

# AMERICAN JOURNAL OF LAW & MEDICINE

VOLUME XXIII NUMBER 4 1997

## ARTICLES

**DRUG TESTING OF HEALTH CARE  
WORKERS: TOWARD A COHERENT  
HOSPITAL POLICY**

**Dana Devon**

**REGULATION OF "DOWNSTREAM" AND  
DIRECT RISK CONTRACTING BY HEALTH  
CARE PROVIDERS: THE QUEST FOR  
CONSUMER PROTECTION AND A LEVEL  
PLAYING FIELD**

**Douglas J. Witten**

## NOTES AND COMMENTS

**HMO AND INSURANCE INSOLVENCY:  
THE BENEFITS AND DETRIMENTS OF A  
FEDERAL SYSTEM**

**Craig P. Druehl**

**PHYSICIAN DESELECTION: THE  
DYNAMICS OF A NEW THREAT TO THE  
PHYSICIAN-PATIENT RELATIONSHIP**

**Richard S. Liner**

**PUBLISHED BY THE AMERICAN SOCIETY OF LAW, MEDICINE &  
ETHICS AND THE BOSTON UNIVERSITY SCHOOL OF LAW**

The AMERICAN JOURNAL OF LAW & MEDICINE is published in the Spring, Summer & Fall, and Winter by the American Society of Law, Medicine & Ethics (ASLME) and the Boston University School of Law. All decisions concerning the content of the JOURNAL are made by a joint ASLME/Boston University School of Law editorial policy committee. Statements of fact and opinion are the sole responsibility of the authors, and are not necessarily endorsed by the editors, ASLME, or the law school.

The editors invite the submission of manuscripts on medicolegal topics. For details, see the inside back cover. Editorial communications, including original manuscripts, should be addressed to Editor-in-Chief, AMERICAN JOURNAL OF LAW & MEDICINE, 765 Commonwealth Avenue, Suite 1672, Boston, MA 02215. Telephone: (617) 353-2912.

Address subscription or membership correspondence to the Membership Director, ASLME, 765 Commonwealth Avenue, Suite 1634, Boston, MA 02215. Business telephone: (617) 262-4990. Requests for permission to reproduce JOURNAL material should be addressed to the Director of Publications, at the preceding address.

Subscription rates are \$170.00 per year for institutions; and \$90.00 per year for individuals (payment for individual subscriptions must be on a personal check) who are not members of ASLME. Foreign subscribers remit an additional \$30.00 per year for foreign postage. Members of ASLME receive the JOURNAL as part of their annual dues (please see details in the back matter).

Missing copies of the JOURNAL will be sent free of charge to subscribers or members of ASLME provided that notice of such a claim is received at ASLME's subscription office *within one month of receipt of the next issue published*. Requests made after this period will be billed at the regular single-issue price of \$25.00 (members) and \$35.00 (nonmembers) and the regular double-issue price of \$40.00 (members) and \$50.00 (nonmembers).

The JOURNAL is indexed in LEXIS, WESTLAW, *Index to Legal Periodicals*, *Legal Contents*, *Index Medicus*, *Social Sciences Citation Index*, *Current Contents: Social and Behavioral Sciences*, *Biosciences Information Service of Biological Abstracts*, and EMBASE.

Library of Congress Catalog Number: 75-645516 (Shelf No. K1.M445). ISSN 0098-8588. U.S. postage paid at Lincoln, Nebraska, in accordance with Permit No. 264 (non-profit organization).

#### **ADMINISTRATIVE OFFICERS OF BOSTON UNIVERSITY SCHOOL OF LAW**

JON WESTLING, B.A., LL.D. (hon.), *President and Professor of Humanities*

JOHN R. SILBER, B.A., M.A., Ph.D., LL.D. (hon.), L.H.D. (hon.), *Chancellor, University Professor and Professor of Philosophy and Law*

RONALD A. CASS, B.A., J.D., *Dean and Professor of Law*

JOSEPH F. BRODLEY, B.A., LL.B., *Senior Associate Dean for Research and Professor of Law*

