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THE TURDUCKEN TASK OF TEACHING HEALTH CARE FINANCING

THOMAS L. GREANEY*

INTRODUCTION

Health Care Financing: really a misnomer when you come down to it. The course covers a vast expanse of legal doctrine, public policy, and law practice involving health care, rather than being confined to the narrow domain of "financing." Of course money makes the world (and legal practice) go round, so financial issues are never far removed from the substance of the course. But the theme of this essay is to point out that this rich and important part of the health law curriculum embraces the structure and control of our nation's method of delivering care to people and that it can be approached in many ways. For example, years ago I renamed my course "Health Care Financing and Business Planning"—a title that doesn't entirely do the job either, but at least conveys the message to students that they are about to be confronted with a subject that covers the practice of health care lawyering and the business (yes, business) of making arrangements among employers, citizens, insurers, hospitals, doctors, nurses, pharmaceutical companies, insurance companies, device manufacturers, state and federal governmental authorities, and many others to provide health care services to the nation. As discussed in this essay, however, there are other approaches to fold the sprawling subject matter into a larger framework. The turducken metaphor (borrowed from a federal circuit court decision discussing the problem of deciding a patent case within an antitrust case[1]) captures the challenge of baking diverse ingredients into a single course.

Like much of health care law, this subject, which I'll call Health Care Financing ("HCF"), can be taught and structured in many ways. Because its content is so sweeping, it can also cover innumerable topics with divergent points of emphasis. Moreover, the constraints of diverse health law curriculum

* As I leave the law school after twenty-nine years, I want to pass along my deep gratitude to the many students and colleagues, especially those on the Health Law Center faculty and staff, who have supported me over the years. Special thanks to my great friend, Sandra Johnson, who took me on board on a casebook and treatise that broadened my horizons and who inspired me over the years.

1. FTC v. Watson Pharm., Inc., 677 F.3d 1298, 1315 (11th Cir. 2012).

offerings among law schools make the coverage determinations even more varied. Hence, this essay does not presume to offer a model course or suggest a minimum package of topics to be covered. Instead, it offers some thoughts about what might be accomplished in different settings and under varying aspirations of the instructor. There is a rich variety of possible approaches to the topic—a phenomenon that reflects the diversity of faculty teaching the subject and the variation of their goals. The caution offered here is that the topic is best presented within some larger framework.

I. GOALS AND CONSTRAINTS

Gigabytes have been spilled by scholars fretting about "what is health law?"[2] Not an unimportant exercise, but also not terribly informative to professors about the proper focus of their courses. For the purposes of designing specific courses and assembling reading assignments and exercises, the threshold issue is: what am I trying to accomplish? For an elective course like health law, this is also the most salient consideration.

The first fork in the road is assessing one's consumers. Are the students reasonably well versed in the basics of health law (i.e. have they had an introductory course) or are they being exposed to the topics as part of a broad survey of the vast expanse of material we call health law? If the former, one can comfortably drill down into at least some of the particularly complex areas to be covered and perhaps undertake some of the experiential approaches discussed below. If the latter, the professor must walk the line between teaching an "issue spotting" course and covering the subject at a level of abstraction that might fail to convey the intricate and interrelated legal issues confronted in practice. Students come to health law courses with different levels of interest and experience in the subject. For purposes of discussion, let's categorize them as follows: the health law "maven," a student who is strongly interested in the subject who perceives it as a possible or likely area he or she would like to pursue after law school; the "sampling" student who has identified health law as one of several areas of law that might be of interest; and the "just visiting" student who is taking the course based on random factors such as the professor's reputation or the time slot the class is offered.

2. *See, e.g.*, Mark A. Hall, *Law, Medicine, and Trust*, 55 STAN. L. REV. 463 (2002). A historical note: My casebook co-authors on HEALTH LAW, Barry Furrow, Sandra Johnson, Timothy Jost, and Robert Schwartz, conceptualized the subject in 1987 around the themes of quality, access, and cost. In subsequent editions, "health care financing" was used to group the corporate, insurance, Medicare and Medicaid, tax, fraud, antitrust, anti-kickback, and Stark topics. *See* BARRY R. FURROW, THOMAS L. GREANEY, SANDRA H. JOHNSON, TIMOTHY S. JOST & ROBERT L. SCHWARTZ, HEALTH LAW: CASES, MATERIALS AND PROBLEMS (7th ed. 2013).

