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**MEDICAL LIABILITY
AND
TREATMENT RELATIONSHIPS**

*Second
Edition*



Wolters Kluwer

Law & Business

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MEDICAL LIABILITY AND TREATMENT RELATIONSHIPS

Second Edition

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Wolters Kluwer

Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

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New York, NY 10011-5201

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Aspen Publishers
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

3 4 5 6 7 8 9 0

ISBN 978-0-7355-7005-4

Library of Congress Cataloging-in-Publication Data

Hall, Mark A., 1955-

Medical liability and treatment relationships / Mark A. Hall, Mary Anne Bobinski, David Orentlicher. – 2nd ed.

p. cm.

Includes bibliographical references and index.

ISBN 978-0-7355-7005-4 (alk. paper)

1. Medical laws and legislation–United States–Cases. 2. Physicians–Malpractice–United States–Cases. 3. Physician and patient–United States–Cases. I. Bobinski, Mary Anne. II. Orentlicher, David, 1955- III. Title.

KF3821.A7H35 2008

344.7304'1–dc22

2007049154



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To Larry C. Hall, Ph.D., for showing me the joys of an academic life.
—*M.A.H.*

To my partner Holly and our daughter Anna, and to my parents, for their
encouragement.
—*M.A.B.*

To the memory of Prof. Herman I. Orentlicher, for his commitment to “neutral
skepticism,” rigorous standards, and, above all, decency.
—*D.O.*

To Bill Curran, for his guiding light.



Preface

The Content and Organization of This Book

This book contains the materials from *Health Care Law and Ethics* (7th ed., 2007) that are focused on medical liability and treatment relationships, with updates through August 2007. As the larger casebook nears its half-century anniversary, we pause to reflect on the remarkable metamorphosis of health care law from a subspecialty of tort law, to a mushrooming academic and practice field whose tentacles reach into myriad scholarly disciplines and areas of substantive law. Each of this book's six prior editions reflects an important stage in this evolutionary growth. Health care law originated as a separate field of professional practice and academic inquiry during the 1960s, when the first edition of the casebook was first published. Under the somewhat grandiose label of "medical jurisprudence," the primary focus at first was on medical proof in all kinds of criminal and civil litigation, on medical malpractice actions against physicians, and on public health regulation. The principal concern was how traditional bodies of legal doctrine and practice — such as criminal, tort, and evidence law — should apply in medical settings.

During the 1970s, bioethics became a major additional area of concern as a consequence of the right to die movement spawned by the *Quinlan* case, and the focus on individual autonomy contained in the informed consent doctrine and the landmark decision on reproductive decision-making in *Roe v. Wade*. Law courses during this and earlier periods were taught under the heading of "law and medicine."

In the 1980s economic and regulatory topics formed the third component of health care law, as exemplified by the increasing application of antitrust laws to

the health care industry, and the growing body of legal disputes under Medicare and Medicaid. This newer dimension accelerated its growth into the 1990s with the spread of HMOs and other managed care organizations, which propelled various corporate and contractual restructurings. These newer topics found their way into courses described as “health law.” New developments present continuing challenges to each of these areas of health care law and ethics. In the new millennium, biotechnology, consumer-driven health care, medical confidentiality, and bioterrorism are examples of emerging issues that receive increased attention in this new edition.

This path of development has resulted in an academic discipline defined more by an accretion of topics drawn from historical events than by a systematic conceptual organization of issues. Each of the four major branches—malpractice, bioethics, public health, and financing/regulation—stands apart from the others and is thought to be dominated by a distinct theme. The principal concern of malpractice law is quality of care; bioethics is concerned with individual autonomy; public health poses the rights of patients against the state; and the primary focus of financing and regulatory law is access to care and the cost of care. As a consequence, health care law has yet to become a truly integrated and cohesive discipline.¹ It is too much the creature of history and not of systematic and conceptual organization.

Our major ambition in the casebook is to remedy this state of disarray. This field has reached a stage of maturity that calls for stepping back and rethinking how all of its parts best fit together as a conceptual whole. In our view that conceptual whole is best organized according to the fundamental structural relationships that give rise to health care law. These relationships are:

1. The patient/physician relationship, which encompasses the duty to treat, confidentiality, informed consent, and malpractice
2. State oversight of doctors and patients, which encompasses the right to die, reproductive rights, physician licensure, and public health
3. The institutions that surround the treatment relationship, encompassing public and private insurance, hospitals and HMOs, and more complex transactions and organizational forms

We develop the traditional themes of quality, ethics, access, and cost throughout each of these three divisions. We also address cutting edge and controversial topics such as AIDS, genetics, managed care, and rationing, but not as discrete topics; instead, we integrate these developments within a more permanent, overarching organizational structure, which is capable of absorbing unanticipated new developments as they occur.

