

HEALTH LAW ORGANIZATION & FINANCE

Spring Term, 2012
Hamline University School of Law
Professor Katrina Pagonis

SYLLABUS

Contact Information

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Class Meetings

Wed. 4:00-6:50 pm, Room 101

Office Hours

In-Office: Wed. 7:00 pm and *by appointment*
Walking: Thurs. 11:00 am (Walker Fieldhouse, Indoor Track)

I. INTRODUCTION & COURSE OBJECTIVES

Welcome to *Health Law Organization & Finance*. 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 some 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 Law: Quality of Care and Liability*), will give you some of the basic tools to successfully navigate (and, in turn, guide clients through) applicable statutes and regulations. 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 access to high quality health care while controlling and justly distributing costs.

This course focuses on the regulation, structure, and financing of the American health care system. We will examine barriers to access, drivers of cost, and factors contributing to high rates of underinsurance and uninsurance. You will learn about private health insurance and the regulation thereof at the state and federal levels. We will also examine the major public insurance programs: Medicare and Medicaid. The course will also review the forms and structures of health care enterprises, with a focus on the creation and regulation of tax-exempt organizations. The fraud and abuse laws, including the False Claims Act, the Anti-Kickback Statute, and Stark, will be reviewed both from the perspective of the compliance department and of the lawyer who must structure health care entities with these laws in mind. Finally, the course will review how antitrust law impacts the structure and conduct of health care providers.

Learning outcomes: By the end of this course, you should:

- Understand how health care is publicly and privately financed in the United States, the drivers of health care costs, and the sources of disparities in access to health care and insurance;

- Critically analyze national health reform legislation;
- Understand the obligations of the board of directors, the implications of non-profit status, and legal rules concerning the structure of health care institutions;
- Analyze how the laws that govern health care financing and impose cost controls on the health care system also drive how health care organizations are structured;
- Advise clients about managing legal risk while achieving their business goals, charitable purposes, and other objectives; and
- Interpret statutes and regulations, identify textual ambiguities, and counsel clients in light of legal uncertainty.

II. LOGISTICS

- A. **Time and Place.** This three-credit course will meet on **Wednesdays**, from **4:00-6:50 pm** in **Law 101**.
- B. **Textbook and Readings.** The syllabus contains a list of readings for each class meeting. There are two versions of our required main text (you are required to have one of the two) and a required supplemental text.
- **Main Text (required; choose one):**
 - **Unabridged Text** (used in both this course and Quality & Liability; 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
 - **Abridged Text** (cheapest option if you are not planning on taking Quality & Liability)
 - BARRY R. FURROW, THOMAS L. GREANEY, SANDRA H. JOHNSON, TIMOTHY S. JOST, ROBERT L. SCHWARTZ, **HEALTH CARE ORGANIZATION AND FINANCE** (6th ed., 2008).
 - Publisher: West
 - ISBN: 9780314184771
 - **NOTE:** Page numbers in the syllabus are keyed to the unabridged casebook. If you are using the abridged text, you can use the table of contents of the unabridged text (posted on TWEN) and the table of contents of the abridged text to find the appropriate readings.
 - **Supplemental Text (required)**

Note: We are using the **2011 Supplement** (do not purchase the 2010 Supplement)

 - BARRY R. FURROW, THOMAS L. GREANEY, SANDRA H. JOHNSON, TIMOTHY S. JOST, ROBERT L. SCHWARTZ, **HEALTH CARE REFORM: SUPPLEMENTARY MATERIALS** (2011).
 - Publisher: West

- ISBN: 978 0314184740

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

- 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 two classes, your absences will be treated as “excessive”* in accordance with Hamline University Academic Rule 108. If you will be absent to attend a hearing required by another course or to observe a religious holiday, it is your responsibility to talk with me in advance to arrange make up work and have the absence excused.

- B. **Missing Part of a Class**

If, for some reason, you need to arrive to class late or leave early, it will count as half an absence as long as you are present for at least an hour of class.

