

TABLE OF CONTENTS

CHAPTER 1

Hospital Organizational Structure

§ 1.01	Introduction	1-2.1
	[1] Public Hospitals	1-3
	[2] Private Hospitals	1-3
	[a] Voluntary	1-3
	[b] Investor-Owned	1-3
	[c] Multi-Unit	1-3
§ 1.02	Governing Body	1-4
	[1] Duties	1-4
	[a] Bylaws	1-4
	[b] Committees	1-5
	[i] Executive	1-5
	[ii] Joint Conference	1-5
	[iii] Institutional Planning	1-5
	[c] Supervision of Medical Staff	1-6
	[i] Medical Staff Bylaws	1-6
	[ii] Privileges	1-6
	[d] Chief Executive Officer	1-7
	[e] Governing Body Membership	1-7
	[f] Member Liability	1-8
§ 1.03	Medical Staff	1-10
	[1] Introduction	1-10
	[2] Organization	1-10
	[3] Membership	1-10
	[a] In General	1-10
	[b] Application for Appointment	1-11
	[c] Delineation of Clinical Privileges	1-12
	[d] Staff Categorization	1-13
	[4] Committees	1-13
	[a] Executive	1-13
	[b] Review Committees	1-14
	[i] In General	1-14

HOSPITAL LIABILITY

	[ii]	Tissue Committees	1-15
	[iii]	Pharmacy	1-16
	[iv]	Medical Records	1-16
	[v]	Blood	1-16
	[vi]	Antibiotics	1-17
	[vii]	Other Committees	1-17
[5]		Staff Privileges	1-17
	[a]	Due Process	1-17
		[i] In General	1-17
		[ii] State Action	1-19
		[iii] Procedural Due Process	1-20
		[iv] Substantive Due Process	1-21
	[b]	Bylaw as Contract	1-22
	[c]	Grounds for Denial	1-23
		[i] School for Practice	1-23
		[ii] Maintenance of Adequate Liability Insurance	1-24
		[iii] Personality	1-25
		[iv] Miscellaneous Grounds	1-27
§ 1.04		Antitrust Liability	1-29
	[1]	Introduction	1-29
	[2]	Applicable Antitrust Law	1-29
		[a] The Sherman Act	1-29
		[b] The Clayton Act	1-31
	[3]	Antitrust Immunity	1-32
		[a] State Action	1-32
		[b] Local Government Antitrust Act of 1984	1-33
		[c] The <i>Noerr-Pennington</i> Doctrine	1-34
		[d] Health Care Quality Improvement Act of 1986	1-34.1
	[4]	Specific Applications of Antitrust Law in Health Care	1-35
		[a] Hospital Mergers	1-35
		[b] Medical Staff	1-38
§ 1.05		Nursing Staff	1-40.2
§ 1.06		Health Care Fraud	1-43
	[1]	Self-Referrals	1-43
		[a] Federal Law	1-43
		[b] State Statutes	1-45
	[2]	Kickbacks and False Claims	1-45
		[a] Civil Monetary Penalties Law	1-48
		[b] Criminal Penalties	1-48.1
§ 1.07		Malpractice Information Available to the Public	1-51
	[1]	Physician Profiles	1-51

TABLE OF CONTENTS

ix

[2]	Hospital Report Cards	1-53
[3]	Other Provisions.	1-53

CHAPTER 2

Immunity

§ 2.01	In General	2-2
§ 2.02	Governmental Immunity	2-3
	[1] In General.	2-3
§ 2.03	Federal Immunity	2-5
	[1] Federal Tort Claims Act	2-5
	[a] In General.	2-5
	[b] Exceptions.	2-7
	[i] Discretionary Function.	2-7
	[ii] Intentional Torts	2-8
	[c] Employee vs. Independent Contractor.	2-9
	[d] The <i>Feres</i> Doctrine	2-10
	[e] Damages	2-15
§ 2.04	State Immunity	2-16.1
	[1] Statutory Limitations	2-16.1
	[a] In General.	2-16.1
	[b] Monetary Limits.	2-18
	[c] Insurance.	2-18
	[d] Common Statutory Immunity Exceptions	2-19
	[2] “Sue or be Sued” Provisions.	2-20.2
	[3] Governmental-Proprietary Test	2-20.2
§ 2.05	Immunity of State Political Subdivisions	2-20.3
	[1] Statutory Constraints	2-20.3
	[2] “Sue or be Sued” Provisions.	2-20.5
	[3] Discretionary Function.	2-20.5
	[4] Monetary Limits.	2-20.6
	[5] Governmental-Proprietary Test	2-21
§ 2.06	Charitable Immunity	2-23
	[1] Historical Perspective.	2-23
	[2] Rationale for Immunity Rule.	2-23
	[3] Exceptions to Immunity.	2-24
	[4] Current Status of Charitable Immunity	2-24
	[a] Monetary Limits.	2-29
	[b] Insurance.	2-29
§ 2.07	Conclusion.	2-30

