

Introduction

*Alan Meisel**

As recently as the mid- to late-nineteenth century, it could honestly be said that there was no medical profession in the United States. Yes, there were doctors. And of course there were patients with illness and injuries. But if it is contentious today as to how best to treat various conditions, a century and a half ago it was nothing short of a circus. Although the American Medical Association had been founded in 1847, allopathic medicine could hardly be said to be the dominant school of thought. Others abounded, some of which still exist today, but none of them were capable of doing very much in the way of treating illness.¹

Slowly, over the course of at least a half century, the scientific method became ascendant in medicine. The development and use of anesthesia together with the understanding of infection and antisepsis eventually made surgery relatively safe and effective. The development of pharmaceuticals that did more good than harm awaited an even later time.

While medicine was in this transformative phase from magic and mystery to science, another development was occurring that today is the second key component—along with scientific medicine—of our contemporary health care system: the rise of the modern hospital. Institutions for the care of the sick had long existed, but because the treatment of sickness was so primitive and ineffective, *care* was about all that could be provided until nature took its course.

Out of these conditions, the modern hospital was born in the latter half of the nineteenth century.² One of the inspirations for its creation was the rise of modern medicine. As the capacity of the medical profession to provide effective treatment increased, doctors increasingly needed facilities, equipment, and personnel that only an institution akin to the modern hospital could provide. Another was the self-help benevolent societies of immigrant

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1. See generally PAUL STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE* (1982).
2. See generally CHARLES ROSENBERG, *THE CARE OF STRANGERS: THE RISE OF AMERICA'S HOSPITAL SYSTEM* (1987).

groups. But another important inspiration was the charitable impulses of both a growing middle class and a growing class of wealthy industrialists who sought outlets for their energies other than the mere accumulation of wealth (or perhaps in reparation therefore).

These latter two motivating forces behind the creation of hospitals explain, to a substantial extent, the fact that hospitals were created as nonprofit institutions. Their charters and bylaws spoke of providing for the needs of the communities that they served, and they did.

Fast forward to the last quarter of the twentieth century when the charitable hospital began to lose its way. There are any number of explanatory factors: The increasing complexity of medical treatment and the increased size of hospitals required a more professional leadership structure both at the management and board levels. The relentless increase in the costs of health care led to parallel pressures to rein in these costs. The opportunity for making profits from the large streams of revenue and from the pressure to control costs bespoke investment opportunities for private investors. Somewhere along the way, the provision of charity medical care sometimes took a back seat to the bottom line.

The realization that the charitable hospital was losing its way became increasingly apparent to local, state, and federal taxing authorities who were not only charged with administering the tax-exempt status of these institutions but of attempting to raise ever large amounts of tax revenues. Over the last two decades, this has led to scattered skirmishes between taxing authorities—mostly state and local—and charitable hospitals—sometimes to get the hospitals to pay more taxes, and sometimes to get the hospitals to provide more charity care or to lose their tax-exempt status. When they could not be resolved through negotiations and the implicit threat of litigation, they sometimes did wind up in court and not always to the satisfaction of the taxing authorities and to other proponents of directing charitable hospitals back to their original mission. This has taken on increased societal importance not merely to raise tax revenues but because of the scandalously growing number of Americans who are uninsured or underinsured for health care.

Enter the Internal Revenue Service, which had previously been relatively quiescent throughout this period of turmoil involving state and local versus charitable hospitals. In the summer of 2005,³ the IRS announced that it was checking compliance by hospitals with requirements for federal tax exemption, revealing that in the previous 10 years it had audited 375 of

3. Robert Pear, *I.R.S. Checking Compliance by Tax-Exempt Hospitals*, N.Y. TIMES, June 19, 2006.

approximately 7,000 nonprofit hospitals and other health care organizations, with the Commissioner of Internal Revenue admitting that “[o]ur audit rates are too low.”⁴

The University of Pittsburgh School of Law was in the process of organizing a symposium to recognize the tenth anniversary of the founding of its Health Law Certificate Program.⁵

This concentration program—the first of what are now five programs in various areas of the law (civil litigation, environmental law, intellectual property and technology law, and international and comparative law)—permits second- and third-year law students to obtain a certificate attesting to their having taken a minimum of 18 credits in the field of health law. This includes the basic survey course in health law and policy, at least 5 electives in health law, a clinic or practicum in health law, and the completion of an in-depth research paper in health law.

The coalescence of these two events—plus the fact that one of our graduates, Thomas K. Hyatt, is a renowned authority on the subject of the taxation of nonprofit health care organizations⁶—made the choice of topic for the symposium a simple one

In his keynote address,⁷ Hyatt discusses the role of the modern charitable tax-exempt hospital. He premises his argument on three basic assumptions. First, tax-exempt hospitals are a type of non-profit organization, which have certain responsibilities to the non-profit community. Second, because modern charitable hospitals constitute tax-exempt public charities, the hospitals must fulfill certain obligations in order to be free from taxation. Finally, the modern charitable hospital constitutes a big business enterprise that needs to be financially controlled in order to maintain its charitable status.

