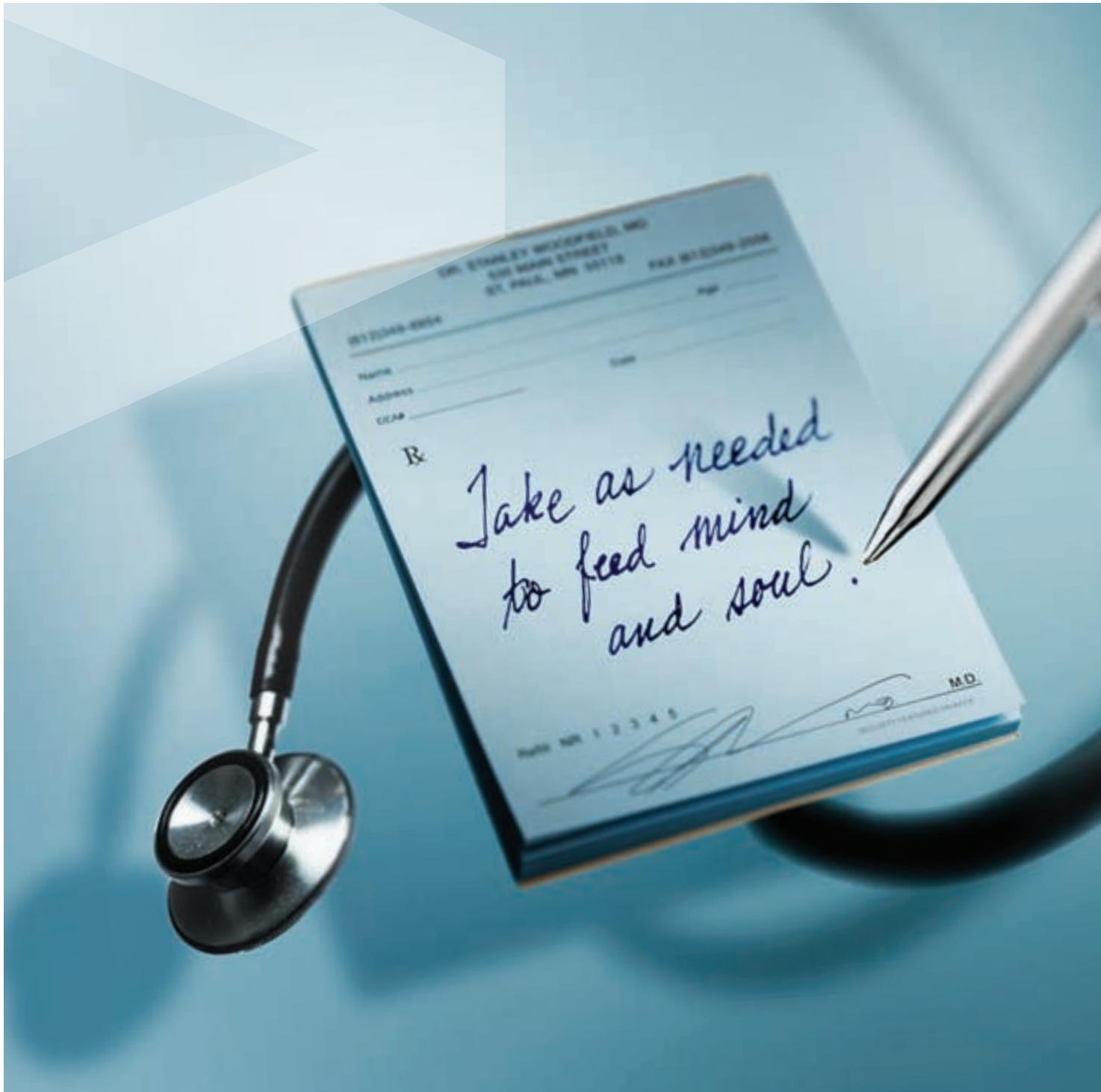


# Health Law CHALLENGES

By Cathy Madison



**WHEN PRESIDENT OBAMA SIGNED THE AFFORDABLE CARE ACT (ACA)** into law in March 2010, and the U.S. Supreme Court upheld most of that law in June 2012, even casual observers could predict that health care organizations of all kinds would need expanded legal counsel to interpret, implement, enforce, and protect its provisions. More lawyers, perhaps. New skill sets. Shifting focus and priorities. Certainly some major upheaval was on the way.

