

Title Page—TK



JONES AND BARTLETT PUBLISHERS

Sudbury, Massachusetts

BOSTON TORONTO LONDON SINGAPORE

World Headquarters

Jones and Bartlett Publishers
40 Tall Pine Drive
Sudbury, MA 01776
978-443-5000
info@jbpub.com
www.jbpub.com

Jones and Bartlett Publishers
Canada
6339 Ormindale Way
Mississauga, Ontario
L5V 1J2
CANADA

Jones and Bartlett Publishers
International
Barb House, Barb Mews
London W6 7PA
UK

Jones and Bartlett's books and products are available through most bookstores and online booksellers. To contact Jones and Bartlett Publishers directly, call 800-832-0034, fax 978-443-8000, or visit our website www.jbpub.com.

Substantial discounts on bulk quantities of Jones and Bartlett's publications are available to corporations, professional associations, and other qualified organizations. For details and specific discount information, contact the special sales department at Jones and Bartlett via the above contact information or send an email to specialsales@jbpub.com.

Copyright 2006 by Jones and Bartlett Publishers, Inc.

All rights reserved. No part of the material protected by this copyright notice may be reproduced or utilized in any form, electronic or mechanical, including photocopying, recording, or any information storage or retrieval system, without written permission from the copyright owner.

This publication is designed to provide accurate and authoritative information in regard to the Subject Matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional service. If legal advice or other expert assistance is required, the service of a competent professional person should be sought.

Library of Congress Cataloging-in-Publication Data

Pozgar, George D.

Legal aspects of health care administration / George D. Pozgar.—10th ed.
p. cm.

Includes bibliographical references and index.

ISBN-13: 978-0-7637-3927-0

ISBN-10: 0-7637-3927-8

1. Medical laws and legislation—United States. 2. Medical personnel—Malpractice—United States. I. Title.

KF3821.P69 2007

344.7304'1—dc22

2006021306

6048

Production Credits

Publisher: Michael Brown

Production Director: Amy Rose

Associate Editor: Kylah Goodfellow McNeill

Associate Production Editor: Rachel Rossi

Marketing Manager: Sophie Fleck

Manufacturing Buyer: Therese Connell

Composition: Circle Graphics

Cover Design: Timothy Dziewit

Printing and Binding: TK

Cover printing: TK

Printed in the United States of America

Contents

Preface	vii
Acknowledgments	xi
Chapter 1 Historical Perspective	1
Early Hindu and Egyptian Hospitals	1
Greek and Roman Hospitals	1
Hospitals of the Early Christian Era	2
Mohammedan Hospitals	2
Early Military Hospitals	3
Medieval Hospitals—The Dark Ages	3
Hospitals of the Renaissance	4
Hospitals of the 18th Century	4
Early Hospitals in the United States	5
Late 19th-Century Renaissance	6
20th-Century Progress	8
Health Care and Hospitals in the 21st Century	9
Just a Beginning	9
Chapter Review	9
Review Questions	10
Web Site References	10
Chapter 2 Introduction to Law	13
Sources of Law	13
Government Organization	18
Department of Health and Human Services	21
Chapter Review	24
Review Questions	24
Chapter 3 Tort Law	27
Negligence	28
Summary Case	36
Intentional Torts	37
Strict/Products Liability	46
Chapter Review	50
Review Questions	52
Chapter 4 Criminal Aspects of Health Care	53
Criminal Law	53
Criminal Procedures	54
False Claims	55
Kickbacks	55
HIPPA and Health Care Fraud	56
Falsification of Records	59
Misuse and Theft of Drugs	59

Physicians Can Be Victims of Fraud	60
Patient Abuse	61
Murder	65
Petty Theft	68
Sexual Assault	69
Chapter Review	69
Review Questions	69

Chapter 5	Contracts and Antitrust	71
	Purpose of a Contract	72
	Types of Contracts	72
	Elements of a Contract	73
	Breach of Contract	73
	Corporate Contracts	73
	Partnerships	74
	Agents	74
	Independent Contractor	75
	Legality of Object	75
	Conditions	75
	Performance	75
	Nonperformance Defenses	76
	Statute of Limitations	76
	Remedies	76
	Employment Contracts	77
	Medical Staff Bylaws: A Contract	80
	Exclusive Contracts	82
	Restraint of Trade	84
	Federal Trade Commission	84
	Sherman Antitrust Act	84
	Hospital Staff Privileges	86
	Patient Transfer Agreement	87
	Insurance Contract	89
	Chapter Review	90
	Review Questions	91