Of course, each professor's experience and judgment affects the content of courses. Law schools vary considerably in the number of health law courses offered and who teaches them. In many schools, the basic health law course or a specialized course in health care financing is taught by practitioners rather than tenured or tenure track faculty. Based on many interactions with these instructors, it is clear to me that they have both experience and a comfort level in dealing with the subjects, although many acknowledge that they confront some topics episodically (and perhaps in crisis situations) rather than in routine counseling. For them, the course can be rich with examples, documents, and case studies drawn from practice. The challenge is putting the doctrine in context and effectively teaching complex material to newcomers. At the risk of overgeneralizing, many practitioners choose to stress "real world" experiences—a valuable, perhaps essential, component of legal education—but can be frustrated by the lack of students' grasp of the myriad core legal doctrines they must master. For some tenured and tenure track faculty, the challenge is different. Many teaching health law come from a teaching or practice background in health law areas largely unrelated to the HCF topics, e.g. constitutional law, bioethics, consumer law. For them, it may take some time to acquire a comfort level with corporate, antitrust, tax, insurance, and administrative law. At the same time, one of the most satisfying aspects of teaching in this area is the opportunity to expand one's understanding of topics as the years go by.[3]

All this argues for some form of coordination among faculty members teaching health law courses. For schools deploying several faculty members and adjunct professors to teach health law courses, it benefits all involved to coordinate both the substance of the materials covered and, if desired, to offer some diversity in the approaches to learning. For example, the opportunity to pair doctrinal offerings with experiential teaching methods, externships, and other methods has proven enriching to faculty as well as students.

II. HEALTH CARE FINANCING EMBEDDED IN A SURVEY COURSE

There are undoubtedly many tracks that one can take in teaching a basic (survey) health law class, and the HCF component can be adapted to a problem-based approach, a lecture with guided discussion that illustrates the key issues with focused questions, or a policy-oriented focus that emphasizes the legislative and regulatory policies and alternatives that the subject presents.

3. Adopters of my casebook have commented on their increased interest in areas once obscure to them as they've taught the subject matter over the years. One sometimes overlooked opportunity for professors looking to tailor their courses is the opportunity to use material in the notes following principal cases to flesh out the subtleties of legal doctrine and its implications. In many areas covered, the "leading case" provides only a glimpse (and sometimes a distorted one) into the application of doctrine in other settings.

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Under any approach, however, difficult choices must be made regarding which subjects to cover and in what depth to present them. Given the constraint of covering even a portion of the vast array of subjects that can be addressed in a survey course, these decisions will undoubtedly reflect the preferences and ambitions of the faculty member and the availability of additional, specialized courses at one's law school.

As a general matter, I would suggest a "decent minimum" approach for the survey course.[4] The goal would be to simultaneously serve the various constituencies described above by exposing them to a number of topics while still conveying an understanding of their subtleties and interrelatedness. Ideally the health law maven will have a good jumping off point for summer employment, law journal responsibilities, and future health law courses. The sampling student will walk away intrigued with the subject matter and inspired to consider further exploration of the subject. And the just visiting student will gain insights into the complexities of regulation and public policy and also be a better-informed citizen.

What then might comprise a "decent minimum"? What follows is, of course, an entirely subjective account, though informed by my experience as both a professor and consultant interacting with members of the health law community. I would expect any of my three categories of consumers to need an understanding of (1) the provider payment mechanisms in the private and public sector and the insurance options and alternatives that consumers face; (2) how the institutions that provide care and their legal constraints is essential; (3) the principal civil and criminal "no-nos" that affect providers and payers and may get them ensnared in one legal net or another; and (4) how the laws of payment and delivery impact patients' well-being.

To get there, students need a solid grounding in health care payment methodologies, old and new. Thus, teaching the basics of Medicare prospective payment, the physician fee schedule, value based methodologies, and ACO structures is important. Along with that, students should understand the "chicken and egg" dilemma of converting payment to bundles and value based methods, and the need for delivery systems to receive and allocate payments and restructure delivery to improve quality and value. Institutional issues include hospital tax exemption and the constraints imposed on exempt organizations by excess benefit and inurement laws. Dealing with what I referred to as "no-nos" must necessarily be anecdotal, but exposure to at least

4. The phrase is borrowed from the long running philosophical debate about the right to health care. Allen E. Buchanan, *The Right to a Decent Minimum of Health Care*, 13 PHIL. & PUB. AFF. 55 (1984); Norman Daniels, *Equity of Access to Health Care: Some Conceptual and Ethical Issues*, 60 MILBANK Q. 51, 66 (1982). No analogous student right is claimed here, although they certainly have a reasonable expectation that the substance covered in any given course has some relationship to their overall preparation to practice law.

one of the following sanctions should acquaint students with the serious sanctions that professionals face when they run afoul of the law: anti-kickback, antitrust, false claims, or Stark law.