For those already immersed in health law, however, it was business as usual, the ACA being merely the latest salvo in a barrage of dynamic change. With recent trends such as consolidation, electronic record-keeping, cost consciousness, and aging populations, the field is not only evolving in significant ways but also delighting those who practice in it.

**NONE OF THOSE INTERVIEWED** anticipated, as new Law School grads, pursuing a health law career, but decades later, every one of them considers it—to repeat their oft-used word—fascinating.

“I feel blessed to have fallen into this, I really do. In 1981, I wasn’t sure what I was getting myself into, but I never looked back,” says Mark Mishek (’77), president and CEO of Hazelden, a Minnesota-based addiction treatment center, since 2008. Mishek also served as president of United Hospital and held numerous positions, including senior vice president, at Allina Hospitals and Clinics. His first love had been labor and employment law, but among his first private practice clients were hospitals on the periphery of the Dakotas and northern Minnesota. He was hooked.

“I was the first lawyer they’d talked to in some time, so I gave advice in a lot of different areas,” Mishek says. His growing health law expertise and intrigue led him to a position as in-house counsel at what was then Metropolitan Medical Center. “It was odd to have imbedded lawyers in a health care organization then,” he points out. “Provider organizations didn’t have them, and the medical device industry was really small. It’s pretty remarkable how the field has exploded in scope and complexity.”

### The allure of challenge

Clearly, in-house health care lawyers have seen their roles change over the years, especially recently. In the early days, they focused on medical malpractice, tax-exempt nonprofit work, and some corporate law. Now they face not only much broader challenges in those areas but also such disparate issues as liability for physicians not on staff; Medicare fraud, abuse, and compliance; and transactional work related to mergers and acquisitions. Legal expertise is a basic requisite, of course, but today’s health care lawyers must often be adept at business, science, and technology as well.

“No health care lawyer is ever bored. Every day is interesting, and there’s constant change,” says Jonathan Oviatt (’82), chief legal officer (CLO) and corporate secretary at Mayo Clinic. He had “zero health care background” when embarking on his career path, but extensive nonprofit and broad transactional experience in private practice stood him in good stead. Starting out at Mayo as a transactional lawyer, he became CLO more than a decade ago and now oversees a legal department growing rapidly in volume and expectations. Its 34 attorneys, 34



legal assistants and contract managers, and 30 support staff must constantly stretch to meet new challenges.

Oviatt lauds his organization for its focus on patient needs and commitment to excellence, and values the twists and turns his health law path has taken. “It’s not what I expected. There have been lots of surprises,” he says. “The biggest change has been becoming part of the senior leadership team. We’ve got the very best medical practice, the best medical researchers, the best medical educators in the world all working together. The teamwork dynamic is fascinating. I expect that’s true of most health care organizations like ours, which is very value-focused.”

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Besides being fascinating, health law “is very intellectually challenging, at least for my pea brain,” laughs Mary Foarde (’80). “You have to know rudimentary business law—corporate organization, contracts—and be able to negotiate financial and business transactions. But then you layer on top of that other things, like unique regulatory issues and, increasingly, filters such as quality of patient care, cost of patient care, coordinated or fragmented patient care. It’s incredibly complicated work that’s really fulfilling.”

Foarde’s small private practice firm, FriedemannFoarde, brings her full circle. She says she had always wanted to be connected to health care in some way but thought becoming a doctor or nurse might be too intense. “Science wasn’t entirely my thing,” she recalls. Starting out as an

attorney at a medium-sized firm, she gravitated toward hospital clients, then acquired two decades of in-house experience, including six years as executive vice president and general counsel at Allina Health System. She believes that 100% on-the-job learning is appropriate in this field, a view that others share.

“If a health law course was offered in law school, I don’t remember taking it,” she says. Although health law courses might be more readily available today, she explains, the topics that most capture the imagination of professors and students may have little to do with the day-to-day basics that crowd a health lawyer’s schedule.

