

INDIANA HEALTH LAW REVIEW

VOLUME 4

2007

ISSUE 2

SYMPOSIUM

HOSPITAL-PHYSICIAN JOINT VENTURES: A PROMISING PARTNERSHIP?

February 21, 2007

Introduction

Eleanor D. Kinney

McDonald-Merrill-Ketcham Memorial Award for Excellence in Law and Medicine

*Of Doctors and Hospitals: Setting the Analytical Framework
for Managing and Regulating the Relationship*

James F. Blumstein

*Hospital-Physician Joint Venture Relationships:
A Useful Tool to Improve Hospital Services*

Steven H. Pratt

Transcript of Live Symposium Panel Discussion

James F. Blumstein,
Gregory L. Pemberton, Norman G. Tabler, Steven H. Pratt
Dennis L. Pippenger, M.D. Michael J. Finnerty

NOTES

*Move Over Managed Care - Health Savings Accounts,
Small Businesses, and Low Wage Earners: Cost, Quality,
and Access*

Russell B. Cate

*Harvesting Organs from Minors and Incompetent Adults to
Supply the Nation's Organ Drought: A Critical Review of the
Substituted Judgment Doctrine and the Best Interest Standard*

Beth A. Schenberg

*Toward a Twenty-First Century Civil Commitment Statute:
A Legal, Medical, and Policy Analysis of Preventive
Outpatient Treatment*

Rachel A. Scherer

*Letting Lilliputians Sit at the Table: Providing Physicians with a
Magnified Voice to Counter the Brobdingnagian HMO*

Brandt R. Voight



INDIANA UNIVERSITY

SCHOOL OF LAW

Indianapolis
IUPUI

Indiana Health Law Review

Volume 4

2006-2007

Editor-in-Chief

Lauren N. Grattenthaler

Executive Managing Editor

Rachel A. Scherer

Executive Notes Editor

Christopher Campaniolo

Executive Production Editor

Russell B. Cate

Executive Articles Editors

Raegan M. Gibson

Brandt R. Voight

Executive Business Editor

Colleen M. Powers

Note Development Editors

Carly S. Everett
Angela K. Grogan
Shannon N. Jamison
Danielle L. Kaiser
Scott J. Smith

Articles Editors

Brent R. Borg
Shana M. Collier
Bernice V. Conway
Neil F. Hazaray
David L. Nie

Associate Editors

Lynn M. Eriks
Chelynne L. Harris
Adam Hollander-Urbach
Kimberly A. Kessinger

Members

Heather A. Barnes
Jacob V. Bradley
Louis J. Britton
Keith A. Butler
Robert W. Cochrane
Matthew V. Daley
Matthew S. Dionne
Mark E. Douglas
Robin E. Ebert
Robert R. Elder
Manju Goel
Emma L. Haw
Michael J. Kyle

Billi J. Lycett
Brendan W. Miller
Clayton R. Portell
Matthew L. Rea
Blake C. Reed
Erin M. Saylor
Thiru Sethuraman
Jonathan D. Stowers
John P. Taylor
Kyra R. Wagoner
Amy Waltz
Jessica D. Williams

Faculty Advisors

Lawrence P. Wilkins (Chair)
Eleanor D. Kinney
David Orentlicher
Robert A. Katz

INDIANA HEALTH LAW REVIEW

(ISSN 1549-3199)

Content. The *Indiana Health Law Review* publishes articles submitted by academics, practitioners, and students on the topics of health law and policy. The scope includes bioethics, malpractice liability, managed care, anti-trust, health care organizations, medical-legal research, legal medicine, and food and drug law. The *Indiana Health Law Review* will be published twice during the 2006-07 academic year.

Disclaimer. The ideas, views, opinions, and conclusions expressed in articles appearing in this publication are those of the authors and not those of the *Indiana Health Law Review* or Indiana University School of Law – Indianapolis.

