

OUTLINE

PREFACE	V
A GLOSSARY OF TERMS AND ACRONYMS	IX
TABLE OF CASES	XXIII

PART I. THE FUNDAMENTALS OF HEALTH CARE DELIVERY AND FINANCE

Chapter 1. Health Insurance Coverage and Regulatory Reform.....	3
A. The Crisis in Health Care Spending and Coverage.....	3
1. The Dimensions of the Crisis.....	3
a. The Spending Crisis	3
b. The Coverage Crisis.....	5
2. The Causes of the Spending Crisis.....	8
a. The Structure of Traditional Insurance.....	9
b. The Incentives for Patients	10
c. The Incentives for Providers	12
d. The Incentives for Insurers and Employers.....	14
e. Traditional Medicare Reimbursement.....	16
f. Managed Care and the Structure of Health Insurance	17
B. Insurance Coverage Reform	20
1. Socialized Medicine and the British System	20

2.	Single Payer, Canadian-Style Insurance	21
3.	Employer or Individual Mandates.....	24
4.	Incremental Alternatives	26
5.	Managed Competition	27
C.	Interlude: Economic and Regulatory Theory	30
1.	The Need for Health Care Rationing	30
2.	The Ethics of Health Care Rationing	33
a.	Rationing Criteria.....	33
b.	Rationing Decision Makers	36
3.	The Economics of Health Care Rationing.....	41
a.	Free Markets vs. Government Controls	41
b.	Economic Theory.....	44
D.	Cost Containment Reforms.....	47
1.	Reducing the Scope of Insurance.....	47
a.	Practical Problems.....	47
b.	Disability Discrimination and Other Legal Problems.....	50
2.	Rigorously Reviewing the Necessity of Care	55
3.	Reforming Provider Payment	59
a.	Medicare Prospective Payment.....	60
b.	Capitation Payment and HMOs	66
4.	Public Utility Regulation	72
E.	Recapitulation.....	73
	Chapter 2. The Treatment Relationship	75
A.	Duty to Accept and Treat Patients.....	76
1.	Doctors.....	77
a.	The “No-Duty” Rule	77

b.	Formation of the Treatment Relationship	79
2.	Hospitals	81
a.	The General Duty to Provide Care	82
b.	Access to Emergency Care	83
(1)	Common Law and Statutory Rights.....	84
(2)	The Emergency Medical Treatment and Active Labor Act	86
(a)	Screening	87
(b)	Treatment and Stabilization	90
(c)	“Preventive” Dumping	91
3.	Doctors Within Health Care Organizations.....	92
4.	Wrongful Denials: Antidiscrimination Law and Refusal to Treat.....	93
a.	Title VI: Race and Ethnicity	94
b.	Disability Discrimination.....	94
(1)	Protected Class.....	95
(2)	Core Provisions	97
5.	Other Bases for a Duty to Treat	101
a.	Constitutional Rights of Access	101
b.	Patients’ Rights.....	103
6.	Terminating the Treatment Relationship	104
B.	The Legal Content of the Treatment Relationship	108
1.	The Fiduciary Core of the Treatment Relationship	108

2.	Confidentiality	110
a.	The Duty to the Patient.....	110
(1)	Common Law Protections.....	111
(2)	Statutory Protections.....	112
b.	The Duty to Protect Third Parties and the Limits of Confidentiality	114
(1)	Statutory Duties to Report.....	115
(2)	Common Law Duty to Protect Third Parties	116
(a)	Basis of the Duty: “Hazard” or “Special Relationship”	117
(b)	Foreseeable Plaintiffs	120
(c)	Discharge of the Duty to Protect.....	121
3.	Informed Consent	123
a.	Classic Doctrine	125
(1)	Risk: What Information Must Be Shared?.....	125
(2)	Negligence: Measuring the Physician’s Conduct	126
(3)	Causation.....	128
(4)	Exceptions to the Duty to Disclose	129
b.	Conflicts of Interest and Fiduciary Principles.....	130
c.	Emerging Applications of Informed Consent	132
4.	Modifying the Terms of the Treatment Relationship	134

**PART II. THE LEGAL STRUCTURE
OF HEALTH CARE DELIVERY**

Chapter 3. Hospital Structure and

Regulation	139
A. Hospital and Facility Regulation	140
1. Licensure, Certification, and Private Accreditation	140
2. Certificate of Need Laws	144
B. Hospital and HMO Medical Staff Issues	150
1. Medical Staff Structure and Staff Selection Process	150
2. Economic Credentialing, Exclusive Contracts, and Institutional Control.....	153
3. Insurance Deselection and Managed Care Contracting	156
4. Hospital Medical Staff Disputes	159
a. Introduction	159
b. Theories of Judicial Review	161
c. The Scope of Judicial Review	166
5. Physician Membership in Managed Care Networks	172
6. Peer Review Confidentiality and Immunity	174
a. State Peer Review Confidentiality Statutes	174
b. Federal Peer Review Immunity	175
C. Labor and Employment Law	177
1. Labor Law	178
a. Patient Care Concerns	178
b. Physician Unions	179

