Chapter 1

Introduction to the American Legal System

John E. Steiner, Jr., Esq.

Key Learning Objectives

By the end of this chapter, the reader will be able to:

- Understand the framework of the legal system.
- Understand how government entities interact to create and change the law, how the court system functions and how private contacts are created and enforced in the American legal system.
- Understand the workings of the legal system, especially as applied to our healthcare system.
- Understand the nature of legal advice and how to use it.
- Appreciate that interpretation of laws and decisions to enforce the laws are not consistent and are sometimes unpredictable.
- The special role of the U.S. Supreme Court.

Chapter Outline

Introduction

The objective of this chapter is to provide an overview of the framework of the legal system. The remainder of the book fits into this framework. That framework should help the reader assess which laws need to be followed, which laws are likely to change, and how laws are changed. The reader will learn about the nature of legal advice and how to use it.

Healthcare services are essential and highly regulated. Those services include clinical care and drugs, devices, other products, and the sites for providing those services. Those who provide, receive, pay for, and regulate healthcare services make decisions that often are based on legal principles with specific legal consequences. Legal advice cannot be obtained before each decision, so it is useful to have a general understanding of the law to help identify when a decision or situation may require legal counsel.

An important feature of civilized societies is the "rule of law" (as opposed to a supreme individual or group of individuals). The rule of law provides a degree of predictability and stability for human interaction and greatly facilitates contracting between private parties. In turn, there is a wide variety of contracts in force or in litigation at all times. Those contracts apply to many activities, including the purchase of goods and services, exchange of patient information, construction of healthcare facilities, protection of the results of creative work (such as inventions, new drugs, or published works on scientific advances, etc.). An overview of contracts is provided in section 1-5.

American society is governed by the "rule of law," not the rules of a single individual.

The special role of the U.S. Supreme Court (often referred to simply as the "Supreme Court") in healthcare policy and legislation is an important element of this chapter and our legal system. For example, shortly after passage of the Patient Protection and Affordability Care Act ("PPACA" – sometimes referred to as "Obama Care") several state attorney generals filed a lawsuit that challenged PPACA based on constitutional arguments. Section 1-6 summarizes the legal issues related to that challenge. At the time of the writing of this chapter, the Supreme Court had not yet ruled on the legal arguments presented in this landmark case.

1-1 The Nature of the Law

The law combines a variety of social norms, processes, and an overall system to guide and govern human conduct, facilitate cooperative enterprise, minimize the use of force to resolve conflicts, and punish those who break the law. A major benefit of laws that are respected by those who are subject to those laws is a sustainable structure for cooperative enterprise. The law also serves to reduce and, as needed, address conflict between individuals and between government and individuals. Since conflicting interests are inevitable, the law also provides ways to resolve disputes.

Like medicine, law is not an exact science. Lawyers often cannot provide a precise answer to a legal question or predict with certainty the outcome of a legal disagreement. Much of the law is subject to interpretation, which creates uncertainty. Many questions have never been precisely addressed by the legal system. Even when questions are answered by the courts or legislature, those answers may change by acts of a "higher court" (i.e., one with greater authority) or by passage of a new law. The ability of the law to adjust to individual situations is one of its strengths. Legal uncertainty is similar to the uncertainty encountered in making medical and nursing diagnostic and treatment decisions. When dealing with systems as complicated as the human body or human society, uncertainty is inevitable. A lawyer's advice is always valuable, just as a physician's advice is valuable, because an attorney can use knowledge of how the law has addressed similar questions in the past to predict the most probable answer in the present. After a dispute arises, a lawyer plays the role of an advocate and represents his or her client's interests as strongly as possible, and within the bounds of the code of professional responsibility and ethics for lawyers.

Law and medicine are similar fields; both are "practiced," and changes are common.

In daily life, the law helps guide our behaviors. Most disputes or controversies between persons or organizations are resolved without lawyers or courts. In many situations, the existence of the legal system is a stimulus to address and settle private disputes in an orderly fashion. Legal principles reinforce those settlements. The likelihood of success in court affects the willingness of

parties to negotiate private settlements. So, it is advantageous to have a basic knowledge of legalities when faced with a dispute.

Laws govern the relationships of private individuals and entities with each other and with government. Laws are divided into civil law and criminal law. Civil law can be divided further into contract law, tort law, and other governmental statutes and regulations. Contract law concerns enforcement of agreements and payment of compensation for failure to fulfill those agreements. In a few situations, courts can order parties to a contract to perform the duties described in the contract, instead of paying compensation for failure to perform the duties. This is a contract remedy called "specific performance." Tort law defines duties that are not based on contractual agreement and provides remedies for injuries that are caused by breaches of those duties. Within the area of tort law, there are two general categories: intentional torts and unintentional torts. One often hears or reads the word "negligence" to describe an error or bad result in healthcare delivery. One also hears the work "malpractice" to describe the same situation. Both words generally apply to unintentional torts. As described later in this book, there also are situations where physicians, nurses, or other healthcare providers have intentionally harmed patients, which would be considered an "intentional tort."

A third area of civil law includes governmental statutes and regulations that require individuals and organizations to act in specified ways. There is a special area of law called "administrative law," which applies in many areas of healthcare regulation and oversight. Examples of the areas addressed by such statutes and regulations include healthcare quality, medical device safety, hazardous waste disposal, labor relations, business arrangements between physicians and healthcare facilities, employment policies, facility safety, and other important topics. The primary goal of most of these regulations is to attain compliance, not to punish offenders.

Criminal law describes and punishes certain conduct that may or does injure people and property. The basic difference between civil and criminal law is the concept of "intent" on the part of someone charged with a crime. Over the past twenty years, criminal law has become a more significant concern for healthcare providers (including individuals and organizations). Both federal and state enforcement authorities have expanded the use of criminal laws to address perceived and actual fraud and abuse in the healthcare system. Some conduct in the healthcare system has been defined or redefined as criminal. In addition, criminal penalties have been expanded or increased in more recent federal legislation. For example, federal privacy laws designed to protect an individual's health information include criminal penalties. If someone improperly takes your healthcare information and tries to make a personal profit with that information and are caught, that person might be sentenced to jail.

The key difference between "civil" and criminal" violations is the concept of "intent," i.e., did the person intend the result that he or she achieved?

1-2 Governmental Organization and Functions

Government is divided into three branches: legislative, executive, and judicial. Each branch of government has a primary function. The legislature makes laws, the executive enforces laws, and the judiciary interprets laws. There are many court decisions, including those of the Supreme Court, that address how the three branches are supposed to share power, according to our Constitution. In practice, the separation of these three branches is not always precise, and there is some overlap.

Separation of Powers. Separation of powers means that none of the branches is clearly dominant over the other two; each branch can affect and limit the functions of the others. Thus, the process for enacting legislation is a system of checks and balances. On the federal level, "Bills" are introduced and become statutes (or "Acts") in Congress. However, a Bill usually does not become a law until signed by the President. When the President refuses to approve the law, it is called a veto. Congress has the option to override the President's veto by a two-thirds vote. In addition, if the President fails to veto or approve within a given time limit, a Bill can become law. A Bill that has become law can ultimately be overturned by the Supreme Court or by another court in the judicial branch if it is decided that the law violates the Constitution.

The separation of powers between our three branches of government is not crystal clear. That lack of clarity creates an important "dynamic tension" in our system of government.