Subscriptions. The current subscription rate is \$20.00 for two issues (domestic mailing). Unless the Business Office receives notice to the contrary, all subscriptions will be renewed automatically. Claims for non-receipt of the current year's issues must be made within six months of the mailing date. Address changes must be received at least one month prior to publication to ensure prompt delivery and must include the old and new addresses and the proper zip code.

Manuscripts. The *Indiana Health Law Review* invites submission of unsolicited manuscripts. All citations should conform to The Bluebook: A Uniform System of Citation (18th ed. 2005). Manuscripts should be double-spaced with standard one-inch margins. The *Indiana Health Law Review*, as a matter of policy, promotes the use of gender-neutral language, and alternate use of the female or male pronoun is intended to refer to both female and male.

Citation. Cite this publication as IND. HEALTH L. REV.

Copyright. Copyright © 2007 by the Trustees of Indiana University. Except as may be expressly provided elsewhere in this publication, permission is hereby granted to produce and distribute copies of individual works from this publication for non-profit education purposes, provided that copies are distributed at or below cost, and that the author, source, and copyright notice are included on each copy. This permission is in addition to rights of reproduction granted under Sections 107, 108, and other provisions of the U.S. Copyright Act and its amendments.

The *Indiana Health Law Review* (ISSN 1549-3199) is the property of Indiana University and is published two times per year by the Indiana University School of Law – Indianapolis, which assumes complete editorial responsibility thereof.

Contact Us. Editorial and Business Offices are located at:

Indiana Health Law Review
Lawrence W. Inlow Hall
530 W. New York Street
Room 136C
Indianapolis, IN 46202-3225
(317) 278-9519

Publisher. The *Indiana Health Law Review* is published and distributed by Western Newspaper Publishing Company, Inc., 537 E. Ohio St., Indianapolis, IN 46204-2173.

In 2003, Indiana University School of Law - Indianapolis established a specialty law review focused specifically on health care law and policy:

INDIANA HEALTH LAW REVIEW

The scope of the INDIANA HEALTH LAW REVIEW includes bioethics, malpractice liability, managed care, anti-trust, health care organizations, medical-legal research, legal medicine, food and drug, and other current health-related topics.

**Detach and mail this subscription form today to receive
future issues**

Subscription Price: \$20.00

- Two (2) Issues
- Automatic Renewal
- Foreign Mailing Is Extra

Mail form to:

Indiana Health Law Review
Indiana University School of Law – Indianapolis
Attn: Executive Business Editor
Lawrence W. Inlow Hall, Room 136C
530 W. New York Street
Indianapolis, IN 46202-3225

Questions?

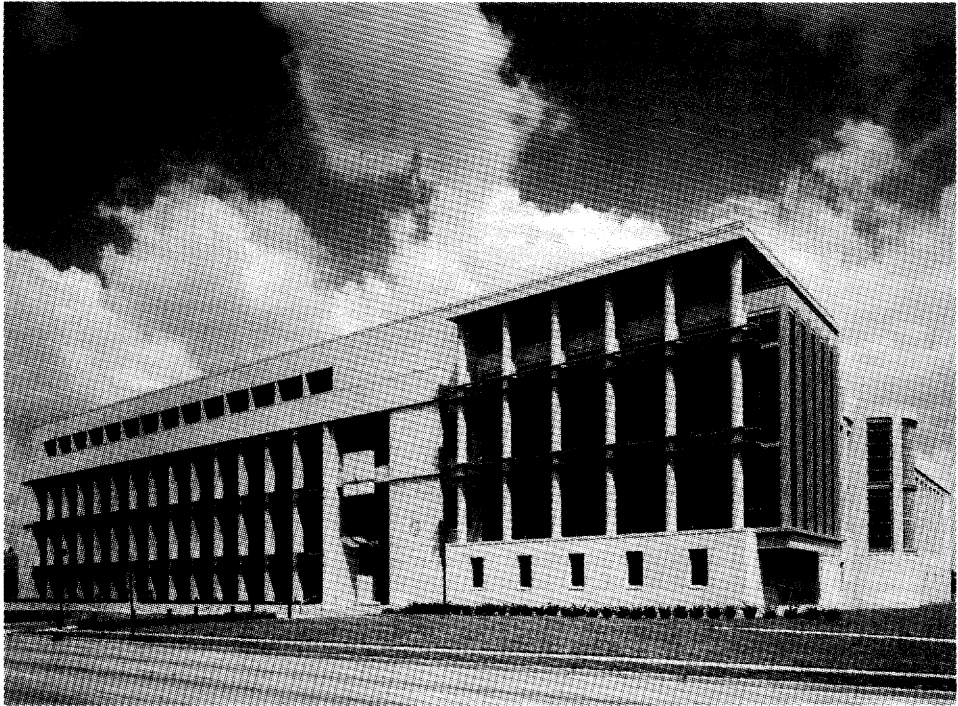
Email: ihr@iupui.edu
Phone: (317) 278-9519
www.indylaw.indiana.edu/~ihr