2. Employment Law..... 182
 - a. Wrongful Discharge..... 182
 - b. Covenants Not to Compete..... 184

Chapter 4. Antitrust Law and Health

- Care 187**
- A. Introduction 187
 - B. Antitrust Boycott Law..... 188
 1. The Conspiracy Requirement 189
 2. Medical Staff Boycotts as Restraints of Trade 191
 - a. Avoiding Per Se Illegality 191
 - b. Avoiding Trial on the Merits..... 196
 3. Exclusions from Managed Care Networks and Illegal Tie-Ins 198
 4. The Patient Care Defense 201
 5. The Interstate Commerce and State Action Defenses 204
 - C. Price Fixing and Vertical Restraints Involving Insurers 207
 1. Price Fixing in Provider Networks 207
 2. Monopolization by Insurers 213
 3. McCarran-Ferguson Exemption 216
 - D. Merger Law..... 217

Chapter 5. Complex Transactions and

- Organizational Forms..... 223**
- A. The Corporate Practice of Medicine 224
 1. The Doctrine's Rationale..... 225
 2. The Doctrine's Survival..... 227
 - B. Insurance and HMO Regulation 229
 1. State Solvency Laws..... 229
 2. Managed Care Regulation 231

3.	Federal Insurance Reform	233
C.	ERISA Preemption	234
D.	Charitable Tax Exemption	241
1.	The Basis for Tax Exemption	242
a.	Hospital Services	242
b.	Other Health Care Institutions	244
2.	Inurement to Private Benefit.....	247
3.	Unrelated Business Income	249
4.	Hospital Reorganization, Diversification, and Conversion of Status	250
a.	Reorganization and Diversification	250
b.	Conversion to For-Profit Status.....	252
E.	Referral Fee Prohibitions.....	256
1.	Sources of Law	256
2.	Earned Versus Unearned Fees	258
F.	Summary.....	261

**PART III. ETHICAL ISSUES IN
PATIENT CARE DECISIONS**

Chapter 6. Defining Death and

	Transplanting Organs	267
A.	Defining Death	267
1.	Cardiopulmonary Criteria	268
2.	Neurological Criteria: Whole Brain Death	268
3.	Neurological Criteria: Upper Brain Death	272
B.	Organ Procurement and Allocation.....	276
1.	Procurement of Organs	277
a.	Organ Donation	277

- b. Donation and the Definition of Death 280
 - c. Mandates, and Novel Rules, for Organ Procurement 281
 - (1) After Death..... 281
 - (2) During Life 284
 - (3) Ownership of Organs 286
- 2. Allocation of Organs 287
 - a. Waiting Lists and UNOS Distribution 288
 - b. The Ethics of Allocation Policies.... 290

Chapter 7. End-of-Life Medical Decisions 295

- A. Refusal of Life-Sustaining Treatment 296
 - 1. The Individual Interests at Stake 298
 - 2. The State's Interests 300
 - 3. Balancing the Different Interests..... 301
 - 4. Potential Ethical Distinctions..... 307
 - a. Withholding Versus Withdrawing Treatment..... 307
 - b. Type of Treatment at Stake 308
 - 5. The Patient Whose Competence Is Uncertain 313
 - a. Adolescents..... 319
 - 6. Patients Lacking Decisionmaking Capacity 321
 - a. Incapacity and the Right to Have Treatment Withheld or Withdrawn 322
 - b. Variation in Procedural Rules 323
 - c. General Trends in Procedural Rules 338
 - d. Advance Directives 340

e.	Deciding for Children	345
(1)	The General Framework of Child Protective Laws.....	345
(2)	The Special Case of the Newborn	349
(a)	Child Abuse Amendments of 1984	350
(b)	Rehabilitation Act and Americans with Disabilities Act	352
(c)	The Role of Physicians	355
B.	Physician Aid in Dying	355
1.	Aid in Dying and the Constitution	356
2.	Rights to Aid in Dying.....	358
3.	The Distinction Between Treatment Withdrawal and Aid in Dying.....	359
4.	Voluntary Stopping Eating and Drinking (VSED)	366
5.	Palliative Sedation	366
C.	Denying “Futile” Treatment to the Patient Who Requests It	369

Chapter 8. Selected Issues in Reproductive

	Medicine.....	379
A.	The Right to Procreate	379
B.	Assisted Reproduction.....	381
1.	Artificial Insemination by Donor (AID).....	382
a.	Basic Rules.....	382
b.	Use by Lesbian Couples	389
c.	Newer Issues.....	390

2.	Surrogate Motherhood, Egg Donation, and In-Vitro Fertilization	391
a.	Surrogacy Contracts Under Traditional Law	392
(1)	Regulation of Private Placement Adoptions	392
(2)	Rights and Identity of the Father	395
(3)	<i>In re Baby M.</i>	396
b.	Gestational Surrogacy and Changing Law	401
3.	The Status of Stored Embryos	405
4.	Genetic Medicine	409
C.	The Right Not to Procreate	417
1.	Contraception and Abortion	417
a.	Contraception	417
b.	Abortion	418
(1)	The Undue Burden Standard	421
(2)	Viability	425
D.	Maternal-Fetal Conflict	427
1.	Forced Treatment and Fetal Surgery....	429
2.	Fetally Toxic Maternal Behavior During Pregnancy	438
	INDEX	451