

# HEALTH LAW: QUALITY OF CARE AND LIABILITY

Fall Term, 2010  
Hamline University School of Law  
Professor Katrina Pagonis

## SYLLABUS

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### Contact Information

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### Class Meetings

Tues. & Thurs., 1-2:15, Law 100

### Office Hours

Tues. & Thurs. 2:15-3:15 or by appointment

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## I. INTRODUCTION & COURSE OBJECTIVES

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Welcome to *Health Law: Quality of Care & Liability*. Health law is a vast and dynamic discipline that covers the myriad interactions between law, medicine, and individual and population-level health. And you are studying health law at a particularly opportune time. The health care industry continues to expand (despite national economic woes) and the laws governing health care continue to multiply, creating a vast, interlocking legal web. While doctors might rightly lament this state of affairs, health lawyers are finding themselves in demand. This course, in conjunction with other health law courses at Hamline (especially *Health Care Organization & Finance*), will give you some of the basic tools to successfully navigate (and, in turn, guide clients through) applicable regulations, statutes, and common law principles. Health law is also of particular interest now because health policy questions are at the forefront of America's consciousness, which is not surprising given the weight of what is at stake: health, autonomy, and money. Accordingly, in addition to studying the current state of the law, we will explore underlying policy considerations and prospects for improving health care using novel legal tools.

This course focuses on (1) how the provision of health care is regulated, (2) sources of liability for various persons and entities involved in the provision of care (individual health providers, health care institutions, and managed care organizations), and (3) the ultimate impact of regulations and liability on quality of care. Throughout the semester, we will be thinking about the impact of law and quality initiatives on cost and access and exploring the underlying tensions between cost, access, and quality.

At the conclusion of the course, you should understand the legal issues underlying each of the following topics:

- Licensure of health care professionals
- Antitrust law and provider efforts to improve quality
- Accreditation and licensing of health care institutions

- Medical staff membership and clinical privileges
- Informed consent and treatment
- Privacy and security of personal health information (HIPAA)
- The duty of physicians and hospitals to provide care (EMTALA)
- Medical malpractice (standard of care)
- Vicarious and direct liability of health care institutions
- Managed care liability and ERISA preemption thereof

In addition, you should be able to articulate how the various legal tools we discuss impact the quality, cost, and accessibility of care.

The course is organized by different actors involved in the provision of care. We will begin with individuals that directly provide care (doctors, nurses, physicians assistants, dentists, optometrists, etc.). Then we will move on to health care institutions (hospitals, ambulatory surgery centers, longterm care facilities, etc.). Lastly, we will talk about the role of managed care in the provision of care, focusing on theories of liability for denials of treatment and ERISA preemption.

## II. LOGISTICS

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- A. **Time and Place.** This three-credit course will meet twice a week on **Tuesdays** and **Thursdays**, from **1:00-2:15pm** in **Law 100**.
- B. **Textbook and Readings.** The syllabus contains a list of readings for each class meeting. There are two versions of our required main text, listed below:
- **Comprehensive Text** (used in both this course and Org & Finance; cheapest option if you're planning on taking both)
    - BARRY R. FURROW, THOMAS L. GREANEY, SANDRA H. JOHNSON, TIMOTHY S. JOST, ROBERT L. SCHWARTZ, **HEALTH LAW: CASES, MATERIALS AND PROBLEMS** (6th ed., 2008).
    - Publisher: West
    - ISBN: 9780314184740
  - **Alternative Text** (cheapest option if you are not planning on taking Org & Finance)
    - BARRY R. FURROW, THOMAS L. GREANEY, SANDRA H. JOHNSON, TIMOTHY S. JOST, ROBERT L. SCHWARTZ, **LIABILITY & QUALITY ISSUES IN HEALTH CARE** (6th ed., 2008).
    - Publisher: West
    - ISBN: 9780314184757

You are required to have one of the above textbooks.