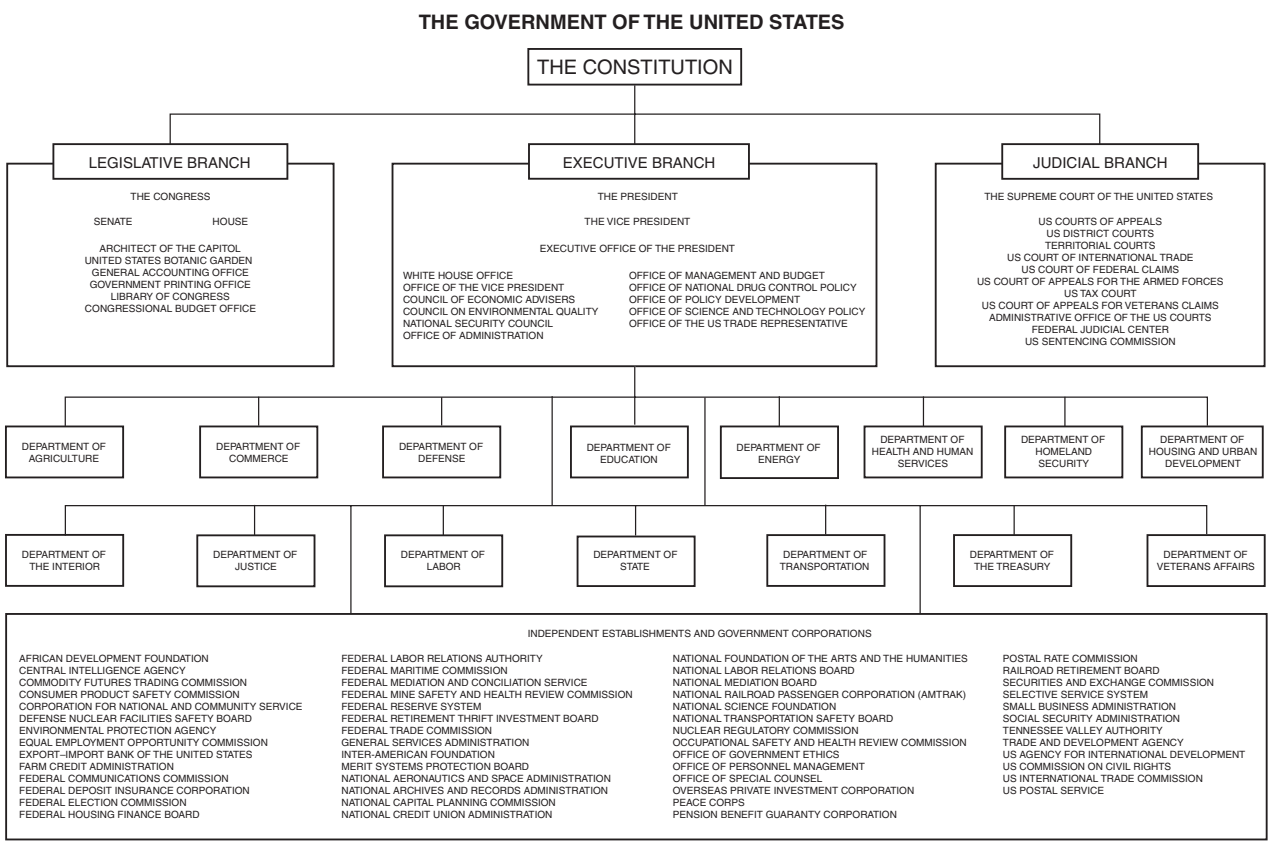

Figure 1-1 The Government of the United States

The executive and legislative branches affect the composition of the judicial branch. The President's nominees for federal judges, including Supreme Court justices, must be approved by the Senate. The Supreme Court's decision is final unless Congress and the President enact or revise legislation that changes a decision by the Supreme Court. That is, a Supreme Court decision is considered the "law of the land," unless the legislature (Congress) and the executive branch (President) pass a law that differs from a Supreme Court decision. Another method of overriding a Supreme Court decision, described later in this chapter, is to amend the Constitution. This takes time and is a complex process.

Here is an explanation of the primary functions of each branch:

LEGISLATIVE. The legislative branch enacts new laws and amends existing laws. It determines the need for new laws and for changes in existing laws, primarily through public hearings and committee meetings. Legislatures typically assign legislative proposals to specific committees with members who have or gain expertise in the areas addressed by the proposals. The committees investigate and hold hearings at which interested persons may present their views. These hearings provide information to assist the committees in considering the Bills. Hearings help publicize issues and develop public support for action. Some Bills are released from the committees and reach the full legislative body, where after consideration and debate, the Bills can be either approved or rejected. Congress and every state legislature, with the exception of Nebraska, consist of two houses. (Nebraska has only one house.) Both houses must pass identical versions of a Bill before it can be presented to the chief executive. Differences in the versions passed by the two houses are sometimes resolved by a joint conference committee. That committee is composed of leaders from both houses, and their compromise is then voted on by both houses.

EXECUTIVE. The primary function of the executive branch is to enforce and administer laws. The chief executive, state governor, or President of the United States also has a role in law creation through the power to approve or veto Bills passed by legislatures. If the chief executive approves a passed Bill, it becomes law. If the chief executive vetoes the Bill, it can become law if the legislature overrides the veto.

The executive branch is organized into departments. Each department is assigned responsibility for specific areas of public affairs and enforces the law that applies to its assigned areas. Most federal laws that directly affect hospitals are administered by the Department of Health and Human Services. In most states, a department is responsible for health and welfare matters, including the administration and enforcement of most laws affecting hospitals. Other departments and governmental agencies also affect hospital affairs. On the federal level, for example, laws concerning wages and hours of employment are enforced by the Department of Labor.

JUDICIAL. The function of the judicial branch is adjudication – deciding disputes in accordance with the law. For example, courts decide suits brought against hospitals by patients seeking compensation for harm they feel was caused by the wrongful conduct of hospital personnel. News of malpractice suits and suits by the government against hospitals frequently receives the greatest attention. However, a less well-known fact is that hospitals also sue to enforce rights or to protect legally protected interests. For example, hospitals initiate suits to challenge acts by governmental agencies; to have legislation concerning hospitals declared invalid; to collect unpaid hospital bills; and to enforce contracts.

Many disputes are resolved by negotiation or arbitration without resort to the courts. However, sometimes a controversy cannot be resolved without going to court. When a dispute is brought before a court, the judge (and, sometimes, juries) decides the meaning of agreements and laws, confirms the facts, and decides which facts are relevant to the dispute at hand. Application of law to the facts is the essence of the judicial process. There are many steps, some more complex than others, to follow before a "fact" is allowed to be considered part of the evidence in a dispute. That is one reason why litigation may take a long time and become expensive.

1-3 Sources of Law

The four primary sources of law are:

- Constitutions (1-3.1)
- Statutes (1-3.2)
- Decisions and rules of administrative agencies (1-3.3)
- Court decisions (1-3.4)

International law embodied in treaties (1-3.5) is a fifth source of law, but it rarely has a direct effect on healthcare providers.

Private agreements can be viewed as a sixth source of law. In many situations, legal requirements in private contracts have a more direct effect on day-to-day decision-making than do government sources of law.

1-3.1 Constitutions

The Constitution of the United States is the supreme law of the land. It establishes the general organization of the federal government, grants powers to the federal government, and places limits on what federal and state governments can do. The Constitution establishes and grants power to the three branches of federal government.

The U.S. Constitution is the supreme law in America.

The Constitution is a grant of power from the states to the federal government. The federal government has only the powers that the Constitution grants expressly or by implication. Express powers include, for example, the power to collect taxes, declare war, and regulate interstate commerce. The federal government is also granted broad implied powers to enact laws "necessary and proper" for exercising its other powers. However, federal courts do enforce limits on how expansively Congress can define its powers by sometimes declaring laws to be outside the authorized powers.[1] When the federal government establishes law within the scope of its powers, that law is supreme. All conflicting state and local laws are invalid.

The Constitution also limits what federal and state governments can do. Many limits on federal power appear in the first ten amendments to the Constitution, called the Bill of Rights. The Bill of Rights protections include the right to free speech; free exercise of religion; freedom from unreasonable searches and seizures; trial by jury; and no deprivation of life, liberty, or property without due process of law. Some of the most frequently applied limits on state power are stated in the Fourteenth Amendment: "...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." These clauses are frequently

referred to as the "due process" clause and the "equal protection" clause.

The "due process" and "equal protection" clauses in the Constitution provide a basis for many interesting and important Supreme Court decisions.

DUE PROCESS OF LAW. The due process clause restricts state action, not private action. Actions by state and local governmental agencies, including public hospitals, are state actions and must comply with due process requirements. Actions by private individuals at the direction of the state can also be subject to these requirements. In the past, private hospitals were sometimes considered to be engaged in state action when they were regulated or partially funded by governmental agencies. As discussed elsewhere in this book, it is now rare for private hospitals to be engaged in state action.

The due process clause applies to state actions that deprive a person of "life, liberty, or property." Liberty and property interests can include a physician's appointment to the medical staff of a public hospital and a hospital's institutional license. Thus, in some situations public hospitals must provide due process, and in other situations, hospitals are entitled to due process. The process that is due varies depending on the situation.

The two primary elements of due process are (1) rules must be reasonable and not vague and (2) fair procedures must be followed in enforcing rules. Rules that are too arbitrary or vague violate the due process clause and are not enforceable. The primary elements of a fair procedure are notice of the proposed action and an opportunity to present information as to why the action should not be taken. The phrase "due process" in the Fourteenth Amendment has been interpreted by the Supreme Court to include nearly all of the rights in the Bill of Rights. Thus, state governments cannot infringe on those rights.

EQUAL PROTECTION OF THE LAWS. The equal protection clause also restricts state action, not private action. Equal protection means that like persons must be dealt with in a like fashion. The equal protection clause addresses categories or classifications used to distinguish persons for various legal purposes. When a classification is challenged, the court must determine whether a different classification between persons justifies a difference in application of rules or procedures. Courts generally require governmental agencies to justify such different treatment with a "rational reason." A major exception to this standard is the "strict scrutiny" standard applied by courts to distinctions based on "suspect classifications," such as race. Another exception is the "intermediate level" of scrutiny applied to sex-based classifications.

