
Legal Aspects of Health Care for the Elderly

An Annotated Bibliography

Compiled by **Marshall B. Kapp**



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Legal Aspects of Health Care for the Elderly

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Foreword

The annotated bibliographies in the Bibliographies and Indexes in Gerontology series provide insight to the question, "What is known in the field of gerontology?" Their purpose is simple, yet profound: to provide comprehensive reviews and references of the work done in various fields of gerontology. Since it is no longer possible for professionals to explore the vast body of research and writing in a subspecialty without years of work, annotated bibliographies are invaluable tools to the researcher.

This fact has become true only in recent years. When I was an undergraduate at Duke (class of '52), I doubt anyone had even heard of gerontology. Almost no one was identified as a gerontologist. Now there are over 5,000 professional members of the Gerontological Society of America. When I was an undergraduate, there were no courses in gerontology. Now there are thousands of courses offered by most major (and many smaller) colleges and universities. When I was an undergraduate, there was only one gerontological journal, the Journal of Gerontology, first published in 1945. Now, there are over forty professional journals and several dozen books in gerontology published each year.

The reasons for the dramatic growth in gerontological interest are clear: the explosive increase in the number of aged; the shift from family to public responsibility for the security and care of the elderly; the recognition of aging as a social problem; and, the growth of science in general. The explosive growth of knowledge in this field has resulted in the need for new solutions to the old problem of comprehending and "keeping up" with a field of knowledge. The old indexes and library card catalogues have become increasingly inadequate for the job; they are cumbersome and unwieldy to use, and keeping them current is an arduous task. On-line computer indexes and abstracts are one solution, but make no evaluative selections nor organize sources logically as is done here. Annotated bibliographies are also more widely available than on-line computer indexes.

These bibliographies are useful to researchers who need to know what research has (or has not) been done in their

field. The annotations contain enough information so the researcher usually does not have to search out the original articles. In the past, review of literature has often been haphazard and rarely comprehensive because of the large investment of time (and money) that would be required for a truly comprehensive review. Now, using these bibliographies, researchers can be more confident that they are not missing important previous research, duplicating past efforts, or reinventing the wheel. It may well become standard and expected practice for researchers to consult such bibliographies even before they start their research.

Dr. Kapp, in his preface, states that this bibliography is intended to be "an educational tool" and emphasizes its usefulness to practicing health and human service professionals as well as researchers, teachers, students, and attorneys in this field. I add that it will be useful to any person old or young, who wishes to find out what is known about legal aspects of health care for the elderly.

This field is one of the most important areas of study because the well-being of elderly persons and the legal integrity of millions of service providers are of concern. Although literature on this subject is of relatively recent vintage, the fact that this bibliography contains 617 references, all of which were published since January 1, 1980, indicates how complex and extensive the field has become. It is clear that one cannot hope to comprehend even one aspect of this field without a guide such as this bibliography.

The author of this bibliography has done an outstanding job of covering all the relevant information and organizing it into easily accessible form. Not only are there 617 annotated references organized into 13 sections, but there is an author index and a comprehensive subject index with many cross-references for the items in the bibliography. Thus, one can look for relevant material in this volume in several ways: (1) look up a given subject in the subject index; (2) look up a given author in the author index; (3) turn to the section that covers the topic; or (4) look over the annotations in Section A for basic knowledge and a general overview of the literature.

Dr. Marshall B. Kapp is an unusually qualified expert in the area of legal aspects of health care for the elderly. He has published more articles, chapters, and books (31) in this area than any other author. His annotations are concise and clear so one can easily understand the essence of the reference and determine whether the original is worth pursuing.

So, it is with great pleasure that we add this bibliography to our series. We believe you will find this volume to be the most useful, comprehensive, and easily accessible reference work in its field. I would appreciate any comments you may care to send me.

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Preface

Health care for the elderly involves much more than an understanding of human biology. It involves a rich and complicated pattern of relationships, encompassing the older person, the family, the physician, other members of the health care team, social service professionals, institutions and their administrators and trustees, private third-party payors and reviewers, government agencies, and the public. These relationships largely determine the access that older persons will enjoy to health care and the quality and cost of services received. These relationships are guided heavily by rules—including legal requirements—that we collectively either explicitly announce or implicitly understand as necessary for the maintenance of a just and orderly society.

