

HAMLIN UNIVERSITY SCHOOL OF LAW

Health Law: Liability & Quality

Fall 2013

Professor Thaddeus Pope

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Time: Mondays & Wednesdays 4:10 to 5:40 p.m.

Place: Law 103

Midterm Exam: 6-hour “take home” between October 10 and 14

Final Exam: 72-hour “take home” anytime during the exam period

I. Course Description

The healthcare industry has become perhaps the most regulated in the United States. As providers and other players respond to this regulatory environment, the health law field has become a dynamic and complex area of law. And it is one evidencing a marked growth in legal employment. Indeed, health law has become such a specialized area that some state bars have developed board certification programs in healthcare.

Still, this course might alternatively be characterized as an advanced torts class in which healthcare is just a “vehicle” for more generally exploring liability as a means for assuring quality. In other words, this class is designed to prepare you for legal practice regardless of where your professional path takes you. Still, while requiring substantial writing and other exercises, this course emphasizes legal doctrine over litigation strategy or public policy. The class is unified around two main themes: (1) legal mechanisms to assure medical quality and (2) legal mechanisms to protect and promote patient autonomy.

Health Law can be divided into five subfields: (1) finance and regulation, (2) public health, (3) biotechnology and life sciences, (4) bioethics, and (5) patient care. This course focuses on patient care, especially as it is regulated through common law provider liability. Specific topics include: (a) the formation and termination of the treatment relationship (contracts); (b) the duty to treat (statutory); (c) informed consent (torts, statutory); (d) confidentiality (torts, statutory); (e) medical malpractice (torts, evidence, civil procedure, agency), (f) hospital liability (torts, agency); (g) managed care liability and ERISA preemption (agency, statutory); and (h) licensure (statutory, administrative).

II. Prerequisites

The class will draw heavily on Torts, as well as from Civil Procedure, and Contracts. Every student in the class will have already had these courses in their 1L year. Familiarity with Agency and Evidence is also recommended but certainly not required.

III. Course Objectives

Upon completion of the course, students will have:

- A. A basic systematic understanding of civil liability legal principles concerning the provision of medical treatment by: (a) individual healthcare providers, (b) institutional providers, and (c) managed care organizations.
- B. A basic systematic understanding of state licensure of individual providers and healthcare facilities, as well as the relationship between licensure, accreditation, and certification.
- C. Further honed legal analysis and writing abilities, through:
 - 1. Exposure to and critique of legal arguments in judicial opinions, legislative reports, and scholarly writing
 - 2. Participation in classroom discussion and group-based exercises
 - 3. Completion of and feedback on weekly problems
 - 4. Completion of and feedback on a written midterm examination
 - 5. Completion of and feedback on a written final examination
- D. Integration of material learned in other classes, such as: business organizations, civil procedure, contracts, evidence, statutory interpretation, and torts.

IV. Required Materials

- A. There is no casebook for this course. All course materials will be distributed through the course TWEN site. I recommend that you download these documents in PDF instead of opening and reading them in HTML. Alternatively, by using citations of the sources on TWEN, you can obtain almost all course materials directly through Westlaw or Lexis, should you want to use their dedicated printers. However, using such printing resources probably will not work for the small minority of course materials that are comprised of medical journals, reports, and PACER documents.

- B. While we will use a fair number of traditional appellate court opinions, a substantial portion of the course materials will be comprised of: statutes, regulations, government reports, and academic law and policy articles.
- C. Due to the rapid and current changes in this area, other materials may be added or substituted.

V. Class Schedule

- A. The class will meet on Mondays and Wednesdays from 4:10 to 5:40 p.m. in Law 103.
- B. The first class meets on Wednesday, August 21. The last class meets on Monday, November 25. The class will meet 25 times. But the class will not meet on the following dates: (i) Monday, September 2nd due to Labor Day; (ii) Wednesday, October 16th due to midterm break; (iii) Wednesday, October 23th due to a conference conflict; and (iv) Monday, November 18th due to conference conflict.
- C. Several class sessions will be offered in an asynchronous online format. This means that you will be able to “attend” these sessions from wherever you have Internet access.
- D. Depending on class interest, I am happy to schedule an extra “review” class during the weeks before the final exam. Please email your questions to me at least 24 hours before such session to better enable me to answer them. I am also happy to meet, at any time during the semester, both with individual students in my office, and with small groups. For example, last year, several students found it useful to review essays that they wrote on extra practice problems.

VI. What to Do First -- in August

- A. Register for the TWEN site with the email address that you use most regularly.
- B. If you have not used TWEN before, review the student user guide.
- C. Read the initial class assignments posted on the TWEN site.
- D. Calendar key course dates into your planning and calendaring systems.
- E. Review the instructions for my old exams (available at www.thaddeuspope.com).

VII. Attendance, Preparation, and Participation

- A. Attendance: Under American Bar Association rules, 80% attendance is required to allow you to write the final exam. Attendance will be taken by passing class lists for signature at the start of each class session.
- B. Class Preparation: I employ only a moderate amount of lecture but lots of case method and problem method questions and problems. Consequently, students must come to class prepared to discuss the material assigned. All assigned cases should be read and briefed. It is useful to analyze each case using the following headings: (i) essential substantive facts, (ii) procedural posture, (iii) issues, (iv) legal principles, (v) reasoning, and (vi) holding. You do not need to know the correct answer (if there is one), but know the reading material and make a reasonable effort to think about the issues raised.
- C. Preparation Time: It is impossible to say exactly how much time you will need for class preparation, since each person's needs are different. But it is likely that you will need around **three hours** of preparation for each class. This includes: reading the materials, briefing the cases, consolidating prior notes, and taking the weekly quiz.
- D. Warning about Class Preparation: Brief the cases **yourself**. Do not make use of commercially prepared outlines before writing your own brief. As Professor DeWolf (at Gonzaga Law) explains, "they are like narcotics. Initially they make you feel good (by taking away your anxiety), but precisely for that reason they have a corrosive effect upon your learning. It is as though you were taking violin lessons, and instead of playing the scales you were assigned by your teacher, you bought a tape of Itzak Perlman playing those scales."
- E. Class Participation: **All** students are expected to participate in class discussions. Sometimes this will be through "clickers" like PollAnywhere. Other times, it will be by "cold calling." If illness or emergency prevents you from being fully prepared, please notify me **before** class. As explained in Section X below, 10% of your course grade is based on class participation.
- F. Meandering Discussion: I want to leave discussion sufficiently free so that you discover key points on your own and feel ownership in lessons learned. Still, I must exert control over class discussion to ensure that you are exposed to key points and to ensure that you are not confused by a discussion that runs too long or too tangentially. It is inappropriate and unfair to hold scores of students hostage to the too-peculiar line of inquiry of just one or two students. If we did not get to them, I am happy to explore your questions outside class in any of the ways described in section XIII below.
- G. Laptops: I will use an instant-poll tool (probably PollAnywhere) in which the entire class "votes" on the answers to orally-posed problems through a browser-supported template. Accordingly, laptops are welcome. If you do not bring a

laptop, I expect that you can “vote” either through a neighbor’s laptop (after refreshing the browser) or through your cell phone. After clicking-in, students will discuss their answers in small groups and then re-vote. Only then will we review the problems.

