

WIDENER UNIVERSITY SCHOOL OF LAW

Health Law I (709)

Fall 2008

Professor Thaddeus Pope

Contacts: Room 325; tmpope@widener.edu; 302-477-2230

Time and Place: M 6:30 – 7:55 p.m. & W 8:20 – 9:45 p.m. in L-123

Midterm Exam: Monday, October 13, 2008 from 6:30 – 7:55 p.m.

Final Exam: Wednesday, December 10, 2008 from 6:30 to 9:30 p.m.

I. Course Description

Health law is an incredibly broad and growing field. This course surveys a subset of some major topics in health law, especially those pertaining to patient care, liability, and bioethics. Topics include: (i) the formation and termination of the treatment relationship; (ii) informed consent; (iii) confidentiality; (iv) individual, institutional, and managed care liability, including the impact of ERISA preemption; (v) physician licensure; and (vi) end-of-life health care decision making. The unifying themes are quality and patient autonomy.

II. Course Objectives

Upon completion of the course, students will have:

- A. A basic systematic understanding of the legal principles surrounding medical liability and treatment relationships;
- B. Further honed legal analysis and writing abilities, through (i) exposure to and critique of legal arguments in judicial opinions, legislative reports, and scholarly writing; (ii) participation in classroom discussion; (iii) completion of weekly written problems; (iv) completion of a written midterm examination; and (v) completion of a written final examination; and
- C. Integration of material learned in other classes, such as business organizations, tax, civil procedure, and torts.

III. Required Materials

- A. MARK HALL, MARY ANNE BOBINSKI & DAVID ORENTLICHER, *MEDICAL LIABILITY AND TREATMENT RELATIONSHIPS* (2d ed. Aspen 2008) (ISBN-13: 978-0735570054) [“HBO”].
- B. Health Law is a rapidly developing area. Accordingly, from time to time, I will post additional current materials to the course TWEN site. I will clarify both in class and on the website whether these are required or suggested materials.

IV. Class Schedule

- A. The class will meet on Mondays from 6:30 to 7:55 p.m. and Wednesdays from 8:20 to 9:45 p.m. in Room L-123.
- B. The class will *not* meet on the following dates: (i) Monday, September 1st due to Labor Day, (ii) Wednesday, September 3rd due to a conference conflict, (iii) Wednesday, October 8th due to Yom Kippur, and (iv) Wednesday, November 12th due to the Academic Calendar. The last class will meet on Wednesday, December 3rd.
- C. Depending on class interest, I am happy to schedule a “review” class during the weeks before the final exam. Please email your questions to me 24 hours before such session to better enable me to answer them.

V. 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. Preparation: I employ little lecture but lots of case method questions and problems. Consequently, students must come to class prepared to discuss the material assigned. All assigned cases must be read and briefed. Analyze each case using the following headings: (i) essential substantive facts, (ii) procedural posture, (iii) issue(s), (iv) legal principle(s), (v) reasoning and (vi) holding. All note problems must be considered before the applicable class session. 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. Warning about 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. . . . [I]t is by listening carefully to your work that you will gradually improve.”

- D. Class Participation: *All* students are expected to participate in class discussions. If illness or emergency prevents you from being fully prepared, please notify me *before* class. I reserve the right to reward exemplary class participation by raising your grade one step (e.g. B+ to A-). Typically, 10% of the class receives such a grade “bump.”
- E. 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 the 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.
- F. Ask Questions: I 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.
- G. 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 on TWEN.

VI. 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.
- 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 6:30 and 8:20 and ending it precisely at 7:55 and 9:45. In return, please do not begin to pack-up while others are still trying to be engaged in the class discourse.

VII. Grading

- A. Weekly Problems (20%).
- B. Midterm Exam (20%)
- C. Final Exam (60%).
- D. 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 180 points. The midterm exam is worth 60 points. The weekly problem analyses are worth a total of 60 points. Grading methods are more fully explained in the next three sections.

VIII. Required Quizzes and Problems

- A. 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 final exam, provided several weeks *after* the end of the semester. Therefore, I will assign weekly multiple choice quizzes and/or short essay problems. These may often be quite short, consisting, for example, of just one question or just one paragraph.
- B. Grading: I will grade the quizzes. For the short essays, I will distribute a score sheet and/or a model answer. But I am happy to review and provide individualized feedback on your essay. Just ask.
- C. Weight: The ten quizzes and essays, in the cumulative, comprise 20% of your total course grade. Each one is worth six points or roughly 2% of your total course grade.
- D. TWEN: While I may ask you to complete some quizzes and essays during class, you will complete most of the quizzes and essays before class on the course TWEN site. I will announce and post the problems and questions at least five days in advance of the due date. I will either review the quiz/problem in class or pose a feedback memo. More details will be discussed when the first problem is assigned.