HOSPITAL LIABILITY

CHAPTER 3

Hospital Tortious Liability

§ 3.01	Introduction	3-2
§ 3.02	Vicarious Liability	3-6
	[1] The Hospital Exception	3-6
	[2] The Hospital Exception Rejected	3-10
	[3] The Private Attending Physician	3-14
	[4] The HMO Physician	3-17
§ 3.03	The Corporate Negligence Doctrine	3-18
	[1] <i>Darling v. Charleston Memorial</i> <i>Hospital</i>	3-18
	[a] The Opinion	3-18
	[b] <i>Darling's Progeny</i>	3-18
	[2] Bestowal and Revocation of Staff Privileges	3-24
	[a] Non-Delegable Duty	3-24
	[b] Medical Staff Liability	3-27
	[c] Governing Board Liability	3-31
	[d] Notice of Physician Incompetency	3-33
	[i] Strict Standard	3-35
	[ii] Liberal Standard	3-37
	[3] Failure to Supervise	3-39
	[a] Illinois—Post- <i>Darling</i>	3-39
	[b] Other Jurisdictions	3-40
	[i] In General	3-40
	[ii] Informed Consent	3-42
	[iii] Ostensible Agency	3-43
§ 3.04	Claims for Possible Future Harm	3-55
	[1] In General	3-55
	[2] AIDS Phobia	3-58
§ 3.05	Statute of Limitations	3-62.4
§ 3.06	Conclusion	3-65

CHAPTER 4

Standard of Care

§ 4.01	Contract	4-2
§ 4.02	Standard of Reasonable Care and Skill	4-5
	[1] In General	4-5
	[2] Simple Negligence vs. Malpractice	4-6

TABLE OF CONTENTS

xi

	[3]	Locality Rule	4-14
		[a] In General	4-14
		[b] Exception to the Locality Rule	4-15
	[4]	Same or Similar Community Rule	4-16
	[5]	National Standard	4-19
	[6]	<i>Ad Hoc</i> Approach	4-21
§ 4.03		Evidence of Standards of Care	4-23
	[1]	Expert Testimony	4-23
	[2]	Voluntarily Assumed Standards	4-41
	[3]	<i>Res Ipsa Loquitur</i>	4-44
		[a] In General	4-44
		[b] Pre-Conditions	4-45
		[c] Expert Testimony	4-48
		[d] Application	4-50.1
		[i] Foreign Objects	4-51
		[ii] Infections	4-53
		[iii] Foreign Substances	4-54
		[iv] Burns	4-54
		[e] Evidentiary Effect	4-54
		[f] Control of the Instrumentality	4-54.1
		[i] In General	4-54.1
		[ii] Surgery	4-55
§ 4.04		Hospital Obligation to Patients	4-58
	[1]	Following Orders	4-58
	[2]	Independent Duty	4-60
	[3]	The Apology	4-62
§ 4.05		The Patient's Right to Dignity	4-65
	[1]	Mentally Ill Persons	4-65
	[2]	Terminal Patients	4-66

CHAPTER 5

Hospital Professional Liability Insurance

§ 5.01		Standard Policies	5-2
	[1]	In General	5-2
	[2]	Coverage	5-2
		[a] Negligence and Malpractice	5-2
		[b] Directors and Officers	5-3
	[3]	“Claims Made” or “Occurrence” Policies	5-3
	[4]	Risk Placement	5-4
	[5]	Conditions of Coverage	5-4.1

HOSPITAL LIABILITY

	[6]	Duty to Defend	5-5
		[a] In General.	5-5
		[b] Duty to Settle	5-6
		[c] Duty to Appeal.	5-6
	[7]	Excess and Other Insurance	5-7
§ 5.02		Alternatives to Traditional Liability	
		Insurance	5-9
	[1]	Inadequacy of Present Approach.	5-9
	[2]	Alternatives.	5-9
	[3]	Group Policies	5-10
	[4]	Tort Reform	5-11
		[a] In General.	5-11
		[b] Litigation Alternatives	5-16
		[i] Third Party No-Fault	5-18
		[ii] First Party No-Fault	5-20
	[5]	Punitive Damages.	5-21
		[a] In General.	5-21
		[b] Deterrence.	5-22
		[c] Punitive Damage Standards	5-24
		[d] Frequency and Size of Punitive Damage Awards.	5-28
		[e] Exclusion of Coverage and Public Policy	5-32

CHAPTER 6**Admission and Emergency Treatment**

§ 6.01		Admission	6-3
	[1]	Common Law Rule	6-3
	[2]	The Emergency Exception to the Common Law Rule	6-4
		[a] In General.	6-4
		[b] The Nature of an Emergency	6-5
		[c] Scarce Medical Resource.	6-5
	[3]	Discrimination	6-6
		[a] Reasonableness.	6-6
		[b] Ability to Pay	6-7
		[i] Hill-Burton Act.	6-7
		[ii] Federal Tax Exemption	6-7
		[iii] State Legislation.	6-8
		[iv] The Emergency Medical Treatment and Active Labor Act	6-9