- H. TWEN Participation: Students are encouraged to participate not only in class but also through the TWEN discussion boards. Start a new thread or comment on one already in progress. The best posts: (i) are full of insight and analysis (critical thinking), (ii) reference the course materials, and (iii) are clearly written (organization & style).
- I. Volunteering: I will frequently ask a question that stumps the person whom I have called on. I will give that person time to think about the question, and see if they can come up with an answer. It will sometimes happen that you have an answer, and instinctively raise your hand to volunteer. I may or may not call on you at that moment. I would prefer your attempt to answer than mine, but best of all is to continue dialogue with the student who was initially called on. Nonetheless, to move things along I may let the volunteer help. Please be sensitive to the fact that the student who is called on often suffers from stage fright, and the most obvious things slip from their mind.
- J. Ask Questions: I will begin each class by asking for both administrative and substantive questions. If you want to know what pages we will cover, please ask. If you are having trouble grasping a particular doctrine, please ask. Alternatively, send an email or start a discussion thread on TWEN.
- K. Show & Tell: The topics in this class are constantly in the news and in the plot lines of movies and broadcast shows. If you notice a story that illustrates or discusses a class topic, please send me an email or start a discussion thread on TWEN. It is both fun and rewarding to work through legal problems in the context of a visually compelling, dramatic clip.
- L. Outlining: The traditional method of exam preparation for law students involves making an outline of all course material. After every unit of material (*e.g.* formation and termination), but at least every two weeks, you should review and consolidate your case notes, class notes, and other material into an outline, flowchart, or other document. Furthermore, you should aim to edit and revise this growing document every time you add to it, both to improve the organization and to clarify the content. In short, the more **actively** you engage the materials, the better your grasp and retention will be.

VIII. Classroom Etiquette

- A. The classroom environment must be conducive to learning for all students. Distractions made possible by advances in technology may undermine that goal.
- B. Audial: During class, in addition to the usual courtesies, kindly disable and refrain from using cell phones, pagers, and any other communication device other than your laptop computer. And please mute your laptop.
- C. Visual: Please refrain from displaying wallpaper, screen savers, or other material on your laptop computer that you can reasonably expect to be offensive or distracting to other students.
- D. End Time: I will be diligent about starting the class precisely at 1:50 and ending it precisely at 2:50. In return, please do not begin to pack-up early while others are still trying to be engaged in the class discourse.

IX. Grading

- A. Weekly Quizzes (20%) – see section IX
- B. Class Participation (5%) – see section X
- C. Midterm Exam (20%) – see section XI
- D. Final Exam (50%) – see section XII
- E. To make my calculations more objective and transparent, I convert all the above percentages into points. There are a total of 300 points for the course. The final exam is worth 150 points. The midterm exam is worth 75 points. The weekly quizzes are worth a total of 60 points. Class participation is worth 15 points. Grading methods are more fully explained in the next four sections.

X. Required Weekly Quizzes

- A. Rationale: I will assign weekly quizzes for three reasons. First, while I will provide informal, oral feedback during class discussions, I do not want the first **formal** feedback that you receive to be your graded midterm or final exam. Second, I want you to approach the material **actively**. Third, because later topics in this course build on and interrelate to earlier ones, I want to provide some external motivation to stay current.

- B. Format: Some quizzes will be comprised of three multiple choice questions. Others will entail drafting a roughly 250-word essay. These (along with the midterm) constitute “formative assessment,” while the final exam constitutes “summative assessment.”
- C. Due Date: You will complete some quizzes in class. You will complete other quizzes before class on the course TWEN site. Those quizzes will be posted on Thursdays and due by 1:00 p.m. the following Monday. I will review the quiz in Monday’s class or post a feedback memo. The immediately upcoming assignments (readings, quizzes) will always be posted on the TWEN home page.
- D. Coverage: These weekly quizzes are primarily meant to test basic understanding of legal principles covered at about the time of the quiz. They are simpler than questions on the midterm and final exams that require more analysis.
- E. Grading: I will grade the quizzes. The twelve quizzes, in the cumulative, comprise 25% of your total course grade. Each quiz is worth 6.25 points, roughly 2% of your total course grade (300 points).
- F. TWEN: Many students have found it useful to approach the multiple choice question quizzes in this manner: (i) open and print the quiz, (ii) answer the questions “offline,” and then (iii) log-in and submit their answers. The short essay quizzes should be submitted as Word or PDF files in TWEN’s “Assignment Drop Box,” rather than by using the “Quiz” protocol. If you ever have a technical problem, just email me your quiz answers.

XI. Class Participation

- A. Class participation comprises 5% of your course grade, 15 of the 300 total course points.
- B. The typical student who regularly meaningfully participates will earn all 15 points. Those who are unprepared or frequently absent will earn either half or none of these points.

XII. Midterm Exam

- A. Date: The midterm exam is a take-home exam that you can self-schedule to take during any six-hour period between 12:01 a.m. on October 10 and 2:00 p.m. on October 14, 2013.
- B. Weight: The midterm exam comprises 25% of your course grade, 75 of the 300 total course points.

- C. Grades: The only letter grade for this course is the final course grade based on the total 300 points. Nevertheless, to enable you to gauge your relative performance, I will assign letter grades to the midterm exams. While the numeric scores compute into the “course” grade (75 of 300 points), midterm letter grades are informational only.
- D. Everything else about the midterm exam is the same as the final exam, except that the midterm is obviously shorter.

