

1996

Foreword

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Recommended Citation

John D. Blum *Foreword*, 5 *Annals Health L. i* (1996).

Available at: <http://lawcommons.luc.edu/annals/vol5/iss1/2>

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Foreword

The development of health law is fundamentally linked to the health care industry, as the law both shapes the industry and is shaped by it. In 1996, the health law field has been very much in a reactive mode, driven by dramatic market changes sparked in large part by the growing impacts of managed care. Although market consolidation and managed care have focused the practice of health law on corporate, regulatory, and insurance issues, the breadth of health law practice is not totally captured by those areas. Perennial health law concerns such as malpractice, confidentiality, and bioethics exist within the context of managed care, but they and many other health law issues continue to develop in traditional contexts reflecting the fact that there are other realities in health care apart from managed care.

This, the fifth volume of the *Annals of Health Law*, is highly representative of the nature of health law in 1996 in as much as it deals with current market-related issues, as well as presents traditional health law topics as they unfold in a very fluid health care scene. Two of the ten articles in Volume 5 are concerned with legal issues of immediate relevance to the managed care environment. The article by Kevin McDonald presents an analysis of the well-known antitrust case involving the Marshfield Clinic. McDonald analyzes the *Marshfield* case from a defense perspective, arguing that the plaintiff's allegations of antitrust law violations by the Marshfield Clinic were not supported by the trial record. An article by Mary Ader concerns a widely discussed managed care issue, the legalities of reimbursement for investigational treatments. Ms. Ader argues that decisions to pay for investigational therapies need to be made on the basis of well-designed clinical trials, and should not be the result of legal precedents, often divorced from scientific realities.

Three articles address legal issues faced by health care entities, with ramifications that affect more than managed care entities. Coauthors Thomas O'Neil III and Adam Charnes write about the viability of the self-evaluative privilege claimed by health care entities that initiate internal reviews to detect fraud. O'Neil and Charnes argue that the self-evaluative privilege offers some degree of protection to internal audit communications, but conclude that the scope of such protection is limited.

James Christopherson's article explores the captive medical malpractice insurance company, an option to which health care entities have turned as a way of reducing liability insurance costs. In particular, the Christopherson piece highlights tax and regulatory considerations that providers must consider before developing captive insurance vehicles. The article by Lois Snyder reviews a state-based health care reform proposal that is a reminder that broad public health issues widely discussed a few years ago are still very real today. Snyder examines the Equicare proposal, a market-based reform plan developed in Pennsylvania that is focused on problems of access as well as inadequate and inefficient public health programs.

The article by Kathleen Vyborny shows the ever-expanding areas of law that health care issues permeate. She reviews the growing field of telemedicine from legal and political vantage points. While the use of communication technology for medical diagnosis and treatment purposes has great potential, Vyborny's article points out the fact that significant legal barriers exist impeding the use of telemedicine.

It has been our tradition to devote a portion of the *Annals* to comparative health law, as it is our continuing belief that by exploring legal approaches of other jurisdiction to address common health problems, we will benefit in resolving our own. In this issue, two comparative and two international health law pieces appear. Todd Krim explores the topic of gestational surrogacy in an article that examines state, federal, and international responses to the complex legal and ethical issues underlying this subject. Krim argues that the United States could benefit from comprehensive federal legislation that would establish a broad-based regulatory structure for the surrogacy issue. In the second comparative piece, Gail Daubert compares the United States' National Practitioner Data Bank with the United Kingdom's National Confidential Enquiry into Perioperative Deaths (NCEPOD). She concludes that the NCEPOD needs more support to be truly valuable, and notes some of the positive results of the Data Bank. Looking at the United Kingdom's responses to human rights issues, John Hodgson explores the rights of the terminally ill under British law. Marc Stauch looks at a way for plaintiffs to succeed in medical malpractice cases under a loss of chance theory, thereby entitling them to recovery in more instances.

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Comparative Health Law

As always, it is my hope that you, the reader, will find this issue of the *Annals of Health Law* relevant, readable, and useable. I am hopeful you that will agree that we have realized our goal in Volume 5 of publishing articles that are intellectually rigorous and that have applied value. I am particularly grateful to the National Health Lawyers Association and their Executive Vice President, Marilou King, for their continued support and assistance with this publication. I am most indebted to our Executive Editor, Marilyn Hanzal, and this year's Senior Editor, Kim Hauser, whose combined efforts were unique and instrumental in producing this volume. They were assisted by articles editors who worked very hard in assuring the highest quality of publication. I also want to thank our peer reviewers whose input is so essential to maintaining the quality and integrity of the publication. Unquestionably health law remains a field that is vital and expansive, and, as it is always fascinating, we at the Institute for Health Law look forward to working on Volume 6.

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