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Foreword

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Foreword

The Summer edition of the *Annals of Health Law* showcases the annual Health Law Colloquium, sponsored by the Institute for Health Law. This year's Colloquium centered on what has become, over the past few years, one of the primary issues in health law: the medical malpractice insurance crisis. The question of medical malpractice reform has been on the agenda of health lawyers for three decades, yet in spite of the cyclical nature of this problem, the area is still complex and solutions are not easily found. It is clear that there are three major interests underlying the malpractice crisis, specifically the insurance industry, the trial bar, and the medical profession. What is also apparent is that vigorous intellectual discourse continues to stimulate new approaches to these traditional problems. The Colloquium transcript is presented in this edition and we hope you will enjoy in written form what was a lively and thought-provoking conference.

Providing an appropriate and relevant transition to the Colloquium transcript on medical malpractice is Dr. William Gunnar's article detailing the issues surrounding the present medical malpractice insurance crisis. Exploring the separate issues involved, the article looks at the changes in physician reimbursement, the economic forces influencing the medical malpractice insurance industry, and the legislative initiatives being considered as possible solutions to the crisis. Dr. Gunnar, a practicing cardio-thoracic surgeon, predicts the impact of federal tort reform and proposes alternatives for malpractice reform.

In addition to the Colloquium transcript and Gunnar article, this edition features five articles that focus on current areas of health law reflecting both the breadth of the field and scope of the interests present at Loyola's Institute for Health Law. Two domestic articles touch on issues that have stirred controversy and comment in recent months. As joint ventures between nonprofit hospital providers and for-profit entities continue to be a popular option for hospitals facing decreasing profit margins, Professor Gary Young analyzes the tax implications of such joint ventures. The recent adoption of IRS Revenue Ruling 98-15, a rule which focuses on the hospital provider's degree of operational control over the venture for purposes of determining whether the tax-exempt status of the provider may be maintained, has been addressed by two controver-

sial cases, *Redlands Surgical Services v. Commissioner*, decided by the Tax Court, and *St. David's Health Care System v. United States*, recently decided by the Fifth Circuit Court of Appeals. The central thesis of Professor Young's article is that the IRS's emphasis on operational control is misplaced from both a legal and policy perspective and that the charitable substance of the provider's activities should dictate the tax analysis rather than the form of a joint venture's governance. With the IRS's increased scrutiny of health-care joint ventures, this area will have continuing importance in the fluid healthcare market.

Another area that has prompted discussion among commentators is the evolving jurisprudence of the ERISA preemption. Author David Trueman, who successfully argued the first case eliminating both section 502(a) and section 514 preemption before the Second Circuit Court of Appeals, reviews the Supreme Court's numerous ERISA preemption decisions. Traditionally, the ability to hold a managed care entity responsible for its actions has been hampered by the preemption provisions of ERISA, but recently, a number of federal courts have found that ERISA does not preempt certain claims against managed care entities. Because conflicts continue among the federal circuits regarding preemption issues, the Supreme Court granted *certiorari* to two cases from Texas to further clarify ERISA preemption matters. Focusing on the *Pegram v. Herdrich* decision, the Supreme Court case that articulated a new ERISA jurisprudence and formed the basis for courts to alter their preemption analysis, Mr. Trueman speculates on how the Supreme Court will rule on the preemption cases under its review and considers what state law claims will be viable in a world of limited preemption. This area of the law will remain significant as controversies between patients/providers and health insurers are likely to continue.

While domestic healthcare issues are always at the forefront of our minds, we recognize that pertinent health law issues do not stop at the border. This edition of the *Annals of Health Law* also features two articles from foreign authors. Dr. Ubaldus de Vries offers a European perspective of the euthanasia law in his home country, the Netherlands. Recognizing the progressive political and legal culture of the Netherlands, Dr. de Vries questions whether the euthanasia law, enacted in 2001 and allowing for euthanasia in cases of "hopeless and unbearable suffering," has gone too far. Although the courts have allowed euthanasia in cases where

the suffering stems from a clinical cause, a recent decision allowing for euthanasia in a case where the suffering was existential, has led to questions of whether the Netherlands is headed down the path to euthanasia on demand. Dr. de Vries reviews case law allowing for euthanasia in certain circumstances, examines the judicial interpretation of the word “suffering,” explores the unique role of the doctor in euthanasia debate, and concludes that the limits of lawful euthanasia have been reached.

Also from outside our borders but discussing an issue relevant to the American practice and teaching of medicine, Israeli author Daniel Sperling writes about using newly dead patients to train medical students in resuscitation procedures, without the consent of the next-of-kin. While the beneficial educational aspect of the training cannot be denied, the manner in which it takes place must be reevaluated. Mr. Sperling argues for the necessity of obtaining consent, from a legal and ethical perspective, before any resuscitation procedure for training purposes is performed. Pointing to professional association guidelines, consent statutes, and case law, Mr. Sperling brings to light the delicate ethical issues involved in training medical students and is a persuasive advocate of informed consent in this context.

It is our hope that you find this issue of the *Annals of Health Law* provocative and insightful. We are in the process of planning next year’s issues and welcome your comments and suggestions. Have a productive and enjoyable summer!

Larry Singer
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Faculty Advisors

Elissa Koch
Editor-in-Chief

P.S. It was only through the hard work and dedication of a wonderful group of third year law students that this issue of the *Annals* was published. Special thanks are due to Editor-in-Chief, Elissa Koch; Managing Editor, Scott Noto; and our Colloquium Editor, Melissa January. If only we could clone them – ah! – an idea for another issue!!

John Blum

Larry Singer