XIII. Final Exam

- A. Date: The final exam is a take-home that you may download and complete during any 72-hours within the exam period.
- B. Weight: The final exam comprises 60% of your course grade, 150 of the 300 total course points.
- C. Format and Length: The final examination will be comprised of three roughly equal parts. This three-part structure has been proven to maximize an exam’s reliability and validity.
 - 1. The first part will include around 25 multiple choice questions.
 - 2. The second part will include around two short or “directed” essay questions focused on one or two specific issues.
 - 3. The third part will include a long essay problem. The essays are essentially hypothetical factual circumstances in which you will be expected to: (i) identify the legal issues, (ii) analyze the problems by applying the correct legal principles to the facts, and (iii) argue for a reasonable conclusion.
- D. Coverage: The exam will test those concepts and issues either covered in assigned readings or explored during class lectures and discussions. The exam will roughly reflect the relative time and emphasis devoted to topics in the course. For example, malpractice will be tested more heavily than licensure.
- E. Open Book: The midterm and final exams are OPEN book exams. You may use any written or printed materials, including, but not limited to: any required and recommended materials, any handouts from class, PowerPoint slides, class notes, and your own personal or group outlines. But no consultation or discussion with any other person is permitted.

- F. Additional Research: While you may use any materials that you have collected for this class, you are neither expected nor are you permitted to do any online or library research (e.g. on Lexis, Westlaw, Google, Bing, reference materials) to answer the exam questions.
- G. Warning about Open Book: Having your notes and materials will **not** relieve you of the need to already know the material. Indeed, it is very probable that if you do not study for this exam **exactly** as you would for a closed-book exam, then you will do very poorly and perhaps not pass.
- H. Grading: All exams will receive a raw score from zero to 150. The raw score is meaningful only relative to the raw score of the other students in the class. The raw score will be added to the midterm and quiz scores. That total will then be converted to a scaled score, based on the class curve. For example, if the highest raw score in the class were 240/300, then that student would receive an A. The final grades will comport with Law School's grading policies.
- I. Exam Feedback: Several weeks after the exam, I will post on the TWEN site: (i) a copy of the exam, (ii) a blank scoring sheet and explanatory memo, and (iii) model answers.
- J. Grade Finality: All grades are final. While sometimes seemingly unfair in application, pursuant to school rules, there will be no negotiations regarding revisions, except to correct any mathematical or clerical errors in computing the final score.
- K. Exam Review: I will be happy to go over the exam with anyone who schedules an appointment to review the exam. On request, I scan and email you a copy of **your** exam answers. If – after reviewing these against the exam, the feedback memo, model answers, and your notes – you have questions about your exam, please email those to me in advance of our meeting so that I can be sufficiently prepared to ensure a productive and efficient meeting.

XIV. Exam Taking Tips

- A. Grading Criteria: I have posted six years of my *Health Law* midterm and final exams and exam feedback memos to twww.thaddeuspope.com. Some of those exams (especially before 2007) had a broader coverage than we will have in this course. Indeed, the coverage in none of these prior classes will be identical to yours. Your exams will be **based only** on what we cover in this class. Still, by working through these old exams, you can get a good sense of the criteria that I employ in grading. In short, I look for:
1. An ability to muster relevant evidence and authority to make arguments both cogently and clearly
 2. An understanding of substantive legal doctrine

3. An appreciation for broader policy concerns that influence how legal doctrine applies to novel situations
 4. A practical appreciation for the context of care in a hospital setting and for the context of tort litigation
- B. Outline Your Answer: I strongly encourage you to use at least one-fourth of the allotted time per question to outline your answers before beginning to write. Do this because you will be graded not only on the substance of your answer but also on its clarity and conciseness. In other words, organization, precision, and brevity count. If you run out of insightful things to say about the issues raised by the exam question, stop writing until you think of something. Tedious repetition, regurgitations of law unrelated to the facts, or rambling about irrelevant issues will negatively affect your grade.
- C. Answer Format: This is important. Use headings and subheadings. Use short single-idea paragraphs (leaving a blank line between paragraphs). Do not completely fill the page with text. Leave white space both between sections and paragraphs.
- D. Answer Content: Address all relevant issues that arise from and are implicated by the fact pattern and that are responsive to the “call” of the question. Do not just summarize all the facts or all the legal principles relevant to an issue. Instead, apply the law you see relevant to the facts you see relevant. Take the issues that you identify and organize them into a coherent structure. Then, within that structure, examine issues and argue for a conclusion.
- E. Citing Cases: You are welcome, but not required, to cite cases. While it is sometimes helpful to the reader and a way to economize on words, do not cite case names as a complete substitute for legal analysis. For example, do not write: “Plaintiff should be able to recover under A v. B.” Why? What is the rule in that case? What are the facts in the instant case that satisfy that rule?
- F. Cross-Referencing: You may reference your own previous analysis (e.g. B’s claim against C is identical to A’s claim against C, because __.” But be very clear and precise what you are referencing. As in contract interpretation, ambiguity is construed against the drafter.
- G. Balanced Argument: Facts rarely perfectly fit rules of law. So, recognize the key weaknesses in your position and make the argument on the other side.
- H. Additional Facts: If you think that an exam question fairly raises an issue but cannot be answered without additional facts, state clearly those facts (reasonably implied by, suggested by, or at least consistent with, the fact pattern) that you believe to be necessary to answer the question. Do not invent facts out of whole cloth.

- I. Honor Code: While you are taking a midterm or final exam, you are subject to the Hamline University Code of Conduct. You may not discuss it with anyone until after the end of the entire exam period. It is a violation of the Honor Code to share the exam questions. Shred or delete the exam questions immediately upon completion of the exam. They will be reposted after the end of the exam period.
- J. Exam Misconduct. The Code of Conduct prohibits dishonest acts in an examination setting. Unless specifically permitted by the exam or proctor, prohibited conduct includes: (1) discussing the exam with another student; (2) giving, receiving, or soliciting aid; (3) referencing unauthorized materials; (4) reading the questions before the examination starts; (5) exceeding the examination time limit; and (6) ignoring proctor instructions.

