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# Teaching Health Law

## Personal Reflections on Teaching Health Law in a School of Public Health

*Peter D. Jacobson*

### Introduction

For the past 20 years, I have been teaching various law courses, mostly to public health students. At the RAND Graduate School, I taught two courses to Ph.D. candidates: one on law and social science, and then a course on law and epidemiology (co-listed with the UCLA School of Public Health). Each year since 1996 at the University of Michigan School of Public Health (UMSPH), I have been teaching health law to our Master of Health Services Administration (MHSA) candidates, and public health law to Master of Public Health (MPH) candidates.<sup>1</sup> I also teach a seminar on health care regulations. In 2004, I taught health law at the Georgetown University Law Center as a visiting scholar.

The non-law student audience presents a different set of challenges than does teaching law students, even though my UMSPH classes usually include at least one dual law/public health degree candidate (and an occasional law student). Teaching a multidisciplinary cohort with little prior exposure to law is an exciting challenge that offers many rewards. What follows are some observations about how to approach teaching health law to non-law students.<sup>2</sup>

### What Do You Want to Accomplish?

As with any course, the first question you need decide is what you want to accomplish. Keep in mind that the multidisciplinary students have different strengths, interests, and perspectives than do law students. The broad purpose of my health law

course is to introduce public health students, especially those interested in health administration and management, to the legal issues they are likely to face in managing a health care organization. If you have been teaching law students, will your goals be different for a multidisciplinary audience? Will you use a different teaching strategy?

For me, the answer to both questions is yes. Noted historian Gordon Wood, observing the differences between academic writing and reviews for lay readers, said that he never regretted writing long non-academic reviews. He added the following:

Not only do such lengthy reviews for nonacademic journals require you to come to terms with the larger implications of the book under review, but they force you to convey what you say in language that is intelligible to general readers. Writing reviews for a lay readership is a marvelously stimulating experience, and all historians ought to try to do it. If they did, they might make our history books much more readable.<sup>3</sup>

Wood's language is a somewhat snarky way of making some important points that underlie my philosophy of teaching health law to non-law students. What I want public health students to learn is very different from my approach to teaching law students. For one thing, the key objective for the former is for future health care executives/public health policymakers to understand the role

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law plays in their strategic decision-making environment. In contrast, law students need to know how the health care system works to provide effective legal advice and representation.

For another, I want non-law students to understand how to communicate with attorneys. To do so, future health care executives need to grasp the difficulties attorneys face in interpreting legislation, regulations, and judicial opinions. How often do attorneys (and professors) respond with a definitive “it depends” when

to get beyond just saying “no.” I stress that it is the health care executive’s job to develop the strategic objectives and to urge the attorney to find a way to achieve the objectives within the law. By understanding the basic legal concepts, the language of the law, and how to apply broad legal frameworks (i.e., the elements of a medical liability claim) to the different scenarios they are likely to confront, they will be in a better position to communicate and negotiate with their attorneys.

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a legal question is posed? This kind of response can be very frustrating to students who expect the law to provide clear answers. Much of my teaching is designed to disabuse them of the notion that law offers definitive answers and to recognize that the lawyer is not trying to avoid responsibility when answering, “It depends.” It is important for students to understand the law’s limits in providing definitive answers to legal issues arising in a rapidly changing health care environment.

A third goal is to learn how to apply broad legal constructs to the situations they will face on a daily basis in running a health care organization. My students do not need to delve into the minutiae of regulations or the intricacies of developing legal doctrine (though I discuss that as well). But they must know how to identify a legal issue, when to bring in the attorneys, and how to communicate with them. Students should also become skilled at pushing attorneys

### Choosing Materials

#### *Selecting the Text*

As a co-author of a law school casebook,<sup>4</sup> it would be natural for me to assign either my own casebook or one of the many excellent books widely used in health law classes (in law schools and elsewhere). Nevertheless, I do not use a law school casebook in my health law course, even though I have not found an adequate alternative text on the market.<sup>5</sup> The reasons for not using a law school casebook are closely related to my framing of the course objectives. Health law texts use a different pedagogical approach (more often designed to hide the ball) that do not meet the objectives I outlined above.<sup>6</sup> For me, the key is to use materials that assist students in applying broad legal principles to situations that are likely to present difficult business challenges (i.e., physician recruitment incentives, mergers).