Courts have ruled that the equal protection clause imposes a constitutional right of interstate travel that has been applied to strike down state limitations on welfare benefits for new residents.[2]

The equal protection clause of the Fourteenth Amendment includes an express grant of enforcement powers to the Congress. That grant of power supersedes the Eleventh Amendment to the Constitution. The Eleventh Amendment bars most lawsuits that seek money from being brought against a state, unless the state consents. Congress can authorize suits against states to enforce equal protection.[3] Other federal powers, such as the Commerce Power, generally do not permit Congress to violate a state's Eleventh Amendment immunity from lawsuits that seek money.[4]

STATE CONSTITUTIONS. Each state has a constitution. The state constitution establishes the organization of state government; grants powers to state government; and places limits on what state government can do. Many of these documents contain rights similar to the rights in the U.S. Constitution, and some provide additional rights.

1-3.2 Statutes

Another major source of law is statutory law, enacted by a legislature. Legislative bodies include the U.S. Congress, state legislatures, and local legislative bodies, such as city councils and county boards of supervisors. Congress has only the powers delegated by the Constitution, but those powers have been broadly interpreted. A state legislature has all powers not denied by the U.S. Constitution, valid federal laws, or the state constitution. A local legislative body has only those powers granted by the state. Some states have granted local governments broad powers through either statutes or constitutional amendments authorizing the "home rule."

PREEMPTION. When state or local law conflicts with federal law, valid federal law controls, and this is referred to as the "preemption doctrine." In addition, certain Federal laws preempt some areas of law. In those areas, state law is superseded by federal law even when it is not in direct conflict with the federal law. Some laws, such as bankruptcy laws and the Employee Retirement and Income Security Act

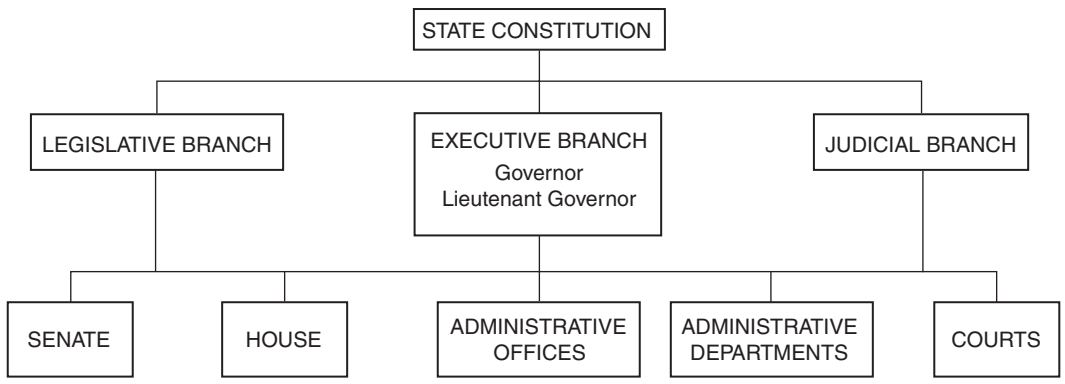

Figure 1-2 State Government Organizations

(ERISA),[5] clearly prohibit state regulation of those subjects. In other laws, where such a clear prohibition is not stated, the courts have concluded that federal law controls (that is, it "pre-empts" state law) based on the aim and scope of the federal law. In these situations, the courts also point out the need for uniformity, and the likelihood that state regulation would obstruct the goals of the federal law.

The "preemption" doctrine is important to understand. It also can be complex to apply and helps shape how courts make decisions that affect our daily lives.

Courts tend not to find implied preemption of state law by a federal law when the state is exercising its police power to protect public health. For example, in 1960 the Supreme Court ruled that the extensive federal regulation of shipping did not preempt a city ordinance concerning smoke emissions. In that case, a federally licensed vessel could be prosecuted for violating the pollution ordinance.[6] In 1985, the Supreme Court ruled that county ordinances regulating blood plasma collection were not preempted by federal regulation of drugs.[7] Some federal laws preempt only some aspects of an area, leaving others to state regulation. For example, the Minnesota Supreme Court ruled in 1986 that federal law preempted state licensure of air ambulances, but that the state could enforce staffing, equipment, and sanitary requirements.[8]

When local laws conflict with state laws, valid state laws supersede. State law can preempt an entire area of law, so local law is superseded even when it is not in direct conflict with state law.[9]

PRIVATE RIGHT OF ACTION. When a statute does not specifically authorize private individuals to bring a lawsuit to enforce the statute, the courts have to determine whether a private right of action is implied.[10] If there is no private right of action, then only the government can enforce the statute. For example, the Health Insurance Portability and Accountability Act (HIPAA) does not create a private right of action for violations of the privacy rights established for individuals and their protected health information.

1-3.3 Decisions and Rules of Administrative Agencies

The decisions and rules of administrative agencies are another source of law. Legislatures delegate to administrative agencies the responsibility and power to implement various laws. The agencies do so by writing regulations that further the purposes of the legislation. In addition, agencies exercise quasi-judicial power when they decide how the statutes and regulations apply to individual situations. These powers are delegated because the legislature does not have the time or expertise to address the complex issues concerning many regulated areas. Examples of federal administrative agencies include the Centers for Medicare and Medicaid Services (CMS); Food and Drug Administration (FDA); National Labor Relations Board (NLRB); and Internal Revenue Service (IRS). CMS administers the Medicare program and the federal aspects of the Medicaid program. The FDA publishes regulations and applies them in decisions related to manufacturing, marketing, and advertising foods, drugs, cosmetics, and medical

Many areas of conduct are regulated by federal agencies. Thus, a basic understanding of "administrative law" and its application are essential for a well-rounded understanding of the American legal system.

devices. The NLRB decides how national labor laws apply to individual disputes. The IRS publishes regulations and applies them to a variety of situations involving personal, corporate, partnership, and other taxable entities.

Many administrative agencies seek to achieve some consistency in their decisions by following the position they adopted in previous cases involving similar matters.[11] This is similar to the way courts develop "common law," discussed later in this chapter. When dealing with these agencies, previous decisions, as well as rules, should be reviewed. Also, federal agencies must follow policies and procedures that are designed to be fair and comply with the Administrative Procedure Act (APA), passed by Congress in 1946.

Administrative regulations are valid only to the extent they are within the authority validly granted to the agency by legislation. Delegation can be invalid when it violates the constitutional requirement of separation of powers. That can happen when the legislation does not sufficiently specify what regulations the administrative body can make. Delegations by Congress usually are found to be valid by the courts. Broad delegation, specifying the general area of law, is permitted.[12] In the past, state courts often declared delegations unconstitutional unless there was considerable specificity. Today, state courts often permit much broader delegation.

As mentioned above, Congress and many state legislatures have passed administrative procedure acts. These laws specify the procedure for administrative agencies to adopt rules and to reach decisions in individual cases when no other law specifies different procedures for the agency. Generally, these laws require proposed rules to be published so that individuals have an opportunity to comment before a rule is considered final. Many federal agencies must publish both proposed and final rules in the Federal Register. Some changes do not have to be published.[13] Many states have similar publications that include proposed and final rules of state agencies. Healthcare providers usually monitor proposed and final rules in these publications and trade association publications. Those publications are used by lobbyists to advocate for or against certain agency positions. Despite their expertise, administrative agencies do not know all the implications of their proposals. They rely on the public and those regulated to alert them to potential problems through the public comment and rule-making processes.

Some administrative agencies use "negotiated rule-making," giving those regulated and other interested parties more input in the development of regulations.[14] This technique typically is used when a regulated activity may involve more than one agency; for example, CMS and the FDA.

Agency enforcement of statutes and regulations may be constrained by agency resources. Sometimes, when legislators are opposed to a law or regulation that they cannot change or repeal directly (for political or procedural reasons), they may curtail or eliminate funding for enforcement.[15] Even when an agency is not the subject of selective funding in this manner, its funding generally is subject to budget limits. Enforcement funds and practices often define the practical meaning of the regulations. When approvals from the government are required, delays in approvals can slow down actual enforcement of regulations.[16]

1-3.4 Court Decisions

Judicial decisions are a fourth source of law. The role of courts is to resolve disputes. In deciding individual cases, courts interpret statutes and regulations; determine whether specific statutes and regulations are permitted by the state or federal constitution; and create the common law when deciding cases not controlled by statutes, regulations, or a constitution. "Common law" is sometimes referred to as "judge made law." Briefly, "common law" is a set of principles and rules of action reflected in court decisions rather than legislation. The common law applies to the protection of persons and property and is based on customs and traditions, as interpreted over time by judges.