TABLE OF CONTENTS

xiii

	[c]	Child Abuse and Rape.....	6-24.18
[4]		The Admission Process	6-24.20
	[a]	Precondition of Duty to Treat	6-24.20
	[b]	Medical Evaluation.....	6-24.21
		[i] Service Patients	6-24.21
		[ii] Private Patients.....	6-24.21
	[c]	Consent.....	6-24.22
		[i] Blanket Consent	6-24.22
		[ii] Informed Consent.....	6-24.22
§ 6.02		Emergency Treatment.....	6-25
	[1]	Obligation to Treat.....	6-25
		[a] Criminal Liability.....	6-27
		[b] Civil Liability.....	6-27
		[c] Liability of Individual Medical Professionals.....	6-28
	[2]	Reliance	6-28
	[3]	JCAH Standards.....	6-28.1
		[a] Level I.....	6-29
		[b] Level II.....	6-29
		[c] Level III	6-29
		[d] Level IV	6-29
		[e] Department Director.....	6-29
		[f] Staff Coverage	6-30
		[g] Nursing Coverage.....	6-30
		[h] Laboratory Services	6-30
		[i] Hospital Policies.....	6-31
	[4]	Hospital Liability	6-31
		[a] In General.....	6-31
		[b] Liability for Private Attending Physicians.....	6-32
		[i] Corporate Negligence.....	6-32
		[ii] Agency	6-32
	[5]	Discrimination	6-38
	[6]	Alternatives to Agency Analysis.....	6-39
		[a] In General.....	6-39
		[b] Enterprise Liability.....	6-39
	[7]	Good Samaritan Legislation	6-40
	[8]	Blood Draws.....	6-42.1
§ 6.03		Ambulance Services	6-43
	[1]	Immunity	6-44
	[2]	The Emergency Medical Treatment and Active Labor Act (EMTALA)....	6-47
	[3]	Delays.....	6-47
	[4]	Vicarious Liability	6-50

HOSPITAL LIABILITY

	[5] In-Hospital Patients and Third Parties	6-50
	[6] Expert Testimony	6-51
	[7] Discovery	6-51
§ 6.04	Interpreters	6-52
	[1] In General	6-52
	[2] Sign Language	6-52

CHAPTER 7**Nosocomial Infections**

§ 7.01	JCAH Standards	7-2
	[1] In General	7-2
	[2] Multi-Disciplinary Committee	7-3
	[3] Records	7-4
	[4] Written Policies for Each Service	7-4
§ 7.02	Liability	7-5
	[1] Duty	7-5
	[2] Proximate Causation	7-6
	[a] Expert Testimony	7-6
	[b] Difficulty of Proof	7-7
	[i] Strict Approach	7-7
	[ii] Liberal Approach	7-8
§ 7.03	Common Problems	7-9
	[1] Failure to Diagnose or Monitor	7-9
	[2] Eye Infections	7-9
	[3] Surgery	7-10
	[a] Accepted Risks	7-10
	[b] Consent	7-11
	[4] Employee and Visitor Infection	7-11
	[a] Hospital-Patient Relationship	7-12
	[b] Hospital as Land Owner	7-12

CHAPTER 8**Equipment Related Patient Injuries**

§ 8.01	Introduction	8-2
§ 8.02	Negligence and Malpractice	8-7
	[1] Duty to Ensure Equipment is Reasonably Safe	8-7

TABLE OF CONTENTS

xv

	[2] Duty to Provide Necessary Equipment	8-8
	[3] Balancing Tests	8-10
	[4] Failure to Warn and Informed Consent.	8-10
	[5] Failure to Test	8-11
	[6] Alleviating the Burden of Providing Negligence	8-12
	[7] Negligence or Malpractice.	8-12.1
§ 8.03	The “Sale” Requirement.	8-12.3
	[1] In General.	8-12.3
	[2] Warranty	8-12.3
	[3] Strict Liability	8-14
§ 8.04	Application of Strict and Warranty Liability to Hospitals for Defective Medical Equipment	8-17
	[1] Warranty	8-17
	[a] Hybrid Transaction.	8-17
	[b] Non-Medical Products	8-18
	[2] Strict Liability	8-18
	[a] Generally Inapplicable to Hospitals.	8-18
	[b] Unique Medical Relationship	8-20
	[c] The Ultimate Consumer.	8-21
	[d] Equipment Inspection.	8-21
	[e] Spreading Risks	8-22
	[f] Conclusion	8-23

CHAPTER 9

Discharge, Transfer and Referral

§ 9.01	Discharge.	9-2
	[1] Medically Appropriate Basis.	9-2
	[2] Tests	9-2
	[3] Discharge Clearance.	9-3
	[a] Medical Professional	9-3
	[b] Clinical Judgment.	9-3
	[4] Instructions	9-4
	[a] In General.	9-4
	[b] The Medical Record.	9-5
	[5] Utilization Review and Eviction	9-5
	[6] Against Medical Advice	9-6.1
	[a] Informed Refusal	9-6.1