XV. Office Hours

I look forward to talking to you outside class. There are several means of doing this:

- A. After class: I will remain in the classroom after each class for all trailing questions, until or unless we are kicked out by another class.
- B. Office: I can typically be found in my office before and after class. If this is not a convenient time, just let me know in class or by email and we can make an appointment with each other. You are welcome to drop in my office anytime, but it is best to confirm a specific time in advance. If you have a specific question, I recommend that you send me the question via email ahead of time. In this way, I can think about your question and offer my best assistance.
- C. Email: Feel free to e-mail me anytime at tpope01@hamline.edu. In urgent circumstances cc thadmpope@aol.com and thaddeus.pope@gmail.com. I will try to promptly answer any question as soon as possible.
- D. TWEN: Whether you want to elaborate on or clarify the required materials or class discussions, you can start a discussion thread on the TWEN site. You are encouraged to provide constructive comments within each other's threads.
- E. Lunch or Coffee: I have found that grabbing a quick lunch (or given the time of this class, coffee/tea) is a good way to get to know each other. If you and one or two other students want to share a bite/coffee/tea, please let me know.

XVI. TWEN Site

The TWEN site will include the following materials:

- A. All required reading for the course (*e.g.* cases, statutes, regulations articles)
- B. PowerPoint slides for each class, posted before each class
- C. Links to MP3 recordings of selected classes and periodic summaries
- D. Links to periodic video summaries of selected topics
- E. Weekly Quizzes (see section IX, *supra*)
- F. Optional supplementary and background reading
- G. Materials concerning health law writing and career opportunities

Warning!! Do not permit the availability of these materials to deter you from preparing and participating in class. I provide these materials to supplement and enhance classroom learning, not to substitute for it. It is important to remember that knowledge acquisition is only one small part of law school education. I plan to do little lecturing during classes. Lectures may seem to provide more value – more content, more certainty. It may seem like you are “learning” more. But this would be poor preparation for the practice of law where there is little certainty. Furthermore, nonattendance is not an option given University and ABA attendance requirements, and the grading policy described above.

XVII. Study Aids and Reference Materials

Despite the prevalence of health law courses in U.S. law schools, there are, as yet, few student-oriented ancillary materials. But there are numerous clear and lucid law review articles and background reports. I will provide copies of, or links to, the more useful of these materials on a topic-by-topic basis. And you have direct free access to most of these through HeinOnline, Westlaw, Lexis, and other databases.

There are also some good reference books. You really **do not** need to use any of these sources. I list them here only should you want to consult them to get more depth or breadth on certain issues.

A. Study Aids for Law Students

1. MARCIA M. BOUMIL & PAUL HATTIS, *MEDICAL LIABILITY IN A NUTSHELL* (West 3d ed. 2011).
2. BARRY R. FURROW, THOMAS L. GREANEY, SANDRA H. JOHNSON, TIMOTHY STOLTZFUS JOST & ROBERT L. SCHWARTZ, *HEALTH LAW* (2d ed. West Hornbook series 2000) (adapted from the 3-volume practitioner series).
3. MARK A. HALL, IRA MARK ELLMAN & DANIEL S. STROUSE, *HEALTH CARE LAW AND ETHICS IN A NUTSHELL* (3d ed. West 2011).
4. SANDRA H. JOHNSON & ROBERT L. SCHWARTZ, *BIOETHICS AND LAW IN A NUTSHELL* (West 2009).

5. ROBERT D. MILLER, PROBLEMS IN HEALTH CARE LAW (9th ed. Jones & Bartlett 2006).

B. Study Aids for Non-Lawyers

1. TONIA D. AIKEN, LEGAL AND ETHICAL ISSUES IN HEALTH OCCUPATIONS (Elsevier 2008).
2. GEORGE J. ANNAS, THE RIGHTS OF PATIENTS: THE AUTHORITATIVE ACLU GUIDE TO THE RIGHTS OF PATIENTS (3d ed. NYU 2004).
3. CAROLYN BUPPERT, NURSE PRACTITIONER'S BUSINESS PRACTICE AND LEGAL GUIDE (4th ed. Jones & Bartlett 2011).
4. BONNIE FREMGEN, MEDICAL LAW AND ETHICS (4th ed. Prentice Hall 2011).
5. CARL HORN, LAW FOR PHYSICIANS: AN OVERVIEW OF MEDICAL LEGAL ISSUES (AMA 2000).
6. JANICE L. KAZMIER, HEALTH CARE LAW (Cengage Learning 2008).
7. MARCIA A. LEWIS & CARL D. TAMPARO, MEDICAL LAW, ETHICS, AND BIOETHICS (6th ed. F.A. Davis 2007).
8. GEORGE D. POZGAR & NINA SANTUCCI, LEGAL ASPECTS OF HEALTH CARE ADMINISTRATION (11th ed. Jones & Bartlett 2012).
9. RONALD W. SCOTT, PROMOTING LEGAL AND ETHICAL AWARENESS: A PRIMER FOR HEALTH PROFESSIONALS AND PATIENTS (Elsevier 2008).

C. General Reference Materials

This is, of course, a highly select list. I have not included CLE or practitioner-oriented materials.

1. AMERICAN COLLEGE OF LEGAL MEDICINE TEXTBOOK COMMITTEE, LEGAL MEDICINE (Mosby 7th ed. 2007).
2. AMERICAN HEALTH LAWYERS ASSOCIATION, FUNDAMENTALS OF HEALTH LAW (West 5th ed. 2011), Westlaw: AHLA-PAPERS.
3. AMERICAN HEALTH LAWYERS ASSOCIATION, HEALTH LAW PRACTICE GUIDE (West CBC 3-vol. looseleaf), Westlaw: HTHLPG.

4. ALISON BARNES ET AL., HEALTH CARE LAW DESK REFERENCE (ALI-ABA 2001).
5. SCOTT BECKER, HEALTH CARE LAW: A PRACTICAL GUIDE (Lexis 1-vol. looseleaf), on LEXIS.
6. BNA HEALTH LAW AND BUSINESS LIBRARY, WEB PORTFOLIOS LIBRARY (BNA Online) (also available in print or CD-ROM).
7. DEAN M. HARRIS, CONTEMPORARY ISSUES IN HEALTHCARE LAW AND ETHICS (Health Admin. Press 2003).
8. PAUL C. LASKY ED., HOSPITAL LAW MANUAL (Aspen 5-vol. looseleaf).
9. BRYAN A. LIANG, HEALTH LAW & POLICY: A SURVIVAL GUIDE TO MEDICOLEGAL ISSUES FOR PRACTITIONERS (Butterworth Heinemann 2000).
10. MICHAEL G. MACDONALD ED., TREATISE ON HEALTH CARE LAW (Matthew Bender 5-vol. looseleaf), on LEXIS.