- C. **Preparedness & 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.

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 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 (or problems). 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 written answers to assigned problems to me via e-mail before class (see “Course Evaluation” below).

E. **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 cell phones and smart phones 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

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
<i>Final examination</i>	<i>Take Home:</i> 72 Hours, Open Book, Anonymous	70%
<i>Client Letter</i>	<i>Take Home:</i> One Week (with word limit), Open Book, Anonymous	30%
<i>Participation & Problems</i>	See below	“Bump up” (see below)

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 volunteer to be on call for 10 of our 13 class meetings and submit via e-mail written responses before class to at least 7 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

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 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

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.

COURSE SCHEDULE

PART I. Access to Care & Health Insurance Coverage

January 18

Course Introduction, the Problem of Access, and Private Health Insurance

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

The Problem of Access: Tuesday, March 23, 2010, President Obama signed the Patient Protection and Affordable Care Act. One of the central aims of this legislation is to increase access to health care for the 50.7 million uninsured Americans (approximately 16.7% of the population) and 25 million underinsured Americans. In the first Part of this course, we will focus on health insurance coverage, looking at both private and public insurance.

Private Health Insurance: We will look at basic principles of insurance and how insurers address adverse selection. We will then look at moral hazard as a driver of health care costs, managed care strategies for containing costs, and state-level efforts to regulate managed care. Finally, we will discuss some of PPACA's provisions regulating the health insurance market.

Reading • Text 560-563, Supp. 78-79, Text 575-582, Supp. 123-155

Problem • Designing a Corporate Wellness Program (Supp. 133)
• Insurance Reforms (Supp. 144)

January 25

ERISA and the Regulation of Private Health Insurance

Prior to the 1970s, health insurance was exclusively regulated by states. After the enactment of ERISA in 1974, states could no longer regulate health plans provided by self-insured employers. In this class, we will look at ERISA and health insurance regulation, focusing on ERISA preemption as a barrier to state-level health insurance regulation. We will also discuss remedies that are available where a health insurer fails to provide benefits under an employee benefit plan.

Reading • Text 688-710, Text 734-48 (skip n.2 on p.741), Supp. 156-163
• Pages 648-661 of *Golden Gate Restaurant Ass'n v. San Francisco* (546 F.3d 639, 648-661 (9th. Cir. 2008))

Problem • ERISA Preemption of State Managed Care Regulation (Text 703)

February 8

Health Reform and Access to Care: HIPAA, COBRA, and PPACA

Before the enactment of health care reform in 2010, the two major federal laws designed to improve access to adequate, private health insurance were COBRA and HIPAA. We will explore the effect of COBRA and HIPAA, and then discuss some central provisions of the Affordable Care Act that are designed to insure 24 million additional individuals by 2019. We will also discuss the role of the individual mandate in the ACA and the pending constitutional challenge to this provision. (The ACA is also expected to

expand coverage to 16 million more persons through expansion of the Medicaid program, which will be discussed in our Feb. 22 class.)

- Reading
- Text 748-753, Supp. 164, Text 575-585, Supp. 81-93, Supp. 106-110
 - Kaiser Family Foundation Video, Health Reform Hits Main Street <http://healthreform.kff.org/the-animation.aspx> (a little simplistic, but it provides a basic overview of PPACA and previews issues that we will discuss in greater depth)
 - Constitutional Challenges to the Individual Mandate – Reading TBD

- Problem
- Advising under HIPAA and COBRA (Text 752)
 - Help from Health Care Reform (Supp. 71)
 - Help for Small Businesses (Supp. 73)
 - Employer Responsibility (Supp. 110)

February 15

Cost Drivers and Variations in Care

In the United States, we pay more for health care in taxes, premiums, and out-of-pocket expenses than many other developed countries. Meanwhile, our population-level health outcomes rank us below many other developed countries, suggesting that we are not always paying for better care. In this class, we will explore the problem of cost and variation in care. We will then look at innovations designed to rein in health care costs and the relationship between cost-cutting measures, quality, and access.

