Health Law Liability & Quality

Fall 2016

Professor Thaddeus Mason Pope

Mitchell Hamline School of Law

Time: Tuesdays and Thursdays from 10:00 to 11:35 AM

Place: MHSL 125

Contact: MHSL Room 320
Thaddeus.Pope@mitchellhamline.edu

I. Course Description

The healthcare industry accounts for nearly 20% of the U.S. gross domestic product. But size is not its only distinguishing feature. The healthcare industry has become the most regulated in the United States. As clinicians, hospitals, payers, and other industry players respond to this increasingly complex regulatory environment, the health law field has become a dynamic and highly specialized area of law.

Consequently, the health law field is evidencing a marked growth in legal employment. It is consistently touted as the "hottest" legal practice area (*see, e.g.,* recent articles in *Wall Street Journal; New York Times; Student Lawyer; National Jurist*). Indeed, health law has become such a distinct field of recognized expertise that some state bars have developed board certification programs in healthcare.

Health Law can be roughly divided into five subfields:

1. Finance & Regulation
2. Public Health
3. Biotechnology & Life Sciences
4. Bioethics
5. Patient Care

This course focuses on the Patient Care domain, especially as the physician-patient relationship is regulated though common law liability. Sometimes, this area of health law is known as "medical law."

This course emphasizes legal doctrine over litigation strategy or public policy. Tactics and strategy are emphasized in the separate *Medical Malpractice* course. In contrast, this course is unified around two broad themes:

1. Legal mechanisms to assure medical quality
2. Legal mechanisms to protect and promote patient autonomy

Eight specific subtopics within these two broad themes include:

1. Formation and termination of the treatment relationship (contracts)
2. Duty to treat (statutory)
3. Informed consent (torts, statutory)
4. Privacy and confidentiality (torts, statutory)
5. Medical malpractice (torts, evidence, civil procedure, agency)
6. Hospital liability (torts, agency)
7. Managed care liability and ERISA preemption (agency, statutory)
8. Licensure, accreditation, and certification (statutory, administrative).

Notwithstanding all this specialized substantive content, this *Health Law Liability & Quality* course might alternatively be characterized as an advanced torts class in which healthcare is just a "vehicle" for more generally exploring liability (and some regulation) 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.

II. Prerequisites

A. 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 three courses in their 1L year.

B. Familiarity with *Agency* and *Evidence* is recommended but not required.

III. Course Objectives

Upon completion of this course, students will have:

A. A basic systematic understanding of:

1. Civil liability legal principles concerning the provision of medical treatment by: (a) individual healthcare providers, (b) institutional providers, and (c) managed care organizations.

2. State licensure of individual providers and healthcare facilities, as well as the relationship among licensure, credentialing, accreditation, Medicare certification, and specialty board certification.

3. Key federal statutes and regulations concerning duties to treat, quality, and confidentiality, including: EMTALA, HIPAA, ADA, and Medicare COPs.

B. 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

C. Integration of material learned in other classes, such as: business organizations, civil procedure, contracts, evidence, statutory interpretation, and torts.

D. Recognition of the major federal, state, and private agencies, entities, and initiatives that are directed at ensuring and improving the quality of medical care.

IV. Required Materials

A. There is no traditional published, bound casebook for this course. There is nothing to purchase.

B. Blackboard Documents

1. All the course materials will be distributed through the course Blackboard course management system for this course. Remember to use Firefox or Chrome as your web browser.

2. For each class session, I will assemble a "packet" of materials into a single PDF document. The packet's cover sheet will both explain the core objectives for the session and summarize the included materials.

3. While we will use a fair number of traditional appellate court opinions, a substantial portion of the written course materials (distributed in 23 PDF "packets") will be comprised of: (1) statutes; (2) regulations; (3) government reports; and (4) medical, law, and policy journal articles.

4. Due to the rapid and current changes in this area, other materials may be added or substituted.

C. PowerPoint

1. I will use 50 to 150 slides per class to guide and focus the discussion. I will post these to Blackboard before class.

2. These slides will include graphics to illustrate concepts. They will include key excerpts of statutory text. And they will include flowcharts and other summaries.