D. **Specific Issue Reference Materials**

1. JULIE A. BARNES, MANAGED CARE LITIGATION (ABA-BNA 2005 & Supp. 2008).
2. ALICE G. GOSFIELD ED., HEALTH LAW PRACTICE GUIDE (Thomson/West annual), Westlaw: HTHLPG.
3. DAVID W. LOUISELL, MEDICAL MALPRACTICE (Matthew Bender 5-vol. looseleaf), on LEXIS.
4. JOHN P. MARREN, MANAGED CARE LAW MANUAL (Aspen looseleaf).
5. ALAN MEISEL & KATHY CERMINARA, THE RIGHT TO DIE (3rd ed. Aspen looseleaf).
6. MARK M. MOY, EMTALA ANSWER BOOK (Aspen 2009).
7. CLAIRE C. OBADE, PATIENT CARE DECISION MAKING: A LEGAL GUIDE FOR PROVIDERS (West CBC looseleaf), Westlaw: PCAREDM.
8. STEVEN E. PEGALIS, AMERICAN LAW OF MEDICAL MALPRACTICE (West CBC 3d ed. 2005 & Supp. 2008) (3 volumes), Westlaw: ALMM.
9. FAY A. ROZOVSKY, CONSENT TO TREATMENT: A PRACTICAL GUIDE (4th ed. Aspen 2009).

E. **Staying Current - Legal Developments**

1. BNA, *Health Law Reporter* covers the latest legal developments that influence the health care industry, including new cases, federal and state legislation, rules from federal regulators, and enforcement trends.
2. New legal articles found through Westlaw, Lexis, HeinOnline, LegalTrac, SSRN, Legal Resource Index, Index to Legal Periodicals, and Index to Foreign Legal Periodicals
3. Government agencies often provide useful guidance on their enforcement activities and priorities. For example, check out the websites of CMS and the Minnesota Board of Medicine.
4. Professional associations often have valuable materials, from articles to podcasts. Especially relevant are: (a) ABA Health Law section, (b) AHLA, (c) ASHRM, and (d) Minnesota State Bar Association Health Law section. I have collected many other resources at the HLI website.
5. There are some great blawgs on health law. I have collected many of these at medicalfutility.blogspot.com

F. **Staying Current - Health Policy Developments**

1. *PubMed* comprises more than 22 million citations for biomedical literature from MEDLINE, life science journals, and online books.
2. New articles found through Springer, Sage, ScienceDirect, ProjectMUSE, JSTOR, and similar databases.

XVIII. Course Reading Outline

The outline below is intended to give you a sense of the course coverage. It is **not** a reading schedule. Given the interactive nature of the law school classroom, it is difficult to predict, much less promise, exactly what material we will be covering on a specific future date. Closely (but not exactly) following its sequence, I will give the specific assignment for the following week during the prior week. **Please note that this course is cumulative. Except for the last two units, later topics build on earlier ones.**

The current assignment will always be posted on the TWEN home page. Old assignments will be collected as a TWEN “document” under the “Admin” tab. All the following materials are available from the TWEN site. Alternatively, most of them can be also obtained from Westlaw and Lexis, if you would find printing from their dedicated printers more convenient. I will probably assign additional material to reinforce and link legal concepts presented below.

1. Triggering of Treatment Duties

Physicians have no common law duty to treat patients. Hospitals sometimes have a common law duty to treat. But such duties have been largely eclipsed by statutory duties, especially EMTALA. Less than 1% of the U.S. population has a **constitutional** right to health care.

A. Duty to Treat

1. Duty to Treat: Common Law for Physicians

Rosenbaum, *JAMA* (2003) (for overview to 1552) 5p

Hurley v. Eddingfield (Ind. 1901) 1p

2. Duty to Treat: Common Law for Hospitals

Wilmington Hosp. v. Manlove (Del. 1961) 7p

Walling v. Flint Osteopathic Hosp. (Mich. App. 1990) 2p

3. Duty to Treat: Constitutional Law

Wideman v. Shallowford Hosp. (11th Cir. 1987) 10p

4. Duty to Treat: EMTALA - Introduction

The primary and most frequently litigated duty to treat arises under the 1986 federal EMTALA statute.

Rosenbaum et al., *Health Affairs* (2012) 6p

Lee, *Annals Health L.* (2004) (for overview) 7p

EMTALA statute, 42 U.S.C. 1395dd 4p

EMTALA regulations, 42 C.F.R. 489.24 7p

5. Duty to Treat: EMTALA for Hospitals

In re Baby K (4th Cir. 1994) 7p
Kaufman v. Franz (E.D. Pa. 2009) 3p
Toretti v. Main Line (3d Cir. 2009) 10p
Smith v. Albert Einstein (3d Cir. 2010) 3p
Jonhson v. Portz (D. Del. 2010) 9p

[Substitute with newer cases in hard or PDF folders.]

6. Duty to Treat: EMTALA for Physicians

EMTALA does not authorize private damages actions against physicians. While private damages actions are the main enforcement vehicle, EMTALA also authorizes administrative sanctions.

Burditt v. DHHS (5th Cir. 1991) 14p
 U.S. DHHS, Office of the Inspector General, *Patient Dumping*,
http://oig.hhs.gov/fraud/enforcement/cmp/patient_dumping.asp

7. Duty to Treat: ADA

ADA statute, 42 U.S.C. 12101-02 & 12181-82 5p
Bragdon v. Abbott (U.S. 1998) (majority) 14p
Glanz. v. Vernick (D. Mass. 1991) 7p
McElroy v. Univ. Neb. (D. Neb. 2007) 7p

8. Duty to Treat: Other Statutes

Hill Burton Act (1946), 42 C.F.R. 124.601 4p
 Title VI (1964), 42 U.S.C. 2000d, 42 C.F.R. 80.3 2p
Walker v. Pierce (4th Cir. 1977) 7p

B. Treatment Relationship

The formation and existence of a treatment relationship is a prerequisite for the triggering of duties that the physician owes qua physician (e.g. informed consent, non-abandonment, malpractice).