The text I used in the late 1990s was Arthur F. Southwick’s seminal

*Law of Hospital and Health Care Administration*.<sup>7</sup> Southwick’s text was a marvelous combination of narrative explanation of current legal principles, along with a thoughtful explication of how he thought legal doctrine should develop in response to changes in health care delivery.<sup>8</sup> Because he died before the next version could adequately incorporate legal responses to managed care, it soon became outdated. Currently, I only assign one chapter from the text, Southwick’s description of the legal system. The current version, written by Stuart Showalter, is an excellent text for undergraduates, but, in my view, is not sufficiently challenging for graduate students.<sup>9</sup> Therefore, I no longer assign a text.<sup>10</sup>

### Constructing the Syllabus

#### *Organizing Principles*

At this point, I do not have a single organizing principle for the course. One could easily organize the class around the Affordable Care Act, or could take a complex factual situation and use each class to introduce the salient legal issues. Another possibility is to use conflicts of interest to organize the material. Although I have considered conflicts of interest and fiduciary duty as organizing principles, I have not tried either approach to see if they could work.

#### *Determining the Materials to Assign*

The next decision to make is which materials to assign. Without a suitable text, the task is to put together cases and materials that provide sufficient background to stimulate class discussion. For the most part, the cases are easier to find than are the background readings. I try to find readings (usually from the peer-reviewed literature) that broadly describe an area of law, and then supplement the readings with cases illustrating specific aspects of legal doctrine. For instance, my antitrust classes currently use a

mix of readings providing an overview of antitrust principles as applied to health care, along with FTC/DOJ letters. For the accompanying cases, I include a merger opinion and an opinion on physician cartel behavior.

Like everyone, I need to make a basic choice between breadth and depth. I unequivocally choose breadth. Because my students will be confronted with the full range of health law challenges, they should be familiar with as many areas as possible, rather than trying to be experts in any one of them. What they need to know is how to identify a legal issue, when to bring in the lawyers, and how to communicate with their attorneys. I stress that they should treat their attorney as a member of the team, but one who is trained to be cautious. It is up to the administrators to articulate their business objectives, and then to negotiate with their attorneys about the limits of what the law will permit.

To me, the best way for health care executives to learn how to communicate with their attorneys is to read full cases. Since most health law casebooks (including my own with Larry Gostin) rely extensively on heavily edited case excerpts to derive the key legal principles, non-law students will not fully understand the reasoning behind the decision, the confusing signals judges often send, and the core ambiguities inherent in interpreting judicial opinions. As a result, I have students read the full opinions for them to grapple with the language, the judicial thought-process, and the interpretive challenges their attorney will confront.

#### *Arranging the Topics*

In my co-authored legal casebook,<sup>11</sup> the chapter on “Law and the American Health Care System” is arranged in four sections: an overview of health law and policy; competition policy; financing; and patient safety. Although cost, quality, and access

are certainly covered, the book is not organized along those lines. My health law course is organized differently. Unlike law students, public health students do not need a primer on health insurance and how the system is organized and financed. In contrast, law students take health law after their first year, so they are already familiar with basic tort and contracts principles and can readily apply them to health care. Thus, my health law course is organized into five parts: introduction to the legal system; liability; legal issues in managing health care organizations; regulating quality of care; and obligations to patients and employees.<sup>12</sup>

At the beginning of the course, I provide students with a detailed overview of the legal system. From what I can tell from reading other syllabi and talking to colleagues who teach similar courses, I spend more time on this than other professors for two reasons. First, I want everyone to be familiar with key terms and concepts of how the legal system operates so that the more difficult material covered later can be placed in a wider and more comprehensible context. Second, it is clear to me that medical and health care professionals have minimal understanding of the legal system, and tend to imbue certain procedures through a narrow and often uncomprehending lens that distorts how law affects them.<sup>13</sup> Since my class is probably the only exposure to law they will have, I want them to leave with a better understanding of the system to avoid subsequent misconceptions.

The question is where to begin with the substantive material. Although my preference would be to start with competition policy, I think that is a very challenging way to introduce students to law. Instead, I begin with liability — individual (i.e., physicians) and institutional. Through their other courses, students are generally familiar with medical liability and tort reform. As such, liability

is tractable, there is a defined legal framework for them to apply, it has significant policy implications, and is an area of great practical importance to them as health care executives and medical professionals. This approach allows me to introduce tort and contract principles early on and is a great introduction to the development of legal doctrine in a rapidly changing industry. In particular, it allows students to consider whether a shift to a market-based system would alter the liability framework. The downside is that I need to introduce the dreaded ERISA preemption discussion earlier than I would like.<sup>14</sup>

Rather than following the liability section with regulating quality of care, I prefer to proceed directly to the core of the course, a long section on the legal aspects of managing a health care facility. This section, which is both the most important and the most technically challenging in the course, is essentially about competition policy. It begins with corporate organizational forms, and includes governance, tax policy, antitrust, and fraud/abuse, before concluding with joint ventures. One way to think about the split between these topics and the subsequent discussion of regulating quality of care is the difference between meeting long-term strategic objectives and meeting the daily needs of a health care organization. Health care executives certainly require both, so the order of presentation probably makes little difference in the end. Once students understand the basic concepts of corporate and tax law, they will be in a better position to apply those principles to quality of care/patient safety.

