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### Foreword

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## Foreword

The *Annals of Health Law* editorial staff is proud to present our Winter Issue of 2008-2009. In this Issue, the Executive Board selected articles offering timely perspectives on a range of current health law topics. In each piece, the authors analyze health law issues that directly affect all of us, including medical triage, the role of the National Guard in public health emergencies, electronic medical records and Health Savings Accounts.

Given the ever-present risks of natural disasters, pandemics, bioterrorism and other public health crises, the allocation of scarce medical resources during emergency situations is of the utmost national concern. In the first article, Professor George P. Smith analyzes the principle of medical triage in distributing limited resources during public health emergencies. He applies the utilitarian principle of triage to the National Strategy of Pandemic Influenza, positing that from a cost-benefit analysis perspective, triage embodies an ideal approach to allocating resources in national emergencies. To further test the validity of medical triage, Professor Smith analyzes two model legislative proposals, the Model State Emergency Health Powers Act and the Turning Point Model State Public Health Act. He concludes that triage represents an effective means of attaining a level of Distributive Justice when allocating scarce medical resources during public health emergencies, and suggests the incorporation of the triage construct into federal policy and model state legislative proposals.

The next article offers a different perspective on managing public health crises, namely the role of the National Guard in enforcing public health mandates. James Balcius and Bryan A. Liang first analyze the activation of the National Guard through Title 10 of the U.S. Code, which prohibits the National Guard from engaging in law enforcement activities under the Posse Comitatus Act (PCA). The authors then review how the National Guard can engage in law enforcement activities if they are activated pursuant to Title 32 and thus are under state control. Balcius and Liang discuss relevant public health tools in emergency and disaster response, such as quarantine and compulsory

vaccination, as well as legal liability issues that drive policy reform. The authors conclude by proposing revisions to the PCA to clarify the law and allow for effective use of military medical assets in emergency and disaster response initiatives.

This Issue next tackles the highly debated topic of electronic medical records (EMR). Specifically, Thomas R. McLean takes a close look at EMR metadata, automatically generated “data about data” certifying how an electronic document has been manipulated. Dr. McLean reviews the potential uses of EMR metadata to profile physician conduct and credibility. He explains that unlike paper medical records, EMR metadata can provide a more realistic image of how a physician actually practices medicine. He then explores how attorneys can use EMR metadata under the new rules for electronic discovery pursuant to the Federal Rules of Civil Procedure and the Federal Rules of Evidence. He reviews recent case law and describes two situations in which EMR metadata will become the most useful: first as an authentication standard when there is a dispute over the integrity of the EMR; and second as a challenge to the veracity of EMR entries when the documentation does not explain a particular patient’s clinical outcome. He concludes by offering advice for physician-defendants to preserve a copy of the EMR with its metadata upon notice of litigation; however, he cautions that physician-defendants should not turn over metadata unless ordered by a court to do so.

Our Issue concludes by addressing Health Savings Accounts (HSAs), a recent attempt under the Medicare Prescription Drug Improvement and Modernization Act of 2003 to reduce the cost of health insurance. Adam Larson takes a critical look at HSAs, exploring whether they will live up to their purported benefits. He reviews the background of HSAs and consumer-directed health care and discusses the likelihood of the program’s success. Within the context of the current political environment, Mr. Larson discusses the future viability of HSAs. He concludes by recommending an overhaul of the current tax-benefit structure of HSAs to include subsidies for low-income families and incentives for small businesses to offer HSA-compatible health insurance plans.

The *Annals* staff is privileged to have had this opportunity to work with a distinguished group of authors, and proud to pub-

lish their contributions in this Issue of the *Annals of Health Law*. We would like to thank all of our authors for their thoughtful collaboration throughout the editorial process, and for their contributions to health law scholarship. We would also like to extend our appreciation to the Beazley Institute for Health Law and Policy for their continued support. We hope you enjoy this Issue.

ANN WEILBAECHER

Editor-in-Chief

J.D. Candidate, December 2009

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