INTERPRETING STATUTES AND RULES. There is frequent disagreement over the application of statutes or regulations to specific situations. Often an administrative agency has the initial authority to decide how to apply its rules. Under the doctrine of primary jurisdiction, courts generally will refuse to accept a lawsuit until the appropriate administrative processes have been used.[17] This is sometimes referred to as the doctrine of "exhaustion of administrative remedies." The final administrative decision usually can be appealed to the courts. The courts, in turn, generally defer to decisions of administrative agencies in certain areas, for example, when the administrative agency's experts are shown to be well qualified to set certain administrative standards that are required to be established under the law. While there is some deference to the agency interpretation of the law concerning the agency, there is no presumption that agency conclusions of law are correct.[18] Courts review whether the delegation to the agency was constitutional. In addition, courts look to see whether the agency acted within its delegated authority, followed proper procedures, had a

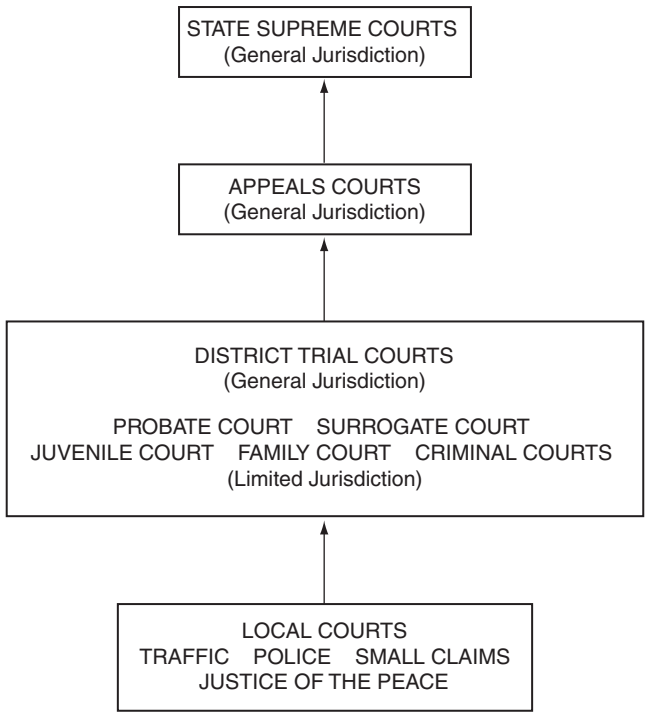

Figure 1-3 State Court System

substantial basis for its decision, and did not discriminate or act arbitrarily in making its decision. The court might have to interpret a statute or regulation or decide which of several conflicting statutes or regulations applies. Courts have developed rules for interpreting statutes. Some states also have a statute specifying interpretation rules. These rules or statutes are designed to help determine the intent of the legislature.

Since agencies touch many areas of our daily activities, the courts often are asked to determine whether an agency is exceeding the authority delegated to it by the legislature.

CONSTITUTIONALITY OF STATUTES AND RULES. Courts also determine whether statutes or regulations violate Constitutional principles, some of those were discussed earlier in this chapter. Courts can declare a law invalid when it is unconstitutional.[19] Laws can be declared unconstitutional because of their content or how they are enacted. For example, in Florida and other states, an appropriation bill (sometimes called a "funding" bill) cannot change the law that says how the money will be spent. Thus, in 1995, the Florida Supreme Court ruled as unconstitutional a provision of the Medicaid appropriation bill that attempted to reinstate pharmacy copayments.[20] The legislature had to make the change in a nonappropriation bill.

COMMON LAW. Many legal principles and rules applied by courts are the product of the common law developed in England and the United States. The term "common law" refers to principles that evolve from court decisions. Common law is continually being adapted and expanded. During the colonial period in North America, English common law applied. After the American Revolution, each state adopted part or all of the existing common law. Subsequent common law has been developed by each state, and so common law differs from state to state. The federal courts have also developed a federal common law. Statutory laws have been enacted to restate many legal principles that initially were established by courts as part of the common law. Many cases, especially disputes among private entities, are decided according to the common law. The common law can be changed by statutes that modify the principles or by court decisions that establish different common law principles.

1-3.5 International Law

International law expressed in the treaties between the United States and other nations is a fifth source of law. International law has rarely had an impact on healthcare providers except when they enter business transactions with businesses in other countries. There may be increased relevance of international law to health care as "medical tourism," global innovations, financing, and research continues to grow and expand beyond borders.

International law can have an impact on domestic policy and practices. For example, the European Union adopted strict requirements for privacy of medical information, which some American businesses had to address in order to engage in business involving European medical information.[21] This has been less of a problem because U.S. standards were strengthened under the federal Health Insurance Portability and Accountability Act (HIPAA) in 2003. Another example is the use of the North American Free Trade Agreement (NAFTA) to challenge a large liability award by an American court.[22]

1-4 Organization of the Court System

The structure of the court system determines which court decisions serve as precedents in a geographic area. There are over fifty court systems in the United States, including the federal system, each state's system, the District of Columbia's system, and the systems of Puerto Rico and the territories. These courts do not all reach the

same decisions concerning specific issues. Frequently, a majority approach and several minority approaches exist on an issue. Careful review is necessary to find the court decisions applicable to an individual hospital and, if there are no such court decisions, to predict which approach courts are likely to adopt.

Some of the variation in outcome is due to different approaches to the law. In some cases, courts consider subsequent social developments when interpreting constitutional and statutory language and common law principles. Also, some judges may take a more active role in the development of the law; these are sometimes referred to as "activist judges" because they

> Judges who seek to actively shape societal norms through their court decisions are sometimes called "activist judges."

bring a certain, relevant perspective to a decision that may not have been raised by the parties. In some cases, courts seek to interpret constitutional and statutory law more strictly, leaving development of the law to other branches of government.

The federal court system and many state court systems have three levels of courts: trial courts, intermediate courts of appeal, and a supreme court. Some states do not have intermediate courts of appeal.

This section is divided into discussions of:

- Trial courts (1-4.1)
- State court system (1-4.2)
- Federal court system (1-4.3)

This is followed by discussions of key legal principles that determine the effect of court decisions: stare decisis (1-4.4) and res judicata (1-4.5). Finally, there is an explanation of how and when matters may be heard by a court: standing (1-4.6).

1-4.1 Trial Courts

In both state and federal trial courts, the applicable law is determined, and the evidence is assessed to determine what the "facts" are. The applicable law is then applied to those facts. The judge determines what the law is. If there is a jury, the judge instructs the jury as to what the law is, and the jury determines the facts and applies the law. If there is no jury, the judge also determines the facts. In some cases, everyone agrees on the facts, and the court is asked only to determine what the law is. In other cases, everyone agrees what the law is, but there is disagreement over the facts. Many cases involve both questions of law and questions of fact.

> In a court setting, establishing the "facts" is a critical first step. In a court of law, the "facts" may not always be what actually happened.

The determination of facts must be based on evidence properly admitted during trial, so "facts" are not necessarily what actually happened. To determine facts for purposes of deciding a case, the credibility of witnesses and the weight to be given to other evidence must be determined.

The judge has significant control over the trial even when a jury is involved. If the judge finds that insufficient evidence has been presented to establish a factual issue for the jury to resolve, the judge can dismiss the case. Or, in civil cases, the judge can direct the jury to decide the case in a specific way. In civil cases, after the jury has come to a decision, the judge can decide in favor of the other side.

DEFAULT OUTCOME AND BURDEN OF PROOF. When analyzing any statute or legal principle, it is helpful to identify the default outcome. That is, what happens if no one can prove that something else should happen. If that default outcome is not desired, the next step is to identify what must be done to convince the judge or jury to determine that the default outcome should not occur. The person who wants a different outcome has the burden of proof. Much of legal planning is to make the default outcome favorable or at least to design documentation to meet the burden of proof for the desired outcome.

Generally, in a trial the plaintiff who brings the suit has the initial burden of proof. When that initial burden is met, the burden usually shifts to the defendant to prove that an exception or specific defense applies to what the plaintiff has alleged.

An example of this analysis is a Florida case in which a hospital sought to collect the balance of a bill from a guarantor where the balance had not been paid by insurance. The trial court placed the burden of proof on the hospital to demonstrate that the services beyond those paid by insurance were medically necessary. In this case, the default position was no payment due from the guarantor. The hospital lost at the trial court level. The appellate

court ruled that the burden of proof should have been on the guarantor to prove lack of medical necessity, so the default position was payment by the guarantor. A new trial was ordered to give the guarantor an opportunity to meet the burden of proof.[23]

Courts often distinguish three aspects of the burden of roof:

- First, the plaintiff generally has to demonstrate a prima facie case before the defendant is obligated to do anything. A prima facie case is demonstrated by providing some evidence that all of the elements necessary for the claim are present. Failure to submit a prima facie case can lead to dismissal.
- Second, when a prima facie case is presented, there is the burden of going forward, frequently called a burden of production. In some types of cases, the burden of production requires the defendant to explain why some defenses apply. For example, after a prima facie case of employment disability discrimination is made, the employer has the burden of production to articulate a legitimate, nondiscriminatory reason for the adverse action against the plaintiff.
- Third, there is the ultimate burden of persuasion. This is the burden to convince the court that, based on the evidence, the court should rule in a particular way. If the burden of persuasion is not met, then the court should rule for the default position. The burden of persuasion generally remains with the plaintiff.[24]

1-4.2 State Court System

The trial courts in some states are divided into separate courts for specific issues, such as family courts, juvenile courts, probate courts, courts limited to lesser crimes, or courts limited to civil cases involving limited amounts of money. Some states have created specific courts with new functions.[25] Each state has trial courts of general jurisdiction that can decide all disputes that are not assigned to other courts or that are barred by valid federal or state law.

