

PREFACE

Overview

The ninth edition of *The Law of Healthcare Administration* continues to offer a thorough treatment of health law in the United States, doing so in plain language for nonlawyers. It begins with a history of law and medicine, moves to a description of how—despite various reform efforts—the US healthcare “system” came to be so fragmented, and then presents specific issues that affect healthcare leaders on a daily basis (e.g., contracts, torts, taxation, antitrust law, regulatory compliance) and—a major addition to the book—human resources (HR) law.

An Entire Chapter on Human Resources

Numerous instructors have asked for a chapter on human resource issues; thus, a new chapter responds to this request. It discusses the distinction between “employee” and “independent contractor,” defines other categories of workers, and goes to considerable length to present civil rights law and various nondiscrimination issues. The chapter also includes a section on labor law—the National Labor Relations Act and the Taft-Harley Act, union organizing, collective bargaining, fair and unfair labor practices, and more. Three judicial decisions with HR-related implications are found in *The Court Decides*.

The chapter is described more fully under the chapter contents heading on p. xvi.

Other Highlights of the Ninth Edition

Discussions of the history of law and the history of medicine have been pared down and combined; they now constitute chapter 1. This is followed by a century’s worth of attempted healthcare reform efforts culminating with passage of the Affordable Care Act (ACA) in 2010 and subsequent (unsuccessful) attempts to “repeal and replace” it.

End-of-life topics have been updated to include new “death with dignity” laws in some states, one state’s adoption of “physician aid in dying” through judicial decision, and the latest on the Physician Orders for Life-Sustaining Treatment (POLST) paradigm.

Throughout the book I have updated citations, added current web addresses, and made editorial changes to minimize (or at least clarify) legal jargon. Like the editions before it, the ninth edition is a practical text for students and educators in health administration, public health, nursing, and similar programs or disciplines.

Chapter Contents

Chapter 1: A Brief History of Law and Medicine

“A page of history is worth a volume of logic,” so this chapter compares the histories of the two disciplines. In part 1, it presents the history of law, its sources, the relationships among the three branches of government, the basic structure of the federal and state court systems, and some basics of legal procedure in civil cases. In part 2, we read about the history of medicine through the ages and the advent of “modern medicine” a mere century or so ago. Viewed in this light, we see that twenty-first-century healthcare is a newborn.

Chapter 2: Access to Healthcare: Rights and Responsibilities

This chapter discusses the structure of the US healthcare “system” and points out that it is not a *system* at all in the true sense of the word. Instead, it is a conglomeration of different types of providers and payors resulting in serious inequalities of coverage.

In response to numerous requests, the chapter outlines the various US government healthcare systems and agencies (e.g., Public Health Service, Indian Health Service, Veterans Administration healthcare), and describes their relationship with the state and private sectors. It describes numerous health policy efforts from the Vaccine Act of 1813, to Medicare and Medicaid, to President Clinton’s reform proposal, to the ACA. The legal challenges to the ACA are discussed in detail, including the landmark cases of *NFIB v. Sibelius* and *King v. Burwell*.

A presentation of traditional principles of access to care follows the section on healthcare reform efforts. These principles include the right to care, rules regarding admission and discharge, the government’s duty to pay in some cases, involuntary commitment of the mentally ill, and utilization review. Appendices show the various federal health insurance programs, the history of health reform efforts, and details on implementation of the ACA.

Chapter 3: The Organization and Management of a Corporate Healthcare Institution

This chapter reviews some basic concepts of corporation law, including a corporation’s “personhood,” its ability to shield owners from personal

liability, the foundations and limitations of corporate power, and the duties of a corporation's governing board. The concept of piercing the corporate veil and the various reasons for and methods of restructuring a healthcare corporation are also explored. Attention is also given to hospital–physician joint ventures and their potential for renewal as a result of the effects of the ACA and other factors in the healthcare environment.

Chapter 4: Human Resources Law

As mentioned earlier, this chapter is brand-new to the text. It describes how employment law affects the healthcare organization, identifies the major employment statutes and case law principles, points out the most significant areas of contention, and enables students to know when to consult employment law experts. Major topics include categories of workers in the workplace, antidiscrimination statutes, and labor law issues.