HOSPITAL LIABILITY

	[b] Medical Staff Member's Obligation	9-7
	[c] The Chart and Release Forms	9-7
	[7] Missed Appointments	9-7
§ 9.02	Transfer and Referral	9-9
	[1] In General	9-9
	[2] Referral	9-9
	[3] Physical Examination	9-9
	[4] Patient's Best Interests	9-10
	[5] Procedure	9-10
	[6] Discharge by Repatriation	9-11

CHAPTER 10**Particular Hospital Services**

§ 10.01	Blood	10-4
	[1] Strict and Warranty Liability	10-4
	[2] Rationale	10-5
	[3] <i>Cunningham v. MacNeal Memorial Hospital</i>	10-5
	[4] Negligence	10-6.1
	[a] In General	10-6.1
	[b] The Obligation to Test	10-7
	[c] Consent	10-8
	[5] Blood Bank	10-8
	[6] Availability	10-9
	[7] Incompatibility	10-10
	[a] In General	10-10
	[b] Rh Factor	10-10
	[8] Acquired Immune Deficiency Syndrome (AIDS)	10-11
	[a] Definitions	10-11
	[b] Manner of Transmission	10-13
	[c] Prevalence in the Workplace	10-13
	[d] Blood Transfusions: Strict Liability and Warranty	10-15
	[e] Blood Transfusions: Negligence	10-18
	[f] Informed Consent for Transfusion	10-22
	[g] Hospital Liability for HIV Transmission Among Hospital Personnel	10-25

TABLE OF CONTENTS

xvii

	[h] Duty to Treat	10-29
	[i] Related Issues	10-31
	[i] Confidentiality	10-31
	[ii] Testing	10-35
	[iii] Statute of Limitations	10-40
	[9] Intraoperative Autologous Transfusions	10-40.1
	[10] Umbilical Cord Blood	10-44.1
	[11] Conclusion	10-47
§ 10.02	Radiology	10-49
	[1] Slip and Fall Litigation	10-49
	[a] The Patient’s Condition	10-49
	[b] Adequate Personnel	10-49
	[2] Hospital Responsibility for Radiologist	10-50
	[3] Radiation Diagnostics and Therapy	10-51
	[a] In General	10-51
	[b] Strict Liability	10-51
	[4] Negligence	10-52.1
	[a] In General	10-52.1
	[b] Equipment	10-53
	[c] Contrast Media	10-53
	[d] Consent	10-54
§ 10.03	[5] Radiology Record Retention	10-54
	Anesthesia	10-55
	[1] Hospital Responsibility	10-55
	[a] In General	10-55
	[b] The “Captain of the Ship” Doctrine	10-56
	[2] General Anesthesia	10-57
	[a] Intubation	10-57
	[i] Teeth	10-57
	[ii] Misplacement of Tube	10-58
	[b] Administration of Anesthesia	10-58
	[i] Personnel	10-58
	[ii] Overdose	10-59
	[iii] JCAH Standards	10-60
	[c] Extubation	10-61
§ 10.04	[3] Spinal Anesthesia	10-61
	Obstetrical Suite	10-62
	[1] Facilities	10-62
	[a] Common Law Rule	10-62
	[b] Adequacy	10-62
	[c] Pregnancy Related Actions	10-63
	[i] In General	10-63
	[ii] Wrongful Diagnosis	10-64

HOSPITAL LIABILITY

	[iii]	Wrongful Pregnancy	10-65
	[iv]	Wrongful Birth and Wrongful Life	10-68
	[v]	Wrongful Death	10-76
	[2]	Deviations from Accepted Obstetrical Standards	10-78
	[a]	Imminent Delivery	10-78
	[b]	Complications	10-79
	[c]	Monitoring	10-80
	[3]	Delayed Caesarean Section	10-82
	[4]	Attendance at Delivery	10-83
	[a]	Obstetrician	10-83
	[b]	Husband	10-83
	[c]	Neonatologist	10-84
	[d]	Newborn Security	10-84
	[5]	EMTALA and Abortion	10-84.1
§ 10.05		Surgery	10-85
	[1]	Vicarious Liability—"Captain of the Ship"	10-85
	[a]	In General	10-85
	[b]	Control	10-86.1
	[c]	Two Masters	10-86.2
	[2]	Direct Liability	10-86.3
	[a]	Hospital Residents and Interns	10-86.3
	[b]	Medical Judgments	10-87
	[c]	Palpably Improper Judgments	10-88
	[d]	Accepted Risks	10-88
	[e]	Pathology Department	10-89
	[f]	<i>Res Ipsa Loquitur</i>	10-90
	[i]	Foreign Object	10-90
	[ii]	Nerve Damage	10-92
	[iii]	Burns	10-94
	[g]	Equipment	10-94
	[h]	Post-Surgical Period	10-95
	[i]	Sales Representatives	10-96
§ 10.06		Autopsy and Donation	10-96.3
	[1]	Autopsy	10-96.3
	[a]	Consent	10-96.3
	[b]	Statutory Authority	10-96.4
	[c]	Scope of Authority	10-96.5
	[2]	Donation	10-96.5
	[a]	Uniform Anatomical Gift Act	10-96.5
	[b]	Revocation	10-101
	[c]	Presumed Consent	10-101
	[3]	Transplants	10-102