1. Formation: Treating Physicians

Adams v. Via Christi (Kan. 2001) 10p
Clanton v. Von Haam (Ga. App. 1986) 4p
Lyon v. Grether (Va. 1977) 4p

2. Formation: Formal v. Informal Consults

Reynolds v. Decatur Hosp. (Ill. App. 1996) 8p
Jennings v. Badgett (Okla. 2010) 5p
Wilson v. Merritt (Cal. App. 2006) 9p

3. **Formation: IMEs and Non-Treating Physicians**
 Bazakos v. Lewis (N.Y.A.D. 2008) 12p
 Bazakos v. Lewis (N.Y. 2009) 2p
 Smith v. Radecki (Alaska 2010) 12p

4. **Termination: Tortuous Abandonment**
 Ricks v. Budge (Utah 1937) 8p
 Payton v. Weaver (Cal. App. 1982) 6p

5. **Termination: Ethics & Licensure**
 N.J.A.C. 13:35-6.22 2p
 AMA Code Med. Ethics 8.115 1p
 Pope Br. *Betancourt v. Trinitas Hosp.* (N.J.A.D. 2010) (p22-28) 5p

6. **Limitation: Impermissible Waivers**
 Tunkl v. Regents U. Calif. (Cal. 1963) 9p
 Film clip: *Ghost Town* (2008)

7. **Limitation: Permissible Waivers**
 While the patient cannot waive her right to adjudicate her right to compensation for negligent error, she can waive other rights. Four notable categories are (1) discharge against medical advice, (2) arbitration instead of litigation, (3) religious refusals, and (4) experiments.

 Ruiz v. Podolsky (Cal. 2010) 8p
 Discharge against Advice Form 1p

2. Informed Consent

- A. **Distinguishing Battery**
 Restatement (Second) Torts 15, illus. 1 1p
 Kohoutek v. Hafner, 383 N.W.2d 295 (Minn. 1986).

- B. **Introduction & Overview**
 Pegalis, *American Law of Medical Malpractice* § 4.1 (optional)

C. Disclosure Standards: Material Risk (Reasonable Patient)

There are two main disclosure standards in the United States. These define the scope of the physician's duty. Around half the states require the physician to disclose information (e.g. benefits, risks, alternatives) that a hypothetical reasonable person in the patient's circumstances would consider material to the treatment decision.

Cornfeldt v. Tangen, 262 N.W.2d 684 (Minn. 1977).

Canterbury v. Spence (D.C. 1972) 37p

Arato v. Avedon (Cal. 1993) 12p

Wilson v. Merritt (Cal. App. 2006) 9p

C. Disclosure Standards: Custom (Reasonable Physician)

Around half the states require the physician to disclose information that the reasonably prudent physician would disclose under the circumstances.

Culbertson v. Mernitz (Ind. 1992) 10p

Rizzo v. Schiller (Va. 1994) 3p

Merenstein, *JAMA* (2006) 2p

D. Disclosure Standards: Subjective Standard (Particular Patient)

The material risk standard requires disclosure of information that the hypothetical reasonable patient in the plaintiff's circumstances would consider material. In contrast, this standard requires disclosure of information that this very patient considered material at the time of the intervention.

Scott v. Bradford (Okla. 1979) 4p

E. Exceptions to Duty

Even if the defendant physician would have a duty to disclose under her/his state's relevant disclosure standard, such a duty would be excused if any one of eight exceptions applies.

Already Known

Generally Known

Waiver

Safe Harbors

Emergency

Therapeutic Privilege

Public Health

Conscience Clauses

F. Causation

Even if the defendant breaches a duty of disclosure, no informed consent action lies unless both (1) the plaintiff is injured and (2) the injury was caused by the breach. The causation element is the most complex element. It is comprised of four separate sub-elements:

Part 1: *Materialization*: The plaintiff suffered an injury that is within the scope of the undisclosed risk.

Part 2: *Scientific Causation*: The plaintiff's injury probably would not have occurred but for the materialization of the undisclosed risk (e.g. as opposed to being caused by the plaintiff's underlying illness or by another defendant's negligence).

Part 3: *Objective Hypothetical Conduct*: The reasonable person in the plaintiff's position probably would not have consented to the procedure but for the breach (lack of disclosure).

Part 4: *Subjective Causation*: The plaintiff must establish that she herself would not have consented to the procedure but for the breach.

G. Disclosure Duty: Experience and Skill

Johnson v. Kokemoor (Wis. 1996) 14p

Howard v. UMDNJ (N.J. 2002) 15p

Marsingill v. O'Malley (Alaska 2002) 9p

DeGennaro v. Tandon (Conn. 2005) 7p

H. Disclosure Duty: Conflicts of Interest

Moore v. Regents U. Calif. (Cal. 1990) 46p

I. Disclosure Duty: Economic & Financial

[Add a source here.]

J. Statutory Right-to-Know Laws

Cal. Health & Safety Code § 442.5 1p

N.Y. Pub. Health L. § 2997-c 1p

N.Y. Pub. Health L. § 2803-o 2p

[Add an abortion law source here.]

K. Federal Medicare Requirements

Youdelman, *Health Affairs* (2008) 8p

[Add OCR language & culture.]

L. Shared Decision Making

Barry, *New Eng. J. Med.* (2012) 2p

Wash. Stat. § 7.70.060 2p

M. Patient Decision Aids

Pope & Hexum, *J. Clinical Ethics* (2013) 8p
 Schenker & Meisel, *JAMA* (2011) 2p
 Schenker, *Medical Decision Making* (2011) 7p
 Demonstration of video and interactive PtDA
[Add Volandes or newer example.]

3. Medical Malpractice**A. Background: Negligent & Non-Negligent Errors**

Leape & Berwick, *JAMA* (2005) 6p
 Hyman & Silver, *Chi. Kent L. Rev.* (2012) 35p
 Minn. DOH, *Adverse Events in Minn.* (9th Rep. Jan. 2013) 3p
 Annas, *New Eng. J. Med.* (2006) 2p
 Larriviere, *Neurology* (2008) 4p

B. Standard of Care (the “Duty” Element)

McCourt v. Abernathy (S.C. 1995) 7p
Locke v. Pachtman (Mich. 1994) 10p
Hill v. McCartney (Iowa App. 1998) 4p

C. Geographic Variations in Standard of Care

There is not one single standard of care against which every physician in the United States is measured. The relevant standard of care in any given case is determined in four ways.