The overall shape of the section is designed to achieve two goals. First, I want students to be conversant with the interplay between judicial and regulatory responses to the changing market arrangements in health care. To develop appropriate business strategies, health care executives must

understand the interaction between the judicial and regulatory functions. Second, because I view joint ventures as the primary instruments of financial and health care delivery arrangements that health care executives will be developing to generate revenue, it is essential that students identify the potential legal barriers to these arrangements. The goal is for students to appreciate the flexibility of using contracts to achieve their health care objectives (i.e., for physician recruitment and retention, and to form ACOs), but to be aware of the potential legal barriers they must surmount. Otherwise, their strategic objectives will be developed in a vacuum and without a clear sense of the significant legal barriers they may face.

In organizing this section, it was relatively easy to incorporate relevant provisions from the Affordable Care Act (though I did not want the ACO to obscure the core legal principles that will remain even if the ACA is repealed or impeded). The most difficult organizational challenge I have is how to integrate regulatory policy into the mix. Given that students will be practicing in a heavily regulated industry, integrating regulations into the mix (i.e., HIPAA, EMTALA, fraud/abuse) is a central objective. Frankly, I have not found a good way to merge regulatory policy into the syllabus. Thus, since joint ventures cannot be analyzed absent consideration of the fraud and abuse regime, I include two classes on fraud and abuse regulations in this section, while covering other regulations in subsequent sections. To be sure, I also include the regulatory aspects of tax and antitrust, but the overall effort seems disjointed.

After the intensity of the competition issues, the course then covers conceptually easier material. Regulating quality of care covers licensure, staff privileges, and peer review. This section provides a link back to

liability and adds staff privileges as a strategic consideration relative to ACO formation. The final section of the course includes obligations to patients and employees (i.e., access to health care, nondiscrimination, informed consent). The key class in this section is on conflicts of interest. At various points in the course, I will have introduced conflicts of interest,

### Teaching to a Predominantly Non-Law Student Audience

For the first few classes, I largely use lectures to explain the legal system and allow students to become accustomed to legal vocabulary, reasoning, and terms. After that, I use a modified Socratic method<sup>15</sup> to examine the assigned cases and their implications. I rely heavily on class discussion to

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so this module works to revisit the earlier examples. It also allows me to discuss how pervasive the conflicts are and how health care executives should deal with them.

Unlike most health law courses in law schools, I do not include much on finance. The students concentrating on health care administration take several courses that examine Medicare, Medicaid, and health insurance principles. Would students benefit from examining their legal aspects? Probably, but it would be at the expense of specific health care topics not covered adequately in other classes (i.e., antitrust, liability).

An area that I have not covered extensively is general employment law. With the increasing attention to employee wellness programs, this is an area that deserves more attention.

elicit the key takeaway points. Early in the course, I go through each case very carefully, but as the students get comfortable with the material (usually between two-three weeks), I spend most of the time examining how to apply each case to hypothetical situations. As noted earlier, I introduce students to the requisite legal frameworks, but it is not important to me whether students can remember the elements of a medical liability claim or the elements of an antitrust action five years later. Much more important is that they leave the class with a sense of how to think about the law in meeting their day-to-day and long-term responsibilities. As the course proceeds, I try to bring some clarity to the discussion, but I make little effort to provide definitive answers to their questions.

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organized, financed, and delivered, they cannot expect clear answers from their attorneys. Understanding the law's inherent ambiguity is an important goal for future health care executives to comprehend. That way, they will not feel overly confident that they can address legal challenges on their own.

One way to facilitate class discussion is to use informal debates. Each student must participate in one debate, with two students per team. (I would use more, but time does not permit it.) I write the prompt and deliberately polarize the issue. As I get to know the students, I do my best to assign them to the opposite side of what I think they would like to argue. Aside from stimulating class discussion, the debates force students to represent a client in an adversarial context and to use judicial opinions to defend their position. It is also a much-needed opportunity to practice their presentation skills.

For written work, I assign either two 8-10 page papers on topics that I select or a longer term paper on a topic the student chooses. My final exam (50% of the grade) is a three-hour essay exam. I always include one question that forces students to think normatively about the material. Last fall, for instance, I asked the following:

In an increasingly competitive market, it seems timely to re-examine the legal system's oversight of the health care enterprise. What public accountability function should the legal system provide in either the transition to a market-driven system or in a world with accountable health care organizations (ACOs) and health insurance exchanges? Does the trend toward consolidation require new ways of thinking about the legal system's role? If so, what approaches would you recommend?