In addition to readings from our course textbook, I will occasionally assign additional cases and articles, copies of which will be posted on TWEN and/or placed on reserve in the library (as indicated in the list of reading assignments). *Unless the reading assignment indicates otherwise, supplemental readings are required (not optional)*

*Students are responsible for reading and analyzing all assigned course materials before each class.*

- C. **TWEN Site.** Course documents, updated syllabi, and any powerpoints used in class will be posted on the class TWEN site. In addition, you are encouraged to participate in discussions of current events in health law by posting to our news forum on TWEN.

### **III. COURSE REQUIREMENTS & POLICIES**

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A. **Attendance**

Attendance is important and required by the ABA and Hamline University School of Law. At the beginning of each class, I will distribute a class roster for you to sign. *If you are absent for more than three classes, your absences will be treated as “excessive”* in accordance with Hamline University Academic Rule 108 unless you obtain approval from me in advance.

B. **Preparedness and Punctuality**

Punctuality and preparedness are both important: they demonstrate your respect for your peers and me and they allow you to get the most out of the class. If you are more than 10 minutes late, you have missed a substantial part of that day’s class; your tardiness will therefore count as an absence.

C. **Preparedness and Participation**

Most class sessions will be based on lectures and class discussion of the issues raised by the lecture and readings. Class discussions showing rigorous thought and an informed understanding of the subject matter will be an integral part of the learning process. You must read all of the assigned materials before class to facilitate discussions.

**Volunteering to be On Call:** At the beginning of each class session, I will have a copy of the seating chart on which you can designate whether you would like to be “on call” for that day. You can sign up to be on call during the 5 minutes preceding class (i.e., once class has begun, you can no longer sign up). See “Course Evaluation” below for information on how volunteering to be on call can boost your grade.

**Participation when not On Call:** If you have not signed up to be on call, you will still be expected to actively engage in small group discussions and activities and should be sufficiently prepared to do so.

D. **Problems**

Problem-solving is crucial to legal practice (and an important learning tool). The book has problems throughout, and you should use these as an opportunity to apply the material and assess your level of understanding. I am available to go over any problems with you during office hours or meetings.

On occasion, I will assign a problem in the book or a problem I will distribute via TWEN along with the readings for a given day. We will go over these assigned problems in small groups and/or as a class. It is particularly important that you come to class having read and reflected on the assigned problem(s) so

that we can use class time efficiently. Students interested in receiving a “bump up” in their grades should also submit short written answers to assigned problems to me via e-mail before class (see “Course Evaluation” below).

D. **Technology Policy**

**Laptops:** Students are expected to use technology in a professional and productive manner. The use of laptops in a manner that does not further our learning objectives or a manner that distracts others is strictly prohibited. **If a student uses technology in a way that distracts others, he or she may have his grade lowered by one-half of a letter; if the student does so again, he or she may be asked to drop the course without receiving academic credit for the class.**

**Cellphones and Similar Devices:** You are prohibited from using cellphones and smartphones during class time. If you use such a device during class, you will have your grade lowered by one-half of a letter. If you do so again, you may be asked to drop the course without receiving academic credit for the class.

**IV. COURSE EVALUATION**

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The grade for the course will be based on your performance on the midterm and final examinations (weight allocated as indicated in the table below) with a possible upward adjustment based on participation and submission of written responses to assigned problems:

	Details	Percent of Final Grade
<b><i>Final examination</i></b>	<i>Take Home:</i> 72 Hours (with word limit), Open Book, Anonymous	70%
<b><i>Midterm examination</i></b>	<i>Take Home:</i> One Week (with word limit), Open Book, Anonymous	30%
<b><i>Participation &amp; Problems</i></b>	See Part III.C., above	“Bump up” (see Part III.C.)

**Bump up.** To be receive a “bump up” in your grade (e.g., raising your final grade from a B+ to an A-), you must (a) volunteer to be on call for 23 of our 28 class meetings and (b) submit (via e-mail) written responses before class to at least 5 of the assigned problems. If you volunteer to be on call but are not in fact prepared, you will be ineligible to receive a bump up.

**V. INSTRUCTOR AVAILABILITY**

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I want to be fully available to help students whenever they need assistance with the content and readings in the class.