“Bioethics issues are fascinating and thorny, and everyone loves to talk about them, but in practice, you may run into half a dozen in a year. Yet you work on complicated regulatory matters every single day,” she says. “It’s hard to believe that the regulatory environment could get more difficult, but with the ACA, it could be even tougher.” She cites expanding definitions of medical fraud, increased use of the False Claims Act, and a higher liability profile for health care providers as some of the issues that will keep today’s and tomorrow’s lawyers on their toes.

“I see nothing but work for health care lawyers—plenty of work,” agrees Teresa O’Toole (’89), chief administrative officer and CLO at Essentia Health, based in Duluth, Minn. She didn’t foresee a health law career when she first began practicing labor and employment law at a Duluth firm, but health care and hospital clients paved the way. Now she wears two hats at Essentia, taking responsibility for some support services (human resources, information technology, marketing, communications) as well as legal functions. All this work tests her stamina but fails to dampen her enthusiasm.

“There’s something different every day,” O’Toole says. “Every type of law you could ever think of practicing touches health care. Not only is it detail-oriented, very interesting, and intellectually challenging, but wherever you practice, you have the same complex issues and regulatory environment. You can live in a smaller community and still be doing cutting-edge work.”

### The drive to consolidate

Essentia Health, which has major hubs in Duluth and Brainerd, Minn., and Fargo, N.D., and also serves patients in Wisconsin and Idaho, is one example of an industry trend inducing change. Formed in 2004 through a partnership of the Benedictine and SMDC Health Systems, Essentia underwent more affiliations in 2008 and again in 2010. As such systems integrate and grow, they face new challenges particular to their patient populations. Essentia’s population in some of its regions, for instance, is aging faster than elsewhere and is also more dependent on government health insurance programs such as Medicare. Traditionally, health care providers that lost money on Medicare patients could make up for it through fees for services to patients with commercial insurance. No longer.

“That party is over,” O’Toole says. Some of the changes she predicts include declining rates of reimbursement and leaner cost structures. “Cost consciousness is really taking on new urgency. In addition, we’re restructuring the way we deliver services, and we’re being held accountable for

the health of our patient population. In an accountable care environment, it will be to our advantage to prevent the need for more expensive interventions that were historically lucrative procedures.” And altering the way in which care is delivered often requires joining forces in new ways with new players.

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Mayo Clinic has long been preparing for the inevitable changes coming to health care by focusing on two key areas, says Oviatt. The first is ensuring a culture of patient safety. The second area involves increasing the number of strategic alliances and relationships, both direct (with ownership) and indirect.

“Mayo has been involved with affiliations since the 1990s,” he says. “Increasingly we see joint ventures without ownership, including hospitals and clinics, insurance companies, pharmaceutical companies, retail, such as retail pharmacies, and employer alliances. Those are directly related to health care, but other very interesting ones are often IT-related. Health care organizations need to have strategic alliances with niche service and product providers.”

Citing the recent merger between Park Nicollet Health Services and HealthPartners in the Twin Cities as an example, Mishek indicates that the “incredible fervor of consolidation” is still going on. Such mergers used to occur every seven or eight months, he says, although many markets have reached a concentration where antitrust laws prevent acute care providers—Allina and Fairview in Minnesota, for example—from merging. Hazelden, however, is in the behavioral health field, where more consolidation may yet occur.

Because it means robust in-house departments and fewer independent physicians who need outside counsel, consolidation might seem to limit the work for health lawyers in private practice. Foarde is not worried, though. “There’s such an explosion of creative stuff going on that can potentially radically alter how people get paid—outcomes, quality of care, patient satisfaction—that I expect to see a lot of entrepreneurs trying to figure out how to meet newly emerging needs. They will need legal help,” she says. “We’ll also see small providers coming together to market themselves to the big health care organizations in order to have bargaining power. I don’t think consolidation will narrow the scope of what we do.”

### The digital transition

The HITECH (Health Information Technology for Economic and Clinical Health) Act, which was part of the 2009 stimulus package, has accelerated the adoption of electronic medical record (EMR) systems across the country, thus creating new challenges for those keeping pace with health care reform. Unresolved issues abound

as lawyers watch, wait, and scramble to deal with whatever might turn up on a given day.