IX. Midterm Exam

- A. Date: The midterm exam is scheduled from 6:30 to 7:55 p.m. on Monday, October 13, 2008.
- B. Weight: The midterm exam comprises 20% of your course grade, 60 of the 300 total course points.

- C. Everything else about the midterm exam is the same as for the final exam except that the midterm is only one-hour instead of three hours.

X. Final Exam

- A. Date: The final exam is scheduled from 6:30 to 9:30 p.m. on Wednesday, December 10, 2008.
- B. Weight: The final exam comprises 60% of your course grade, 180 of the 300 total course points.
- C. Format and Length: The final examination will be comprised of three roughly equal parts. The first part will include multiple choice questions. The second part will include short answer questions. 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, and (iii) come to 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 on topics in the course. For example, malpractice will be tested more heavily than licensure.
- E. Open Book: On the exam, you will be allowed to use any written or printed materials you choose. No electronic devices are permitted.
- F. 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 as you would for a closed-book exam, then you will do very poorly and perhaps not pass.
- G. ExamSoft: I strongly encourage you to register to *type* your midterm and final exams, using your laptop and special security software that you can download from the Law School's website, <<https://www.examsoft.com/widenerlaw>>. Typing your exam allows you to create a work product in a way that will be least distracting from the substance.
- H. Grading: All exams will receive a raw score from zero to 180. The raw score is meaningful only relative to the raw score of the other students in the class. The raw score will be converted to a scaled score, based on the class curve. For example, if the highest raw score in the class were 110, then that student would receive an A. The final grades will comport with Law School's grading policies and suggested grading curve.
- I. Exam Review and Feedback: Several weeks after the exam, I will post on the TWEN site both a copy of the exam and an explanatory memo and/or a model

answer. All grades are final; there will be no negotiations regarding revisions, except to correct any mathematical or clerical errors in computing the final score. Of course, I will be happy to go over the exam with anyone who schedules an appointment to review the exam. I will give you a copy of your exam answers. If – after reviewing these against the exam, the feedback memo, 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.

- J. Grading Criteria: I will post my old *Health Law* exams and my old exam feedback memos and score sheets on TWEN. While some of those exams had a broader coverage than we will have in this course, you can get a good sense of the criteria I employ in grading. In short, I look for:
1. An ability to muster relevant evidence and authority to make arguments 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

XI. 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 at tmpope@widener.edu. I will try to answer promptly any question you have as soon as possible.
- D. TWEN: Whether you want to elaborate or clarify the casebook 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.

XII. TWEN Site

The TWEN site will include the following materials:

- A. PowerPoint slides for each class, posted shortly before each class
- B. Links to MP3 recordings selected classes
- C. Problems and Quizzes (see section VII, *supra*)
- D. Statutes, cases, and other materials

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.

XIII. 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. 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 on certain issues.

A. Study Aids

1. MARCIA M. BOUMIL ET AL., *MEDICAL LIABILITY IN A NUTSHELL* (West 2d ed. 2003).
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* (2d ed. West 1999).
4. GEORGE D. POZGAR & NINA SANTUCCI, *LEGAL ASPECTS OF HEALTH CARE ADMINISTRATION* (Aspen 7th ed. 1999) (directed toward non-lawyers).

B. General Reference Materials

This is, of course, a highly select list. I have not included CLE or practitioner-oriented materials. Nor have I included materials more narrowly focused.

1. AMERICAN COLLEGE OF LEGAL MEDICINE TEXTBOOK COMMITTEE, LEGAL MEDICINE (Mosby 7th ed. 2007).
2. AMERICAN HEALTH LAWYERS ASSOCIATION, FUNDAMENTALS OF HEALTH LAW (West 4th ed. 2008), Westlaw database AHLA-PAPERS.
3. AMERICAN HEALTH LAWYERS ASSOCIATION, HEALTH LAW PRACTICE GUIDE (West CBC 3-vol. looseleaf), Westlaw database 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), available on LEXIS.
6. DEAN M. HARRIS, CONTEMPORARY ISSUES IN HEALTHCARE LAW AND ETHICS (Health Admin. Press 2003).
7. PAUL C. LASKY ED., HOSPITAL LAW MANUAL (Aspen 5-vol. looseleaf).
8. BRYAN A. LIANG, HEALTH LAW & POLICY: A SURVIVAL GUIDE TO MEDICOLEGAL ISSUES FOR PRACTITIONERS (Butterworth Heinemann 2000).
9. ROBERT W. LUNDY, JR., ED., TREATISE ON HEALTH CARE LAW (Matthew Bender 5-vol. looseleaf), on LEXIS.