As our health care system struggles to cope with the ever-increasing ranks of uninsured and underinsured Americans, Dean Mary Crossley wonders whether it is time to modify the IRS “community benefit” standard for granting tax exemptions to hospitals.⁸ When the IRS adopted the “community

4. *Id.*

5. See <http://www.law.pitt.edu/academics/programs/health>.

6. See THOMAS K. HYATT & BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT HEALTHCARE ORGANIZATIONS* (2d ed. 2001).

7. Thomas K. Hyatt, Address at the University of Pittsburgh Health Law Certificate Program Tenth Anniversary Symposium: The Role of the Modern Charitable Hospital (Feb. 5, 2007), in *PITTSBURGH J. ENV'T & PUB. HEALTH LAW*, Spring 2007, at ___-___.

8. Mary Crossley, Address at the University of Pittsburgh Health Law Certificate Program Tenth Anniversary Symposium: Non-Profit Hospitals, Tax Exemption and Access for the Uninsured (Feb. 5, 2007), in *PITTSBURGH J. ENV'T & PUB. HEALTH LAW*, Spring 2007, at ___-___.

benefit” standard in 1969, policymakers assumed that the new Medicare and Medicaid programs would provide complete coverage for the indigent, and that the payments would adequately cover the cost of care. Recent developments in health care, including rapid cost inflation, increased competition between hospitals, and the growing number of insured, have all contributed to a significant decline in the quality of health care provided to indigent Americans. It is estimated that the tax benefit received by hospitals annually under the “community benefit” standard totals \$20 billion. Is this money well spent? Crossley outlines three proposals for fixing the system: (1) establish an explicit “charity care” requirement for tax exemption, as was the standard before 1969; (2) require health care providers to articulate the exact community benefits provided to ensure that those benefits are actually realized; or (3) replace the tax exemption with targeted incentives, so as to encourage good behavior for non-profit and for-profit hospitals alike.

Karl Emerson, Director of Pennsylvania’s Bureau of Charitable Organizations, notes that charitable sector scandals and abuses are exposed every day in the media, increasing public skepticism toward all charitable organizations and decreasing contributions.⁹ Empowered by the Solicitation of Funds for Charitable Purposes Act, various state agencies, local District Attorney’s offices, and the Pennsylvania Attorney General can investigate allegations that a particular charitable organization has been misusing funds. Hospitals and their foundations, along with all other charitable organizations, are monitored to ensure that they are obeying the dictates of state and federal law. Recently, the Internal Revenue Service has begun taking part in enforcement efforts, targeting charitable organizations that file false tax returns in an effort to punish those who violate the public’s trust.

In her *Remarks on Tax Issues*, Linda Burke, a tax advisor and former IRS official, spoke about current and upcoming changes in the way the IRS will be treating non-profit organizations, particularly hospitals and other health care providers.¹⁰ In pointing out that the federal standards for tax exemption are often less stringent than state standards, she discusses the breakdown of the IRS’s business divisions, and focuses more specifically on the Tax Exempt/Government Entities Division (TEGE), which covers charitable

9. Karl Emerson, Address at the University of Pittsburgh Health Law Certificate Program Tenth Anniversary Symposium: Comments on the Role of Modern Charitable Health Care Providers (Feb. 5, 2007), in PITTSBURGH J. ENV’T & PUB. HEALTH LAW, Spring 2007, at ____-____.

10. Linda Burke, Address at the University of Pittsburgh Health Law Certificate Program Tenth Anniversary Symposium: Remarks on the Tax Issues (Feb. 5, 2007), in PITTSBURGH J. ENV’T & PUB. HEALTH LAW, Spring 2007, at ____-____.

organizations, government entities, and pension and welfare plans. noting that TEGE's importance and scope within the IRS has grown in recent years due in large part to the magnitude of the health care industry. Burke also discusses Commissioner Everson's increased emphasis on the non-profit hospital area. Some of those efforts, including more careful consideration of tax exemption requests, sending questionnaires to 600 of the largest hospital organizations, and the development of a strategic plan in regards to information gathering, are all addressed, as are the potential consequences and the future of the tax-exempt area.

Thomas Boyle begins his discussion by raising some questions and comments in answer to questions posed by Tom Hyatt.¹¹ Many changes have occurred as a result of the growth of Medicare, both in terms of the number of participating hospitals and the number of Medicare beneficiaries. Non-profit hospitals and for-profit hospitals are becoming more and more alike, partly due to the pressure non-profit hospitals are feeling to be more businesslike. Mr. Boyle discusses the relationship between tax exemption and fraud and abuse. Pennsylvania is ahead of some other states by virtue of its detailed statute and an ad valorem real estate tax. After a massive health care bankruptcy, the Pennsylvania Attorney General set up a system of requirements for health care business transactions. The federal rules prevent hospitals, non-profit and for-profit, from engaging in practices common in other areas and hospital clients need to be advised of the consequences of such actions.

11. Thomas Boyle, Address at the University of Pittsburgh Health Law Certificate Program Tenth Anniversary Symposium: Intersection of Tax-Exemption and Fraud and Abuse Issues (Feb. 5, 2007), *in* PITTSBURGH J. ENV'T & PUB. HEALTH LAW, Spring 2008, at ___ - ___.