- Reading
- Leonhardt, *Making Health Care Better*, (N.Y. Times 11/8/2009), posted on TWEN
 - Gawande, *The Cost Conundrum* (New Yorker 6/1/2009), posted on TWEN
 - Text 26-28, 563-574, 585-594; Supp. 79-80, 110-115, 62-65 (n.1)

- Problem
- Consumer-Driven Health Care (Text 593)

February 22

Public Health Insurance Programs: Medicare and Medicaid

- Reading
- Text 785-803, Supp. 165-197
 - Summaries of Medicare and Medicaid Programs, posted on TWEN
 - The States' Constitutional Challenge of PPACA's Medicaid Expansion – Reading TBD

- Problem
- Medicaid Eligibility (Supp. 191)

PART II. Corporate Structure and the Implications of Non-Profit Status

February 29

Choice of Entity; Governance; the Corporate Practice of Medicine; Integration

Today, we move from payment for health care services to the structure of our health care delivery system. We will look at how our health care delivery system has evolved over the past couple decades, and then look at options for forming health care entities

(choice of legal entity, types of integrated systems). As you read about Waldo's experiences at different times in our history, think about how the many organizational structures and systems he encounters impact his health care (and the way that decisions are made). When reading about choice of entity, you should also think about how you might go about advising a client that is considering forming a corporation or partnership. We will also study the corporate practice of medicine doctrine and its impact on the structure of health care entities. Finally, we will study corporate governance in health care, focusing on the legal obligations borne by directors and officers of for-profit and nonprofit corporations in health care.

Reading • Text 909-923, 923-24 n.2, 945-966; Supp. 202-206

March 5 – 9

SPRING BREAK! ENJOY!

March 14

Nonprofit Providers: Governance and Tax Exempt Status

Many health care organizations are organized as not-for-profit entities under § 501(c)(3). Nonprofit status is extremely beneficial (federal and state tax exemption), but it imposes additional legal requirements. Nonprofit corporate governance, for example, mirrors for-profit corporate governance in many ways, but trustees of nonprofits bear additional fiduciary duties. And, to secure and maintain their tax-exempt status, hospitals must use their resources for “charitable purposes”.

Reading • Recall *Stern* (Text 912-919)
• Text 923-942, 944-945, 966-981; Supp. 207-211

Problems • Hope Springs Eternal (p.944)
• Organizing All Saints Health Care (p.965)
• St. Andrew's Medical Center (p. 979)

March 21

Nonprofit Providers: Tax Exempt Status – Payers, Integrated Delivery Systems, and Joint Ventures; Private Inurement, Private Benefits, and Excess Benefit Transactions

We will begin today with an examination of nonprofit status for health care entities other than hospitals, namely HMOs and integrated delivery systems. We will also look at joint ventures between nonprofit and for-profit providers and the risk that such arrangements might impermissibly further non-exempt purposes. We will also examine the prohibition on private benefit and private inurement by 501(c)(3) organizations and the additional prohibition on excess benefit transactions (EBTs) in the Tax Payer Bill of Rights II. As you go through the readings on private benefit, private inurement, and EBTs, you should carefully compare them in terms of their scope and the penalties that can be imposed for their violation.

At the end of class, we will look at reports from Minnesota's Attorney General's office concerning the activities of nonprofit health providers in the state to see specific examples of inurement, etc.

