

LIABILITY AND QUALITY ISSUES IN HEALTH CARE

Sixth Edition

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*To Donna Jo, Elena, Michael, Nicholas, Eva,
Robert and Hayden*

B.R.F.

To Nancy, T.J. and Kati

T.L.G.

To Bob, Emily, Kathleen, Colin, Nicholas and Zachary

S.H.J.

To Ruth, Jacob, Micah, and David

T.S.J.

To Jane, Mirra and Elana

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This book is also dedicated to the memory of Nancy Rhoden and
Jay Healey, great teachers, wonderful colleagues and
warm friends.

*

Preface

This sixth edition of the paperback, *Liability and Quality Issues in Health Care*, marks the twentieth anniversary edition of our text, first published in 1987. Since that first edition, no part of the American landscape has changed more than the American health care system. The system has been stressed by demographic changes, buffeted by the winds of political change, and utterly transformed by social and economic developments. The formal structure of the business of health care was a small part of the subject of health law when we published our first edition; it is now the subject of entire graduate programs. The for-profit commercial sector of the health care economy sounded like a lamb twenty years ago; now it roars like a lion. Until a few years ago virtually no one attained elective office because of her position on issues related to health care; now opinion polls peg it as one of the most important issues in the 2008 election. Economic and political fortunes have been made (and lost) predicting the reactions of Americans to changes in our system for delivering health care. While the perspective that we must bring to the legal analysis of health care is far broader now than it was twenty years ago, the fundamental concerns on which that analysis is brought to bear are surprisingly unchanged. As was the case in 1987, we want to know what role the law might play in promoting the quality of health care but now in 2008 the problem of medical error and poor quality has finally moved to the forefront of regulatory and consumer concerns in the American system.

This paperback sixth edition continues to employ materials from a variety of sources. It contains the most significant and useful judicial opinions dealing with the issues of quality and liability in health law, drawn from the federal and state courts. The book also contains statutes, legislative history, administrative regulations, excerpts from contracts, consent forms, and a host of other kinds of materials designed to bring the subject of health law to life in the classroom. It also contains many classroom-tested problems that should be helpful in encouraging reflections on these materials. While many of the problems and other materials have been brought forward from earlier editions of this book, every section has been rewritten and the organization of the text reflects new developments in American health care. All cases, statutes, regulations, and other materials in the casebook have been edited to enhance their teaching value while assuring that they reflect problems faced by health lawyers coping with the health system in 2008 and beyond. The notes expose students to a range of the most subtle health law inquiries under discussion at the time of publication.

This paperback provides a detailed teaching tool for both the doctrinal underpinnings and the litigation issues for professional liability cases; it also looks at the new caselaw and regulatory initiatives that are bubbling up across the country. Chapter 1, the introduction, provides some benchmarks against which we can measure other developments in health care. It addresses how we define illness and health, how we assess quality within the health care system

including how we address medical error, how we establish the foundation for good health and the prevention of disease, and how we might fairly distribute health care within our society. The next five chapters (chapters 2 through 6) address ways in which the law can contribute to the promotion of the quality of health care. This part of the casebook includes thorough treatment of governmental efforts to assure the quality of health care services, including the interaction between public and private quality initiatives, as well as extensive analysis of medical malpractice law. Chapter 6 now contains a section of managed care liability, following directly from the section on institutional liability, and ends with a brief discussion of malpractice reform.

Chapter 7 then addresses the issues of access to health care and the movement from common law litigation to EMTALA and, the ADA and Title VI as tools to expand access to health care. Chapter 8 looks at the role of insurance and the nature of managed care quality regulation. Chapter 9 addresses the federal role in regulating managed care, with an extensive look at ERISA and the Supreme Court's latest rulings, particularly *Davila*. The continued evolution of managed care is examined, as is the emergence of the consumer-driven health care movement. This material also addresses legal obligations to provide medical services, and examines legal and policy issues in health care disparities.

This book is designed to be a teachable book. We are grateful for the many comments and helpful suggestions that health law teachers across the United States (and from elsewhere, too) have made to help us improve this new edition. We attempt to present all sides of policy issues, not to evangelize for any political, economic or social agenda of our own. This task is made easier, undoubtedly, by the diverse views on virtually all policy issues that the several different authors of this casebook bring to this endeavor. A large number of very well respected health law teachers have contributed a great deal to this and previous editions by making suggestions, reviewing problems, or encouraging our more thorough investigation of a wide range of health law subjects. We are especially grateful to Charles Baron, Eugene Basanta, David Bennahum, Robert Berenson, Kathleen Boozang, Arnold Celnicker, Don Chalmers, Ellen Wright Clayton, Judith Daar, Dena Davis, Kelly Dineen, Ileana Dominguez-Urban, Stewart Duban, Margaret Farrell, David Frankford, Michael Gerhart, Joan McIver Gibson, Susan Goldberg, Jesse Goldner, Andrew Grubb, Art LaFrance, Diane Hoffmann, Jill Horwitz, Amy Jaeger, Eleanor Kinney, Thomasine Kushner, Pam Lambert, Theodore LeBlang, Antoinette Sedillo Lopez, Lawrence Singer, Joan Krause, Leslie Mansfield, Thomas Mayo, Maxwell Mehlman, Alan Meisel, Vicki Michel, Frances Miller, John Munich, David Orentlicher, Vernellia Randall, Ben Rich, Arnold Rosoff, Karen Rothenberg, Mark Rothstein, Sallie Sanford, Giles Scofield, Jeff Sconyers, Charity Scott, Ross Silverman, Loane Skene, George Smith, Sheila Taub, Michael Vitiello, Sidney Watson, Ellen Wertheimer, William Winslade and Susan M. Wolf for the benefit of their wisdom and experience.

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It has been a splendid opportunity to work on the twentieth anniversary editions of our health law casebooks and paperbacks. It has been a constant challenge to find a way to teach cutting edge issues influencing our health care system—at times before the courts or legislatures have given us much legal material for our casebook. Each time we have done a new edition, there have been developments that we find difficult to assess as to whether they will become more significant during the lifespan of the edition or are simply blips. It is always difficult to delete materials that required much labor and still remain quite relevant but that have been eclipsed in importance by others, and the length of each succeeding edition attests to our challenge. Finally, we don't write this casebook for our classes alone, but rather for yours as well. We enjoy teaching, and we hope that comes through to the students and teachers who use this book.

A note on editorial style: Elipses in the text of the quoted material indicate an omission of material within the quoted paragraph. Centered elipses indicate the omission of a paragraph or more; the first line following centered elipses may not be the first line of the next paragraph, and the last line preceding centered elipses may not be the last line of the preceding paragraph. Brackets indicate the omission of a citation without the omission of other materials. There is no acknowledgment of omitted footnotes. To the extent it is possible, the style of this casebook is consistent with the principle that legal writing form should follow function, and the function of this text is to help students understand health law.

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