Most state court systems have intermediate appellate courts. Usually, these courts decide only appeals from trial court decisions. Some states permit a few issues to be taken directly to an intermediate appellate court. When an appellate court is deciding an appeal, additional evidence is not accepted. Only evidence in the trial court record is used. An appellate court almost always accepts determinations of fact from the trial court because the jury and judge see witnesses and can better judge their credibility. Usually, the appellate court bases its decision on whether proper procedures were followed in the trial court and whether the trial court properly interpreted the law. However, an appellate court will occasionally find that a jury or trial judge verdict is so clearly contrary to the evidence that it will either reverse the decision or order a new trial.

Each state has a single highest court, usually called the Supreme Court. In some states, the name is different. For example, in New York the highest court is called the Court of Appeals, while trial courts are called supreme courts. The highest court decides appeals from intermediate appellate courts and some direct appeals from trial courts. The highest court usually also has other duties, including adopting procedural rules for the state court system, determining who can practice law in the state, and disciplining lawyers and other judges for improper conduct.

In most states, there is no right to review by the highest state court. The highest court has discretion whether or not to grant review. Thus, the intermediate appellate court decision is the final decision in many cases.

1-4.3 Federal Court System

The federal court system has a structure similar to that of state court systems. The trial courts are the U.S. District Courts and special purpose courts such as the Court of Claims, which determines certain claims against the United States.

LIMITED JURISDICTION. Federal trial courts are fundamentally different from a state trial court because they all have limited jurisdiction. Proper "jurisdiction" for a federal trial court lawsuit must either present a federal question or be between citizens of different states. In many types of cases, the controversy must involve at least $75,000. Federal question cases include those involving applications of federal statutes and regulations and those involving possible violations of rights under the U.S. Constitution. When a federal trial court decides a controversy between citizens of different states that does not involve a federal question, it is acting under what is called its diversity jurisdiction. In diversity cases, federal

To bring a case in federal court, there must be proper "jurisdiction." There are two types of proper jurisdiction and each has specific requirements.

court procedures are used, but the law of the applicable state is used, rather than federal law.

ABSTENTION. Sometimes federal trial courts will decline to decide state law questions until they have been decided by a state court. This is called abstention.[26] It is designed to leave state issues for state courts and minimize the federal court workload. Federal courts generally do not abstain when important federal questions are affected by the state law question. Some states have procedures by which federal courts can ask the highest state court to decide a question of state law.

FEDERAL CIRCUIT COURTS OF APPEALS. An appeal from a federal trial court goes to a U.S. Circuit Court of Appeals. The United States is divided into twelve circuits, geographic areas numbered one through eleven plus the District of Columbia Circuit and a nongeographic Federal Circuit.

U.S. SUPREME COURT. The highest court is the U.S. Supreme Court. It decides appeals from courts of appeals. Decisions of the highest state courts can also be appealed to the Supreme Court if they involve federal laws or the U.S. Constitution. Sometimes when the court of appeals or the highest state court declines to review a lower court decision, a lower court decision can be reviewed by the Supreme Court.

The Supreme Court has the authority to decline to review most cases. With few exceptions, a request for review is made by filing a petition for a writ of certiorari. If the Court grants the writ, the lower court record is transmitted to the Supreme Court for review. In most cases, the Court denies the writ, which is indicated by "cert denied, [vol.] U.S. [page] [year]" at the end of the case citation. Denial of a writ of certiorari does not indicate approval of the lower court decision; it merely means the Supreme Court declined to review the decision.

1-4.4 Stare Decisis

Courts generally adhere to the doctrine of stare decisis, which is frequently described as "following precedent." By applying principles developed in previous, similar cases, the court arrives at the same ruling in the current case as it did in the preceding one. Slight differences in circumstances can provide a reason for the court not to apply the previous rule to the current case. Even when such differences are absent, a court may conclude that a common law principle is no longer appropriate and may depart from precedent. An example of this overruling of precedent is the reconsideration and elimination of the common law principle of charitable immunity, which for many decades provided nonprofit hospitals with virtual freedom from liability for harm to patients.[27] Courts in nearly every state overruled precedent that had provided immunity, so now nonprofit hospitals can generally be sued,[28] except in the few states that have reestablished charitable immunity by statute.[29]

> Courts adhere to an important doctrine in American law, which is following decisions made by courts with higher authority. The Latin term "stare decisis" is used to refer to this doctrine; it is also referred to as "following precedent."

When a court is presented with an issue, it is bound by the doctrine of stare decisis to follow the precedents of higher courts in the same court system that have jurisdiction over the geographic area where the court is located. Each appellate court, including the highest court, is also generally bound to follow the precedents of its own decisions unless it decides to overrule such precedent due to changing conditions. However, many courts issue some opinions that are not published and cannot be used as precedent.[30] Another reason that a court can change its prior position is that controlling statutes or regulations have changed. Most decisions by a federal circuit court of appeals are made by a panel of three judges. There is a special procedure, called en banc review, by which all the active judges in the circuit can review the decision of a panel and overrule the decision.[31]

Decisions from equal or lower courts do not have to be followed. Federal circuit courts consider but do not defer to decisions of other circuits.[32] Usually, decisions from courts in other court systems do not have to be followed. One exception is when a federal court is deciding a controversy between citizens of different states and must follow state law as determined by the highest court of that state. Another exception is when a state court is deciding a controversy involving a federal law or constitutional question and must follow the decisions of the U.S. Supreme Court.

A third exception occurs when a court determines that the law of another jurisdiction governs some aspect of the case. The court must then follow the decisions of the highest court in the state or country whose law governs. With the growth of interstate and international transactions and travel, courts are frequently confronted with issues of choice of law, having to decide what law governs. It is not unusual for the law of another state or country to govern some or all aspects of a case, especially in contract disputes, where the contract will

often specify that the law of another jurisdiction governs. Many courts will not research foreign law. They place the burden of proof on the person who is relying on the foreign law to prove what that law is and adopt the default outcome of assuming that the other law is no different than the forum state's laws.

When a court is presented with a question that is not answered by statutes or regulations and that has not been addressed by the applicable court system, the court will often examine judicial decisions in other systems to help decide the new issue. Judicial decisions from other systems are also examined when a court reexamines an issue to decide whether to overrule precedent. Most court systems tend toward some consistency. However, a court is not bound by decisions from other systems, and it may reach a different conclusion.

There can be a majority approach to an issue that many state court systems follow and one or more minority approaches that other state courts follow. State courts show more consistency on some issues than others. For example, nearly all state courts have completely eliminated charitable immunity. However, while nearly all states require informed consent to medical procedures, some states determine the information that must be provided to patients by reference to what a patient needs to know, while other states make the determination by reference to what other physicians would disclose. Thus, there are the "reasonable patient" and the "reasonable physician" standards as to this element of informed consent.

Courts can reach different conclusions because state statutes and regulations differ. For example, Georgia had a statute that specified that a physician need only disclose "in general terms the treatment or course of treatment" to obtain informed consent.[33] In 1975, a Georgia court interpreted that statute to eliminate the requirement that risks be disclosed to obtain informed consent.[34] As a result, Georgia courts stopped basing liability on failure to disclose risks[35] until 1989, when a state statute again required risk disclosure for most surgery and some other procedures.[36] Courts in other states are unlikely to consider Georgia court decisions concerning this issue because these decisions are based on Georgia statutes, not on Georgia common law.

In summary, while it is important to be aware of trends in court decisions across the country, legal advice should be sought before taking actions based on decisions from court systems that do not have jurisdiction over the geographic area in which the hospital is located.

1-4.5 Res Judicata

Another doctrine that courts follow to avoid duplicative litigation and conflicting decisions is res judicata, which means "a thing or matter settled by judgment." When a legal controversy has been decided by a court and no more appeals are available, those involved in the suit cannot take the same matters to court again.[37] This is different from stare decisis in that res judicata applies only to the parties involved in the prior suit and to issues decided in that suit. The application of res judicata can be complicated by disagreements over whether specific matters were actually decided in the prior case.

"Res judicata" is an important legal doctrine used in our court system. It means "a thing or matter settled by judgment."

