The Academic Perspective

The Results of Our Research

Twenty years ago, only a few law schools offered any course on health law. Today, most schools offer at least one course and now dozens offer health law programs. The annual Health Law Professors’ Conference (HLPC) now draws up to two hundred attendees. Health law has begun taking its rightful place in the law school curriculum.

We found some significant gaps, however, between what law schools offer and what the profession hopes to see in new health lawyers. Members of the American Health Lawyers Association (AHLA) want to see more substantive classes in fraud & abuse, business, tax, life sciences, and health care reimbursement. Desired skills include working in teams, processing practical transactional skills, and effectively analyzing client-focused problems.

We should remember that most of AHLA’s senior leadership never took a health law class in law school and we should beware of specifying an “ideal” curriculum as we can only imagine the changes that will occur in the following decades. The primary goal is to build good foundations for new health lawyers entering the profession; but even with that more modest goal, it will be difficult to shape law school curricula from the outside.

Issues, Obstacles, and Options

Law school curricula are set by full time professors, few of whom are AHLA members. Some of the current full time health law professors focus their teaching and research on bioethics and may not have the background to teach the classes desired by AHLA members. Existing health law casebooks do not allocate sufficient class time to some of the key topics.

Any attempt to “force” reforms on law schools is likely to be counterproductive. It will be important to develop a long term plan to engage with law schools. Four possible complimentary options are:

1. Offer a greatly reduced price for full-time health law professors to attend AHLA’s Annual Meetings. With tight law school budgets, attending the Annual Meeting would cost more than half the annual travel budget for most professors. If we want full-time professors at AHLA’s Annual Meetings, the registration price should be dramatically reduced.

2. Continue engaging with the American Society of Law, Medicine & Ethics, which sponsors the annual Health Law Professors’ Conference. Engagement efforts have been made in the recent past but the connections between the professors and the profession remain thin. It is interesting to note that very few adjunct professors teaching health law attend the HLPC conference. Perhaps AHLA members who teach as adjuncts could participate more directly in the ASLME and HLPC.

3. Begin an iterative feedback process with law schools on the gaps between curriculum and AHLA members’ expectations. This would need to be much more robust than a simple reputational survey (which is already done by US News & World Report). A better process might be to assess law schools on whether their health law curriculum matches the AHLA model. To be fair, this process would need to be both transparent (objectively scored) and iterative (changes over time as we learn more). AHLA should view this as an opportunity to begin a dialogue with law schools.

4. Organize and engage within AHLA the members who teach as adjuncts in law schools. While they will have only modest ability to influence curricular choices in law schools, they are a very important and often overlooked stakeholder.

Curricular Guidance

Introduction and Scope

Many new attorneys lack exposure to the full range of health law issues as practiced by AHLA’s members. This Curricular Guidance Model identified the core legal subjects and skills that a well-prepared, new health care lawyer should have studied in law school.

One danger encountered in this initiative was the temptation to include every possible subject, but this was impractical as most law schools only reserve three or four credit hours for teaching the core health law class. We were also mindful that many current leaders in AHLA did not take a health law
course in law school, generally because the course was not offered. Our challenge is to produce well-developed, new health lawyers in a rapidly changing area without over-specifying the curricular model.

We have worked collaboratively, both law professor and practicing AHLA member, to reach consensus on a model that appropriately balances health law expertise with curricular freedom, producing students capable of original thought and creativity. This Curricular Guidance Model should be useful to several audiences:

• Professors teaching health law, if they wish to modify their curriculum to reflect feedback from the AHLA;
• Professors writing, revising, and selecting health law casebooks;
• Appointments Committees at law schools, when hiring entry-level tenure-track health law professors; and
• Associate Deans at law schools, when hiring adjunct health law professors.

We address three issues:

• Content of the health law survey course;
• Health law concentrations or certifications; and
• Teaching health law skills.

Health Law Survey Course Content

To serve their clients well, health care lawyers should have a broad understanding of the health care marketplace in which their clients operate. Health law survey courses can help students build a strong foundation for future health law-related work by describing stakeholders (such as health care providers, patients, payers, policymakers, and regulators), explaining health care financing, and identifying key issues in health care delivery, such as quality and safety concerns. Students should recognize the importance of both public and private payers not only in financing health care (and thereby affecting patients’ access to it), but also in shaping health care delivery through the conditions and incentives associated with payment mechanisms. Students should be aware of cost trends within the industry and should be familiar with at least a few recent initiatives to address these trends. They should be able to discuss the implications of these initiatives for both patients and providers. Students should also be aware of organizational trends in the industry, such as an increasing tendency toward affiliation and integration that raises many legal issues. By developing a better understanding of the health care marketplace, students should be able to gain a better grasp of the challenges their clients face.