Chapter 5: Contracts and Intentional Torts

This chapter addresses the essential elements of a valid contract—competent parties, “meeting of the minds,” consideration, and legality of purpose—and the importance of contract law in the relationships between patients and their physicians and between patients and hospitals. The chapter also briefly discusses issues related to workers' compensation and intentional tort, pointing out that both can affect physician–patient and hospital–patient relationships.

Chapter 6: Negligence

This chapter outlines the four basic elements of proof in a tort case, the ways the standard of care can be proven, and the concept of causation. It addresses *respondeat superior* (vicarious liability), the “school rule,” *res ipsa loquitur*, defenses to malpractice suits, and alternatives to the tort system.

Chapter 7: Liability of the Healthcare Institution

This chapter shows that the law has come a long way in recent years as it relates to healthcare organizations: The shift from charitable immunity to application of respondeat superior in the healthcare setting is one example. The demise of the “captain-of-the-ship” and “borrowed-servant” doctrines is another. These notions have now expanded to the point that the independent contractor defense seems no longer viable in the healthcare field. The chapter also addresses the rise of managed care in the 1980s and 1990s, the conflicts that sometimes arise between advancing patient welfare and reducing healthcare costs, and the phenomenon of Employee Retirement Income Security Act preemption providing immunity for some managed care organizations.

Chapter 8: Medical Staff Privileges and Peer Review

This chapter focuses on decisions about medical staff privileges. It points out that management and the medical staff are responsible for the credentialing process and may recommend physician applicants (including doctors of osteopathy, dentistry, podiatry, and chiropractic, as well as other physicians, depending on state law). The ultimate responsibility for appointing a competent medical staff lies with the hospital governing board, however. The chapter also addresses issues related to the peer review and quality assurance functions, both of which are efforts to monitor the quality of care. It concludes with some thoughts about accountable care organizations, complementary and alternative medicine practices, and integrative healthcare.

Chapter 9: Health Information Management

The title of this chapter reflects a belief that the term *medical records* is passé because information about a person's health (or payment for health-related services) can be maintained in many types of media other than paper. Regardless of the form in which it is maintained, health information must be accurate and its confidentiality must be ensured. This chapter reviews the various ways in which health information is properly used, such as for documentation of treatment, for accurate billing, and as evidence in legal forums. It also discusses the Health Insurance Portability and Accountability Act and other state and federal laws that govern the protection of health information. It outlines circumstances in which third parties may legitimately access individuals' health information with and without patient consent, and it points out the pitfalls that one can encounter when that information is improperly disclosed inadvertently or through "hacking" by cyberthieves.

Chapter 10: Emergency Care

This chapter reviews the common-law rule that individuals have no duty to provide emergency care and the rule's numerous exceptions, both judicial and statutory. It provides considerable detail on the federal Emergency Medical Treatment and Labor Act, which currently sets the standard for emergency department personnel's review of patients' conditions, and presents examples of liability for failure to meet those standards. The chapter concludes with a brief discussion of Good Samaritan statutes, which are probably unnecessary but have afforded some medical personnel a measure of emotional comfort.

Chapter 11: Consent for Treatment and Withholding Consent

This chapter explores the difference between consent and informed consent and outlines the minimum requirements for the latter. It also considers consent issues in emergency situations and such thorny issues as the right to die (i.e., refusal to consent to life-sustaining treatment), consent for patients

who are not competent to make choices for themselves, and physicians' role in helping terminally ill patients end their lives legally. The chapter ends with discussion of various methods of documenting and enforcing patients' end-of-life preferences—including living wills and durable powers of attorney—and discusses “death with dignity” laws that allow physicians to help certain terminal patients to end their own lives. The landmark Montana case permitting physician aid in dying in the absence of statute is presented in *The Court Decides*. The appendix compares advance directives to Physician Order for Life-Sustaining Treatment forms.

Chapter 12: Taxation of Healthcare Institutions

This chapter addresses the taxation of healthcare organizations, which are primarily not-for-profit corporations. All tax-exempt organizations are not-for-profit, but not all not-for-profits are tax exempt. The standards for income and property tax exemption are also discussed, as are the occasions in which some income of a tax-exempt organization may be taxable. The chapter raises the question of what it means to be a charity and what implications that designation may have under federal and state law. It closes with a review of a 2010 decision that, if followed by other states, augurs rough sailing ahead for nonprofit hospitals' property tax exemptions, especially if the ACA continues to decrease the number of uninsured Americans.