1-4.6 Standing

Another important requirement is that the person bringing the suit must have standing. Courts can only decide actual controversies, and the person bringing the suit must have an actual stake in the controversy. Persons with such a stake are said to have standing. Sometimes parties with a stake do not have standing for other reasons. For example, in some states governmental entities do not have standing to challenge the constitutionality of state statutes and regulations.[38]

1-5 Contracts

A contract is a legally enforceable agreement. Healthcare providers have many contracts involving all areas of operations, including employment contracts; contracts to purchase supplies and equipment; construction contracts; sales contracts; contracts to purchase services; and contracts involving leases, loans, and other matters. The primary purpose of a written contract is to set forth the elements of a legally binding agreement and to facilitate compliance, not to prepare for litigation. All elements of contracts should be carefully thought through and clearly articulated. This section outlines some of the legal problems associated with contracts. The law of contracts is complex, and there are exceptions to these general rules. Contracts should be reviewed with the assistance of legal counsel. Healthcare administrators are expected to be sophisticated in business matters and will find themselves bound by contracts, even if a properly created contract is not in the organization's best interest.

WHEN IS THERE A CONTRACT? Usually, agreements to agree in the future are not enforceable. Generally, there is no contract until the agreement itself is reached. However, sometimes courts find that a contract exists before the formal contract is signed, so administrators should be circumspect with promises, negotiations, correspondence, and letters of intent.

Agreement can sometimes be inferred from conduct. Thus, it is prudent to state the parties' intent clearly and in writing. For example, when a contract between a Pennsylvania hospital and a managed care company expired, the hospital sent the company a written rejection of the company's offer to extend the contract. Yet, the hospital continued to submit claims and accept payments from the managed care company. The company asserted that the hospital had accepted the offer of extension by its conduct. A Pennsylvania court rejected this assertion, ruling that the hospital's express written rejection barred implied assent by conduct.[39]

CONSIDERATION. Courts usually require all participants, often called parties, to pay a price in order for a binding contract to exist. This price, called the consideration for the contract, can be an act, forbearance to do or request something, change of legal relationship, or promise. When one party has not provided any consideration, the courts usually will not let that party enforce the contract. One exception is that most written sales contracts are enforceable against merchants without consideration because of the Uniform Commercial Code (UCC), which has been adopted by the states.

UNENFORCEABLE CONTRACTS. Courts will not enforce many other contracts, such as illegal contracts,[40] contracts that are viewed by the court as against public policy,[41] oral contracts of the type the law requires to be written, and unconscionable contracts. The public policy rule was applied by a federal appellate court to declare that a contract with an unlicensed nursing agency was unenforceable.[42] The agency could not sue to enforce the contract because it did not have the license required by state law. The statute of frauds requires contracts of certain types (e.g., conveyances of land, leases for over a year, and certain employment contracts) be in writing to be enforceable, unless an exception applies.[43] Unconscionable contracts are contracts that shock the conscience of the court, usually by being extortionate. Because courts usually apply the unconscionability doctrine only to consumer contracts, healthcare providers are seldom protected by the doctrine in dealings with other businesses. However, some contracts with patients, such as exculpatory contracts purporting to limit the patient's right to sue, could be found to be unconscionable and thus unenforceable.

Courts occasionally refuse to enforce part of an agreement. For example, courts will generally not enforce penalty provisions. Another example is that in many circumstances courts will not enforce agreements not to compete.[44] Many contracts specify that if the agreement is found partly invalid that the remainder is still enforceable. This provision can create problems when the invalid portion was of central importance, but it can also save advantageous arrangements when the invalid portion is less significant.

PAROLE EVIDENCE RULE. Courts tend to review only the words in the written contract by applying the parole evidence rule. Under that rule, oral promises made during negotiations that are not included in the final written agreement are assumed to have been negotiated away.[45] Healthcare providers must be diligent to include in a written contract any oral statements important to them and made before signing the contract. If these statements are important to the agreement, they should be in the written contract.

COURT-ADDED TERMS. In some circumstances, a court will add terms to contracts.

Ambiguous or missing elements. When a written contract is ambiguous or does not have critical elements, the court will sometimes consider testimony concerning oral understandings. The court will try to avoid this, but sometimes oral understandings must be considered. The court then must sift through the usually conflicting recollections of the parties and decide what to believe.

The "parole evidence" rule is important in many contract negotiations, especially for healthcare services to be provided by medical professionals.

Lack of agreement. Sometimes it is clear that no agreement, written or oral, was reached concerning critical elements, such as the delivery date. The court will sometimes fill these gaps with a provision the court considers to be reasonable. However, courts will not always fill the gaps, thus forcing the parties to solve the problem on their own.

Implied elements. The law routinely implies some elements in contracts if the element is not otherwise addressed. For example, the UCC specifies that certain sales contracts

will be interpreted as having certain provisions unless the contract provides otherwise. One such provision specified by the UCC is an implied warranty of merchantability. This means that the merchant is making a strong representation to the purchaser that the goods are fit for the ordinary purposes for which such goods are normally used. In addition, another provision is an implied warranty of fitness for a particular purpose. This means that the goods are fit for the specific purpose the seller has reason to know the buyer intends for the goods. There are many exceptions to these warranties. One of the clearest is when the contract explicitly disclaims warranties.

Some states recognize an implied covenant of good faith and fair dealing in every contract.[46] However, some of these states restrict the scope of this covenant. In those states, this implied covenant cannot be used to override the express terms of the agreement and can only be used when an express term of the contract has been breached.[47] Where the covenant is restricted in this manner, it cannot be used to add a term that the parties did not address in the agreement.

Courts will sometimes imply additional elements, for example, that the person signing the contract has the authority to do so. Administrators should be cautious about making promises or concessions, especially in writing. Other employees should be instructed not to sign documents without proper authority and review.

BREACH OF CONTRACT. The purpose of the contract is to document plans for completing the agreement and for dealing with contingencies that preclude completion. As a last resort, litigation can be required to deal with breach of contract. The courts will compel performance of some contracts, such as contracts to transfer land or unique goods. Courts will also sometimes issue an injunction prohibiting another party from violating a restrictive covenant. Examples of restrictive covenants include an agreement not to compete or not to disclose a trade secret. However, in most situations the only remedy the court will award is money, called damages. When it is difficult to calculate the damages from breach of a contract, the parties sometimes agree in advance what the amount of damages will be. This agreed amount is called liquidated damages and is stated in the contract. Although courts usually do not enforce contract provisions that are considered penalties, courts frequently enforce liquidated damages provisions when the amounts are reasonable. Or, stated another way, an amount stated in a contract that a court considers excessive (in light of the breach) usually is treated as an unenforceable penalty. But, a reasonably negotiated amount intended to address the harm caused by a breach of the contract to the nonbreaching party is considered an enforceable "liquidated damages" clause.

DISPUTE RESOLUTION. Contracts can address other issues concerning dispute resolution. They can specify which state's law governs the contract and where lawsuits may be filed.[48] Some contracts specify that disputes will be resolved by arbitration, rather than by court litigation.

DEFENSES TO CONTRACT LAWSUITS. There are several defenses to contract lawsuits, including waiver and default. Sometimes courts interpret conduct of the parties, such as regular acceptance of late delivery without complaint, as implying a modification to the agreement. In this example, one party waives its contract right of timely delivery.

The defense of default is based on the logic that some promises are dependent on others and that some events must occur in a sequence. A party that fails to perform an earlier step in the sequence can be found to be in default, excusing the other parties from carrying out subsequent steps. Vendors sometimes claim that their delay is due to failure of the hospital to provide needed data or material. Sequences should be carefully structured so that this defense is available only when it is appropriate.

THIRD-PARTY BENEFICIARIES. Sometimes courts will permit persons, called third-party beneficiaries, who are not parties to contracts to enforce the part of the contract that is intended to benefit them.[49] Sometimes this contracting structure is intended by the parties to the contract. For example, a contract between a hospital and a health maintenance organization (HMO) may state that the hospital will not bill the patient even if the HMO does not pay. In this example, the patient generally can use that contract statement to oppose billing efforts by the hospital. Generally, a third-party beneficiary must take the limitations in the contract along with the benefits. In a Colorado case, a physician claimed to be a third-party beneficiary to a hospital purchase contract. The court ruled that the claim had to be arbitrated under the arbitration clause in the contract because third-party beneficiaries have to take the contract burdens with the benefits.[50]

CONTRACTS WITH GOVERNMENT AGENCIES. One ambiguous area of the law is the extent to which relationships with governmental agencies are governed by generally accepted contract law principles. In some areas, contract law principles are applied. In other areas, the government

retains the power to make unilateral changes which a party to a private contract could not do. In some areas, the government claims that contract principles do not apply. For example, a federal appellate court ruled that the relationship between the federal government and a physician in the National Health Service Corps is a statutory relationship, not a contractual relationship, so no contractual defenses were available.[51]