D. Podcast and Video Summaries

1. After most classes, I will prepare an audio or video summary of the main points from that class. These will normally be just 5 to 10 minutes in length.

2. In addition to recapping the key points of the day, I will expand on questions left unanswered and provide additional case examples.

E. Video Lectures

1. To enable us to focus most of our class time on problems and exercises, I will record narrated PowerPoint slides providing an overview of key rules and doctrines.

2. I will distribute links to these videos, so that you can view them before class.

F. Upcoming Assignments

1. The immediately upcoming assignments (readings, quizzes) will always be posted on the Blackboard home page.

2. Pedagogical literature indicates that receiving reminders helps students stay on top of course requirements. To get text messages, text @hegbk to the number 81010. Alternatively, go to rmd.at/hegbk on your phone and follow the instructions. This is only an additional way to receive the same information that will already be on Blackboard.

V. Class Schedule

A. The class will meet on Tuesday and Thursday mornings from 10:00 a.m. to 11:35 a.m. in MHSL 125.

B. The first class meets on Thursday, August 18. The last class meets on Thursday, November 17. The class will meet twenty-four times.

C. The class will **not meet** on the following four dates:

1. Thursday, October 6 due to a conference conflict
2. Thursday, October 13 due to a conference conflict
3. Thursday, October 20 due to mid-semester break
4. Tuesday, November 8 due to a conference conflict

During the early October skipped classes, you will complete a midterm exam. During the November skipped class, you will complete online exercises that I will provide.

D. **Required Extracurricular Meeting 1 of 2**. I would like to get to know each of you outside class. Therefore, before October, please schedule a 20-minute meeting at a convenient time, perhaps before or after class.

E. **Required Extracurricular Meeting 2 of 2**. Sometime during the span of the semester, please attend a meeting of one of the Minnesota health licensing boards. There are dozens and they have a variety of weekday and weekend meeting times. http://mn.gov/health-licensing-boards. Please prepare a short (~2 minute) report for the class.

F. Several class sessions may be offered in an asynchronous online format. This means that you will be able to "attend" these sessions from wherever you have Internet access.

G. **Extra Review Session.** Depending on class interest, I am happy to schedule an extra "review" class during the weeks before the final exam.

1. Please email your questions to me at least 24 hours before such session to better enable me to answer them.

2. 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. Confirm that you are registered for the course Blackboard site with the email address that you use most regularly.

B. If you have not used Blackboard before, review the student user guide. https://connect.mitchellhamline.edu

C. Review this syllabus.

D. Read the initial class assignments posted on Blackboard and emailed to you.

E. Calendar key course dates into your planning and calendaring systems.

F. 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 hour of class. This includes: reading the materials, briefing the cases, consolidating prior class and margin 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**: Every student is expected to participate in class discussions. Sometimes this will be through "clickers" like Poll Anywhere. 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, 5% 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 other 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 below.

G. **Clicker Quizzes & Laptops**: I will use an instant-poll tool (probably Poll Anywhere) 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. **Blackboard Participation**: Students are encouraged to participate not only in class but also through the Blackboard 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 Blackboard. **Never hesitate** to seek more clarity about any substantive topic or administrative matter concerning this course.

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 Blackboard. 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 documents. 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 10:00 and ending it precisely at 11:35. In return, please do not begin to pack-up early while others are still trying to be engaged in the class discourse.

IX. Grading Summary

A. This course is comprised of four components from which you can earn a total of 300 points.

Course Component	Percent	Points	Explanation
Weekly Quizzes	20%	60	*see* section X
Class Participation	5%	15	*see* section XI
Midterm Exam	25%	75	*see* section XII
Final Exam	50%	150	*see* section XIII
	100%	300	

B. Your total point sum (of 300) is meaningful only relative to the point sums of other students in the class. Your total will 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. Please review the Student Handbook. http://mitchellhamline.edu/students/student-handbook/.

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 and "connected" to the material.

B. **Format**: Most quizzes will be comprised of five to ten multiple choice questions. A few may entail drafting a roughly 250-word essay. These (along with the midterm) constitute "formative assessment," while the final exam constitutes "summative assessment."

