Exam ID # _____

WIDENER UNIVERSITY SCHOOL OF LAW

HEALTH LAW I MIDTERM EXAM

Professor Pope **Fall 2010**

GENERAL INSTRUCTIONS:

1. **Read Instructions**: You may read these instructions (the first three pages of this exam packet) ***before*** the official time begins.

2. **Honor Code:** While you are taking this exam, you may not discuss it with anyone.

3. **Competence:** Accepting this examination is a certification that you are capable of completing the examination. Once you have accepted the examination, you will be held responsible for completing the examination.

4. **Exam Packet:** This exam consists of **ten (10) pages**, including this cover page. Please make sure that your exam is complete.

5. **Identification:** Write your exam number in four places: (1) Write it in the space provided in the upper-right hand corner of this page. (2) Write your exam number on the cover of each Bluebook (or your ExamSoft file) that you use for Part Two. (3) Write your exam number (***and*** fill in the corresponding ovals) on the Scantron form. (4) Write your exam number on the upper-right-hand corner of your envelope.

6. **Anonymity:** The exams are graded anonymously. Do ***not*** put your name or anything else that may identify you (except for your student number) on the exam.

7 **Timing:** This exam must be completed within seventy-five (75) minutes.

8 **Scoring:** There are 60 points on the exam, approximately one point per minute. The exam is written and graded as a 60-point, 60-minute exam. But you have 75 minutes in which to complete the exam. Thus, you have 15 extra "buffer" minutes.

9 **Open Book:** This is an OPEN book exam. You may use ***any*** written 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. You may not use a computer other than in its ExamSoft mode.

10 **Format:** The exam consists of two parts which count toward your grade in proportion to the amount of time allocated.

PART ONE comprises 10 multiple choice questions worth two points each, for a ***combined*** total of 20 points. The suggested total completion time is **20 minutes**.

PART TWO comprises one essay question worth 40 points. The suggested completion time is **40 minutes**.

11 **Grading:** All exams will receive a raw score from zero to 60. The raw score is meaningful only relative to the raw score of other students in the class. The only "real" letter grade is that computed at the end of the course by summing the midterm, final, and quiz scores. But for informational purposes only, I will estimate a letter grade for your midterm. Your raw score will be converted into a scaled score, based on the class curve. (There are two separate curves: one for M.J. students and one for J.D. and LL.M. students.) For example, if the highest raw score in the class were 40 of 60, then that student would typically receive an "A." I will post an explanatory memo and a model answer to TWEN a few weeks after the exam.

12 **Special Instructions:** Instructions specific to each exam section are printed immediately below.

SPECIAL INSTRUCTIONS FOR PART ONE:

1. **Format:** This Part contains 10 multiple choice questions, worth two points each, for a combined total of 20 points. This part has a suggested completion time of 20 minutes. Please note that the questions vary in both length and complexity. You might answer some in 20 seconds and others in two minutes.

2. **Identification:** Write your Student ID ***both*** on the first page of this exam booklet. ***and*** on the Scantron form. Fill in the corresponding ovals.

3. **Fill the Oval on the Scantron:** For each question***, fill in*** the oval on the Scantron corresponding to the ***best*** answer choice.

4. **Ambiguity:** If (and only if) you believe the question is ambiguous, such that there is not one obviously best answer, neatly explain why in a separately marked section of your Bluebook or ExamSoft file. Your objection must (i) identify the ambiguity or problem in the question and (ii) reveal what your answer would be for all possible resolutions of the ambiguity. I do ***not*** expect this to be necessary.

SPECIAL INSTRUCTIONS FOR PART TWO:

1. **Submission:** Write your ***essay*** answers in your Bluebook examination booklets or ExamSoft file. I ***will not*** read any material which appears only on scrap paper.

2. **Legibility:** Write legibly. I will do my best to read your handwriting, but must disregard (and not give you points for) writing that is too small to read or otherwise illegible. ***I am serious; write neatly.***

3. **Outlining Your Answer:** I strongly encourage you to use ***at least*** one-fourth of the allotted time per question to outline your answers on scrap paper ***before*** beginning to write in your exam booklet or ExamSoft file.

   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.

4. **Answer Format:** This is important. ***Use headings and subheadings***. Use short single-idea paragraphs (leaving a blank line between paragraphs).

5. **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.

6. **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?

7. **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.

8. **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.

9. **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.

STOP !