I will hold *office hours one hour after each class*. I am also available to meet with students by appointment. Feel free to come to office hours individually or with your study group.

## **VI. FINAL THOUGHTS**

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I am fascinated by the subject matter of this course and hope you will share my enthusiasm for the intellectually challenging ideas presented in the readings and the class work. I look forward to getting to know you and to our many thoughtful discussions. If I can ever be of assistance, please come by and see me at any mutually convenient time.

## PRELIMINARY COURSE SCHEDULE

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The course schedule provided below covers the first part of our course (focusing on health care professionals). Revised course schedules will be made available through our course TWEN site. It is your responsibility to ensure that you regularly check TWEN for the most up-to-date version of the syllabus.

### **PART I. Health Care Professionals: Regulation, Obligations, and Liability**

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During the first portion of the semester, we will focus our studies on individual health professionals (including doctors, dentists, optometrists, nurses, and physician assistants).

#### ***A. Licensure***

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**August 24**

##### **Course Introduction & Licensing Health Care Professionals**

Introduction: Overview of the course; explanation of class policies and expectations

Licensing Health Care Professionals: We begin the course by discussing the states' direct regulation of health care professional through the issuance of licenses. Licensing decisions bring issues of cost, quality and access (pervading concerns in health law that are often in tension with one another) to the forefront. We will explore the interactions between these concepts through a case study on mid-level dental practitioners.

- Reading
- Furrow 115-17
  - *Dent v. West Virginia* (excerpted version posted on TWEN)
  - Sekiguchi et al., *Improving the Oral Health of Alaska Natives*, 95 AM. J. PUB. HEALTH 769 (2005) (<http://www.ajph.org/cgi/reprint/95/5/769>)
  - Allukian, et al., Letter—*APHA Presidents Support Dental Therapists*, 95 AM. J. PUB. HEALTH 1880 (2005) (<http://www.ajph.org/cgi/reprint/95/11/1880>)
  - Campbell, et al., Letter—*Improving the Oral Health of Alaska Natives*, 95 AM. J. PUB. HEALTH 1880 (2005) (<http://www.ajph.org/cgi/reprint/95/11/1880>)
  - Williams, *Dental Therapists Learning the Drill*, ST. PAUL PIONEER PRESS, Jan. 14, 2010, at A6, (Westlaw: 2010 WLNR 227332)

**August 26**

##### **Scope of Practice**

The authority of states to regulate the medical profession has, in large part, been settled since *Dent*. Today, licensure battles often focus on scope of practice issues. When has a licensed individual (e.g., a nurse practitioner) exceeded her permissible scope of practice? When do an unlicensed individual's activities fall within the practice of medicine? How do decisions on these questions impact cost, quality, and access?

- Reading
- *Recommended:* Skim Furrow 131-32 for some brief background on CAM before doing the readings below
  - Furrow 140-158 (skip the problem on 140-41)

- Problem
- Physicians, Physician Assistants, and Nurses (p156)

**August 31**

##### **Disciplinary Measures**

An integral component of licensure scheme allows for disciplinary measures to be taken (including suspension or revocation of the license) when an individual fails to meet professional standards. When courts review these disciplinary actions, they apply a highly deferential standard of review. (Nonetheless, our readings provide examples of instances where the courts have found for the

petitioner.) Should boards of medicine discipline doctors that are attempting novel therapies the same way they might discipline a doctor providing outdated therapies? What are the risks of using disciplinary measures too frequently? Too rarely?

Reading • Furrow 117-140

## ***B. Antitrust: Regulating Quality through Provider Competition?***

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**September 2**

### **Introduction to Antitrust and Cartels**

State licensure laws grant practitioners a state-sanctioned monopoly for health care services.

Practitioners, however, are still subject to federal and state antitrust laws. Antitrust is covered more fully in Health Care Organizing and Finance, but we will look at when and how practitioners might use quality goals to justify anticompetitive activities.