C. **Blackboard**: You will complete the quizzes on the course Blackboard site. They are not timed. But they are designed to take approximately 15 minutes for you to complete.

D. **Due Date**: A quiz is due by noon on **every** Monday of the semester, except October 10, because you will have just completed your self-scheduled midterm examination.

Quiz	Available by 5:00 p.m.	DUE by 9:00 p.m.
1	Thursday, August 18	Monday, August 22
2	Thursday, August 25	Monday, September 29
3	Thursday, September 1	Monday, September 5
4	Thursday, September 8	Monday, September 12
5	Thursday, September 15	Monday, September 19
6	Thursday, September 22	Monday, September 26
7	Thursday, September 29	Monday, October 3
8	Thursday, October 13	Monday, October 17
9	Thursday, October 20	Monday, October 24
10	Thursday, October 27	Monday, October 31
11	Thursday, November 3	Monday, November 7
12	Thursday, November 10	Monday, November 14

E. **Feedback**: We will review the quiz in Tuesday's class and/or I will post a feedback memo.

F. **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.

G. **Grading**: I will grade the quizzes. The twelve quizzes, in the cumulative, comprise 20% of your total course grade (60 of 300 points). Therefore, each quiz is worth 5 points, 1.66% of your total course grade (300 points).

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. In other words, most students presumptively will and actually will earn all these points. Those who are regularly 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 Wednesday, October 5 and 11:59 p.m. on Monday, October 10, 2016.

B. **Duration:** This exam is designed to be completed within just two hours. The six-hour window is designed to permit you to step away and refresh. That way, you can revise and polish your answer to be more complete and lucid.

C. **Weight**: The midterm exam comprises 25% of your course grade, 75 of the 300 total course points.

D. **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.

E. Everything else about the midterm exam is the same as the final exam, except that the midterm is shorter.

XIII. Final Exam

A. **Date:** The final exam is a take-home that you may obtain and complete during any 48 hours within the final exam period in a method approved by the Law School Registrar.

B. **Duration:** This exam is designed to be completed within just five hours. The 48-hour hour window is designed to permit you to step away and refresh. That way, you can revise and polish your answer to be more complete and lucid.

C. **Weight:** The final exam comprises 50% of your course grade, 150 of the 300 total course points.

D. **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.

E. **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.

F. **Cumulative:** The final exam is cumulative. Topics already tested on the midterm may also appear on the final exam. But the emphasis will be on topics covered after the midterm.

G. **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.

H. **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.

I. **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.

J. **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 100/150, then that student would receive an A. The final grades will comport with Law School's grading policies.

K. **Exam Feedback:** Several weeks after the exam, I will post on Blackboard:
1. A copy of the exam
2. A blank scoring sheet and explanatory memo
3. Model answers.

I will also email you directly a scanned copy of your own marked exam with you individual scoring sheet.

L. **Exam Review:** I will be happy to go over the exam with anyone who schedules an appointment to review the exam. Please first review my scoring and notes on your exam, the feedback memo, model answers, and your own notes. If you still 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.

M. **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.

XIV. Exam Taking Tips

A. **Old Exams**: I have posted nine years of my *Health Law* midterm and final exams and exam feedback memos to www.thaddeuspope.com. Some of those exams (especially before 2007) had a broader coverage or different relative emphases 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.

B. **Grading Criteria**: In your exam answer, 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

C. **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.

D. **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.

E. **Headings & Subheadings:** Use headings and subheadings to divide different legal theories and distinct types and parts of analysis. Keep your paragraphs short – to around three to eight lines.

F. **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. If you are writing whole paragraphs of pure law or pure fact, that is a symptom that you may not be engaged in legal analysis.

G. **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?

H. **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.

I. **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.

J. **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.

K. **Honor Code:** While you are taking a midterm or final exam, you are subject to the Mitchell Hamline 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 (hard and e-copies) immediately upon completion of the exam. They will be reposted after the end of the exam period.

L. **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. **Walks**: Discussing health law while walking around campus or the neighborhood is a great way to get exercise and to assure a creative and alert discussion.

