its tenth year. As of May of 1993, we awarded thirty-nine LL.M.s in Health Law and sixty-nine Masters of Jurisprudence in Health Law degrees. Most important, our graduates are making meaningful contributions to both the legal and health science professions. I invite you, the readers, to provide us with ideas for articles and suggestions for improving this publication as well as our health law educational efforts generally.