Do NOT turn this page until the proctor signals

PART ONE

10 questions worth two points each = 20 points
Suggested Time = 20 minutes

1. Physician provides treatment (cardiopulmonary resuscitation, CPR) that the patient previously specifically decided against by signing a do not resuscitate order (DNR). Patient's BEST cause of action is:

A. Informed consent.
B. Abandonment.
C. Battery.
D. EMTALA.

2. Which of the following statements is TRUE?

I. Under EMTALA, hospital emergency departments can refuse to treat patients whom they determine have arrived in stable condition, even if, and even because, those patients do not have medical insurance.
II. Generally, a physician-patient relationship is limited to those physicians with whom a patient has direct contact, and does not extend to specialists consulted only informally by the primary physician.

A. I.
B. II.
C. Both I and II.
D. Neither I nor II.

3. Mork discovered that his physician used a ZZ procedure in operating on his shoulder that the physician had not described to Mork when seeking his consent for the surgery. The physician now argues that her failure to explain the ZZ creates no liability. In a material risk jurisdiction like California or New Jersey, which of the following arguments, if established, would be independently sufficient to support the physician's position?

A. A reasonable person would not consider the ZZ information material.
B. A reasonable person would have proceeded with this surgery even had he known about the ZZ procedure.
C. A reasonably prudent physician would not have described the ZZ procedure to the patient under the circumstances.
D. Both A and B.
E. All of the above.

Use this fact pattern for BOTH problems 4 and 5.

In December 2009, Terri had breast reduction surgery. But she was surprised and dismayed by the presence of hypertrophic scars. Terri has sued the surgeon and the case has gone to trial. The following three witnesses testified:

Dr. Cooper, plaintiff's expert: Dr. Cooper reviewed plaintiff's medical files and records and found no fault with the surgery itself. He testified that Terri's poor understanding of the English language prevented the signed consent from being valid. Dr. Cooper further testified that he has personally performed nearly 1000 breast reduction surgeries, and that in each case he discussed the scarring and other risks involved. Each of those patients elected to undergo the surgical procedure despite the stated risks.

The surgeon: The surgeon testified that consent is an ongoing process of discussion between physician and patient, and that not all risks or matters of discussion are set forth in the signed consent form. Plaintiff testified that she had difficulty reading English and did not understand the consent form that she signed for the surgery. She did not, however, ask to have a Spanish consent form or an interpreter provided, although she did sign a consent in Spanish for general medical services to be provided by the hospital. Moreover, although Terri claimed to have difficulty understanding English when spoken, she testified that she acted as a translator for another Spanish-speaking patient while at the hospital.

Terri: Terri testified on direct examination that while she understood the basic nature of breast reduction surgery, had she known about the potential for wide scarring she probably would not have undergone the procedure. On cross-examination, Terri admitted that regardless of the risks involved, she still would have had the surgery because she really wanted to alleviate the pain in her back and shoulders.

4. The jury is MOST likely to find that, in an action for informed consent, Terri cannot satisfy the element of:

A. Duty.
B. Breach.
C. Causation.
D. Damages/Injury.

5. If Terri has trouble making her informed consent claim, she could still probably successfully bring a claim for:

A. Battery.
B. Abandonment.
C. Both A and B.
D. Neither A nor B.

Use this fact pattern for BOTH problems 6 and 7.

On or about September 17, 2010, Sasha presented to the emergency department at Delaware State Hospital with neurological signs and symptoms, including but not limited to left sided weakness. At the ED, Sasha came under the care and treatment of defendant Dr. House. After giving Sasha the standard examination for his symptoms, Dr. House discharged Sasha, determining a diagnosis of "mild TIA, left calf strain."

Only several hours later, Sasha was transported to Chester County Hospital via air ambulance with a diagnosis of acute stroke. Sasha suffered permanent and progressive neurological injury and damage, including but not limited to paralysis, as a result of the stroke.

NOTE: A transient ischemic attack is a "mini-stroke" that produces stroke-like symptoms but no lasting damage. Generally, TIAs are important in predicting ***if*** a stroke will occur rather than ***when*** one will happen. They can occur days, weeks or even months before a major stroke. But more severe TIAs are usually soon followed by severe strokes.

6. Sasha can probably establish the following claims against Delaware State Hospital:

A. EMTALA because Dr. House's screening was inadequate, failing to detect the Severe TIA and imminent stroke.
B. EMTALA because Dr. House discharged Sasha without stabilizing his emergency medical condition (severe TIA soon developing to stroke).
C. Both A and B.
D. Neither A nor B.

7. Which of the following is TRUE?

A. Dr. House and Sasha were not in a treatment relationship.
B. If Dr. House knowingly discharged Sasha with an un-stabilized emergency medical condition, then Sasha has an EMTALA claim against Dr. House.
C. If the reasonably prudent physician would not have discharged Sasha with an un-stabilized emergency medical condition, but Dr. House did so discharge, then Sasha has an EMTALA claim against Dr. House.
D. Sasha does not have a wrongful termination (abandonment) claim against Dr. House.
E. More than one of the above.