Legal implications of health care for the elderly are growing increasingly important and complex. Literature on this subject is of relatively recent vintage, and varies widely in sophistication, breadth of coverage, and depth of analysis. However, the number and variety of books, reports, and articles in this sphere are burgeoning to keep pace with legal developments.

This volume is intended to assist practicing health and human service professionals, as well as researchers, teachers, and students in the health and human service fields in more easily identifying and locating relevant sources of information and guidance. Attorneys and law students should also find this book useful. Of course, neither this book, nor any of its individual entries, can serve as a substitute for obtaining personalized, definitive legal advice for participants in specific factual circumstances raising legal questions.

The able assistance of Dr. Erdman B. Palmore, series editor and Mr. Loomis Mayer, social and behavioral sciences editor at Greenwood Press, is gratefully acknowledged. I also express my sincere appreciation for expert librarial assistance provided by the staffs of the Wright State University Health Sciences Library and the University of Dayton Law Library. Last, but not least, I thank the Wright

State University School of Medicine word processing center and Ms. Debbie Goode for her diligence and care in putting my words into readable form.

Legal Aspects of Health Care for the Elderly: An Annotated Bibliography is intended to be an educational tool. The end to which this volume is a means is the provision of health and human services in a manner that best respects the autonomy, dignity, and well-being of older individuals, while safeguarding the legal integrity of the service provider. The achievement of this goal ultimately will depend less on the tool itself than on how well the artisan--the reader--interprets and utilizes it.

Introduction

The interplay of law and medicine has been recognized since ancient times. Legal doctrines relating to liability for substandard care, informed consent, confidentiality, and cessation of medical treatment predate Hippocrates. Yet, as society in general and medical science in particular have grown steadily in complexity, sophistication, and expectations, legal rules and rulemakers have become increasingly entangled in the whole panoply of medical decisions and decisionmaking. Today, it may be claimed without too much hyperbole that a familiarity with pertinent legal considerations is as essential for a health care professional as is knowledge of the basic sciences or good clinical technique.

Literature attempting to analyze, explain, and on occasion criticize the law/medicine relationship has a long and distinguished history. Most early writings in this area focus on issues in forensic medicine--that is, the application of medical knowledge and techniques to help resolve legal questions such as criminal insanity or cause of death. The fields of forensic psychiatry and forensic pathology were most prominent in this early literature.

In the past half-century or so, the medicolegal literature has expanded to include discussion of topics in medical jurisprudence--that is, the set of legal principles and processes that influence and control the way medicine is practiced. As medicine is governed by legal factors more and more, the literature recognizing and responding to that influence has become more voluminous.

The elderly comprise one particular subset of health care consumers. Most generic medicolegal issues (except, for instance, questions applying exclusively to pediatric populations) affect the elderly as well as potential patients of other ages. Conversely, most legal issues faced by older patients also confront younger persons who adopt, or have thrust upon them, the patient role. However, even generic medicolegal questions more often than not take on unique twists and connotations when older patients are involved.

Thus, an identifiable body of law concerned with personal and institutional relationships, implicated by the delivery of health care for the elderly, is evolving. Concomitantly, a separate literature devoted to explicating, discussing, and suggesting improvements in that body of law is slowly but surely developing.

Examples of literary discussions of that body of law are abstracted and arranged in this volume. These references are taken from prominent medical, nursing, health administration, and legal literature. The methodology employed in identifying the sources cited here commenced with a review of the author's own extensive (albeit disorganized) collection of materials and sources cited in that collection. Next, the Index to Legal Periodicals, Current Law Index, Index Medicus, Index to Hospital Literature, and the post-1980 indices of the following journals were manually researched: The Gerontologist; Journal of the American Geriatrics Society; Journal of the American Medical Association; Generations; New England Journal of Medicine; Annals of Internal Medicine; Archives of Internal Medicine; American Family Physician; Journal of Family Practice; American Journal of Law and Medicine; Law, Medicine and Health Care; Journal of Legal Medicine; Journal of Health Politics, Policy and Law; Hastings Center Report; and American Journal of Nursing. Finally, card catalogs were examined at the Wright State University health sciences library, the University of Dayton law library, and the libraries of the medical institutions that are affiliated with the Wright State University School of Medicine.

