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Foreword

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Introduction

Undoubtedly, 1994 will be remembered as the year in which health care financing reform dominated the domestic political agenda. The popular press has been filled with stories about the myriad of proposed reforms, and the lexicon of health care bureaucrats and policy makers is now the fare of every day discourse. As of this writing, the Congress is now emersed in winding its way through the shoals of reform legislation, and the final bill has yet to emerge.

Regardless of the outcome of the legislative process, the health care industry, in reaction to pending changes and in response to market forces, has made significant changes already. Managed care has emerged as a primary vehicle for change, and a host of integrated delivery system arrangements are being created, not to mention an ever expanding set of health care acronyms. The evolving structures of managed care are both complex and delicate, and to succeed, they must be both cost effective and consumer friendly. In all likelihood, managed care plans will influence and be shaped by market forces and regulation simultaneously, and this arena will be characterized by consolidations, false starts, and continual change.

From the standpoint of the law, it has been the marketplace, as much as government, that has fueled the health law field in 1994. Evolving medical care organizations have sparked a host of corporate and contractual issues, in conjunction with the expected (and often unexpected) regulatory considerations. The literature available to health lawyers in 1994 is filled with discussions of antitrust, tax exemption, fraud and abuse, and the usual and unusual sets of organizational charts. Of course, the perennial variations of Medicare and Medicaid, as well as a host of other statutory issues spawned by the Americans with Disabilities Act, the Health Care Quality Improvement Act, and others, continue to round out the practice of health law.

This third issue of the *Annals of Health Law* contains fourteen articles, reflecting the breadth and diversity of applied and academic health law. Five of the articles in this volume deal with practice-oriented issues. The article by David Marx and Christopher M. Murphy reviews antitrust enforcement in 1993, and the authors argue that enforcement philosophy, in the face of

new cooperative health care ventures, has become more flexible. Three articles in this issue are concerned with various aspects of the Medicare and Medicaid programs. An article by Robert L. Roth deals with provider reimbursement for hospital services and the tension between Medicare and the generally accepted accounting principles (GAAP). Roth uses the sixth circuit case of *Guernsey Memorial Hospital v. Secretary of HHS* to illustrate the difficulties in deciphering "reasonable costs." In his article, Timothy Stoltzfus Jost examines Medicare/Medicaid fraud and abuse in the context of false claims and illustrates how unlikely provider sanctions are if "due diligence" can be established, even in the face of clear technical violations. The difficulties states have had in withstanding judicial challenges against new Medicaid reimbursement methodologies under the Boren Amendment is the subject of John M. Burman's article. Burman argues that the Boren Amendment was designed to give states greater latitude in dealing with Medicaid reimbursement, but that goal does not square with the posture of the judiciary. Looking at the policy implications of managed care, Edward Hirshfeld's article examines managed care from a physician's perspective and posits that so-called advanced managed care organizations, consumed by cost considerations, will impact negatively on medical practice if physician participation in management is not integrated.

The remainder of Volume 3 presents various aspects of medical malpractice, from American, Canadian, British, and Danish perspectives. All but one of the eight pieces were originally presented as papers at the Institute for Health Law's 4th Annual Comparative Health Law Conference in October 1993. The article exploring the Danish medical malpractice claiming system was written by an LL.M. graduate who came to study at the Institute for Health Law from Denmark.

We hope that you will find Volume 3 of the *Annals of Health Law* insightful, provocative, and even helpful. Our gratitude goes out to all our authors and many peer reviewers for their efforts and contributions to this endeavor. I continue to be grateful to the National Health Lawyers Association for their support of this publication and to their Executive Vice President Marilou King for her helpful input. Without the hard work of our executive editor, Marilyn Hanzal, this volume would still be in the idea stage. Lastly, special thanks to our Senior Editor, Jennifer Schima, for all her hard work. Best wishes to her as she

launches her career in legal publishing — may the jurisprudential muses be with her!

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