Reading • Furrow 1095-96 (read through “Sherman Act § 1”)  
• Furrow 1097-99 (starting with “Defenses and Exemptions” on 1097)  
• Furrow 1100-1106

**September 7**

### **Quality Justifications for Anticompetitive Activities**

We will continue our discussion of antitrust, focusing on purported quality justifications. As you read the materials, ask yourself: Is the patient care defense in *Wilk* appropriate? Who should decide whether cost-savings justify a reduction in quality? Does a market-based approach to health care cost and quality make sense?

Reading • Furrow 1108-18 (read through note 2), 1120-24

## ***C. Formation and Termination of the Doctor-Patient Relationship***

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**September 9**

### **Duty to Treat**

In today’s class, we will explore whether and when doctors are legally obligated to provide care.

When we move on to discuss health care institutions (in Part II of the course), you will discover that physicians working in emergency departments are statutorily obligated to provide care in some circumstances, but for now we will focus on common law obligations.

Reading • Furrow 596-604, 606 n.1, 607 n.5  
Problem • Cheryl Hanachek (Furrow 607-08)  
• Ethics and Law (Furrow 608-09)

## ***D. Informed Consent***

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**September 14**

### **From Battery to Negligent Nondisclosure**

In talking about informed consent, there are two key causes of action: battery and negligent nondisclosure. How do the elements of battery and negligent nondisclosure differ? When might a litigant claim battery and why? What disclosures are doctors required to make to avoid negligence claims? And how does the “professional disclosure standard” compare with the “reasonable patient standard” in negligent nondisclosure cases?

Reading • Furrow 230-46  
• Chen, *Treating Patients as Partners, by Way of Informed Consent*, N.Y. TIMES (July 30, 2009), available at <http://www.nytimes.com/2009/07/30/health/30chen.html>.

**September 16**

### **Negligent Nondisclosure: Particular Types of Information**

We will discuss whether certain types of information (the physician’s track record and experience and statistical mortality information) must be disclosed to the patient. How might consumer

protection laws come into play in some of these cases? When is full disclosure not in the best interest of the patient? And who should decide what is in the patient's best interest?

- Reading • Furrow 246-267 [typo: p273, last line: "declined" should read "consented"]  
Problem • Disclosing Physician Risks, p258

### September 21

#### **Negligent Nondisclosure: Causation, Damages, and Exceptions**

We will briefly address the obligation to disclose physician conflicts of interest, and then examine causation and damages in negligent nondisclosure cases and exceptions to the duty to disclose. What criteria should we use in deciding whether a doctor is obligated to disclose a conflict of interest? How do the subjective and objective causation tests differ? In courts using the objective reasonable patient test, is evidence regarding whether the plaintiff would have consented if fully informed still relevant? Why or why not? Is an undisclosed but unrealized risk actionable? Why or why not? Might the plaintiff in *Tisdale* have brought claims other than her negligent nondisclosure claim? Explain. Lastly, what exceptions to the disclosure obligations are there?

- Reading • Furrow 268-276  
• Furrow 276-88 (skip the problem on 288)

## ***E. Medical Malpractice, Warranties of Cure, and Waivers***

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### September 23

#### **Medical Malpractice: Standard of Care**

Medical malpractice claims, like other professional malpractice claims, require proof of the traditional negligence elements: duty, breach, causation, and damages. The physician's duty arises from the physician-patient relationship. We will focus on the second element: breach. What is the standard of care? And how might litigants seek to prove the standard of care? What types of evidence is relevant or irrelevant to the standard of care? You should understand the differences between the locality rule, the similar or modified locality rule, and a national standard of care.

- Reading • 327-39, 342-54

### September 28

#### **Judicial Standard Setting and Waivers of Liability**

We will wrap up our discussion of the standard of care by discussing the rare instances where courts might judicially set the standard of care. Then we will discuss waivers and partial limitations on the right to sue. When will courts enforce an agreement waiving or limiting the patient's right to sue for malpractice? Should these agreements be broadly or narrowly enforced? Why?

- Reading • Furrow 357-63, 218-228