While every teacher will approach the material in different ways, the following topics are suggested as the core of the Health Law Survey Course:

• The organization and finance of the U.S. health care market place, including:
  ○ All major public and private stakeholders;
  ○ History, trends, and reforms; and
  ○ Constitutional limits on health laws.
• Federal, state, and private health care reimbursement systems for hospitals, physicians, pharmaceuticals, and other health care items and services, as well as emergent pay-for-performance models such as bundled payments, sharing risk, and accountable care organizations (ACO).
• Federal and state regulation of health insurance, including:
  ○ ERISA;
  ○ Managed care;
  ○ The Patient Protection and Affordable Care Act (PPACA) insurance rules;
  ○ Federal and sate cost control mechanisms such as medical loss ratio (MLR); and
  ○ State and federal exchanges.
• Fraud and Abuse laws, including:
  ○ Civil Monetary Penalties;
  ○ Anti-Kickback Law;
  ○ Exclusion;
  ○ Stark II;
  ○ False Claims Act;
  ○ Corporate Integrity Agreements;
  ○ State laws; and
  ○ Compliance plans.
• Health information technology, privacy, and security, including the Health Information Portability and Accountability Act (HIPAA), the Genetic Information Nondiscrimination Act (GINA), and meaningful use.
• Quality, patient safety, and provider regulations, including:
  ◦ Malpractice;
  ◦ Licensing, credentialing, accreditation, and Medicare Conditions of Participation (COPs);
  ◦ Corporate practice of medicine;
  ◦ Medical staff, peer review, and National Practitioner Data Bank (NPDB); and
  ◦ Initiatives in Medicare, Medicaid, and private plans relating to reporting and rewarding higher quality and lower cost.
• Governance and regulation of tax exempt health care organizations by the Internal Revenue Service (IRS) and state attorneys general.
• Patient autonomy, including:
  ◦ Informed consent;
  ◦ Patient rights;
  ◦ End of life care;
  ◦ Reproduction; and
  ◦ Human subject research.
• The importance and limitations of public health law, including mandatory vaccinations, tobacco control, wellness programs, and emergency preparedness/quarantine powers.
• Introduction to health care antitrust (see the discussion below regarding concentrations and certificates).

Health Law Concentrations or Certificates
Health law concentrations or certificates give graduates more specialized preparation for a career in health law. We see four important components:
• Specialized coursework in health law;
• Important courses in the general law school curriculum;
• Practical experience in a health law externship or clinic; and
• A capstone course.

Specialized Coursework in Health Law
Law school graduates with a concentration or certificate in health law should also have a deeper understanding of the basic health law topics described above (i.e., an advanced class in health care fraud and abuse or a specialized ERISA class), as well as a solid introduction to some of the following additional topics:
• Life sciences, including Food and Drug Administration (FDA) regulation of pharmaceuticals and medical devices, intellectual property, reimbursement, tort, and global regulation of human subject research;
• Business literacy with health care financial statements, business concepts, and basic statistics;
• Health care antitrust (see discussion below);
• Physical and mental health disabilities, including the Americans with Disabilities Act (ADA), psychiatry, and commitment; and
• Racial and economic health disparities, including limited English proficiency (LEP).

Important Courses for the General Law School Curriculum
While we recommend the following general courses for all aspiring health care lawyers, they are particularly recommended for health law certificates and concentrations:
• Administrative Law—Some administrative law should be embedded in the health law survey course, helping the student understand the health law agencies (e.g., Centers for Medicare and Medicaid Services, FDA, IRS) and how a practitioner interacts with them, including administrative proceedings and advisory opinions;
• Antitrust Law, including:
  ◦ The goals and contours of antitrust law in the health sector;
  ◦ The primary statutes, defenses, and issues relevant to health care, such as the state action doctrine, hospital market definition, and clinical and financial integration;
  ◦ Health care guidance from the agencies, including the ACO Joint Statements;
  ◦ Provider networks; and
  ◦ Scope of practice issues, such as minute clinics.

If the general antitrust class does not include these topics, they should then be covered in either the health law survey course or in a specialized health care antitrust class.
• Business Associations—The study of corporations and other business associations provides an essential foundation for health law practice.

• Labor and Employment—The introductory course in labor and employment is becoming increasingly important to many health law practice settings.

• Tax—The introductory course in federal income taxation is very important. Additional tax courses are also recommended in corporate and partnership tax. An introduction to exempt organizations should be included in the health law survey course and a more specialized course in exempt organizations (tax and governance) is recommended.

Practical Experience in a Health Law Externship Clinic

We recommend at least one practical experience for academic credit in a supervised health law externship or a specialized health law clinic for all health law concentrations or certificates. This experience may also include a substantial writing component.

Capstone Course in Health Law

Finally, we recommend a capstone experience in health law for 3Ls, which integrates elements from across the health law curriculum into a practical, team-oriented course. One possible example of a capstone could be Health Care Transactions, with students working in small teams on simulation transactions of increasing complexity. Other examples of capstones could be advanced health law courses taught jointly with business school faculty and students, as well as Medical-Legal Partnerships involving students from law, medicine, and public health.

The capstone should include a substantial writing component relevant to the particular type of class: transactional capstones could include joint venture agreements; advocacy capstones could include substantial policy position papers; litigation capstones could include appropriate court documents. The overall goal is to improve the students’ writing ability within health law with high quality, relevant work.

Teaching Health Law Skills

Many law schools have recently supplemented traditional law school teaching methods, especially in the second and third years. We applaud this trend and suggest stronger emphasis on:

• Casebook and classroom teaching that examines a diversity of legal materials beyond appellate court decisions, including:
  ○ Statutes, regulations, preambles, advisory opinions, guidance, standards, and other regulatory materials from a variety of federal, state, and private sources;
  ○ Client and board room documents, including documents that an associate might be asked to draft or comment on early in their career;
  ○ Complaints and depositions;
  ○ Medical and health policy literature; and
  ○ Legislative text and committee reports.

• Working in small teams on collaborative projects, including some elements of negotiation, drafting, and transactions;

• Teaching and assessment that include problem sets, including the problem sets that AHLA members have developed for law schools (see Appendix A); and

• Health law specific research skills, including health law research guides that some law schools maintain for students (for example, Boston University Law School’s guide is available at www.bu.edu/lawlibrary/research/health/index.html).