MALPRACTICE SUITS BASED ON CONTRACT. Most malpractice suits against physicians, hospitals, and other healthcare providers are based on tort law, not on contract law. One type of malpractice case based on contract law is the claim that the physician promised a certain outcome that was not achieved. Absent a specific promise to cure, a physician is not an insurer of a particular outcome. However, if the physician is imprudent enough to make a promise, the law will sometimes enforce it. One of the most publicized cases was *Guilmet v. Campbell*,[52] in which the Michigan Supreme Court upheld a jury finding that a physician had promised to cure a bleeding ulcer. On that basis, the court imposed liability for the unsuccessful outcome, even though the physician was not negligent in providing the care. The Michigan legislature later passed a law[53] making promises to cure unenforceable unless they are in writing, in effect overruling *Guilmet*. In states that do not have these laws, a consent form that disavows any assurance of results can provide protection from such claims.[54]

A breach of contract suit can also arise from failure to use a promised procedure. In a Michigan case, the patient had been promised that her child would be delivered by a cesarean operation.[55] The physician failed to arrange for the operation, and the baby was stillborn. The physician was found liable for breaking his promise to arrange for the operation. A New York appellate court ruled that when a physician orally agreed to deliver a baby for a Jehovah's Witness mother without using transfusions, obtaining a court order and giving a transfusion could constitute a breach of contract.[56]

Cases based on oral promises are unusual, but they demonstrate that physicians and other healthcare providers should be careful in what they say to patients so that their efforts to reassure do not become promises they cannot fulfill.

1-6 Role of the Supreme Court in the 2010 Health Care Reform Legislation

The Patient Protection and Affordable Care Act ("PPACA") was challenged the day after President Obama signed it into law. The challenges were brought by a number of state attorney generals and, at the time this chapter was written, PPACA challenges were heard by the Supreme Court decision of June 2012 addressed several legal arguments,

The "Commerce Clause" in the U.S. Constitution is the basis for one of the Constitutional challenges to the "Patient Protection and Affordable Care Act."

including the "Commerce Clause" argument. In its decision, the Court found that the Commerce Clause is brief and states that Congress has authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[57]

PPACA, as currently written, imposes a penalty on those who fail to purchase health insurance by the beginning of 2014. This part of PPACA is referred to as the "minimum essential coverage" requirement. As written, PPACA imposes a tax penalty for each month an individual does not have minimum essential coverage. In brief, it is accepted that Congress can, and does, regulate activity that affects interstate commerce, such as transportation and many other basic, economic activities. However, it is highly unusual to attempt, through legislation, to impose a penalty (i.e., a fine or tax) on someone who fails to engage in a certain type of economic activity, such as buying health insurance coverage.

Thus, the requirement that individuals purchase a minimum amount of health insurance, or pay a penalty, is at the heart of the constitutional challenge to PPACA. The plaintiffs argue that such a requirement exceeds the intended scope of the Commerce Clause.

Chapter Summary

The overview of our legal system in this chapter serves as a framework for the remainder of this book. Subsequent chapters will address a variety of specific legal problems and issues in healthcare law. The main points and themes in this chapter are applied daily in our healthcare system. It is helpful and important to be aware of many of those points and their interplay with planning and decisions by healthcare persons, including executives, business planners, physicians, and other caregivers. Both the law and medicine are "arts," as opposed to firmly established, little changing "science." This is partly due to the fact that there are multiple sources of law. In addition, our legal system balances federal and state powers in a unique way that is based primarily on the Constitution of the United States of America. Also, our judicial system is structured both to allow for a reasonably ordered way to resolve disputes and to recognize geographic and cultural differences.

Given the ambiguity and subjectivity inherent in human efforts to legislate, interpret, apply, and enforce laws, the reader should appreciate why and how court decisions change the law.

Key Terms and Definitions

Administrative Law - The collection of rules, regulations, guidance, and decisions created by administrative agencies of the government.

Breach - Failure to keep a promise or a violation of a legal obligation, such as a contract or a law.

Commerce Clause - One of the "enumerated powers" listed in the U.S. Constitution (Article I, Section 8, Clause 3). The Commerce Clause states that the Congress shall have power "To regulate Commerce with foreign nations and among the several States, and with the Indian Tribes." The clause is one of the most fundamental powers delegated to Congress by the framers of the U.S. Constitution.

Common Law - Principles and rules of action, reflected in court decisions, rather than in legislation. The common law applies to the protection of persons and property and is based on community customs and traditions, as interpreted over time by judges.

Exhaustion of Administrative Remedies - This principle is important in administrative law. Many disputes are first handled by administrative agencies. The applicable agency typically has primary responsibility for disputes (or cases) that involve the rules or regulations that are administered by the agency. "Exhaustion of administrative remedies" requires a person to first seek a resolution of a matter by following agency hearing and appeals processes. Once those steps are completed, a party who is dissatisfied with the agency decision may file a complaint in court.

Jurisdiction - Authority given by law to a court to determine the outcome of disputes and rule of legal matters in a specific geographic area or over specific types of legal disputes.

Res Judicata - In Latin it means "the thing has been judged." In the law, the term refers to a thing or matter decided by the judgment of a court that involves the same parties.

Standing - The right of a party to file a lawsuit under the circumstances in a particular court or other body with authority to make decisions that bind the party.

Instructor-Led Questions

1. What are some of the reasons that legal advisers cannot give precise answers?
2. What are the roles of the branches of government? How does the system of checks and balances function so that each limits the powers of the others?
3. What are the primary sources of law?
4. How do the Due Process Clause and Equal Protection Clause of the U.S. Constitution restrict the scope of permissible laws?
5. Which law should be followed when there are conflicts among laws?
6. On what grounds can the enforceability of laws be challenged? How does this differ when the law being challenged is a statute, regulation, or court decision?
7. How does the role of the courts as a source of law differ when they are interpreting statutes and regulations, determining the constitutionality of laws, or creating the common law?
8. What are the "facts" for the purpose of a trial?
9. Discuss the effect of the designation of the default outcome and the assignment of burden of proof in communicating priorities and determining the outcome of disputes.
10. What are some of the limits that are placed on who may take cases to court and the types of cases courts will consider? How does this differ between federal and state courts?
11. Discuss the extent to which precedent binds other courts.
12. When do private parties have a binding contract? What is necessary to create a contract? What types of contracts are unenforceable?
13. When will courts add terms to private contracts?
14. When does a contract create rights for persons who are not parties to the contract?

Endnotes

1 E.g., *Brzonkala v. Virginia Polytechnic Inst.*, 169 F.3d 820 (4th Cir. 1999) (en banc) [law making rape a federal crime exceeds interstate commerce power]; Civil rights law on rape victims is unconstitutional, court says, N.Y. Times, Mar. 6, 1999, A8.

2 *Shapiro v. Thompson*, 394 U.S. 618 (1960) [state cannot require year residency for welfare benefits]; *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974); *Bethesda Lutheran Homes & Servs. v. Leean*, 122 F.3d 443 (7th Cir. 1997) [state Medicaid residency rule for coverage of intermediate care struck down]; *Maldonado v. Houstoun*, 157 F.3d 179 (3d Cir. 1998) [striking down state law limiting welfare benefits to new residents for one year to lesser of state's benefits or prior state's benefits]; but see *Jones v. Helms*, 452 U.S. 412 (1981) [state may impose additional penalty for leaving state after abandoning child]; *McCarthy v. Philadelphia Civil Serv. Comm'n*, 424 U.S. 645 (1976) [city may require city employees to be residents of city].

3 *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

4 *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Abril v. Virginia*, 145 F.3d 182 (4th Cir. 1998) [cannot authorize private suits against states under Fair Labor Standards Act].

5 29 U.S.C. § 1144 [ERISA preemption].

6 *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960).

7 *Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707 (1985).

8 *Hiawatha Aviation of Rochester, Inc. v. Minnesota Dep't of Health*, 389 N.W. 2d 507 (Minn. 1986).

9 E.g., *Robin v. Incorporated Village of Hempstead*, 30 N.Y.2d 347, 285 N.E.2d 285 (1972).

10 E.g., *Suter v. Artist M.*, 503 U.S. 347 (1992) [child beneficiaries of Adoption Act cannot enforce requirement of reasonable state efforts to keep children in their homes]; *Gentry v. Department of Pub. Health*, 190 Mich. App. 102, 475 N.W.2d 849 (1991) [no private right of action to enforce nursing home patient bill of rights]; *Evelyn V. v. Kings County Hosp. Ctr.*, 819 F. Supp. 183 (E.D.N.Y. 1993) [Medicaid recipients have no statutory right to enforce Medicaid regulations against provider]; but see *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990) [providers can enforce Medicaid "reasonable rates" requirement]; *Fulkerson v. Comm'r, Maine Dep't of Human Servs.*, 802 F. Supp. 529 (D. Me. 1992) [Medicaid recipients may enforce equal access to care provision].