In deciding which topics to present in each section and in what depth, our basic guide has been to focus on the essential attributes of the medical enterprise

¹ This disarray is reflected by the ongoing confusion over competing names for the field. Although “law and medicine” and “health care law” appear to signify the same topic, the first term is understood to mean older style malpractice subject matter, and the second term is used to refer to newer economic and regulatory issues. Paradoxically, whereas “health care law” and “health law” might be thought to signify somewhat different fields—the latter not restricted to medical treatment and therefore encompassing public health issues—in fact they are taken to mean the same thing.

that make it uniquely important or difficult in the legal domain. Health care law is about the delivery of an extremely important, very expensive, and highly specialized professional service. If it were otherwise, this book would likely not exist. Some lawyers and scholars maintain that there is no unifying concept or set of ideas for health care law; instead, it is merely a disparate collection of legal doctrines and public policy responses, connected only by the happenstance that they involve doctors and hospitals in some way—much as if one had a course on the law of green things or the law of Tuesdays.² It would be far more satisfying to find one or more organizing principles that explain not only what makes the disparate parts of health care law cohere, but also why that coherence distinguishes health care law from other bodies of integrated legal thought and professional practice.

We believe those organizing principles can, in part, be found in the phenomenology of what it is to be ill and to be a healer of illness. These two human realities are permanent and essential features that distinguish this field from all other commercial and social arenas. They permeate all parts of health care law, giving it its distinctive quality and altering how generic legal doctrine and conventional theories of government respond to its problems and issues. Health care law might still be worth studying even without these unique attributes of medical encounters, but it is much more engaging and coherent because of them. It is these attributes that give rise to an interrelated set of principles that justify classifying health care law as a coherent and integrated academic and professional discipline. For additional discussion, see *The History and Future of Health Care Law: An Essentialist View*, 41 *Wake Forest L. Rev.* 347 (2006).

Accordingly, we stress the essential attributes of medical encounters throughout these materials by incorporating insights from other academic disciplines and theoretical perspectives. Behavioral disciplines such as psychology, sociology, and anthropology help to illuminate the nature of medical knowledge and the lived experience of illness, dependency, and trust as they occur in real-life medical encounters. Findings from health services research published in the health policy literature create a stronger empirical and theoretical base for exploring health care law, one that better exposes its broad social impact. Analytical disciplines, such as economics and moral and political theory, create the foundation for understanding developments in financing, regulation, and bioethics. And, the perspectives of feminist, communitarian, and critical race theory demonstrate the limitations of conventional analytical models and help us understand how health care law must evolve to accommodate viewpoints and concerns that have been excluded in the past.³

² For a similar claim relating to cyberlaw, see Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. Chi. Legal F. 207, 207–208 (1996).

³ For additional discussion of the overall content of health care law and approaches to teaching it, see Symposium, *Rethinking Health Law*, 41 *Wake Forest L. Rev.* 341 (2006); Symposium, *The Field of Health Law: Its Past and Future*, 14 *Health Matrix* 1 (2004); American Society of Law and Medicine Task Force on Health Law Curricula, *Health Law and Professional Education*, 63 U. Det. L. Rev. 245 (1985); William J. Curran, *Titles in the Medicolegal Field: A Proposal for Reform*, 1 *Am. J.L. & Med.* 1 (1975); Symposium, *Teaching Health Law*, 38 *J. Leg. Educ.* 485 (1988); Symposium, 6 *J. Health Admin. Educ.* 221 (1988); Clark Havighurst, *American Health Care and the Law: We Need to Talk!*, 19(4) *Health Aff.* 84 (July 2000).

In the first chapter, we have collected background and introductory readings that are relevant in a number of places throughout the book, as well as to several different approaches to teaching the course. These are intended for teachers and students to draw on selectively when and where they see fit.