The remaining questions are similar to the debate and paper topics dealing with the substantive topics covered. For example, I include a reasonably complex joint venture problem, and a liability issue that also involves denial of insurance coverage.

One of the exit competencies for my course is to promote ethical values

teaching an interdisciplinary cohort? I think there are two reasons for you to consider.

First, there is a good chance it will improve your work. Communicating complex legal issues to law students requires a different strategy than communicating similar concepts to a non-legal audience. Many of us pub-

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as being integral to effective decision-making. While I only have one class designated to bioethics, I raise ethical considerations in almost every class. The inevitable realities of the business environment will certainly lead to compromises with an ethical ideal. Yet I think it is important for students to discuss what the law demands and what is ethically appropriate behavior even if meeting the ethical ideal will be difficult. For instance, we discuss the legal requirements for terminating staff privileges, but also consider providing due process even if not contractually required.

#### **Why Teach an Interdisciplinary Course?**

By temperament and my scholarly interests, I am much more suited to teaching in a school of public health than in a law school. I lack almost any interest in writing law reviews for a living, and my research is largely applied rather than developing legal theory. More importantly, I just enjoy the challenge of teaching law to people who will otherwise have only limited exposure to legal concepts. But why should those of you who teach in law schools be interested in

lish in journals and venues beyond law reviews (in the peer-reviewed literature, for trade publications, on blogs, etc.). Since few policymakers read law review articles, teaching non-law students may stimulate a desire to publish your work in venues that are likely to reach a larger audience. Timothy Jost's recent blogs for *Health Affairs* are a good example.<sup>16</sup> Teaching a multidisciplinary audience will make it easier to translate health law developments to the wider public sphere.

Second, it will reinforce why health law is an important area. As I have written elsewhere, I find it hard to comprehend why law schools tend to devalue health law.<sup>17</sup> Teaching an audience of future (or current) physicians and health care administrators will be a great reminder of how important law is to stakeholders and health practitioners.

On a personal level, I find it incredibly rewarding to watch students become increasingly comfortable with how to use the law to advance their strategic objectives while simultaneously realizing the law's limitations. Every term, I will have at least once student who struggles early and

then really excels at the end. Often, non-law students will understand the legal concept without being able to translate it into legal terminology. That can be very frustrating, but it is a minor irritation compared to the reward of having a student say that he or she now reads articles involving legal topics with greater understanding than before taking the course. Why else do we teach?

#### References

1. The residential master's degree students have a mix of backgrounds and disciplines. I also teach in our Executive Master's Program, where most of the students are either physicians or health care executives.
2. These observations are equally applicable to my law and public health course.
3. G. S. Wood, *The Purpose of the Past* (New York: The Penguin Press, 2008): at 9.
4. L. O. Gostin and P. D. Jacobson, *Law and the Health System* (New York: Foundation Press, 2005).
5. I intend to write a health law text designed for non-law students. On several occasions, I have asked some of my top executive master's students to read the health law chapter of the Gostin-Jacobson book and to assess its suitability for my health law course. Uniformly, they find the casebook more difficult to follow than the approach I use in their course, described in this essay.
6. In fairness, the notes and comments in the leading health law texts do an excellent job of raising hypotheticals that test a student's understanding of and ability to apply the core legal principles.
7. A. F. Southwick, *Law of Hospital and Health Care Administration*, 2nd ed. (Ann Arbor, Michigan: Health Administration Press, 1988).
8. Although Professor Southwick was my predecessor at the University of Michigan School of Public Health, I never had the pleasure of meeting him. In fact, I was not his choice to succeed him!
9. J. S. Showalter, *The Law of Health-care Administration*, 6th ed. (Chicago: Health Administration Press, 2011).
10. For the law and public health course, I assign Larry Gostin's *Public Health Law: Power, Duty, Restraint*, 2nd ed. (Berkeley: University of California Press, 2008).
11. L. O. Gostin and P. D. Jacobson, *Law and the Health System* (New York: Foundation Press, 2005).
12. My syllabus is located at <<http://www.sph.umich.edu/iscr/faculty/profile.cfm?unique=pdj>> (last visited March 20, 2011).
13. See, e.g., P. D. Jacobson and M. G. Bloche, "Improving Relations between Attorneys and Physicians," *Journal of the American Medical Association* 294, no. 16 (2005): 2083-2085.
14. My epitaph is going to read: "Someone asked him to write one more article on ERISA preemption and he couldn't take it any more!"
15. I raise lots of questions on what the case means, but use the questions to generate further discussion rather than a rigorous Socratic approach.
16. See <<http://healthaffairs.org/blog/author/jost/>> (last visited March 20, 2011).
17. P. D. Jacobson, "Health Law 2005: An Agenda," *Journal of Law, Medicine & Ethics* 33, no. 4 (2005): 725-738.