Chapter 6	Civil Procedure and Trial Practice	93
	Pleadings	94
	Discovery and Examination Before Trial	96
	Attorney-Client Privilege	96
	Incident and Investigative Reports	97
	Preparation of Witnesses	97
	Motions	98
	Pretrial Conference	98
	Motion to Dismiss	98
	Summary Judgment	99
	Notice of Trial	99
	Memorandum of Law	99
	The Court	99
	The Jury	100

Subpoenas	100
Burden of Proof	101
Statutory Violation	101
Policy and Procedure Violations	101
Res Ipsa Loquitur	101
Opening Statements	103
Examination of Witnesses	103
Evidence	104
Expert Testimony	108
Defenses Against Plaintiff's Allegations	109
Closing Statements	117
Judge's Charge to the Jury	117
Jury Deliberation and Determination	118
Awarding Damages	118
Joint and Several Liability	122
Appeals	122
Execution of Judgments	123
Chapter Review	123
Review Questions	124
Chapter 7 Corporate Liability	143
Introduction	143
Authority of Health Care Corporations	144
Corporate Organization and Committee Structure	145
Doctrine of Respondeat Superior	147
Corporate Negligence	150
Duties of Health Care Corporations	152
CEO/Administrator's Role and Responsibility	160
Medical Staff	162
Chapter Review	163
Review Questions	164
Chapter 8 Medical Staff	000
Introduction	000
Medical Staff Organization	000
Medical Staff Privileges	000
Delineation of Clinical Privileges	000
Appeal Process	000
Medical Staff Bylaws—A Contract	000
Physician Supervision and Monitoring	000
Reappointments	000
Medical Director	000
Negligent Acts	000
Physician-Patient Relationship	000
Chapter Review	000
Review Questions	000
Chapter 9 Nursing and the Law	000
The Practice of Nursing	000
The Broadening Scope of Practice	000

Nurse Licensure	000
American Nurses Association	000
National League for Nursing	000
Nurse Practice Roles	000
Negligent Acts	000
Chapter Review	000
Review Questions	000

Chapter 10 Liability by Departments and Health Care Professionals 000

Introduction	000
Ambulatory Care Centers	000
Anesthesia	000
Chiropractor	000
Dentist	000
Emergency Department	000
The Environment	000
Laboratory	000
Medical Imaging	000
Nutritional Services	000
Paramedic	000
Pharmacy	000
Physical Therapy	000
Physician Assistant	000
Podiatrist	000
Respiratory Therapist	000
Security	000
Sexual Improprieties	000
Surgery	000
Certification of Health Care Professionals	000
Licensing Health Care Professionals	000
Helpful Advice for Caregivers	000
Chapter Review	000
Review Questions	000

Chapter 11 Information Management and Health Care Records 000

Introduction	000
Managing Information	000
Medical Records	000
Chapter Review	000
Review Questions	000

Chapter 12 Patient Consent 000

Introduction	000
Consent—A Definition	000
Patient Self-Determination Act	000
Informed Consent	000

	Right to Refuse Treatment	000
	Proof of Consent	000
	Who May Consent	000
	Religious Beliefs	000
	Refusal of Treatment	000
	Release Form	000
	Exculpatory Agreement	000
	Statutory Consent	000
	Consent and Judicial Intervention	000
	Defense and Failure to Inform	000
	Chapter Review	000
	Review Questions	000
Chapter 13	Legal Reporting Requirements	000
	Introduction	000
	Child Abuse	000
	Elder Abuse	000
	Communicable Diseases	000
	Births and Deaths	000
	Suspicious Deaths	000
	National Practitioner Data Bank	000
	Risk Management and Incident Reporting	000
	Sentinel Events and The Joint Commission	000
	Corporate Compliance Programs	000
	Chapter Review	000
	Review Questions	000
Chapter 14	Issues of Procreation	000
	Introduction	000
	Abortion	000
	Circuit and District Court Decisions	000
	State Regulation	000
	Sterilization	000
	Artificial Insemination	000
	Wrongful Birth, Life, and Conception	000
	Chapter Review	000
	Review Questions	000
Chapter 15	Patient Rights and Responsibilities	000
	Introduction	000
	Patient Rights	000
	Admission	000
	Discharge	000
	Transfer	000
	Patient Bill of Rights	000
	Patient Responsibilities	000
	Patient Advocacy	000
	Chapter Review	000
	Review Questions	000