D. **Email:** Feel free to e-mail me anytime at thaddeus.pope@mitchellhamline.edu. Please use a descriptive subject heading. In urgent circumstances cc thadmpope@aol.com and thaddeus.pope@gmail.com, and text 310-270-3618. I will try to promptly answer any question as soon as possible.

E. **Blackboard**: Whether you want to elaborate on or clarify the required materials or class discussions, you can start a discussion thread on the Blackboard site. You are encouraged to provide constructive comments within each other's threads.

F. **Lunch or Coffee**: I have found that grabbing a quick breakfast, lunch or 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. Blackboard Site

The Blackboard 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 X, *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 & 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 (3d ed. West Hornbook series 2014).
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. JOHN E. STEINER JR., PROBLEMS IN HEALTH CARE LAW: CHALLENGES FOR THE 21ST CENTURY (10th ed. Jones & Bartlett 2014).

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 AMD ETHICS (4th ed. Prentice Hall 2011).
5. GINNY WACKER GUIDO, LEGAL AND ETHICAL ISSUES IN NURSING (6th ed. Pearson 2014).
6. CARL HORN, LAW FOR PHYSICIANS: AN OVERVIEW OF MEDICAL LEGAL ISSUES (AMA 2000).
7. JANICE L. KAZMIER, HEALTH CARE LAW (Cengage Learning 2008).
8. MARCIA A. LEWIS & CARL D. TAMPARO, MEDICAL LAW, ETHICS, AND BIOETHICS (6th ed. F.A. Davis 2007).
9. GEORGE D. POZGAR & NINA SANTUCCI, LEGAL ASPECTS OF HEALTH CARE ADMINISTRATION (11th ed. Jones & Bartlett 2012).
10. RONALD W. SCOTT, PROMOTING LEGAL AND ETHICAL AWARENESS: A PRIMER FOR HEALTH PROFESSIONALS AND PATIENTS (Elsevier 2008).

C. General Health Law Reference Materials

This is, of course, a highly select list. I have not included many 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 (6th ed. 2014).
3. AMERICAN HEALTH LAWYERS ASSOCIATION, HEALTH LAW PRACTICE GUIDE (West CBC 3-vol. looseleaf).
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. CALIFORNIA MEDICAL ASSOCIATION, CALIFORNIA PHYSICIANS LEGAL HANDBOOK (2013).
8. CANADIAN MEDICAL PROTECTIVE, MEDICAL LEGAL HANDBOOK FOR PHYSICIANS IN CANADA (7th ed. 2010).
9. DEAN M. HARRIS, CONTEMPORARY ISSUES IN HEALTHCARE LAW AND ETHICS (Health Admin. Press 2003).
10. PAUL C. LASKY ED., HOSPITAL LAW MANUAL (Aspen 5-vol. looseleaf).
11. BRYAN A. LIANG, HEALTH LAW & POLICY: A SURVIVAL GUIDE TO MEDICOLEGAL ISSUES FOR PRACTITIONERS (Butterworth Heinemann 2000).
12. MICHAEL G. MACDONALD ED., TREATISE ON HEALTH CARE LAW (Matthew Bender 5-vol. looseleaf), on LEXIS.

D. Medical Malpractice Reference Materials

1. LEE S. GOLDSTEIN, MEDICAL MALPRACTICE: GUIDE TO MEDICAL ISSUES (Lexis 2013).
2. DAVID S. GREENBERG & BRIAN P. SCHNEIDER EDS., HEALTHCARE LITIGATION AND RISK MANAGEMENT ANSWER BOOK (PLI 2015).
3. DAVID W. LOUISELL, MEDICAL MALPRACTICE (Matthew Bender 5-vol. looseleaf), on LEXIS.
4. JAMES T. O'REILLY & MICHELLE L. YOUNG, MEDICAL MALPRACTICE: AVOIDING, ADJUDICATING, AND LITIGATING IN THE CHALLENGING NEW CLIMATE (2014).
5. STEVEN E. PEGALIS, AMERICAN LAW OF MEDICAL MALPRACTICE (West CBC 3d ed. 2005 & Supp. 2014) (3 volumes), Westlaw: ALMM.