The death of Bill Curran, the original author of the casebook, left us with a considerable burden to shoulder. Although Prof. Curran was involved in the conceptual reorganization of these materials, he was unable to contribute to their selection and editing. Still, his presence is felt in every part of these materials through the inspiration of his mentoring, his friendship, and his vast body of work.

We intend that this book will continue to serve as more than a teaching tool, and will prove useful as an ongoing resource for conducting research in health care law. To that end we provide substantial bibliographic notes in each section. Also, we have created a dedicated World Wide Web site to serve this book: www.health-law.org. It contains interesting background materials, updates of important events since publication, additional relevant topics that were excluded due to space constraints, and links to other resources on the internet.

The following is a bibliography of resources and readings that relate to research in health care law generally. Additional bibliographic references that relate to particular parts of health care law can be found at pages 28 and 274.

Treatises and Texts: Barry Furrow et al., *Health Law* (2d ed. 2001); Mark A. Hall, Ira Mark Ellman, and Daniel S. Strouse, *Health Care Law and Ethics in a Nutshell* (2d ed. 1999); Michael MacDonald et al., *Treatise on Health Care Law*; John H. Robinson, Roberta M. Berry & Kevin McDonnell, eds., *A Health Law Reader: An Interdisciplinary Approach* (1999); World Health Organization, *International Digest of Health Legislation*.

Health Care Law Journals and Recurring Symposia: American Journal of Law and Medicine (Boston Univ.); Annals of Health Law (Loyola-Chicago); DePaul Journal of Health Care Law; Food, Drug and Cosmetic Law Journal; Health Law & Policy Abstracts and Public Health Law Abstracts (SSRN on-line journals); Health Matrix (Case Western Univ.); Houston Journal of Health Law & Policy; Indiana Health Law Review (Indiana Univ.-Indianapolis); Journal of Contemporary Health Law and Policy (Catholic Univ.); Journal of Health & Biomedical Law (Suffolk), Journal of Health and Hospital Law (St. Louis Univ., AHA); Journal of Health Care Law & Policy (Univ. of Maryland); Journal of Law and Health (Cleveland-Marshall); Journal of Law, Medicine and Ethics (ASLME); Journal of Legal Medicine (So. Illinois Univ.); Medical Trial Technique Quarterly; Journal of Medicine and Law; St. Louis Univ. Law Journal; Seton Hall Law Review; Quinnipiac Health Law Journal; Whittier Law Review; Yale Journal of Health Policy, Law and Ethics.

Leading Medical, Industry, and Health Policy Journals: American Journal of Public Health; American Medical News (AMA); Health Affairs (published by Project Hope); Health Care Financing and Delivery (SSRN on-line journal), Health Care Financing Review (DHHS); Health Economics, Policy and Law (Cambridge Press), Health Services Research; Inquiry (published by Excellus, a Blue Cross plan in Rochester, New York); Hospitals and Health Networks (AHA); Journal of the American Medical Association; Journal of Health Politics,

Policy and Law; Medical Care; Milbank Memorial Fund Quarterly; Modern Healthcare; New England Journal of Medicine.

Health Law Societies, Digests, and Newsletters: ABA Forum on Health Law (newsletter); American College of Legal Medicine (Milwaukee; journal); American Society of Law, Medicine, and Ethics (Boston; two journals); BNA Health Law Reporter (Washington, D.C.; weekly); American Health Lawyers Association (Washington, D.C.; monthly digest and newsletter, bimonthly journal); Specialty Law Digest: Health Care Law (monthly).

Acknowledgments

This manuscript could not have been prepared without the thoughtful advice of our colleagues who commented on drafts and gave us suggestions for revision (especially Bill Brewbaker, Seth Chandler, Judy Failer, Hank Greely, David Hyman, Eleanor Kinney, Jack Nelson, Mark Pescovitz, Phil Peters, and Dan Strouse), without the diligent help of those students and staff who assisted us over the past few years (Sarah Batut, Chet Chea, Nathan Childs, Tyler Hall, Sarah Harbottle, Laura Hermer, David Higgins, Faith Long Knotts, James Martin, Michael Schrader, and Betsy Segal), and without the superhuman patience of our families (who, curiously, wish to remain anonymous). Finally, we thank the authors and publishers who granted permission to use each of the excerpts of copyrighted material in these readings.

Mark A. Hall
Mary Anne Bobinski
David Orentlicher

December 2007



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