Chapter 16	Acquired Immune Deficiency Syndrome	000
	AIDS and Health Care Workers	000
	Suspension of Surgical Privileges	000
	Confidentiality	000
	Medical Records	000
	AIDS and the Right to Know	000
	AIDS: The Right To Treatment	000
	Mandatory Testing	000
	News Media and Confidentiality	000
	Discrimination	000
	Negligence	000
	Criminal Actions	000
	Reporting Requirements	000
	AIDS Emergency Act	000
	Occupational Safety and Health Act	000
	AIDS Education	000
	Chapter Review	000
	Review Questions	000
Chapter 17	Health Care Ethics	000
	Introduction	000
	Ethics Committee	000
	End-of-Life Issues	000
	Autopsy	000
	Organ Donations	000
	Experimentation	000
	Chapter Review	000
	Review Questions	000
Chapter 18	Malpractice Insurance	000
	Introduction	000
	The Insurance Policy	000
	Liability of the Professional	000
	The Insurance Policy	000
	Medical Liability Insurance	000
	Medical Malpractice Insurance Associations	000
	Self-Insurance	000
	Trustee Coverage	000
	Mandated Medical Staff Insurance Coverage	000
	Investigation and Settlement of Claims	000
	Chapter Review	000
	Review Questions	000
Chapter 19	Labor Relations	000
	Introduction	000
	Unions and Health Care Organizations	000
	Federal Labor Acts	000
	State Laws	000
	Labor Rights	000
	Management Rights	000
	Equal Employment Opportunity—Affirmative Action Plan	000
	Patient Rights During Labor Disputes	000

	Injunctions	000
	Administering a Collective Bargaining Agreement	000
	Chapter Review	000
	Review Questions	000
Chapter 20	Employment, Discipline, and Discharge	000
	Introduction	000
	Employment at Will	000
	Public Policy Issues	000
	Interference with Employment Activities	000
	Defamation Actions	000
	Retaliatory Discharge	000
	Fairness: The Ultimate Test	000
	Unemployment Compensation	000
	Termination	000
	Effective Hiring Practices	000
	Chapter Review	000
	Review Questions	000
Chapter 21	Managed Care and Organizational Restructuring	000
	Introduction	000
	Common Models of Managed Care Organizations	000
	Horizontal Consolidations	000
	Federally Qualified HMOs	000
	State Laws	000
	Case Management Firms	000
	Third-Party Administrators	000
	Utilization Review	000
	Liability for Nonparticipating Physicians	000
	Employee Retirement Income Security Act	000
	Reducing Exposure to Liability	000
	Health Care Quality Improvement Act of 1986	000
	Managed Care and Legal Actions	000
	Antitrust	000
	Corporate Reorganization	000
	Restructuring Alternatives	000
	General Considerations	000
	Medical Staff and Restructuring	000
	Fund-Raising	000
	Regulatory Authority Checklist	000
	Anticompetition	000
	Safe-Harbor Regulations	000
	Statements of Antitrust Enforcement Policy in the Health Care Area	000
	Chapter Review	000
	Review Questions	000
Chapter 22	Tort Reform and Reducing the Risk of Malpractice	000
	Introduction	000
	Arbitration and Mediation	000

Structured Awards	000
Pretrial Screening Panels	000
Collateral Source Rule	000
Contingency Fee Limitations	000
Frivolous Claim	000
Joint and Several Liability	000
Malpractice Caps	000
No-Fault System	000
Peer Review Organizations	000
Medical Misconduct	000
Regulation of Insurance Practices	000
Setting Standards of Medical Care	000
National Health Care Reform	000
Risk Management	000
Continuous Quality Improvement	000
Chapter Review	000
Review Questions	000

Chapter 23 Patient Safety and Zero Tolerance	000
Introduction	000
Leadership	000
Medical Staff	000
Human Resources	000
Educations	000
Information Technology (IT)	000
Planning	000
Resource Allocation	000
Performance Improvement (PI)	000
Abbreviations	000
Blood Transfusions	000
Emergency Department (ED)	000
Environmental Safety	000
Identifying the Correct Patient	000
Illegible Handwriting	000
Infant Security	000
Infection Control	000
Laboratory	000
Medication Use	000
Patient Assessment	000
Patient Care Unit	000
Patient Rights	000
Sterile Supply	000
Surgery	000
Verbal Orders	000
Ventilator-Related Injuries	000
Spiritual Care Services	000
Web Sites	000
Chapter Review	000