Mailing Address:

Name/Title _____
Company/School _____
Address _____
City _____ State ___ ZIP _____
Email _____

Payment Method: Enclosed
(Make Check Payable to
INDIANA HEALTH LAW REVIEW)

Bill Me Later



**Please enter my subscription
to the
*INDIANA LAW REVIEW***

Name _____
Address _____

Enclosed is \$_____ for _____ subscription(s)

Mail to: ATTN: Editorial Specialist
 at

INDIANA LAW REVIEW
INDIANA UNIVERSITY SCHOOL OF LAW—INDIANAPOLIS
Lawrence W. Inlow Hall
530 West New York Street
Indianapolis, Indiana 46202-3225

For an *academic* year, the subscription rate for four issues is:
Domestic, \$30; Foreign, \$35; Student, \$20

Single Issue, \$10; Survey Issue \$20
Symposium Issue, \$15



INDIANA UNIVERSITY

SCHOOL OF LAW

Indianapolis
IUPUI

MASTER OF LAWS (LL.M.) PROGRAM

THE PROGRAM

- 24-credit program with a wide range of elective courses
- Thesis required
- Internship opportunities

ONE DEGREE—FIVE TRACKS

- American Law for Foreign Lawyers
- Health Law, Policy and Bioethics
- Intellectual Property Law
- International and Comparative Law
- International Human Rights Law

FEATURING THE HEALTH LAW, POLICY AND BIOETHICS TRACK OF THE LL.M. PROGRAM

The William S. and Christine S. Hall Center for Law and Health at IU Law—Indianapolis is widely acknowledged as one of the premier programs of its kind among U.S. law schools.

- Gain Practical and Theoretical Knowledge in the Areas of Health Law, Policy and Bioethics
- Learn about the Institutions and Structures of Healthcare and how they affect the ethical issues that arise in medical and legal practices
- Enhance your opportunities for health law-related employment
- Courses offered:
 - Biotechnology*
 - Antitrust and Healthcare*
 - Bioethics*
 - Medical Malpractice*