E. Consent and Confidentiality Reference Materials

1. CALIFORNIA HOSPITAL ASSOCIATION, CONSENT MANUAL (40th ed. 2013).
2. PATRICIA CARTER, HIPAA COMPLIANCE HANDBOOK (2015).
3. CLAIRE C. OBADE, PATIENT CARE DECISION MAKING: A LEGAL GUIDE FOR PROVIDERS (West CBC looseleaf), Westlaw: PCAREDM.
4. FAY A. ROZOVSKY, CONSENT TO TREATMENT: A PRACTICAL GUIDE (4th ed. Aspen 2009).

F. Reference Materials on Other Issues

1. JULIE A. BARNES, MANAGED CARE LITIGATION (ABA-BNA 2005 & Supp. 2008).
2. DAN DOBBS, THE LAW OF TORTS: PRACTITIONER TREATISE (2d ed. Thomson West 2011 & Supp. 2014) (4 volumes).
3. WILLIAM D. GOREN, UNDERSTANDING THE ADA (4th ed. ABA 2013)
4. ALICE G. GOSFIELD ED., HEALTH LAW PRACTICE GUIDE (Thomson/West annual), Westlaw: HTHLPG.
5. JOHN P. MARREN, MANAGED CARE LAW MANUAL (Aspen looseleaf).
6. ALAN MEISEL, KATHY CERMINARA, THADDEUS POPE, THE RIGHT TO DIE (3rd ed. Aspen looseleaf).
7. JEFFREY C. MOFFAT, EMTALA ANSWER BOOK (Wolters Kluwer 2015).

G. Staying Current - Legal Developments

1. BNA newsletters *Health Law Reporter* and *Health Care Daily* cover 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. The American Health Lawyers Association (AHLA) is the largest professional association for this legal practice area. AHLA has some great newsletters that are delivered daily, weekly, and/or monthly. Cheap student memberships are available.
3. Other professional associations also often have valuable materials, from articles to podcasts. The ABA Health Law section has *Health Lawyer, Health eSource*, and other great resources. The Minnesota Medical Association also tracks legal developments pertaining to quality as part of its advocacy efforts. Their monthly magazine *Minnesota Medicine* is freely available.
4. 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.
5. New legal articles found through Westlaw, Lexis, Hein Online, LegalTrac, SSRN, Legal Resource Index, Index to Legal Periodicals, and Index to Foreign Legal Periodicals

6. There are some great blawgs on health law. I have collected many of these at medicalfutility.blogspot.com. I especially recommend Harvard's *Bill of Health* and the *Health Affairs* blog.

H. **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. You can also create alerts for new articles in PubMed and in the journals of key publishers like Springer, Sage, Science Direct, Project MUSE, JSTOR, and similar databases.

I. **Staying Current – And Networking**

1. The Minnesota State Bar Association Health Law section holds monthly breakfast CLE meetings. Breakfast is included and these events are always free for law students.
2. For a summary of these and other local and regional events, subscribe to the Hamline University Health Law Institute's weekly *HLI Brief.*

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. Therefore, closely (but not exactly) following its sequence, I will give the specific assignment for the following week during the prior week.

The current assignment will always be posted on the Blackboard home page. Old assignments will be collected as a Blackboard "document." All the following materials are available from the Blackboard 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.

Please note that this course is cumulative. Most topics build on earlier ones. The course is divided into these eleven main sections:

1. Licensing & credentialing clinicians
2. Duty to treat
3. Treatment relationship
4. Informed consent
5. Medical malpractice
6. Licensing, certifying, and accrediting facilities
7. Hospital liability

8. Managed care liability
9. Malpractice reform
10. Financial incentives for quality
11. Confidentiality & privacy

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1. Licensing & Credentialing Clinicians

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

- Excerpts from FSMB, *Medical Regulatory Trends and Actions* (2014)
- Excerpts from Minnesota Medical Practice Act
- *State v. Miller* (Iowa 1995)

C. Discipline Function

- Excerpts from FSMB, *Medical Regulatory Trends and Actions* (2014)
- Excerpts from Minnesota Medical Board report
- *In re Lawrence Egbert* (Md. State Bd. Physicians, Dec. 2014)