Chapter 24	Worldwide Search	000
	Introduction	000
	Web Site Directory	000
	International Web Sites	000
Chapter 25	Journey to Excellence	000
	A Patient’s Perspective	000
	Creating a New World Order	000
	The Journey Begins	000
	The Health Care War Room	000
	Dream Boards	000
	Ideas for Getting Started	000
	Funding Your Programs	000
	The Five Senses	000
Glossary		000
Index		000

Welcome to the tenth edition of *Legal Aspects of Health Care Administration*. Whether the reader is a student or a seasoned professional, the topics presented in the following chapters, as with previous editions, lay a strong foundation in health law. The tenth edition presents a wide range of health law topics in an interesting and understandable format, leading the reader through the complicated maze of the legal system. This book describes how common medical errors which have consistently been repeated over time continue to have a negative impact on the reputations and financial well-being of healthcare professionals, their employers and more importantly, the health and lives of their patients.

The news media continues to paint a grim picture of the health care industry by featuring distressing headlines that sensationalize medical errors. The following are some of the more recent examples of headlines in the media:

- ERs Swamped Despite New Beds and Strategies

“The demands on emergency medicine that last week brought warnings of a national system in crisis are as intense locally as almost anywhere in the country.”

Washington Post, June 18, 2006

- When Doctors Make Mistakes

“I wouldn’t have sued if I’d been shown the smallest bit of human compassion. . . .”

—*SELF*, May 2006

- “. . . They’re Here”

“Previously, hospitals were told well in advance of when the JCAHO surveyors were scheduled to arrive for on-site inspections, and facilities

spent months preparing for the visit. Prompted by criticism that the visits were being stage-managed, the JCAHO switched to unannounced inspections. . . . Now, hospitals only know that surveyors will show up. . . .”

—*Modern Hospital*, April 24, 2006

- What Doctors Hate About Hospitals

“It requires almost a stroke of luck to enter a U.S. hospital and receive precisely the right treatment—no more and no less.”

—*TIME*, May 1, 2006

- Illegal Trade in Bodies Horrifies Loved Ones

“Over the past 19 years, more than 16,800 families have been represented in lawsuits claiming loved ones’ body parts were stolen for profit.”

—*USA TODAY*, April 27, 2006

- Infections Take Heavy Toll on Patients, Profit

—*The Washington Post*, March 29, 2006

- Hospitals Save Money but Safety is Questioned

“A growing number of hospitals . . . are saving money by reusing medical devices designated for one time use, ignoring the warnings of manufacturers, which will not vouch for the safety of their reconditioned products. . . .”

—*The Washington Post*, December 11, 2005

- 11,600 Patients Got Infections in PA. Hospitals

“Pennsylvania . . . the first state to publicly report the toll hospital infections take, saying that more than 11,600 patients got infections last year.”

—*USA TODAY*, July 13, 2005

- Life and Death Politics

“The Schivao case is just the latest front in a much nastier war. It is an American tragedy for the modern media age—litigious, polarizing, personal, political, and televised round the clock”

—*U.S. News and World Report*, April 4, 2005

- Top 100 Verdicts of 2004

“Resident left unattended drowned in bathtub . . . Brain damage blamed on delayed response to early labor emergency situation . . . Nurse failed to inform physician of irregular heart rate . . . Doctor cut one duct too many during gallbladder removal. . . .”

—*National Law Journal*, February 21, 2005

- Fatal Medical Errors Said to be More Widespread

“. . . the number of patients who died from medical errors is more than double the findings in a 1999 report that sparked widespread concern.”

—*The Wall Street Journal*, July 27, 2004

- Public Opinion on Medical Care

“Nearly half the public say they are very concerned about an error resulting in injury happening to themselves or their family when they receive health care in general. . . .”

—*Kaiser Family Foundation*, July/August 2003.

The readers of this book must not become so desensitized that they believe such occurrences cannot happen to them. Because the law is continually evolving, it is important that the reader possess a basic understanding of how and when the law relates to the health care field in general, and the reader’s specific area of responsibility in particular.

This book answers that need by serving as both a text in the classroom and as a reference for the practitioner. To assist the reader in applying the substantive material in this book, actual court cases are presented. The decisions in cases discussed are generally governed both by applicable state and federal statutes and common-law principles. When reviewing a case, the reader must keep in mind that the case law and statutes of one state are not binding in another state.

This edition begins with a chapter that provides some historical perspective on the development of hospitals, illustrating both their progress and failures through the centuries. There is broad discussion of the legal system, including the sources of law. The text continues with a basic review of tort law, criminal issues, contracts, anti-trust, civil procedure, and a wide range of real life legal and ethical dilemmas that caregivers have faced as they wound their way through the courts. The final chapters provide an overview of various ways to improve the quality and delivery of health care.