APPLICATION DEADLINES

Fall Semester: July 15

Spring Semester: October 15

www.indylaw.indiana.edu/llm

Indiana University School of Law—Indianapolis

2006-2007 ADMINISTRATIVE OFFICERS AND FACULTY

Administrative Officers

- ADAM W. HERBERT, *President of the University*. B.A., M.A., University of Southern California; Ph.D., University of Pittsburgh.
- CHARLES R. BANTZ, *Chancellor, Indiana University-Purdue University—Indianapolis*. B.A., M.A., University of Minnesota; Ph.D., The Ohio State University.
- SUSANAH M. MEAD, *Interim Dean and Professor of Law*. B.A., Smith College; J.D., Indiana University School of Law—Indianapolis.
- THOMAS B. ALLINGTON, *Associate Dean for Technology and Professor of Law*. B.S., J.D., University of Nebraska; LL.M., New York University School of Law.
- ANGELA M. ESPADA, *Associate Dean for Student Services*. J.D., Indiana University School of Law—Bloomington.
- JEFFREY W. GROVE, *Associate Dean for Graduate Studies and Professor of Law*. A.B., Juniata College; J.D., George Washington University Law School.
- ANDREW R. KLEIN, *Associate Dean for Academic Affairs and Paul E. Beam Professor of Law*. B.A., University of Wisconsin; J.D., Emory University School of Law.
- JONNA KANE MACDOUGALL, *Assistant Dean for Institutional Advancement*. J.D., Indiana University School of Law—Indianapolis.
- TERESA (TERRI) J. CUELLAR, *Director of Technology Services*. B.S., St. Bonaventure University, New York.
- VIRGINIA MARSCHAND, *Director of Administration and Finance*. B.A., Indiana University—Kokomo; M.P.A., Indiana University-Purdue University—Indianapolis; J.D., Indiana University School of Law—Indianapolis.
- CLAIRE GROVE, *Director of the LL.M. Program*. B.A., Indiana University; J.D., Indiana University School of Law—Indianapolis.
- PATRICIA KIMBERLY KINNEY, *Director of Admissions*. B.S., Purdue University; J.D., Indiana University School of Law—Indianapolis.
- AMANDA KAMMAN, *Acting Director of Development*. B.A., Indiana University.
- HEATHER MCCABE, *Director, Public Health Law Program, William S. and Christine S. Hall Center for Law and Health and Grant Specialist*. B.A., 1993, Indiana University—Bloomington; M.S.W., 1996, Indiana University School of Social Work—Indianapolis; J.D., 2003, Indiana University School of Law—Indianapolis.
- CHASTITY THOMPSON ADEWOPO, *Director of Professional Development*. B.S., Indiana University.

Faculty

- CYNTHIA M. ADAMS, *Clinical Associate Professor of Law*. B.A., Kentucky Wesleyan College; J.D., Indiana University School of Law—Indianapolis.
- THOMAS B. ALLINGTON, *Associate Dean for Technology and Professor of Law*. B.S., J.D., University of Nebraska; LL.M., New York University School of Law.
- JUDITH FORD ANSPACH, *Professor of Law and Director, Ruth Lilly Law Library*. B.S., M.L.S., Kent State University; J.D., Mississippi College School of Law.
- CYNTHIA BAKER, *Associate Clinical Professor of Law and Director, Program on Law and State Government*. B.A., J.D., Valparaiso University.
- GERALD L. BEPKO, *Indiana University-Purdue University—Indianapolis Chancellor Emeritus, Indiana University Trustee Professor and Professor of Law*. B.S., Northern Illinois University; J.D., IIT/Chicago-Kent College of Law; LL.M., Yale Law School.
- KAREN E. BRAVO, *Assistant Professor Law*. B.A., The University of the West Indies; J.D., Columbia University School of Law; LL.M., New York University School of Law.
- ROBERT BROOKINS, *Professor of Law*. B.S., University of South Florida; J.D., Ph.D., Cornell University.
- KENNETH D. CHESTEK, *Clinical Associate Professor of Law*. B.A., Pennsylvania State University; J.D., University of Pittsburgh School of Law.
- DANIEL H. COLE, *R. Bruce Townsend Professor of Law*. A.B., Occidental College; A.M., University of Chicago; J.D., Lewis and Clark Law School; J.S.M., J.S.D., Stanford Law School.
- JEFFREY O. COOPER, *Associate Professor of Law*. A.B., Harvard University; J.D., University of Pennsylvania Law School.

PAUL N. COX, *Centennial Professor of Law*. B.S., Utah State University; J.D., University of Utah College of Law; LL.M., University of Virginia School of Law.