D. Economic Protectionism & Scope of Practice Battles

- *Sensational Smiles v. Mullen* (2d Cir. 2015)

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

1. **Privileging & Credentialing**
    - We will explore this further in unit 7 on hospital liability
2. **Insurance delisting**
    - We will explore this further in unit 8 on MCO liability
3. **Public reporting of outcome measures**
4. **Medicare Exclusion**
    - U.S. Senate Letter to CMS (2013)
    - OIG report (2016)
5. **Specialty Boards**
    - Iglehardt, *New Eng. J. Med.* (2012)

2. Duty to Treat

Physicians have no common law duty to treat sick or injured people. Hospitals sometimes have a common law duty to treat. But such duties have been largely eclipsed by statutory duties, especially EMTALA.

A. Common Law

1. Physicians

- Rosenbaum, *JAMA* (2003) (for overview to 1552)
- *Hurley v. Eddingfield* (Ind. 1901)
- Film clip: *Seinfeld* final episode re good Samaritan

2. Hospitals

- *Wilmington Hosp. v. Manlove* (Del. 1961)
- *Walling v. Flint Osteopathic Hosp.* (Mich. App. 1990)

B. Constitutional Law

Less than 1% of the U.S. population (mostly incarcerated prisoners) has a **constitutional** right to health care.

- *Wideman v. Shallowford Hosp.* (11th Cir. 1987)

C. EMTALA

1. Introduction

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

- ASHRM, *How to Read Statutes & Regulations* (2003)
- Rosenbaum et al., *Health Affairs* (2012)
- Lee, *Annals Health L.* (2004) (overview)
- Zibulewsky, *BUMC Proc.* (2001) (overview)
- Stanger, *Compliance Today* (2015) (overview)

2. Primary Law

- EMTALA statute, 42 U.S.C. 1395dd
- EMTALA regulations, 42 C.F.R. 489.24

3. EMTALA for Hospitals

- *In re Baby K* (4th Cir. 1994)
- *Kaufman v. Franz* (E.D. Pa. 2009)
- *Toretti v. Main Line* (3d Cir. 2009)
- *Smith v. Albert Einstein* (3d Cir. 2010)
- Film clip: *Johnny Carson* (1982)
- Sample hospital policy (as exercise)

3. 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 such as fines and exclusion from Medicare.

- *Burditt v. DHHS* (5th Cir. 1991)
- Dahl, *Testimony before US Commission Civil Rights* (2014)
- U.S. DHHS, Office of the Inspector General, *Patient Dumping,* http://oig.hhs.gov/fraud/enforcement/cmp/patient_dumping.asp

D. ADA

1. Background

- ADA statute, 42 U.S.C. 12101-02 & 12181-82
- Lagu, *Annals Internal Med.* (2013)
- Peacock, *New Eng. J. Med.* (2015)
- Crowley, *JAMA* (2015)

2. Cases

- *Bragdon v. Abbott* (U.S. 1998) (majority op.)
- *Glanz. v. Vernick* (D. Mass. 1991)
- *McElroy v. Univ. Neb.* (D. Neb. 2007)
- *DHHS v. San. Augustin* (DHHS DAB 2012)

E. Other Federal Statutes

- Hill Burton Act (1946), 42 C.F.R. 124.601
- Title VI (1964), 42 U.S.C. 2000d, 42 C.F.R. 80.3
- ACA 1557 (2016)
- *Walker v. Pierce* (4th Cir. 1977)

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3. Treatment Relationship

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

A. Formation & Creation of the Relationship

1. Analogy: Attorney-Client Relationship

- *Togstad v. V.O.M.& K.* (Minn. 1980)

2. **Treating Physicians**

- *Adams v. Via Christi* (Kan. 2001)
- *Clanton v. Von Haam* (Ga. App. 1986)
- *Lyon v. Grether* (Va. 1977)

3. Formal v. Informal Consults

- *Reynolds v. Decatur Hosp.* (Ill. App. 1996)
- *Jennings v. Badgett* (Okla. 2010)
- *Wilson v. Merritt* (Cal. App. 2006)