Reading • Text 981-1022, Supp. 206-207

- Problems
- Excess Benefit Transactions (p.1020)
 - St. Andrews Medical Center, Part Two (p.1021)
 - Checking in on Charity and Governance (Supp. 208)

PART III. Fraud and Abuse

March 28

False Claims Act

We will begin our discussion of fraud and abuse laws with the False Claims Act, which prohibits the submission of false or fraudulent bills to the federal government. ***Each Student is to bring one press release and background piece on a recent False Claims Act judgment and/or settlement which will be discussed in class.***

- Reading
- Text 1023-1053, Supp. 212-220
 - 31 U.S.C. § 3729 post-FERA (read the redlined version on TWEN showing the FERA amendments to the FCA)

- Assign-
ment
- **Required** (does not count toward bump up problems):
Bring one press release and background piece on a recent False Claims Act judgment and/or settlement, which will be discussed in class.

- Problems
- Padding the Cost Reports (Supp. 214)
 - Additional problem distributed in class

April 4

Antikickback Statute (AKS)

***** 6:50 pm CLIENT LETTER ASSIGNMENT DISTRIBUTED VIA TWEN*****

At 6:50 pm, the assignment will become available for download via TWEN.

Coverage: The assignment will cover all materials through the False Claims Act (AKS is not covered; if you see an AKS issue, do not address it).

Office Hours: Once the assignment is distributed, I will be unavailable to discuss any materials covered on or before March 28 until after the letters have been submitted.

While referral fees are commonplace in other industries, they are problematic in health care because of their tendency to increase the volume of care provided (and, therefore, the cost of health care paid for through public insurance programs). We will start today's class by focusing on the structure of the AKS and the general prohibition against kickbacks. We will then look at exceptions and the more commonly used safe harbors. As an attorney structuring transactions or monitoring compliance, your practice will frequently involve researching safe harbors and advising your client on ways in which they might minimize legal risks using safe harbors. We will not undertake an exhaustive review of each potentially applicable safe harbor; instead, we will use key safe harbors as examples.

- Reading
- Text 1053-1081, Supp. 221-222
- Problems
- Advising under the Fraud and Abuse Laws (Text 1054-56)
 - Sorting it Out (Text 1081)

April 11

The Stark Law—Self-Referrals

*****4:00 pm CLIENT LETTERS DUE VIA TWEN*****

All client letters must be submitted by 4:00 pm

Late Letters: Late letters will be penalized according to the assignment instruction sheet.

Timeliness is determined solely on the basis of the TWEN timestamp, so you should plan on uploading your letter early to avoid losing points for lateness.

Reminder: Be sure to reread the assignment instructions before submitting your letter.

The Stark law takes a transactional approach to addressing the problem of self-referrals and unnecessary medical care. As you read the statutory language, think about similarities and differences between the Stark Law and AKS (a table might be useful). As with AKS, we will only explore a couple key exceptions under the Stark Law in order to practice reading exceptions and applying them in particular situations. We will also discuss some changes to Stark in PPACA.

Reading • Text 1081-1094, Supp. 220-225

Problems • Space & Equipment Rentals, Physician Recruitment (Text 1085)
• Group Practices (Text 1087)
• Medical Directors (Text 1092)

PART IV. Antitrust

April 18

Unlawful Restraints on Trade and Health Care Integration

Antitrust law plays an important role in limiting the evolution of health care delivery systems insofar as integration limits competition. We will begin with a broad overview of antitrust law and then focus in on Sherman Act § 1. In this class, we will be particularly focused on antitrust law and health care integration and financing arrangements (including ACOs).

Reading • Text 1095-1106, 1126-1149; Supp. 226-233

Problem • Organizing an ACO (Supp. 231)

April 25

Hospital Mergers & Review

In our last class, we will focus on mergers and acquisitions in health care. Here, we will be primarily concerned with Clayton Act § 7.

Reading • Text 1098 (Clayton Act § 7), 1160-1185; Supp. 242-245

Problem • Review Problem: The Heart Specialty Hospital (Text 1184)

Final Review • Post any questions or “sticky points” that you would like covered in our final review **by Tuesday, April 24 at 8:00pm**. Questions should be **posted on TWEN in the discussion forum for Final Review Questions** (anonymous postings are permitted).