Although the court cases relating examples of malpractice are often mirror images of the failures of medicine, this tenth edition presents a book of lessons from which the reader can understand where the medical and legal worlds collide. Taken as a whole, the content of this book serves as a reminder to its readers that they must learn from the mistakes and tragedies experienced by others to avoid repeating them. The legal cases and resulting headlines should be a reminder as to the responsibility the caregiver has to the profession he or she chosen, and to use the knowledge gained from studying this book to help prevent themselves from becoming the next headline.

IT’S YOUR GAVEL

“It’s Your Gavel” boxes provide the reader an opportunity to make decisions about actual court cases. Most chapters begin with a case that has been reviewed by the courts in state or federal jurisdictions. After reviewing each case and subsequent relevant material, readers can take on the role of the fact finder and render a decision. Then, at the end of the respective chapters, the actual court findings and reasoning for each case are given in “The Court’s Decision” box.

CASE PRESENTATION FORMAT

When reviewing the various cases in this book, the reader should consider what happened, why things went wrong, what the relevant legal issues are, and how the event could have been prevented. The reader should also consider if one fact in a particular case changed, how the outcome might have been different. What would the fact be? The

cases presented in the text have been chosen because of their frequency of occurrence. The general format for case review is as follows:

Title: Each case has a title that signals the type of case to be reviewed.

Case Citation: describes where a court's opinion in a particular case can be located. It identifies the parties in the case, the text in which the case can be found, the court writing the opinion, and the year in which the case was decided. For example, the case citation "Bouvia v. Superior Court (Glenchur), 225 Cal. Rptr. 297 (Ct. App. 1986)" is described as follows:

- * Bouvia v. Superior Court (Glenchur): identifies the basic parties involved in the lawsuit.
- * 225 Cal. Rptr. 297: identifies the case as being reported in volume 225 of the California Reporter on page 297.
- * Cal. Ct. App. 1986: identifies the case as being decided in the California Court of Appeals in 1986.

Students who wish to research a specific case should visit a law school library, which will contain various state and regional reporters.

Facts: A review of the material facts of the case is presented. **Issues:** This is the disputed point or question the

judge or jury must decide. The issues discussed in any given case are selected for review on the basis of medical and legal pertinence to the health care professional. Although any one case in this text may have multiple issues, emphasis is placed on those issues considered to be more relevant for the reader in the context of the topic being discussed.

Issue: A description as to why a case is being presented to the court.

Holding: The court's ruling based on the facts, issues, and applicable laws pertaining to a case is summarized.

Reason: The rationale for the court's decision based on the facts, issues, and relevant laws surrounding a case is presented. Several cases in the text require students to analyze the case themselves and determine the facts, issues, holding, and reason for that case decision.

Discussion: Discussion questions, although prompted by a particular case, may not necessarily be germane to the facts of the case. The questions are merely presented as opportunities for discussion and in no way add to the facts of a specific case decision.

**Author's Note:* This text is educational in nature and should not be considered a substitute for legal advice on any particular issue. Moreover, each chapter presents an overview, rather than an exhaustive treatment, of the various topics.

Acknowledgments

I am grateful to the very special people in the more than 600 hospitals in forty states with whom I have consulted, surveyed, and provided education over the past 15 years. Their shared experiences have served to remind me of the importance to make this book more valuable in the classroom and as a reference for practicing health care professionals.

To my students in health care law classes at the New School for Social Research, Molloy College, Long Island University-C.W. Post College, Saint Francis College, Saint Joseph's College, my intern from Brown University, and my resident in hospital administration, while I was an on-site faculty member of the George Washington University in Washington, D.C., as well as those I have instructed through the years at various seminars, I will always be indebted for your inspiration.

Special thanks to the Physicians' Record Company for granting permission to use the chapter "History of Hospitals," as adapted from the book *Hospital Organization and Management* by Malcolm T. MacEachern, M.D., C.M., D.Sc. (Hon.), LL.D. (Hon.), F.A.C.S., F.A.C.P., F.A.C.H.A., F.A.I.H.A. (Australia).

Many thanks are also extended to all those special people at the National Library of Medicine and the Library of Congress for their guidance over the years in locating research materials.

The author especially acknowledges the staff at Jones and Bartlett Publishers, Inc., whose guidance and assistance was so important in making this Tenth Edition a reality. Special thanks to Mike Brown, Kylah McNeill, and Rachel Rossi.