KENNETH D. CREWS, *Associate Dean of the Faculties for Copyright Management; Samuel R. Rosen Professor of Law and Professor of Library and Information Science*. B.A., Northwestern University; J.D., Washington University School of Law; M.L.S., University of California, Los Angeles; Ph.D., University of California, Los Angeles.

JAMES D. DIMITRI, *Clinical Associate Professor of Law*. B.S., Indiana University; J.D., Valparaiso University School of Law.

JENNIFER ANN DROBAC, *Associate Professor of Law*. B.A., M.A., Stanford University; J.D., J.S.D., Stanford Law School.

GEORGE E. EDWARDS, *Professor of Law and Director, Program in International Human Rights Law*. B.A., North Carolina State University; J.D., Harvard Law School.

FRANK EMMERT, *John S. Grimes Professor of Law and Executive Director, Center for International and Comparative Law*. Erstes Juristisches Staatsexamen (J.D.), University of Munich Law School; LL.M., The University of Michigan Law School; Ph.D., University of Maastricht; Diploma, European University Institute.

NICHOLAS GEORGAKOPOULOS, *Professor of Law*. Ptyhiion Nomikis, Athens University School of Law; LL.M., S.J.D., Harvard Law School.

JEFFREY W. GROVE, *Associate Dean and Professor of Law*. A.B., Juniata College; J.D., George Washington University Law School.

FRANCES WATSON HARDY, *Clinical Associate Professor of Law*. B.S., Ball State University; J.D., Indiana University School of Law—Indianapolis.

LINDA KELLY HILL, *Professor of Law*. B.A., J.D., University of Virginia.

JOHN LAWRENCE HILL, *Professor of Law*. B.A., Northern Illinois University; J.D., Ph.D., Georgetown University.

LAWRENCE A. JEGEN, III, *Thomas F. Sheehan Professor of Tax Law and Policy*. A.B., Beloit College; J.D., M.B.A., The University of Michigan; LL.M., New York University School of Law.

HENRY C. KARLSON, *Professor of Law*. A.B., J.D., LL.M., University of Illinois College of Law.

ROBERT A. KATZ, *Associate Professor of Law*. A.B., Harvard College; J.D., University of Chicago Law School.

ELEANOR D. KINNEY, *Hall Render Professor of Law; Co-Director of the Center for Law and Health and Executive Director, Latin American Law Program*. B.A., Duke University; M.A., University of Chicago; J.D., Duke University School of Law; M.P.H., University of North Carolina.

ANDREW R. KLEIN, *Associate Dean and Paul E. Beam Professor of Law*. B.A., University of Wisconsin; J.D., Emory University School of Law.

ROBERT E. LANCASTER, *Clinical Associate Professor of Law*. B.A., Millsaps College; J.D., Tulane Law School.

NORMAN LEFSTEIN, *Professor of Law and Dean Emeritus*. LL.B., University of Illinois College of Law; LL.M., Georgetown University Law School.

MARÍA PABÓN LÓPEZ, *Assistant Professor of Law and Co-Director, Latin American Law Program*. B.A., Princeton University; J.D., University of Pennsylvania Law School.

GERARD N. MAGLIOCCA, *Associate Professor of Law*. B.A., Stanford University; J.D., Yale Law School.

ALLISON MARTIN, *Clinical Associate Professor Law*. B.S., J.D., University of Illinois.

DEBORAH MCGREGOR, *Clinical Associate Professor of Law and Assistant Director of Legal Analysis, Research and Communication*. B.A., University of Evansville; J.D., Georgetown University Law School.

MARY H. MITCHELL, *Alan H. Cohen Professor of Law*. A.B., Butler University; J.D., Cornell Law School.

NOVELLA NEDEFF, *Clinical Associate Professor of Law*. B.A., J.D., Indiana University.

JAMES P. NEHF, *Cleon H. Foust Fellow and Professor of Law and Director, European Law Program*. B.A., Knox College; J.D., University of North Carolina Law School.