8. A physician may terminate a treatment relationship:

A. At any time, for any reason because of freedom of contract.
B. Because of the patient's disability.
C. With sufficient notice.
D. With a certification that the benefits of transfer outweigh the risks.

9. The ADA defines a person with a disability as:

A. An individual with a physical or mental impairment that substantially limits a major life activity.
B. An individual who has a record of an impairment that substantially limits a major life activity.
C. An individual who is perceived by others as having an impairment that substantially limits a major life activity, even if the individual does not actually have such impairment.
D All of the above.

10. In which of the following circumstances was a treatment relationship probably formed?

I. Defendant physician placed prescriptions by phone as an accommodation to plaintiff, an extended family member who subsequently developed glaucoma. Plaintiff testified that he inquired of physician concerning eye drops and drug. Physician testified that he warned plaintiff that he did not like plaintiff using the drugs and advised him to see his ophthalmologist.
II. Plaintiff telephoned defendant physician, who had treated her previously for an unrelated condition. Physician listened late at night to her recital of symptoms. Physician told plaintiff that he could offer no advice until he was able to examine her.
III. Sole contact between plaintiff and physician was a telephone call in which the physician informed plaintiff of the hospital's admission policies. Specifically, after ascertaining that plaintiff had a private physician, defendant physician informed plaintiff that she could not be admitted unless arrangements were made for admission by the private physician. But plaintiff was unable to contact the private physician and suffered cerebral hemorrhage.

A. I only.
B. I and II.
C. I and III.
D. II and III.
E. All of the above.

---------- **END OF PART ONE** ----------

PART TWO

1 essay question worth 40 points

Suggested time = 40 minutes

William Shore is a seventy-seven-year-old male who resides in Cape May, New Jersey. (New Jersey, like California and D.C., is a material risk jurisdiction.) In 2007, Shore had what he described as a "flicker of a blackout," which caused him to become unsteady when he stood up. Following this episode, Shore visited his family physician. After a workup, this physician referred Shore to Dr. Target, a cardiologist.

Dr. Target arranged for Shore to have a catheterization performed on June 24, 2007. Before the catheterization, Shore was given a form to sign that would authorize Dr. Target to implant a cardioverter defibrillator (ICD) into Shore's heart if necessary. Although Shore does not recall being told exactly what an ICD would do or whether he actually needed one, he signed the form.

After the catheterization, Dr. Target informed Shore that he needed to have an ICD implanted. Dr. Target recommended an ICD made by Medtronic. On June 25, 2007, Shore signed a consent form authorizing Dr. Target to implant a Medtronic Marquis ICD (the ICD) into his chest. Shore understood that the purpose of the ICD was to deliver a shock to his heart if it needed regulating. However, Shore does not recall Dr. Target ever offering any advice regarding: (i) exactly which type of ICD she would be implanting, (ii) which ones were better than others, or (iii) what the risks of implanting an ICD were.

The summer after Dr. Target implanted the ICD, the ICD delivered an unexpected shock to Shore's heart. During his next visit, Dr. Target told Shore that the ICD was "set at the wrong speed," and so she had a nurse adjust it accordingly. Thereafter, on the morning of August 2, 2010, Shore experienced yet another unexpected shock from the ICD as he was getting dressed. Shore's wife called for an ambulance, which took Shore to the local hospital.

Soon after the August 2010 incident, during a "normal defibrillator visit," a nurse informed Shore that three percent of the type of Medtronic ICD that Shore had in his chest "may suffer sudden and premature battery failure." The nurse also stated that Dr. Target "had known about the defect for about a year." Neither the nurse nor Dr. Target gave Shore any advice as to whether to replace the ICD. At that time, Shore was, however, given a copy of a *Device Alert*, which discussed: (i) the potential defect, (ii) how to monitor the battery of an implanted ICD, and (iii) that the patient had the option of having a different ICD implanted. At one point, the *Device Alert* reads,

> My signature below indicates that all of the information above has been explained to me including the risks and benefits of each course of action, and that I had a chance to ask questions about this information.

Shore signed his name at the bottom of the Device Alert.

