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Foreword

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Foreword

In this Summer Issue of Volume 16, the 2006-2007 Executive Board has selected articles for publication that touch on distinctive issues affecting healthcare providers, administrators, payors, consumers, and legal practitioners. The first section of this Issue contains four scholarly pieces, and the second section contains materials related to the Beazley Institute for Health Law and Policy's Sixth Annual Health Law and Policy Colloquium, *Diagnosing the Data*.

Examining the Federal Trade Commission's retrospective challenge of a hospital merger in Illinois, Mr. Tom Campbell provides an insightful analysis of one of the agency's major anti-trust enforcement initiatives in health care in the last several years. His article, entitled "Defending Hospital Mergers After the FTC's Unorthodox Challenge to the Evanston Northwestern – Highland Park Transaction," is based in part on a presentation made to the Illinois Association of Healthcare Attorneys 24th Annual Health Law Symposium, held at the Chicago Marriott Downtown, October 4, 2006. Because the case produced several departures from antitrust orthodoxy, these departures may affect the trials of future hospital mergers that are challenged. Mr. Campbell reviews the methodology and evidence of the case, and he identifies theories and best practices that are important for administrators and legal practitioners to implement in future mergers.

Ms. Keri Tonn next examines the interplay between patient access to care, physician recruitment, and fraud and abuse protections in "HPSA and the Anti-Kickback Safe Harbor: Are We Sending Doctors to the Right Neighborhoods?" This informative article presents the problems within a niche area of health law, the Health Professional Shortage Area (HPSA) safe harbor of the Anti-Kickback Statute. Ms. Tonn advocates for its removal by discussing how the HPSA designation is being used incorrectly to curb fraudulent behavior and how the current provision serves few hospitals. The author suggests innovative solutions to remedy the problems with the current HPSA designation system.

The next article, "Gavels in the Nursery: An Appellate Court Shuts Out Parents and Physicians from Care Decisions," is co-

written by Ms. Kellie R. Lang, Dr. Steven Leuthner, and Dr. Arthur R. Derse. This article explores a recent Wisconsin Court of Appeals decision in a medical malpractice case and its ramifications regarding Wisconsin's informed consent statute. The authors compare and contrast this decision with previous Wisconsin Supreme Court cases and consider the relevance of applicable federal law. The article thoughtfully analyzes how the Wisconsin Court of Appeals should have approached the issue, and it highlights potential conflicts regarding the ethical duties of providers treating children and the role of parental input.

In "Electronic Healthcare Data Collection and Pay-for-Performance: Translating Theory into Practice," Dr. Ramesh C. Sachdeva connects the theory of pay-for-performance to the realities of its implementation. The author's insight is grounded in his work for a national data collection consortium and as Vice President of Quality and Outcomes at the Children's Hospital of Wisconsin. The article expands the *Diagnosing the Data* conversation by describing the challenges of collecting meaningful data and by addressing the potential legal issues that data use raises. Drawing on his national and local experience, Dr. Sachdeva concludes with suggestions for adopting data collection programs that are both clinically relevant and scientifically reliable.

The Colloquium section of this Issue explores the collection and use of patient and provider data by the myriad of entities having an interest in such data. Electronic medical records and their use are beginning to change the way data collection, retrieval, and analysis are done, bringing with them a host of business and legal issues. These issues were addressed at the Colloquium, *Diagnosing the Data*, held on December 5, 2006. In addition to five esteemed professionals in the health law field who gave formal presentations, many health law attorneys and scholars attended the Colloquium. We are pleased to offer our readers transcripts of each speaker's presentation at the Colloquium. Additionally, we hope you enjoy the introductions to each transcription, which were written by *Annals of Health Law* staff members.

In the keynote speech, Dr. Kenneth W. Kizer, President, CEO, and Chairman of the Board of Medsphere Systems Corporation, addressed the widespread implementation of electronic health records and the many secondary uses of health data to greatly benefit the public good. Dr. Kizer emphasized

that undesirable non-direct uses of personal health information must be addressed with a national framework as this technology is developed. Next, Mr. Stephen J. Weiser, Assistant General Counsel for BlueCross BlueShield of Illinois, spoke about privacy laws and how they affect health plans and pay-for-performance programs.

Following Mr. Weiser, Dr. Arthur R. Derse described ethical issues that arise from the digitization of medical data, drawing from his experiences as Senior Consultant for Academic Affairs at the American Medical Association's Institute for Ethics and in his roles at the Medical College of Wisconsin. Dr. Derse is also a co-author of the second article in this Issue, "Gavels in the Nursery: An Appellate Court Shuts Out Parents and Physicians from Care Decisions." Next, Ms. Michelle L. Dougherty, Director in Practice Leadership for the American Health Information Management Association, discussed data quality and data issues such as performance and quality management. Finally, Dr. Paul M. Schyve, Senior Vice President of the Joint Commission, spoke about performance measurement in improvement and accreditation, primarily as it relates to hospitals.

In conclusion, we hope you enjoy the variety of health law topics presented in this issue. Each Board member has enjoyed working for the *Annals of Health Law* and has benefitted from the opportunity to work with these authors. We likewise hope that our readers will benefit from the results of our work. We would like to thank the Beazley Institute for Health Law and Policy, Kelley Yaccino, John Blum, and Larry Singer for their support.

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