TABLE OF CONTENTS

xix

§ 10.07	Psychiatric Services	10-104
	[1] Escape by a Patient	10-104
	[2] Self-Inflicted Injuries	10-106
	[a] Negligent Supervision	10-106
	[b] Unsafe Premises	10-107
	[c] Failure to Notify a Physician	10-107
	[d] Decision to Confine a Patient	10-108
	[e] Suicide	10-109
	[3] Liability to Third Parties	10-111
	[4] Gun Control and the Mental Health Professional	10-117
	[a] Gun Control Legislative History	10-118
§ 10.08	Medication	10-123
§ 10.09	Corpses	10-125
§ 10.10	Pain Relief Management	10-128
	[1] Philosophical Background	10-128
	[2] Federal	10-129
	[3] State	10-131

CHAPTER 11

Nursing

§ 11.01	Nursing Professionalism and Its Legal Implications	11-2
	[1] Subservient Status	11-2
	[2] Negligence Standard	11-2
	[3] Changed Roles	11-3
	[a] The Nurse Practitioner in General	11-3
	[b] Nurse Anesthetists and Midwives	11-5
	[4] Communications	11-7
§ 11.02	Malpractice Litigation	11-8
	[1] In General	11-8
	[2] Ministerial vs. Professional Judgments	11-8
	[3] Standard of Care	11-10
	[4] Expert Testimony	11-11
	[5] Statute of Limitations	11-12.2
§ 11.03	The Realities of Nursing Practice	11-14
§ 11.04	Nursing Duties	11-16
	[1] Following Orders	11-16
	[2] Observation and Consultation	11-18.1

HOSPITAL LIABILITY

	[a] Patient Condition	11-18.1
	[b] Patient Activity	11-18.2
[3]	Injections and Unsterile Equipment	11-19
[4]	Operating Room	11-21
	[a] In General	11-21
	[b] Ministerial Acts	11-21

CHAPTER 11A**The Hospital Pharmacy**

§ 11A.01	Introduction	11A-2
§ 11A.02	Ownership and Location of a Pharmacy Within a Hospital	11A-4
§ 11A.03	Regulations	11A-6
	[1] Conditions of Participation in Medicare Programs	11A-6
	[2] State Boards of Pharmacy	11A-7
	[3] Joint Commission on Accreditation of Healthcare Organizations	11A-8
	[4] Controlled Substances	11A-9
§ 11A.04	Pharmacy Recordkeeping	11A-10
§ 11A.05	Pharmacy Personnel	11A-11
	[1] Non-Pharmacists	11A-11
	[2] Pharmacy Residents	11A-11
§ 11A.06	Manufacture and Marketing	11A-13
§ 11A.07	Learned Intermediary	11A-14
§ 11A.08	Medication Errors	11A-17
§ 11A.09	Use of Experimental Drugs Under Investigation	11A-21
§ 11A.10	Authority of Non-Physicians to Prescribe Medications	11A-22
	[1] Physician's Assistants	11A-22
	[2] Nurse Practitioners or Clinical Nurse Specialists	11A-22
	[3] Optometrists	11A-23
	[4] Certified Nurse Midwives	11A-23
§ 11A.11	The Future of the Hospital Pharmacy	11A-24
	[1] Introduction	11A-24
	[2] Quality of Care	11A-24
	[3] Cost Containment	11A-25

CHAPTER 12

Informed Consent

§ 12.01	Introduction	12-1
§ 12.02	Self-Determination vs. Medical Paternalism . . .	12-3
	[1] Theoretical Basis	12-3
	[2] The Medical Tradition	12-7
	[3] The Legal Tradition	12-8
§ 12.03	Battery or Negligence?	12-10
§ 12.04	The Modern Era	12-12
§ 12.05	Scope of Disclosure	12-17
	[1] Professional Standard vs. Lay Standard	12-25
	[2] Breast Cancer-Informed Consent Statutes	12-32
§ 12.06	Proximate Causation	12-32.2
§ 12.07	Exceptions to Informed Consent	12-32.8
	[1] Consent Implied in Fact	12-32.8
	[2] Consent Implied in Law	12-35
	[3] Excused Absence of Consent	12-36
	[4] Emancipated Minor	12-38
§ 12.08	Hospital Responsibility	12-41