1. National

In most U.S. jurisdictions the physician is measured against what the reasonable prudent physician in the United States would have done under the circumstances.

Hall v. Hilbun (Miss. 1985) (majority) 21p

2. Strict Locality

Under this standard, the defendant is measured against what a reasonable physician in the defendant’s community would have done. This has been largely abandoned.

3. Statewide

In three states (AZ, VA, WA), the defendant is measured against what the reasonable prudent physician in that state would have done.

4. **Same or Similar Community**

While a “strict locality” rule has been abandoned, some states still follow some version of a “same or similar community” standard.

Lewis, *JAMA* (2007) 4p

Chapel v. Allison (Mont. 1990) 6p

Shaffer v. Yang (Ark. App. 2010) 3p

D. **Other Variations in the Standard of Care**

1. **Economic**

Even the majority of states that employ a uniform national standard allow variations to account for differences in resources.

Hall v. Hilbun (Miss. 1985) (majority) 21p

2. **Specialists & Board Certified Physicians**

Even in those states that employ a same or similar community standard, specialists are held to a national standard.

3. **Schools of Thought (Respectable Minority)**

Whether a jurisdiction sets the standard of care at the national, statewide, or same or similar community level; there may be more than one legitimate standard of care in that jurisdiction.

Jones v. Chidester (Pa. 1992) 6p

PA Civil Jury Instruction 11.04 9p

Jandre v. Physician Ins. (Wis. 2012) 50p

4. **Judicial**

In the extraordinarily uncommon and exceptional case, the standard of care might be set by the court instead of by expert witnesses.

Helling v. Carey (Wash. 1974) 3p

5. **Clinical Practice Guidelines**

Both as part of a greater move toward evidence-based medicine and as a way to reduce defensive medicine, policymakers have reinvigorated efforts to define the standard of care with CPGs.

Mehlman, *J. L. Med. Ethics* (2012)

D. Expert Witnesses: Qualification

An expert witness is almost always needed to establish the standard of care. The standard of care must typically be established to prove breach.

Creekmore v. Maryview Hosp. (1st Cir. 2011) 10p
Thompson v. Carter (Miss. 1987) (majority) 7p
Jones v. Bagalkotakar (D. Md. 2010) 11p
Daubert v. Merrell Dow (U.S. 1993) 20p
 Minn. Stat. § 145.682

E. Expert Witnesses: Weight and Credibility

Trower v. Jones (Ill. 1988) 5p
 Film clip: *The Verdict* (1982)
 Film clip: *My Cousin Vinny* (1992)

F. Causation: But For

Even if they can establish duty and breach, medical malpractice plaintiffs must typically also establish that they would not have been injured “but for” the defendant’s negligence. Yet, in some jurisdictions plaintiffs can alternatively establish that the defendant’s negligence deprived them of a “chance” at avoiding injury.

G. Causation: Lost Chance

Dickhoff v. Green (Minn. 2013) 15p
Mohr v. Grantham (Wash. 2011) (en banc) 20p
Wendland v. Sparks (Iowa 1998) 6p
Valdez v. Newstart (Tenn. 2008) 6p

H. Damages: Economic & Non-economic

Fein v. Permanente Med. Group (Cal. 1985) (to 670) 2p
Roberts v. Stevens Clinic Hosp. (W.Va. 1986) (majority) 12p

I. Damages: Punitive & Exemplary

McCourt v. Abernathy (S.C. 1995) 0p
 Minn. Stat. 549.20

J. Damages: Loss of Consortium

Hochfelder, *NY Injury Cases Blog* (2009) 2p

K. Affirmative Defenses**1. Statutes of Limitation**

Rock v. Warhank (Iowa 2008) 5p

Stuard v Jorgenson (Idaho 2011) 10p

2. Statutes of Repose

Jewson v. Mayo Clinic (8th Cir. 1982) 6p

3. Statutes of Repose: Course of Treatment

Wells v. Billars (S.D. 1986) 5p

Gomez v. Katz (N.Y.A.D. 2009) 9p

Cunningham v. Huffman (Ill. 1993) 9p

4. Assumption of Risk

Anaya- Burgos v. Lasalvia-Prisco (D.P.R. 2008) 7p

5. Comparative Negligence

Schneider v. Revici (2d Cir. 1987) (not II.A) 6p

6. Arbitration & Settlement

Madden v. Kaiser Hosp. (Cal. 1976) 12p

Levine, *ABA Health eSource* 2010 2p

[Expand or move to tort reform section.]

L. Alternative Theories of Liability**1. Res Ipsa Loquitor**

Locke v. Pachtman (Mich. 1994) 0p

Jones v. Gaes (Ky. 2011) 9p

18 Del. Code 6853(e) 1p

Freeman v. X-Ray Assocs. (Del. 2010) 16p

Harder v. Clinton (Okla. 1997) 9p

2. Ordinary Negligence (e.g. Non-Patients)

Bradshaw v. Daniel (Tenn. 1993) 10p

Flashback: see the material on formation above

3. IIED & NIED

Rideout v. Hershey Med. (Pa. D&C 1995) 7p

[See colorful new cases e.g. Spangler, Sheika]

4. Battery

Flashback: we covered this above under informed consent.

5. **Breach of Contract**
Kaplan v. Mayo Clinic (8th Cir. 2011) 12p
[action on remand??]
Sullivan v. O'Connor (Mass. 1973) 6p
6. **Vicarious/Captain of the Ship**
 Spring, *MLMIC Dateline* (2010) 5p
Franklin v. Gupta (Md. App. 1990) 15p
7. **Criminal**

4. Hospital Liability

A. Relationship between Providers and Hospitals

1. **Independent Contractors: Staff Privileges**
 Traditionally, most physicians have not been employees of hospitals. But that has been rapidly changing over the past few years as hospitals acquire physician practices.
2. **Employment: Hospitalists, Nurses**
 Film clip: *Critical Care* (1997)

B. Vicarious Liability

Establishing the vicarious liability of a hospital or other institution/facility entails two steps. First, you must establish the liability of the individual provider. Second, you must establish that the relationship between the individual provider and the institution affords a basis for vicarious liability. Because of step one, you can always establish liability against the individual defendant. Vicarious liability does not get you a double recovery, just an alternative source of satisfying the judgment.