4. Telemedicine

- *White v. Harp* (Vt. 2011)

5. IMEs and Non-Treating Physicians

- *Bazakos v. Lewis* (N.Y.A.D. 2008)
- *Bazakos v. Lewis* (N.Y. 2009)
- *Smith v. Radecki* (Alaska 2010)
- *Skelcy v. United Health* (3d Cir. 2015)
- Film clip: *Seinfeld* Jackie Chiles

B. **Termination & Ending of the Relationship**

1. Tortuous Abandonment

- *Ricks v. Budge* (Utah 1937)
- *Payton v. Weaver* (Cal. App. 1982)

2. Termination: Ethics & Licensure

- N.J.A.C. 13:35-6.22
- AMA CODE OF MEDICAL ETHICS §§ 8.11, 8.115, 10.01
- Pope Br. *Betancourt v. Trinitas Hosp.* (N.J.A.D. 2010) (22-28)

C. Limitation of Liability in the Treatment Relationship

1. Impermissible Waivers

- *Tunkl v. Regents U. Calif.* (Cal. 1963)
- Film clip: *Ghost Town* (2008)
- Film clip: Weird Al, *Like a Surgeon*

2. **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)
- *Schlegel v. Kaiser* (E.D. Cal. 2007)
- Discharge against Advice Form

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4. Informed Consent

Virtually all clinicians aspire to excellence in diagnosing disease. But far fewer, unfortunately, aspire to the same standards of excellence in diagnosing what patients **want**. The legal doctrine of informed consent recognizes that patients can suffer just as much from a preference misdiagnosis as from a medical misdiagnosis. Both medical misdiagnosis and preference misdiagnosis are types of medical malpractice.

A. **Introduction & Overview**

- Pegalis, *American Law of Medical Malpractice* § 4.1 (optional)

B. **Distinguishing Battery**

- Film clip: *Love and Other Drugs* (2010)
- Film clip: *Whose Life Is It Anyway* (1981)
- Restatement (Second) Torts 15, illus. 1
- *Kohoutek v. Hafner*, 383 N.W.2d 295 (Minn. 1986).

C. **Disclosure Standards (Duty Element)**

There are two main disclosure standards in the United States. These define the scope of the physician's duty. These are the measures or tests for what information the physician has a legal duty to disclose.

1. **Material Risk (Reasonable Patient)**

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. Tongen* (Minn. 1977)
- *Canterbury v. Spence* (D.C. 1972)
- *Arato v. Avedon* (Cal. 1993)
- *Wilson v. Merritt* (Cal. App. 2006)

2. Custom (Reasonable Physician)

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

- *Culbertson v. Mernitz* (Ind. 1992)
- *Rizzo v. Schiller* (Va. 1994)
- Merenstein, *JAMA* (2006)
- Merenstein, *JAMA Int. Med.* (2014)

3. 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, the subjective standard requires disclosure of information that **this very patient** considered material at the time of the intervention.

- *Scott v. Bradford* (Okla. 1979)

D. 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	Emergency
Generally Known	Therapeutic Privilege
Waiver	Public Health
Safe Harbor	Conscience Clause

E. 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 Causation (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.

F. Special Disclosure Duties

In most informed consent cases, the plaintiff's claim concerns the physician's failure to disclose risks from the administered treatment. But informed consent doctrine has also been used to address non-disclosure of other types of information.

1. Experience and Skill

- *Johnson v. Kokemoor* (Wis. 1996)
- *Howard v. UMDNJ* (N.J. 2002) (optional)
- *Marsingill v. O'Malley* (Alaska 2002) (optional)
- *DeGennero v. Tandon* (Conn. 2005) (optional)

2. Conflicts of Interest

- *Moore v. Regents U. Calif.* (Cal. 1990)
- Oregon DOJ (2013)

3. Economic & Financial

- *Hastings Center Rep.* (2014) (optional)

G. State & Federal Regulation

Over the past 50 years, informed consent has evolved primarily as a common law torts-based doctrine. But as many gaps persist, states have specifically mandated certain disclosures by statute. Informed consent is also enforced by state and federal regulators.