An EMR system “has the potential to be a game-changer if we can get it to do all the ACA needs it to do,” Foarde says, pointing out that future tinkering will help track outcomes, allowing consumers and others to rank service providers, and other such nuances. “But now it’s more a billing system than anything else.” Electronic access to patient records, however, also makes mischief more possible. Health care organizations must work ever more diligently to make sure their records aren’t lost, misplaced, or rifled through.

“It used to be that in order to lose 10,000 records, you’d need a truck,” Foarde explains. “Now you’d just need a flash drive. But most people believe that the benefits will outweigh the detriments.”

O’Toole agrees: “It’s been an interesting evolution, and we’re still evolving.” Essentia’s electronic record-keeping has existed for a decade for some patients, but only recently has the same electronic record been implemented in most of its hospitals. Much has yet to be determined, like what, exactly, constitutes a legal medical record.

“In our EMRs, we’re creating a giant database with all kinds of imbedded information that may or may not be of use to the patient, an attorney, or the courts,” she points out. “Patient privacy laws are extremely important. And because we can track every access to patient records by user, our enforcement obligation is heightened.”

The electronic shift has turned out to be more complex and difficult than originally envisioned, adds Mishek, sometimes leading to unintended consequences. Better coding among service providers, for example, leads to higher reimbursement rates, which prompts government scrutiny. “We’re not quite there yet,” he says. “Confidentiality and the security of information are huge issues, especially as that information gets moved around. Health care organizations will require excellent lawyers to help them make the most of the statute.”

At Mayo Clinic, which has had completely integrated medical records since the ’20s, the goal of keeping information focused on the patient rather than on the service provider is nothing new. Now, however, it’s complicated by privacy, security, state laws, federal regulations, and best practice issues. That means the legal department will continue to have plenty to do. Says Oviatt, “We’ll be working on it for many, many years.”

### What’s next

Health law is indeed a hot field, wide open and awaiting new generations of lawyers. Whether they stumble upon, fall into, or plan to enter the field, they will need far-ranging skills and a sense of what kind of legal work they might enjoy most.

“Providers are really grappling with what the ACA actually means, and how to put together an accountable health care organization. A whole new world is unfolding, especially for providers, and we’re going to need smart, well-educated, experienced lawyers who can help clients navigate and make the most of it,” says Mishek. He has taught health law courses but agrees that they are only a beginning for today’s prospective health care lawyers, who



MARY FOARDE ('80)



TERESA O'TOOLE ('89)

should seek a much wider base. A working knowledge of antitrust law is important, as is a strong foundation in business. While it may seem that health law is becoming more niche-oriented, specific expertise must be balanced by broad experience and knowledge of the field.

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“In-house is where you’re really going to learn,” he adds. “You’ve got to understand how the game is played. You can’t just be a litigator who litigates the False Claims Act.”

Typically, general counsels have fostered an integrated view of such discrete areas as business transactions, medical malpractice and risk management, bioethics, intellectual property, and insurance regulation, but “there are so many different subfields now that they’ve gotten pretty specialized. It’s impossible to know everything across all of them,” Foarde says. “Compliance, for example, is a completely separate subfield that has been growing for the past 14 years and is showing no signs of stopping.”

As he considers what’s essential for up-and-coming health care lawyers, Oviatt champions basic human interaction skills—intuition, listening ability, and common sense—which he deems equally or even more important than legal analytical ability or subject area expertise. He advises new lawyers to focus carefully on law-related volunteerism and community service activities to help develop the leadership and operational skills necessary for success.

“We are not an island,” he says. “Teamwork and collegiality in a very large legal department is what distinguishes a highly effective lawyer from one who is just really smart.”

O’Toole sees a growing need for lawyers with good technical skills and scientific backgrounds, to keep up with changing technology. These days, health care organizations may do far more than simply provide health care. “Frequently our providers are physicians who are engaged in education and research and may have patentable ideas for tools and devices. Physicians are often scientists first, then doctors,” she says.

But any health care law experience at all is good, because opportunities for experienced lawyers will present themselves. Those lawyers “will need some specialized knowledge, but it’s easier to learn by actually doing than by reading the regs with no end in mind,” O’Toole concludes. “Patient care is something that can’t be completely off-shored. There will always be some need for health care lawyers nearby.” ▣

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By Cathy Madison, a freelance writer/editor based in the Twin Cities