Chapter 13: Competition and Antitrust Law

This chapter reviews the basic concepts of antitrust law, including laws against restraints of trade, monopolization, and price discrimination. It distinguishes among the various per se violations and shows how cases that do not fit one of those categories are decided on the basis of a rule-of-reason analysis. Exemptions from the antitrust laws include implied repeal, state action, Noerr-Pennington, and the business of insurance doctrines. This chapter reviews the factors used in defining the appropriate market for individual cases, and it concludes with a discussion of what to expect in the coming years, especially now that the ACA is being implemented. A significant US Supreme Court decision from North Carolina has been added to *The Court Decides*, and other cases (from Ohio and Idaho) are also discussed.

Chapter 14: Issues of Reproduction and Birth

This chapter reviews many of the sensitive and contentious legal questions surrounding reproduction. These include sterilization, wrongful life, wrongful birth, surrogate parenting, in vitro fertilization (IVF), stem cell research, and abortion. The hospital's role in reproduction issues is discussed, including whether the hospital can be required to provide such services and whether government programs will pay for the procedures if the hospital does provide

them. The chapter also points out that stem cell research will continue to be an issue, and it points out that it may only be a matter of time before abortion shows up again on the Supreme Court's docket.

Chapter 15: Fraud Laws and Corporate Compliance

This chapter addresses one of the most salient issues in healthcare today: the prevention of fraud and abuse in governmental healthcare programs. The major fraud laws are reviewed, as are the aggressive enforcement activities of federal and state regulators; the severe monetary and criminal penalties that can be imposed for violations of these laws are emphasized. The chapter also discusses some of the changes to the fraud laws occasioned by the passage of the ACA, and it reviews the basics of a proper corporate compliance program, an essential preventive measure and a valuable resource for a wide range of legal and ethical issues.

Instructor Resources

This book's Instructor Resources include a test bank; PowerPoint presentations; and an updated instructor's manual with chapter overviews, answers to end-of-chapter discussion questions, and answers to end-of-case discussion questions.

For the most up-to-date information about this book and its Instructor Resources, go to ache.org/HAP and browse for the book's title, author name, or order code (2403).

This book's Instructor Resources are available to instructors who adopt this book for use in their course. For access information, please e-mail hapbooks@ache.org.

ACKNOWLEDGMENTS

Rare are the authors who are not beholden to others for the success of their work. In my case, gratitude extends back more than two decades to the late professor Arthur F. Southwick of the University of Michigan. It was he who authored *The Law of Hospital and Health Care Administration* (1978), the landmark text, published by Health Administration Press (HAP), from which this book descends.

I used the second edition of the book while teaching at Washington University School of Medicine, and I collected a set of companion cases that HAP published as a supplement. Upon Professor Southwick's death in 1997, the editors approached me to update the text. Thus my name first appears on the third edition, known then as *Southwick's The Law of Healthcare Administration* (1999).

In addition to Professor Southwick—whom I never met, unfortunately—I am grateful to the many staff and editors of HAP who have assisted me for nearly 25 years. The list includes Andrew Baumann, Helen-Joy Bechtel, Jane Cayalag, Janet Davis, Cepheus Edmondson, Rob Fromberg, Marisa Jackson, Scott Miller, Betsy Perez, Theresa Rothschadl, Jennifer Seibert, James Slate, and Chris Underdown. These dedicated individuals have reconfirmed the old adage, “There is no such thing as good writing; there is only good rewriting [and proofreading, layout, cover design, marketing, etc.].”

For this new edition of the book I am especially indebted to my copyeditor, Theresa Rothschadl. I also thank Joseph Topinka, Sallie Thieme Sanford, G. Roger King, Martha “Marty” Knutson, and Jeff Sconyers for their professional advice on human resources issues; Susan and Rick Jackson on human resources and other subjects; and Peter Korchnak, Amy Vandembroucke, Lonny Shavelson, Bob Uslander, Jeff Levine, Kathryn Tucker, and Amy Harris Lavan on death with dignity and aid in dying. Without the assistance of these fine professionals, this text would not be as good as it is. Any remaining errors or omissions, of course, are mine.