1. **Respondeat Superior**
Schloendorff v. Soc'y NY Hosp. (N.Y. 1914) 4p
 Restatement (Third) Agency 2.04 & 7.07 2p
2. **Ostensible Agency**
Adamski v. Tacoma Hosp. (Wash. App. 1978) 7p
Thomas v. Oldfield (Tenn. 2008) 5p
3. **Non-delegable Duty Doctrine**
Renown v. Vanderford (Nev. 2010) 9p

C. Direct Liability

1. **Background: National Practitioner Database**
Public Citizen, *NPDB Report 1-9* (2009) 9p
2. **Negligent Selection**
Johnson v. Misericordia Hosp. (Wis. 1981) 18p
Restatement (Third) Agency 7.05 6p
3. **Negligent Retention**
Engelhardt v. St. John Health System (Mich. App. 2012) 9p
Frigo v. Silver Cross (Ill. 2007) (edited) 16p
Film clip: *Ghost Town* (2008) (3 strikes)
4. **Negligent Supervision (Policies, Procedures, Training)**
Darling v. Charleston Hosp. (Ill. 1965) 9p
Stroud v. Abington Hosp. (E.D. Pa. 2008) (4-5, 9-12) 5p
Scampone v. Grane Healthcare (Pa. Super. 2010) 20p
5. **Ordinary Negligence (Equipment, Facilities)**
6. **Negligence *Per Se***

5. Managed Care Liability

A. Vicarious Liability

1. **Staff/Group Model**
Since physicians are directly employed in this model, the MCO is liable for their negligence under respondeat superior, just as a hospital is liable for the negligence of employed physicians and nurses (within the scope of employment).
2. **IPA Model**
Ostensible agency works with MCOs pretty much like it works with hospitals.

Boyd v. Albert Einstein Med. (Pa. 1988) 6p
Shannon v. McNulty (Pa. Super. 1998) 8p
Petrovich v. Share Health (Ill. 1999) 17p

B. Direct Liability**1. Negligent Selection & Retention**

Again, this theory of direct liability works with MCOs pretty much like it works with hospitals.

Dukes v. U.S. Healthcare (3d Cir. 1995) 9p

Pagarigan v. Aetna (Cal. App. 2005) 17p

2. Negligent Utilization Review

This is a unique theory of liability that can be brought against a MCO. The claimed negligence concerns the decision to not cover/pay for a procedure.

Wickline v. State (Cal. App. 1986) 8p

LACMA v. Healthnet (LASC 2012)

[Any other cases here like Yarick?]

C. ERISA Preemption (502 Complete Preemption)

The only type of claim against a MCO that can be preempted by ERISA is a claim for negligent UR. Vicarious liability and negligent selection/retention theories are unaffected by ERISA.

Barnidge, *Hous. L. Rev.* (2004) (for overview) 34p

28 U.S.C. 1441 1p

29 U.S.C. 1132 1p

U.S. Const., Art. VI 1p

Aetna v. Davila (U.S. 2004) 18p

Sarkisyan v. CIGNA (C.D. Cal. 2009) 15p

D. ERISA Preemption (514 Conflict Preemption)

29 U.S.C. 1144 1p

Gallagher v. CIGNA (D. Me. 2007) 15p

Rush Prudential v. Moran (U.S. 2002) (majority) 16p

6. Medical Malpractice Reform**A. Overview**

Shepherd, *Vanderbilt L. Rev.* (2014)

Schwartz, *NYU L. Rev.* (2013)

Williams, *Stan. L. & Pol'y Rev.* (2012)

[Update these sources.]

- B. Defensive Medicine**
 Mello, *Health Affairs* (2010) 7p
 Mass. Med. Society, *Report* (2008) 9p
 Bishop et al., *Archives Internal Med.* (2010) 2p
- C. Medical Malpractice Reform**
 Kachalia & Mello, *NEJM* (2011) 7p
 Widman, *Cal. L. Rev.* (2010) 13p
 CRS, *Reform* (2006) 12p
- D. Initiatives to Reform Medical Malpractice Litigation**
- 1. Reducing Claims Frequency**

Statutes of limitations	Limit contingency fees
Damage caps	Pretrial screening panels
Certificate/affidavit of merit	Tough substantive law

 - 2. Reducing Claims Severity**

Damage caps	Collateral source offset
Periodic payments	Limit joint & several

Fein v. Permanente (Cal. 1985) (majority) 18p
Perry v. Shaw (Cal. App. 2001) 3p

 - 3. Increasing the Certainty of Frequency and Severity**

Damage caps	Codify law
Health courts	Arbitration

 - 4. No-Fault Compensation Schemes**
 - Florida Birth-Related Neurological Injury Compensation Assn
 - Virginia Birth-Related Neurological Injury Compensation Program

 - 5. Informal and Intramural Dispute Resolution**
 - “I’m Sorry” laws and programs (e.g. University of Michigan)
 - Mediation programs

 - 6. Improving the Quality of Care Itself**
 - Pay for performance
 - “Never events”

7. Individual Provider Licensure

A majority of our time in this course will be focused on tort-based liability. But liability is only one quality-assuring mechanism. Another is licensure. Both individual providers and healthcare institutions must be licensed by the state.

A. Overview

Thompson & Robi, *J. Leg. Med.* (2012)

B. Gatekeeping Function

State v. Miller (Iowa 1995) 10p
Minnesota Medical Practice Act

B. Discipline Function

Modi v. Medical Board (W.V. 1995) 18p
Noesen v. Pharmacy Board (Wis. App. 2008) 7p
Flashback: The defendant in *Kokemoor* not only lost the informed consent Case but he also lost his license.

E. Telemedicine and Online Prescribing

State v. Hageseth (Sup. Ct., Cal. 2009) 2p

E. Scope of Practice

APN, midwife, and optometrist battles

F. Alternatives to Licensure (Other Quality-Assuring Mechanisms)

Privileging and credentialing
Insurance delisting
Public reporting of outcome measures

8. Facility Licensure, Accreditation, and Certification

A. Licensure

Minnesota Health Facilities Code (excerpts) 9p
Cal. DOH, Administrative Penalties Report 1p

B. Accreditation

The Joint Commission, *Fact Sheet* 1p

C. Certification

Medicare Conditions of Participation (excerpts) 5p
Smith v. Heckler (10th Cir. 1984) 9p
Smith v. Bowen, (D. Colo. 1987) 4p
Cospito v. Heckler (3d Cir. 1984) 24p