C. Specific Issue Reference Materials

1. MARK M. MOY, EMTALA ANSWER BOOK (Aspen 2008).
2. CLAIRE C. OBADE, PATIENT CARE DECISION MAKING: A LEGAL GUIDE FOR PROVIDERS (West CBC looseleaf), Westlaw database PCAREDM.
3. STEVEN E. PEGALIS, AMERICAN LAW OF MEDICAL MALPRACTICE (West CBC 3d ed. 2005 & Supp. 2008) (3 volumes).
4. FAY A. ROZOVSKY, CONSENT TO TREATMENT: A PRACTICAL GUIDE (3d ed. Aspen 2006).

XIV. Course Reading Outline

The outline below is intended to give you a sense of the course coverage. It is *not* a reading schedule. Following its sequence, I will give the specific assignment for the following week during the prior week. Note that the reading below is only from the HBO casebook. I will assign at least ten other cases (to be posted in PDF on TWEN) to reinforce and link legal concepts presented in the casebook materials.

1. Introduction

- 1.1. Overview 1-9
- 1.2. Nature of Medical Practice 9-68

2. Treatment Relationship

2.1. Formation, Structure, Termination

- 2.1.1. Duty to Treat
 - 2.1.1.1. Duty to Accept 69-96
 - 2.1.1.2. Wrongful Rejection 96-110
- 2.1.2. Treatment Relationship
 - 2.1.2.1. Forming 110-123
 - 2.1.2.2. Limiting 123-126
 - 2.1.2.3. Terminating 127-134

2.2. Informed Consent

- 2.2.1. Informed Consent
 - 2.2.1.1. Theory 196-204
 - 2.2.1.2. Disclosure Standards 204-217
 - 2.2.1.3. Limiting Liability 217-224
 - 2.2.1.4. Conflicts of Interest 224-243

2.3. Confidentiality of medical information

- 2.3.1. Duty to Maintain Confidentiality 175-185
- 2.3.2. Duty to Breach Confidentiality 185-196

3. Liability

3.1. Errors and Theories of Liability

- 3.1.1. Medical Mistakes and Quality
 - 3.1.1.1. Nature and Extent of Error 273-287
 - 3.1.1.2. Quality of Care 287-300
- 3.1.2. Physician Liability
 - 3.1.2.1. Custom Standard of Care 300-316
 - 3.1.2.2. Variations in Standard of Care 216-332
 - 3.1.2.3. Qualifying and Examining Experts 332-361
- 3.1.3. Alternative Theories of Liability
 - 3.1.3.1. Res ipsa 361-365
 - 3.1.3.2. Negligence 365-376
 - 3.1.3.3. Breach of Contract 376-382
 - 3.1.3.4. Vicarious 382-388
 - 3.1.3.5. Strict 388-393
 - 3.1.3.6. Products 393-406

3.2. Causation	406-416
3.3. Defenses	
3.3.1. Statutes of Limitation	416-421
3.3.2. Affirmative Defenses	421-427
3.4 Arbitration and Settlement	427-435
3.5 Damages	436-454
3.6 Institutional Liability	
3.6.1 Hospitals (direct and vicarious)	454-479
3.6.2 Managed Care	479-503
3.6.3 ERISA Preemption	
3.7 Medical Malpractice Reform	503-524
4 <u>Other legal mechanisms to ensure quality</u>	
4.1 Licensure of Providers	134-151
4.2 Licensure of Facilities	151-161
5 <u>Death & Dying</u>	
5.1 Competent Patients	TWEN PDF
5.1.1 Federal Constitutional Basis	
5.1.2 Common Law Basis	
5.1.3 State Interests that Limit the Right to Forgo	
5.1.4 Statutory Basis	
5.2 Competence	TWEN PDF
5.3 Incompetent Patients	TWEN PDF
5.3.1 Formerly competent	
5.3.1.1 Proxy Decision Making	
5.3.1.2 Advance Directives	
5.3.2 Never competent	