CHAPTER 13

Refusal of Treatment

§ 13.01	The Right of a Competent Adult to Refuse Treatment	13-2
	[1] General Acceptance	13-2
	[a] Common Law	13-2
	[b] Constitutional Law	13-6
	[i] Right of Privacy	13-6
	[ii] Free Exercise of Religion	13-8
	[2] State Interests	13-9
	[a] Preservation of Life	13-10
	[b] Protection of Innocent Third Parties	13-11
	[c] To Safeguard the Integrity of the Medical Profession	13-13
	[d] Prevention of Suicide	13-15
	[3] Informed Refusal	13-17

HOSPITAL LIABILITY

§ 13.02	Foregoing Life-Sustaining Treatment for Incompetents	13-19
	[1] The Right to Death	13-19
	[a] Common Law and Constitutional Right	13-19
	[b] Criminal and Civil Liability	13-21
	[2] Incompetency	13-24
	[a] In General	13-24
	[b] Brain Death	13-25
	[c] Permanent Vegetative State or Demented Condition	13-27
	[3] Surrogate Decision-Making Standards	13-29
	[a] Substituted Judgment	13-29
	[b] Best Interests	13-32
	[i] Objective Standard	13-32
	[ii] Limited-Objective Test	13-34
	[iii] Quality of Life	13-34
§ 13.03	Nutrition and Hydration	13-37
	[1] In General	13-37
	[2] The Act/Omission Distinction	13-40
	[3] Ordinary/Extraordinary Distinction	13-40.1
§ 13.04	Decision-Making Process	13-41
	[1] Advance Directives	13-41
	[a] Natural Death Acts	13-41
	[b] Power of Attorney Acts	13-45
	[c] Health Care Proxy	13-46
	[d] Assisted Suicide	13-47
	[2] Family and Physician	13-50.1
	[a] In General	13-50.1
	[b] Minors	13-52
	[c] Fetus	13-54.3
	[3] Hospital Role	13-54.4
	[a] In General	13-54.4
	[b] DNR Policy	13-54.4
	[c] Ethics Committees	13-55
§ 13.05	Assisted Suicide	13-57
§ 13.06	Pain Relief Management	13-62.1
	[1] Philosophical Background	13-62.1
	[2] Federal	13-63
	[3] State	13-65

CHAPTER 14

Patient Medical Records

§ 14.01	Patient Medical Records	14-4
	[1] Maintenance Requirements	14-4
	[2] Government Requirements.	14-4
	[a] State	14-4
	[b] Federal	14-5
	[3] Categories	14-5
	[4] Authorized Entries	14-6
	[5] Counter Signature.	14-6
§ 14.02	Retention of Records	14-7
	[1] Amorphous Standard of Retention	14-7
	[2] Applicable State Statutes and Regulations.	14-8
	[3] Federal Regulation	14-8
	[4] Statute of Limitations	14-8.1
	[a] Contract.	14-9
	[b] Negligence and Malpractice	14-9
	[c] Tolls	14-9
	[d] Accrual	14-10
	[5] Uniform Act.	14-10
§ 14.03	Particular Records.	14-11
	[1] Admission Record	14-11
	[a] Identification.	14-11
	[b] Delay in Treatment	14-11
	[2] Patient’s Medical History	14-11
	[a] In General.	14-11
	[b] Substituted History.	14-12
	[c] Effect on Litigation	14-12
	[3] Physical Examination.	14-12
	[a] In General.	14-12
	[b] Liability.	14-12
	[4] Order Sheet.	14-13
	[a] In General.	14-13
	[b] Verbal Orders	14-13
	[c] Effect on Litigation	14-14
	[5] Clinical Record.	14-14
	[a] In General.	14-14
	[b] Consultation	14-14
	[c] Nurses’ Notes	14-14
	[6] Testing and Procedure Reports	14-15
	[7] Evidence of Informed Consent	14-15
	[a] Procedures and Treatments	14-15
	[b] Contents of Form.	14-15

HOSPITAL LIABILITY

	[c]	Signature and a Presumption of Validity	14-16
	[8]	Discharge Summary	14-17
§ 14.04		Confidentiality and the Patient	
		Hospital Record	14-18
	[1]	Ethical Principle	14-18
	[2]	Legal Principle	14-19
	[a]	Evidentiary Privilege	14-19
	[b]	Exceptions	14-21
		[i] Disclosures Outside of Relationship	14-21
		[ii] Public Interest	14-22
		[iii] OSHA	14-22
		[iv] Quality Assurance	14-23
		[v] Patient Access to His Records	14-23
	[3]	Health Insurance Portability and Accountability Act (HIPAA)	14-28
	[a]	Introduction	14-28
	[b]	Covered Entities and Business Associates	14-30
		[i] Covered Entities	14-30
		[ii] Business Associates	14-31
	[c]	Confidentiality	14-31
		[i] Introduction	14-31
		[ii] Safeguards	14-32
		[iii] Electronic Transactions	14-32.1
		[iv] Patient Notification	14-32.1
		[v] Consent and Authorizations	14-33
		[vi] Patient Access to Information	14-34.4
		[vii] Penalties	14-34.5
	[4]	The Health Information Technology for Economic and Clinical Health Act (HITECH)	14-34.7
	[a]	Overview	14-34.7
	[b]	Privacy and Penalties	14-34.8
§ 14.05		Waiver of Confidentiality	14-34.10
	[1]	Non-Confidential Information	14-34.10
	[2]	Placing Medical Condition in Controversy	14-34.10
	[3]	Analysis of Which Issues Are in Controversy	14-34.12
	[4]	Child Custody Cases	14-34.12
	[a]	No Waiver	14-34.13