The collection of sources contained in this annotated bibliography is selective, rather than comprehensive. Several specific selection criteria were consciously utilized.

First, all references included here were originally published between January 1, 1980 and August 31, 1987. The latter cutoff date was chosen for purposes of manageability. The beginning date represents the judgment that while some significant and presently relevant discussions of legal aspects of health care for the elderly appeared prior to this decade, most are much more recent. Given the pace of pertinent legislative and judicial developments in this area and the maturation and multiplication of corresponding professional literature, the material included in this volume is as up-to-date as possible.

Second, references are listed here only if they explicitly deal with a "legal" aspect of health care for the elderly, as opposed to the numerous other aspects that might be discussed. Many of the sources cited deal primarily with one of these other aspects, but consciously mention important legal concerns. For inclusion in this volume, an aspect of health care for the elderly is considered "legal" in nature if, in this author's judgment, it likely would be characterized as such by an attorney, a health care provider, or the older health care consumer. Topics from

the fields of both forensic medicine and medical jurisprudence are included.

This author made the decision to exclude from this listing a number of valuable books and articles that deal exclusively with the ethical dimensions of health care for the elderly. Certainly, legal and ethical aspects are frequently inextricably intertwined, and legal requirements concerning health care can rarely be comprehended adequately without a thorough appreciation of the ethical or value rationales underpinning those requirements. Many of the sources cited here provide extensive and eloquent expositions of those ethical underpinnings. However, law and ethics are not interchangeable or synonymous. Unless a book or journal article devotes some noticeable attention to specific, enforceable prescriptions and proscriptions laid down by a specific government (the bibliography focuses on American law, although a few references provide some comparative perspective) at a specific point in time (the present), that source was not included.

Similarly, the proliferating sources concentrating on financial aspects of providing health services to the elderly were considered appropriate for this volume only where the source integrated into its economic discussion some analysis of the accompanying legal ramifications. Discussions of the business law (e.g., antitrust, Medicare fraud and abuse) implications of providing health services to older markets were not included unless those discussions also expressly considered the associated patient care issues. Sources discussing solely economic aspects of health care for the elderly or the ethics of elderly health care contain vital information but deserve their own bibliographies.

Third, references are included here only if they deal with the older health care consumer. This means that sources discussing only generic medicolegal concepts, with no particular attention to the elderly, were excluded. If though, a generic medicolegal discussion could be reasonably read to have specific bearing on the special needs and characteristics of the older patient, that discussion was a candidate for selection. Additionally, sources examining only legal concerns of the elderly outside of the health care setting, such as crime victimization or landlord-tenant difficulties, did not enter this volume. The clear emphasis here is on health care issues, although that domain has been interpreted quite broadly.

Finally, potential sources were disqualified from inclusion here if, in this author's opinion, they were either so patently inaccurate or poorly written that they would not be helpful to the reader. Use of this criteria in no way warrants that included sources therefore are uniformly accurate or well-written. Many excellent sources were excluded under other selection criteria or due to oversight.

The individual entries are organized according to primary legal topic. I have endeavored to define these topics

broadly enough to keep the project manageable, but precisely enough to be descriptive. Since many entries span a variety of legal topics, the organization is supplemented by cross-referencing where appropriate.

For each bibliographic entry, sufficient information is given to enable the reader to locate the cited source. For books and book chapters, the author and/or editor, title, publisher, place and year of publication, and pages are listed. For reports, similar information, plus report number where applicable, is provided. For journal articles, the author(s), title, journal name, volume, issue, page numbers, and year of publication are included.

On many points, the intersection of law, aging, and health care, lacks clarity and definitude. Guidelines are evolving though, and health care and human service professionals must be familiar with these guidelines and with the principles they promote. As these guidelines evolve, so too does the literature explaining and contributing to their evolution. In the past decade, the literature has exploded to the point that some careful organization and direction is needed if the literature is to be useful. This annotated bibliography humbly proposes to make this literature less intimidating and more accessible to those who must understand and implement it for the benefit of the older health care consumer.

Abbreviations

Amer.	American
Ann.	Annals
Arch.	Archives
Inter.	International
J.	Journal
Legis.	Legislation
Med.	Medical
Rev.	Review
Univ.	University

Entries by Topic

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