FREDERICK M. LAWRENCE, B.A., J.D., *Associate Dean and Professor of Law*

DANIEL J. FREEHLING, B.S., J.D., *Associate Dean and Professor of Law*

CHRISTINE A. MARX, B.S., J.D., *Assistant Dean for Student Affairs*

#### **OFFICERS OF THE AMERICAN SOCIETY OF LAW, MEDICINE & ETHICS**

NANCY NEVELOFF DUBLER, LL.B., *President*

JOHN LANTOS, M.D., *President-Elect*

SARA ROSENBAUM, J.D., *Secretary*

ELLEN WRIGHT CLAYTON, M.D., J.D., *Immediate Past President*

BENJAMIN W. MOULTON, J.D., M.P.H., *Executive Vice President*

ELLIOT L. SAGALL, M.D., *Founder and First President*

# AMERICAN JOURNAL OF LAW & MEDICINE

## BOARD OF EDITORS

**FACULTY EDITOR-IN-CHIEF**  
**Frances H. Miller, J.D.**  
Boston University School of Law

**FACULTY EDITOR-IN-CHIEF  
EMERITUS AND FOUNDER**  
**John A. Norris, J.D., M.B.A.**

**ASSOCIATE DIRECTOR/PUBL. DIRECTOR**  
**Michael Vasko, M.A.**  
American Society of Law, Medicine & Ethics

**CIRCULATION MANAGER**  
**Thomas Psipsikas**  
American Society of Law, Medicine & Ethics

**EXECUTIVE VICE PRESIDENT**  
**Benjamin W. Moulton, J.D., M.P.H.**  
American Society of Law, Medicine & Ethics

## EDITORS

**Michael Baram, J.D.**  
Boston University School of Law

**Charles H. Baron, LL.B., Ph.D.**  
Boston College School of Law

**Henry A. Beyer, J.D.**  
Fernald School Corp.  
Waltham, Massachusetts

**Lee J. Dunn Jr., J.D., LL.M.**  
Dunn & Auton  
Boston, Massachusetts

**Richard F. Gibbs, M.D., J.D.**  
Harvard Medical School

**Jay Alexander Gold, M.D., J.D., M.P.H.**  
Wisconsin Peer Review Organization

**Clark C. Havighurst, J.D.**  
Duke University School of Law

**Nathan Hershey, J.D.**  
University of Pittsburgh Grad. School of Public Health

**Edward E. Hollowell, J.D.**  
Hollowell & Silverstein  
Raleigh, North Carolina

**Sheila Jasanoff, J.D., Ph.D.**  
Cornell University Prog. on Science Technology & Society

**Timothy S. Jost, J.D.**  
Ohio State University College of Law

**Jay Katz, M.D.**  
Yale University Law School

**Renée M. Landers, J.D.**  
Boston College School of Law

**Sylvia A. Law, J.D.**  
New York University School of Law

**Aubrey Milunsky, MB.B.Ch., D.Sc., F.R.C.P., D.C.H.**  
Boston University School of Medicine

**Irwin N. Perr, M.D., J.D.**  
University of Washington School of Medicine

**Harvey E. Pies, J.D., M.P.H.**  
Blue Cross and Blue Shield of Florida  
Jacksonville, Florida

**Marc A. Rodwin, J.D., Ph.D.**  
Indiana University School of Public & Environmental  
Affairs

**Elliot L. Sagall, M.D.**  
Founder, American Society of Law, Medicine & Ethics

**E. Donald Shapiro, J.D., LL.D.**  
New York Law School

**Sidney Shindell, M.D., LL.B.**  
Medical College of Wisconsin

**Robert B. Shira, D.D.S.**  
Tufts University

**Paul R. Tremblay**  
Boston College School of Law

**David G. Warren, J.D.**  
Duke University Medical Center

**Cyril H. Wecht, M.D., J.D.**  
St. Francis Central Hospital  
Pittsburgh, Pennsylvania

**James G. Zimmerly, M.D., J.D., M.P.H.**  
Monumental Life Insurance Co. of AGON

# AMERICAN JOURNAL OF LAW & MEDICINE

## INTERNATIONAL BOARD OF EDITORS

**Professor Koichi Bai**  
Director, Institute of Medical Humanities  
Kitasato University School of Medicine  
Japan

**Prof. Dr. Erwin Deutsch**  
Faculty of Law  