TABLE OF CONTENTS

xxv

	[b] Waiver	14-34.13
[5]	Authorizations	14-34.13
	[a] Form and Content	14-34.13
	[b] Inspection and Copying	14-34.14
[6]	<i>Ex Parte</i> Interviews	14-34.15
[7]	Non-Litigants	14-34.19
	[a] In General	14-34.19
	[b] Parent and Siblings	14-34.21
	[c] Corporate Negligence	14-34.22
§ 14.06	Admissibility of Patient Hospital Records	14-36
	[1] Hearsay	14-36
	[2] Business Record Exception	14-36
	[a] In General	14-36
	[b] Conclusions and Opinions	14-36.1
	[i] State Rules	14-36.1
	[ii] Federal Rules	14-36.2
	[3] Admission Against Interest	14-36.2
§ 14.07	Incident Reports	14-37
	[1] Risk Management and Incrimination	14-37
	[2] Discovery	14-37
	[a] Privilege	14-37
	[b] Protecting the Privilege	14-38
	[3] Admissibility	14-38.1
§ 14.08	Liability Consequences	14-40
	[1] In General	14-40
	[2] Negative Observations	14-40
	[3] Proximate Causation	14-41
	[4] Alterations	14-42
	[5] Unauthorized Release	14-43
	[a] Privileges to Release	14-45
	[b] Hospital Policy	14-45
	[c] Disclosures to Law Enforcement Agencies	14-46
	[6] Subpoenas	14-47

CHAPTER 15

Hospital Accreditation and Review Organizations

§ 15.01	Joint Commission on Accreditation of Hospitals	15-2
	[1] History	15-2
	[2] Hill-Burton and Medicare	15-2
	[3] Standards	15-3

HOSPITAL LIABILITY

	[4]	Accreditation	15-3
	[5]	JCAH Records	15-4
	[6]	Reform	15-5
§ 15.02		Review Organizations	15-6
	[1]	PSRO	15-6
	[2]	PRO	15-6
	[2A]	PSO	15-7
	[3]	Hospital Review Committees	15-8
	[a]	Legal Requirements	15-8
	[b]	Review Committee Deficiencies	15-13
	[c]	Discovery of Review Records	15-13
	[i]	Retrospective and Prospective	15-15
	[ii]	Exceptions to Confidentiality	15-17
	[iii]	Physician's Use of Records	15-22
	[iv]	Racial Discrimination	15-23

CHAPTER 16**Hospital Liability for Employment Law Violations**

§ 16.01		Americans With Disabilities Act	16-2
	[1]	Overview of the Act	16-2
	[2]	Scope of Coverage Under Title I of ADA	16-3
	[a]	Covered Entities	16-3
	[b]	Protected Individuals	16-4
	[c]	Covered Physical or Mental Impairments	16-7
	[d]	Determining Status as a "Qualified Individual"	16-10
	[i]	Essential Functions of a Job	16-10.1
	[ii]	Reasonable Accommodation vs. Undue Hardship	16-11
	[e]	Exclusion for Illegal Use of Drugs	16-13
	[3]	Prohibited Conduct Under Title I of the ADA	16-14.1
	[a]	In General	16-14.1
	[b]	Pre-Employment Inquiries and Medical Exams	16-16

TABLE OF CONTENTS

xxvii

[4]	Defenses	16-18
	[a] Business Necessity in General—Section 12113(a)	16-18
	[b] Qualification Standards Based Upon Safety and Health Concerns Generally— Section 12113(b)	16-19
	[c] Special Rules for Food Handlers—Section 12113(b) . . .	16-20
§ 16.02	Sexual Harassment	16-22
	[1] Introduction	16-22
	[2] Legal Principles	16-22
	[a] Determining Illegal Conduct	16-22
	[b] Liability for Actions of Supervisors	16-24
	[c] Liability for Actions of Co-Workers	16-25
	[d] Liability for Third-Party Harassment	16-25
	[3] Suggestions for Prevention	16-26
§ 16.03	Retaliatory Discharge	16-28
	[1] Whistleblower Suits	16-28
	[2] Church Amendment	16-32