DAVID ORENTLICHER, *Samuel R. Rosen Professor of Law and Co-Director of the Center for Law and Health*. A.B., Brandeis University; J.D., M.D., Harvard College.

JOANNE ORR, *Clinical Associate Professor of Law*. B.S., Indiana State University; J.D., California Western School of Law.

ANTONY PAGE, *Assistant Professor of Law*. B. Comm., McGill University; M.B.A., Simon Fraser University; J.D., Stanford Law School.

- MICHAEL J. PITTS, *Associate Professor of Law*. B.S.J., Northwestern University; J.D., Georgetown University Law Center.
- H. KATHLEEN PATCHEL, *Associate Professor of Law*. A.B., Huntington College; J.D., University of North Carolina Law School; LL.M., Yale Law School.
- FLORENCE WAGMAN ROISMAN, *William F. Harvey Professor of Law*. B.A., University of Connecticut; LL.B., Harvard Law School.
- JOAN M. RUHTENBERG, *Clinical Professor of Law and Director of Legal Analysis, Research and Communication*. B.A., Mississippi University for Women; J.D., Indiana University School of Law—Indianapolis.
- JOEL M. SCHUMM, *Clinical Associate Professor of Law*. B.A., Ohio Wesleyan University; M.A., University of Cincinnati; J.D., Indiana University School of Law—Indianapolis.
- LAWRENCE P. WILKINS, *William R. Neale Professor of Law*. B.A., The Ohio State University; J.D., Capital University Law School; LL.M., University of Texas School of Law.
- LLOYD T. WILSON, JR., *Associate Professor of Law and Director, Central and Eastern European Law Program*. B.A., Wabash College; M.A., Duke University; J.D., Indiana University School of Law—Bloomington.
- MARY T. WOLF, *Clinical Professor of Law and Director of Clinical Programs*. B.A., Saint Xavier College; J.D., University of Iowa College of Law.
- R. GEORGE WRIGHT, *Lawrence A. Jegen III Professor of Law*. A.B., University of Virginia; Ph.D., Indiana University; J.D., Indiana University School of Law—Indianapolis.

Emeriti Faculty

- EDWARD P. ARCHER, *Professor of Law Emeritus*. B.M.E., Rensselaer Polytechnic Institute; J.D., LL.M., Georgetown University Law School.
- JAMES F. BAILEY, III, *Professor of Law Emeritus*. A.B., J.D., M.A.L.S., The University of Michigan.
- AGNES P. BARRETT, *Associate Professor of Law Emerita*. B.S., J.D., Indiana University.
- CLYDE HARRISON CROCKETT, *Professor of Law Emeritus*. A.B., J.D., University of Texas; LL.M., University of London (The London School of Economics and Political Science).
- DEBRA A. FALENDER, *Professor of Law Emerita*. A.B., Mount Holyoke College; J.D., Indiana University School of Law—Indianapolis.
- DAVID A. FUNK, *Professor of Law Emeritus*. A.B., College of Wooster; J.D., Case Western Reserve University School of Law; M.A., The Ohio State University; LL.M., Case Western Reserve University; LL.M., Columbia Law School.
- PAUL J. GALANTI, *Professor of Law Emeritus*. A.B., Bowdoin College; J.D., University of Chicago Law School.
- HELEN P. GARFIELD, *Professor of Law Emerita*. B.S.J., Northwestern University; J.D., University of Colorado School of Law.
- HAROLD GREENBERG, *Professor of Law Emeritus*. A.B., Temple University; J.D., University of Pennsylvania Law School.
- WILLIAM F. HARVEY, *Carl M. Gray Professor of Law & Advocacy Emeritus*. A.B., University of Missouri; J.D., LL.M., Georgetown University Law School.
- W. WILLIAM HODES, *Professor of Law Emeritus*, A.B., Harvard College; J.D., Rutgers University School of Law—Newark.
- WILLIAM ANDREW KERR, *Professor of Law Emeritus*. A.B., West University; B.S., Duke University; J.D., LL.M., Harvard Law School.
- WILLIAM E. MARSH, *Professor of Law Emeritus*. B.S., J.D., University of Nebraska.
- RONALD W. POLSTON, *Professor of Law Emeritus*. B.S., Eastern Illinois University; LL.B., University of Illinois College of Law.
- KENNETH M. STROUD, *Professor of Law Emeritus*. A.B., J.D., Indiana University—Bloomington.
- JAMES W. TORKE, *Carl M. Gray Professor of Law Emeritus*. B.S., J.D., University of Wisconsin.
- JAMES PATRICK WHITE, *Professor of Law Emeritus*. A.B., University of Iowa; J.D., LL.M., George Washington University Law School.