University of Göttingen  
Germany

**Professor Bernard M. Dickens, Ph.D., LL.D.**  
Faculties of Law and Medicine  
University of Toronto  
Canada

**Dr. S.S. Fluss**  
World Health Organization  
Switzerland

**Honorable Justice Michael D. Kirby**  
President, Court of Appeal  
Supreme Court of New South Wales  
Australia

**Prof. Dr. H.J.J. Leenen**  
Instituut voor Sociale Geneeskunde  
Universiteit van Amsterdam  
The Netherlands

**Professor Amos Shapira**  
Faculty of Law  
Tel Aviv University  
Israel

**Professor P.D.G. Skegg**  
Faculty of Law  
University of Otago  
New Zealand

**Dr. M.A.M. Wachter**  
Director, Institute of Bioethics  
The Netherlands

# AMERICAN JOURNAL OF LAW & MEDICINE

AMERICAN JOURNAL OF LAW & MEDICINE  
STUDENT BOARD OF EDITORS FOR  
1997–1998

## EDITOR-IN-CHIEF

Michelle A. Zamarin

## EXECUTIVE EDITOR

Jerome B. Tichner Jr.

## MANAGING EDITORS

Kristine Dimitrova

Bradley G. Rausa

## SYMPOSIUM EDITOR

Jennifer Horner

## ARTICLES EDITORS

Michelle M. Enfinger

Alissa Epstein

Kristen M. Green

Nicole Jerabek

## PROJECTS EDITOR

Bethany Cooper

## CASE & NOTE EDITORS

Grace Bacon

Craig P. Druehl

Shana Lewinger

Natalie Marjancik

Lou Ross

## THIRD-YEAR EDITORS

Erica Abate

Theonie Alicandro

Kerri Catino

Robert Earley

Jonathan Eichman

Catherine Kaczowka

Rachelle A. Kagan

Jason M. Levy

Richard Liner

Ryan McDonald

Judith Michelman

Julia Nelson

Mary Osterbauer

K. Shiek Pal

Kathleen Paralusz

Michael Portmoy

Andrea Rathburn

Randi Rivner

David Rudin

Sharon Schlesinger

Betsi Silverman

Stephen D. Wilson

## STAFF MEMBERS

Noel Bilitz

Jennifer Blake

Kendra Carlson

Robert Chatham

Alison Chen

Caroline Chen

Jeremy A. Colby

Rachelle De Gregory

Dylan Devito

Danielle Dooley

Andrew Eliseev

Adam Falk

Rebecca Galeota

John Gorzkowski

Jennifer Greaney

Brian Green

Julia Jacobson

Jeremy Johnson

Jason Karavias

Isidor Kim

Colin Kisor

Gabrielle Lipson

Jessika Moon

Laurie Moroff

Melissa Paddock

Henry Park

Geoff Repo

Rebecca Risse

Leigh Rubinstein

Amy Schoeffel

Susan Seitz

Nathan Spatz

Tamar Terzian

Karen Volmar

Leann Westerhold

Angela Whitehead

Jennifer Williamson

# AMERICAN JOURNAL OF LAW & MEDICINE

VOLUME XXIII NUMBER 4 1997

## ARTICLES

DRUG TESTING OF HEALTH CARE WORKERS: TOWARD A COHERENT HOSPITAL POLICY 399 Dana Devon

REGULATION OF "DOWNSTREAM" AND DIRECT RISK CONTRACTING BY HEALTH CARE PROVIDERS: THE QUEST FOR CONSUMER PROTECTION AND A LEVEL PLAYING FIELD 449 Douglas J. Witten

## NOTES AND COMMENTS

HMO AND INSURANCE INSOLVENCY: THE BENEFITS AND DETRIMENTS OF A FEDERAL SYSTEM 487 Craig P. Druehl

PHYSICIAN DESELECTION: THE DYNAMICS OF A NEW THREAT TO THE PHYSICIAN-PATIENT RELATIONSHIP 511 Richard S. Liner

## MEDICOLEGAL REFERENCE LIBRARY

SELECTED RECENT COURT DECISIONS 539

INDEX 556

ANNOUNCEMENTS 557

Copyright 1997 by the American Society of Law, Medicine & Ethics, Inc. (ASLME) and the Boston University School of Law. Unless otherwise noted, the materials appearing herein may be copied for classroom use, provided that (1) the user notifies the Director of Publications of ASLME; (2) the author(s) and the *American Journal of Law & Medicine* are identified; and (3) the proper notice of copyrights is affixed to each copy.