11 E.g., *Citrosuco Paulista, S.A. v. United States*, 704 F. Supp. 1075, 1088 (Ct. Int'l Trade 1988).

12 *Yakus v. United States*, 321 U.S. 414 (1994) [broad price control delegation during World War II upheld].

13 E.g., *National Med. Enterprises v. Shalala*, 43 F.3d 691 (D.C. Cir. 1995) [reclassification of labor costs to different cost center for Medicare payment purposes was not substantive rule requiring notice and comment]; *Association of Am. R.R. v. Dep't of Transportation*, 309 U.S. App. D.C. 7, 38 F.3d 582 (D.C. Cir. 1994) [when final rule differs from proposed rule, agency not required to give separate notice if final rule is "logical outgrowth" of rule-making proceeding].

14 E.g., Negotiated rulemaking panel reaches consensus; sends outline of rule to HCFA, 7 Health L. Rptr. (BNA) 425 (1998) [hereinafter Health L. Rptr. (BNA) will be cited as H.L.R.]; Advisory group gives seal of approval to managed care anti-kickback safe harbor, 7 H.L.R. 155 (1998); S. Martin, Reinventing rule-making, Am. Med. News, Feb. 23, 1998, 7.

15 See House GOP hopes to cut funding used to enforce dozens of U.S. regulations, WALL St. J., June 1, 1995, at A16.

16 E.g., Lack of funds forces HCFA to revise survey priorities, 4 H.L.R. 407 (1995) [HCFA could not complete survey and certification of home health agencies (HHAs), which threatened moratorium on new HHAs].

17 E.g., *Johnson v. Nyack Hosp.*, 964 F.2d 116 (2d Cir. 1992) [physician must first pursue N.Y. state administrative remedies before suit challenging privilege termination].

18 E.g., *Keeton v. D.H.H.S.*, 21 F.3d 1064 (11th Cir. 1994).

19 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

20 *Moreau v. Lewis*, 648 So. 2d 124 (Fla. 1995).

21 European Union directive may not impact health care, other business operations, 7 H.L.R. 1705 (1998).

22 T. Carlisle, Loewen seeks $725 million from U.S., WALL ST. J., Jan. 13, 1999, B11 [notice of claim filed with U.S. Dep't of State under North American Free Trade Agreement, claiming bias and seeking damages for state jury verdict].

23 *Public Health Trust v. Holmes*, 646 So. 2d 266 (Fla. 3d DCA 1994).

24 E.g., *Brenneman v. Medcentral Health Sys.*, 366 F.3d 412 (6th Cir. 2004); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

25 L. Eaton & L. Kaufman, In problem-solving court, judges turn therapist, N.Y. TIMES, Apr. 26, 2005, A1.

26 E.g., *Trent v. Dial Med. of Fla., Inc.*, 33 F.3d 217 (3d Cir. 1994).

27 E.g., *Mikota v. Sisters of Mercy*, 183 Iowa 1378, 168 N.W. 219 (1918) [established charitable immunity].

28 E.g., *Haynes v. Presbyterian Hosp. Ass'n*, 241 Iowa 1269, 45 N.W.2d 151 (1950) [overruled charitable immunity].

29 E.g., *Marsella v. Monmouth Med. Ctr.*, 224 N.J. Super. 336, 540 A.2d 865 (1988).

30 See *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001) [constitutional to forbid use of unpublished decisions].

31 E.g., *Atchison, Topeka and Santa Fe Ry. Co. v. Pena*, 44 F.3d 437 (7th Cir. 1994) (en banc), aff'd, 516 U.S. 152 (1996).

32 Id.

33 GA. CODE ANN. § 31-9-6(d) (1985).

34 *Young v. Yarn*, 136 Ga. App. 737, 222 S.E.2d 113 (1975).

35 E.g., *Padgett v. Ferrier*, 172 Ga. App. 335, 323 S.E.2d 166 (1984). The Georgia Supreme Court has interpreted a similar statute concerning consent to sterilization as limiting the applicability of the informed consent doctrine, *Robinson v. Parrish*, 251 Ga. 496, 306 S.E.2d 922 (1983).

36 GA. CODE ANN. § 31-9-6.1 (1988 Supp.).

37 E.g., *Lim v. Central DuPage Hosp.*, 972 F.2d 758 (7th Cir. 1992), cert. denied, 507 U.S. 987 (1993) [physician's second antitrust suit barred by res judicata].

38 E.g., *Trustees of Worcester State Hosp. v. Governor*, 395 Mass. 377, 480 N.E.2d 291 (1985) [statutes]; *Palomar Pomerado Health System v. Belsh*, 180 F.3d 1104 (9th Cir. 1999) [regulations].

39 *Temple Univ. Hosp., Inc. v. Healthcare Management Alternatives, Inc.*, 764 A.2d 587 (Pa. Super. 2000).

40 E.g., *Nursing Home Consultants Inc. v. Quantum Health Srvcs.*, 112 F.3d 514 (without op.). 1997 U.S. App. LEXIS 10544 (8th Cir. 1997) [contract violating anti-kickback provisions is void].

41 E.g., *Swafford v. Harris*, 967 S.W.2d 319 (Tenn. 1998) [contingency fee contract with physician expert witness void as against public policy].

42 *United States Nursing Corp. v. Saint Joseph Med. Ctr.*, 39 F.3d 790 (7th Cir. 1994).

43 E.g., *Preventive Med. Inst. v. Weill Med. College* (N.Y. Sup. Ct.), N.Y.L.J., July 19, 2002, 17 [alleged oral agreement concerning name on clinic sign barred by statute of frauds]; *Americare Health Alliance of Ga. LLC v. America's Health Plan Inc.*, (N.D. Ga. Mar. 3, 1998) as discussed in 7 H.L.R. 473 (1998) [alleged contract between health plan, provider group unenforceable under statute of frauds which requires such contracts to be in writing].

44 E.g., *Meadox Meds., Inc. v. Life Sys., Inc.*, 3 F. Supp. 2d 549 (D. N.J. 1998) [medical products manufacturer granted two-year exclusive distribution agreement that included a noncompetition covenant for term plus one year, court refused to enforce one year noncompetition after nonrenewal, lack of proprietary relationship in information manufacturer sought to protect].

45 E.g., *Coram Healthcare Corp. v. Aetna U.S. Healthcare Inc.*, 94 F. Supp. 2d 589 (E.D. Pa. 1999); *International Business Mach. Corp. v. Medlantic Healthcare Group*, 708 F. Supp. 417 (D. D.C. 1989).

46 E.g., *Maglione v. Aegis Family Health Ctrs.*, 607 S.E.2d 286 (N.C. App. 2005); *County of Brevard v. Miorelli Eng'g, Inc.*, 703 So. 2d 1049 (Fla. 1997).

47 E.g., *Insurance Concepts & Design, Inc. v. HealthPlan Servs., Inc.*, 785 So. 2d 1232 (Fla. 4th DCA 2001).

48 See *Hyland Lakes Spuds, Inc. v. Schmieding Produce Co., Inc.*, 25 F. Supp. 2d 941 (E.D. Wis. 1998) [contract construed to be consent to jurisdiction, not exclusive forum selection].

49 *Smith v. Chattanooga Med. Investors, Inc.*, 62 S.W.3d 178 (Tenn. App. 2001) [Medicaid-eligible person was third-party beneficiary of Medicaid contract between nursing and state which was breached by refusal to readmit after hospitalization]; but see *Kirkpatrick v. Merit Behavioral Care Corp.*, 99 F. Supp. 2d 458 (D. Vt. 2000) [beneficiaries of health plan not third-party beneficiaries of plan contract with utilization review provider].

50 *Lee v. Gandcor Med. Sys., Inc.*, 702 F. Supp. 252 (D. Colo. 1988).

51 *United States v. Vanhorn*, 20 F.3d 104 (4th Cir. 1994).

52 *Guilmet v. Campbell*, 385 Mich. 57, 188 N.W.2d 601 (1971); see also *Bobrick v. Bravstein*, 116 A.D.2d 682, 497 N.Y.S.2d 749 (2d Dept. 1986) [contract suit allowed against physician].

53 Mich. Comp. Laws § 566.132. Some states have similar laws, e.g., Fla. Stat. § 725.01; *Flora v. Moses*, 727 A.2d 596 (Pa. Super. 1999).

54 E.g., *Moore v. Averi*, 534 So. 2d 250 (Ala. 1988).

55 *Stewart v. Rudner & Bunyan*, 349 Mich. 459, 84 N.W.2d 816 (1957).

56 *Nicoleau v. Brookhaven Mem. Hosp.*, 201 A.D.2d 544, 607 N.Y.S.2d 703 (2d Dept. 1994).

57 U.S. Const. art.I, Section 8, cl.3.

Additional Resources:

Free dictionary of Law Terms and Legal Definitions: http://www.nolo.com/dictionary

Glossary of Legal Terms: http://www.nycourts.gov/lawlibraries/glossary.shtml