III. HEALTH CARE FINANCING AS A SEPARATE COURSE: BAKING IT INTO A FRAMEWORK

Attorneys in transactional practices confront many areas of the law: corporate law (including other forms of business associations such as LLCs and partnerships, securities law, and nonprofit corporate law); Medicare payment rules and regulations; antitrust; anti-kickback law; Stark; tax exemption law (including inurement, private benefit, and excess payment); the corporate practice of medicine doctrine; certificate of need regulation; HIPAA; and staff privileging law and practice, to name a few.[5] In an effort to provide a unifying framework to cope with the challenge of teaching this sprawling (and let's face it, mind-numbing) expanse of doctrine, I've sought to situate the doctrine in a larger framework that brings some theme, and perhaps coherence, to the subject.[6]

A. HCF as Transactional Law

As noted, health care transactions, including mergers, joint ventures, and corporate reorganizations, require that attorneys address many of the laws that are the components of the HCF curriculum. Hence a useful—and most salient—teaching method is to incorporate structural problem exercises in the class discussions. For example, the class can be given a factual scenario involving providers considering some form of integration, and subject to various constraints such as market, financial, and competitive conditions.[7] Students may be asked to consider initially the business strategies conducive to accommodating their clients' objectives. This first step usefully leads to a discussion of how changing payment arrangements create financial incentives to reorganize delivery methods, which in turn necessitates acquisitions or contractual affiliations. Perhaps even more important is the opportunity to acquaint students with the importance of understanding (and advising) on the

5. State laws in some areas such as anti-kickback, fee splitting, and antitrust complement those listed in the text and transactions implicate many other state and local laws and regulations.

6. Other frames might include compliance, legislative reform proposals, and access/advocacy.

7. The annual transactional health law competition sponsored by Loyola University Chicago School of Law requires students to develop an extensive client memo recommending a course of action and analyzing the legal and strategic issues presented by their proposal. *See* LOYOLA UNIVERSITY CHICAGO SCHOOL OF LAW, BEAZLEY INSTITUTE FOR HEALTH LAW & POLICY, THE L. EDWARD BRYANT, JR. NATIONAL HEALTH LAW TRANSACTIONAL COMPETITION, http://www.luc.edu/media/lucedu/law/centers/healthlaw/pdfs/Bryant_Competition_Brochure.pdf [https://perma.cc/9NMZ-KJSF].

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business and strategic issues their clients confront. As the semester progresses, students can reconsider the problem taking into account the complexities of structural recommendations introduced by antitrust, anti-kickback, Stark, and tax exempt law.[8]

B. HCF and Health Reform

Another frame involves the interaction of the reforms introduced by landmark legislation such as the Affordable Care Act, MACRA, and administrative law actions, and the legal doctrines covered in the course. Assigning projects that focus on implementation of specific statutory provisions provides the opportunity to consider both the specific implications of the statutory directive and the broader effects that regulations may have. For example, I have added a "skills" component to my HCF course that requires students to draft comments on administrative rule makings, proposed legislation, or other matters and to draft a client memo explaining the legal and strategic considerations underlying their work. This project brings to life the nuances of the doctrine in many areas. For example, the implementation of § 501(r) of the Internal Revenue Code entailed regulatory adjustments that have important implications for many hospitals. Students were assigned responsibility to comment on rulemaking specifying requirements for hospitals' financial assistance policies[9] and community health needs assessments.[10]

IV. AVUNCULAR ADVICE

Don't shortchange these important topics. Enjoy and emphasize the rich human and policy importance of this area of the law. Teach it so as to make students better counselors and citizens.

8. The Furrow Health Law Casebook offers a structural counselling problem that students are asked to reconsider as additional areas of law are introduced. FURROW ET AL., *supra* note 2, at 1003–04, 1071.

9. 26 U.S.C. § 501(r)(3) (2012); 26 C.F.R. § 1.501(r)-3 (2016).

10. 26 U.S.C. § 501(r)(4); 26 C.F.R. § 1.501(r)-4.