CHAPTER 17

HMO Liability for Medical Malpractice

§ 17.01	Introduction	17-1
§ 17.02	Types of Managed Care Arrangements	17-2
	[1] In General	17-3
	[2] Fiduciary Duty and Jurisdiction	17-4
§ 17.03	ERISA and the Preemption Issue	17-6
	[1] Preemption in General	17-6
	[2] The Controversy Over Preemption	17-8
	[a] Arguments in Favor of Preemption	17-9
	[b] Arguments Against Preemption . . .	17-10
	[c] Possible Resolution of the Conflict	17-11
§ 17.04	Theories of Liability	17-14
	[1] <i>Respondeat Superior</i>	17-14
	[2] Ostensible Agency	17-16
	[3] Corporate Negligence	17-17

HOSPITAL LIABILITY

[4]	Negligent Selection of Participating Physicians	17-17
[5]	Negligent Utilization Review	17-18
[6]	Express or Implied Warranty	17-19
[7]	Breach of Contract	17-20
[8]	The Federal False Claims Act	17-20

CHAPTER 17A**Telemedicine**

§ 17A.01	Introduction	17A-1
§ 17A.02	Physician Licensing	17A-5
§ 17A.03	Privacy	17A-8
§ 17A.04	Third Party Payment	17A-10
§ 17A.05	Malpractice	17A-11

CHAPTER 18**Environmental Hazards**

§ 18.01	Introduction	18-2
§ 18.02	Definitions	18-3
	[1] Solid Waste	18-3
	[2] Hazardous Waste	18-3
	[3] Infectious Waste	18-5
§ 18.03	Regulations	18-7
	[1] Centers For Disease Control	18-7
	[2] Resource Conservation and Recovery Act	18-7
	[3] The Medical Waste Tracking Act	18-8
	[4] CERCLA	18-9
	[5] OSHA	18-10
	[6] Transportation of Wastes	18-10
	[7] Water Pollution Legislation	18-12
	[8] Miscellaneous Federal Regulations	18-12
	[9] Individual States	18-13
	[a] California	18-13
	[b] Georgia	18-13
	[c] Illinois	18-13
	[d] New Jersey	18-13
	[e] New York	18-13
	[f] West Virginia	18-13

TABLE OF CONTENTS

xxix

§ 18.04	Treatment of Medical Waste	18-14
	[1] Introduction	18-14
	[2] Incineration	18-14
	[3] Recycling	18-16
	[4] Violations	18-17

CHAPTER 19

Nonmedical Liability

§ 19.01	Premises Liability	19-1
	[1] Slip and Fall	19-1
	[2] Security	19-6.1
	[3] Other Negligence Actions	19-6.2
§ 19.02	Bystander Actions for Emotional Distress	19-8
	[1] The Physical Injury Rule	19-10
	[2] Zone of Danger	19-11
	[3] Misdiagnosis	19-13
	[4] Labor and Delivery	19-14.1
§ 19.03	Consumer Fraud	19-15
§ 19.04	Kidnapping Infants	19-19
§ 19.05	Hospital Violence	19-22

CHAPTER 20

Nursing Home Civil Liability

§ 20.01	Introduction	20-1
§ 20.02	Regulatory Framework	20-5
	[1] Regulatory Assumptions	20-6
	[2] Resident Assessments	20-6
	[3] Quality of Care	20-7
	[4] Resident Rights	20-8
	[5] Facility Staffing	20-10
	[6] Compliance	20-11
§ 20.03	Common Law Actions	20-13
	[1] Causes of Action	20-13
	[2] Arbitration and Mediation	20-15
	[3] Presuit Requirements	20-22
	[4] Pleading	20-24
	[5] <i>Prima Facie</i> Case	20-25
	[6] Negligence	20-25

HOSPITAL LIABILITY

	[7]	Survival Damages and Wrongful Death	20-29
	[8]	Sexual Assault	20-30
	[9]	Discovery	20-31
§ 20.04		Statutory Private Right of Action	20-34
§ 20.05		Conclusion	20-42

CHAPTER 21**Disaster Preparedness**

§ 21.01		Introduction	21-2
§ 21.02		Disaster Preparedness	21-5
	[1]	Natural Disasters	21-5
	[2]	Terrorism	21-6
	[3]	Financial Considerations	21-6.1
	[4]	Communication	21-6.2
	[5]	Staff	21-6.3
	[6]	Training	21-7
	[7]	Management	21-9
	[8]	Surge Hospitals	21-10
	[9]	Security	21-13
	[10]	Tools	21-15
§ 21.03		Hospital Responses to Epidemics and Pandemics	21-16
	[1]	Ebola Virus	21-16
		[a] Symptoms	21-17
		[b] Transmission and Treatment	21-19
		[c] Hospital Roles	21-21
		[i] Frontline Healthcare Facilities	21-21
		[ii] Assessment Hospitals	21-22
		[iii] Treatment Centers	21-22
		[d] Discharge	21-23
		[e] U.S. Cases	21-24
	[2]	COVID-19	21-26

GLOSSARY	G-1
-----------------------	-----

INDEX	I-1
--------------------	-----