Law Library Faculty

- JUDITH FORD ANSPACH, *Professor of Law and Director, Ruth Lilly Law Library*. B.S., M.L.S., Kent State University; J.D., Mississippi College School of Law.
- DRAGOMIR COSANICI, *Head of Reference*. B.A., Michigan State University; M.I.L.S., University of Michigan; J.D., University of Kansas.

DEBRA DENSLAW, *Reference Librarian*. B.A., Franklin College; M.S., University of Illinois, Urbana-Champaign; J.D., Valparaiso School of Law.

RICHARD HUMPHREY, *Reference Librarian*. A.A., Brewton-Parker Junior College; B.A., Georgia Southwestern College; M.L.S., University of Kentucky.

WENDELL E. JOHNTING, *Assistant Director for Technical Services*. A.B., Taylor University; M.L.S., Indiana University.

CHRIS E. LONG, *Catalog Librarian*. B.A., Indiana University; M.A., Indiana University; M.L.S., Indiana University.

MAHNAZ K. MOSHFEGH, *Acquisition/Serials Librarian*. B.A., National University of Iran; M.S., Tehran University; M.A., Ball State University; M.L.S., Ph.D., Indiana University.

MIRIAM A. MURPHY, *Associate Director of Law Library*. B.A., Purdue University; J.D., M.L.S., Indiana University—Bloomington.

KIYOSHI OTSU, *Computer System Specialist*. A.A., Parkland College; A.B., M.S., C.A.S., University of Illinois.

INDIANA HEALTH LAW REVIEW

Volume 4

Issue 2

TABLE OF CONTENTS

SYMPOSIUM

HOSPITAL-PHYSICIAN JOINT VENTURES: A PROMISING PARTNERSHIP? February 21, 2007

Introduction *Eleanor D. Kinney* 205

McDonald-Merrill-Ketcham Memorial Award for Excellence in Law and Medicine

Of Doctors and Hospitals: Setting the Analytical Framework for Managing and Regulating the Relationship *James F. Blumstein* 209

Hospital-Physician Joint Venture Relationships:
A Useful Tool to Improve Hospital Services.....*Steven H. Pratt* 239

Transcript of Live Symposium Panel Discussion
.....*James F. Blumstein, Gregory L. Pemberton,
Norman G. Tabler, Steven H. Pratt,
Dennis L. Pippenger, M.D., & Michael J. Finnerty* 263

NOTES

Move Over Managed Care – Health Savings Accounts, Small Businesses, and Low Wage Earners: Cost, Quality, and Access *Russell B. Cate* 287

Harvesting Organs from Minors and Incompetent Adults to Supply the Nation's Organ Drought: A Critical Review of the Substituted Judgment Doctrine and the Best Interest Standard *Beth A. Schenberg* 319

Toward a Twenty-First Century Civil Commitment Statute: A Legal, Medical, and Policy Analysis of Preventive Outpatient Treatment *Rachel A. Scherer* 361

Letting Lilliputians Sit at the Table: Providing Physicians with a Magnified Voice to Counter the Brobdingnagian HMO *Brandt R. Voight* 435