Shore and Dr. Target subsequently decided to replace the ICD with one made by Guidant Corporation. The surgery to replace the ICD was scheduled for September 1, 2010. In mid-August, however, Shore read in the *Wall Street Journal* that Guidant, like Medtronic, was experiencing technical problems with their ICDs. Shore called Dr. Target's office to discuss the surgery and the other kinds of ICDs that were available. But Dr. Target was on vacation. When Dr. Target returned Shore's call, on August 30, 2010, she was upset that Shore didn't trust her choice of putting in a Guidant. She told Shore that he shouldn't have any questions about it. Ultimately, Dr. Target told Shore, "Look, you don't trust me; you need to get another doctor, and don't ever come back to my group." Dr. Target provided Shore with the name of another doctor, but Shore never called that doctor.

Please fully assess any claims that Mr. Shore might bring against Dr. Target.

---------- END OF PART TWO ----------

Pope – Health Law: Fall 2010 Midterm Exam Scoring Sheet **Exam ID _____**

Multiple Choice Questions

Question	Correct	% class	Explanation	Points	Earned
1	C	95	Treatment without any consent at all is battery.	2	
2	C	61	Many answered B. But motive is not relevant to EMTALA analysis.	2	
3	D	85	Some answered A. But PTF must show causation (B) as well as duty.	2	
4	C	76	Some answered B. But while possibly true, the facts more solidly support C.	2	
5	D	88	Some answered A. But PTF did consent as evidenced by at least 2 forms.	2	
6	D	73	Some answered A or B. But DEF gave a uniform "standard" screening. And finding no EMC, DEF had no duty to stabilize an EMC.	2	
7	D	15	Many answered B or E. But an individual may not sue a physician under EMTALA.	2	
8	C	95		2	
9	D	39	This is directly from the statute.	2	
10	A	63	Many answered C. But physician (in III) made no diagnosis or recommendation whether implicit or explicit.	2	
TOTAL			(Mean score = 13.8) (High score = 20)	**20**	

Essay Question

NOTE: This problem was adapted from *Melton v. Medtronic, Inc.*, No. 4729, 2010 WL 3397422 (S.C. App. Aug. 25, 2010).

	Issue	P	E
Informed Consent – Initial Implantation			
Treatment Relationship	T only owes a duty of informed consent only if WS and T were in a treatment relationship. They were, here, because T was actually treating WS.	**2**	
Duty	This is a material risk jurisdiction. Therefore, T had a duty to disclose those risks that the reasonable patient would find material.	**1**	
	The reasonable patient would find significant to his decision to have an ICD implanted: (a) risks of the ICD such as battery failure and unnecessary shocks, (b) alternatives to this ICD model.	**4**	
Breach	T did not disclose the risks or advantages either of this or of alternative models.	3	
Injury	WS got unexpected shocks in 2008 and 2010. The 2010 shock resulted in a ED visit. Arguably, the undisclosed risks necessitated the replacement.	**3**	
Causation	The first unexpected shock (2008) was apparently not due to the undisclosed risk but to a speed setting error. But the second shock (2010) was apparently due to the ICD defect.	**2**	
	With appropriate disclosure, arguably the reasonable person would have done otherwise and avoided injury. Depending on WS' baseline risk, arguably the reasonable person in WS' circumstances would not have had an ICD at all. This is unlikely because it appears that WS needed an ICD and the risk was relatively low. Alternatively, the reasonable person might have opted for another manufacturers' ICD with less risk of shocks.	**3**	
Informed Consent – Delayed Decision to Remove			
Treatment Relationship	T only owes a duty of informed consent if WS and T were in a treatment relationship. They were because T was actually treating WS.	**--**	**--**
Duty	Arguably, the reasonable patient would find that a 3% battery rate failure was significant to his decision whether to ***keep*** an ICD implanted.	**4**	
Breach	T knew but did not disclose this fact for over one year. Indeed, this information was disclosed and the *Device Alert* was provided only when WS happened to next visit the office.	**2**	
Injury	The replacement of the ICD was significantly delayed. It is unclear what harm the delay in replacing the ICD caused WS.	**3**	
Causation	If the delay in replacing the ICD resulted in harm to WS, then WS can recover in an informed consent action if WS can show such harm resulted from the Medtronic ICD.	**2**	
	The reasonable person knowing of the battery failure defect might choose to replace the ICD (as WS chose). This would avoid additional unnecessary shocks.	**3**	
Abandonment (Wrongful Termination)			
Treatment relationship	T and WS were in a treatment relationship.	**2**	
Termination w/o notice	T unilaterally terminated the relationship.	**2**	
	T provided zero notice (like *Budge*). This was just one day before planned surgery. T did provide the name of a referral. But it is unlikely that was sufficient under the circumstances.	**3**	
Injury	It is unclear whether or how the delay in replacing the ICD caused WS harm.	**1**	
Total		**40**	