1. Statutory Disclosure Mandates

- Minn. Stat. § 145.471 (2015)
- Cal. Health & Safety Code § 442.5
- N.Y. Pub. Health L. § 2997-c
- N.Y. Pub. Health L. § 2803-o
- Pope & Hexum, *J. Clinical Ethics* (2014) (optional)

2. Federal Medicare Requirements

- Youdelman, *Health Affairs* (2008)
- DHHS OCR on EFL

3. **Enforcement by Medical Boards**

- *Wisconsin v. Kokemoor* (Wis. Med. Bd. 1996)

H. **Patient Decision Aids**

Decision aids are an important tool that can meaningfully inform and guide these discussions. These evidence-based educational tools may include educational literature, decision grids, videos, and web-based interactive programs that provide a balanced presentation of the condition and treatment options, benefits, and harms.

- *Kaiser Health News* (March 2015)
- Tulsky, *JAMA Internal Medicine* (2015)
- Wilson, *Critical Care Medicine* (2014)
- Pope & Moulton, *Shared Decision Making* (OUP 2016)
- Pope & Hexum, *Journal of Clinical Ethics* (2013)
- Demonstration of video and interactive PDA

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5. Medical Malpractice

A. Background

1. **Negligent & Non-Negligent Errors**

- James, *J. Patient Safety* (2013)
- Leape & Berwick, *JAMA* (2005)
- Minn. DOH, *Adverse Events in Minn.* (2015)
- Consumer Union, *Senate Health Committee* (July 2014)

2. **Medical Malpractice Litigation**

- Hyman & Silver, *Chi. Kent L. Rev.* (2012)
- Annas, *New Eng. J. Med.* (2006)
- Larriviere, *Neurology* (2008)

B. Standard of Care (the "Duty" Element)

- *McCourt v. Abernathy* (S.C. 1995)
- *Locke v. Pachtman* (Mich. 1994)
- *Hill v. McCartney* (Iowa App. 1998) (optional)

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. The defendant is always measured against the reasonably prudent physician. But which one? The one practicing in this city? In a city like this? In this state? In the United States? The applicable standard depends on state law.

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)

2. Strict Locality

Under this standard, the defendant is measured against what a reasonable physician in the defendant's community would have done. This used to be the majority standard. But it has been largely abandoned, except in Idaho.

- Idaho statute excerpt

3. Statewide

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

- Merenstein, *JAMA* (2006)

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)
- *Chapel v. Allison* (Mont. 1990)
- *Shaffer v. Yang* (Ark. App. 2010)

D. Other Variations in 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)

2. Board Certified Physicians

Even in those states that employ a same or similar community standard, specialists certified by specialty boards 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. A defendant clinician can avoid liability by establishing compliance with any one of these SOCs.

- *Jones v. Chidester* (Pa. 1992)
- PA Civil Jury Instruction 11.04
- *Jandre v. Physician Ins.* (Wis. 2012)

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)

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)

E. Expert Witnesses

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

1. Qualification

- *Creekmore v. Maryview Hosp.* (1st Cir. 2011)
- *Thompson v. Carter* (Miss. 1987) (majority)
- *Jones v. Bagalkotakar* (D. Md. 2010)
- *Daubert v. Merrell Dow* (U.S. 1993) (optional)
- Minn. Stat. § 145.682

2. Weight & Credibility

Once the judge permits the expert to testify, it is up to the jury to determine how persuasive the expert is compared to the other parties' experts.

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

F. Causation

1. But For

Even if they can establish duty and breach, medical malpractice plaintiffs must typically **also** establish that probably they would not have been injured "but for" the defendant's negligence.

2. Lost Chance

Yet, in some jurisdictions plaintiffs can alternatively establish that the defendant's negligence deprived them of a "chance" at avoiding injury.

- *Dickhoff v. Green* (Minn. 2013)
- *Mohr v. Grantham* (Wash. 2011) (en banc)
- *Wendland v. Sparks* (Iowa 1998)
- *Valdez v. Newstart* (Tenn. 2008)

G. Damages

1. Economic & Non-economic

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

2. Punitive & Exemplary

- *McCourt v. Abernathy* (S.C. 1995)
- Minn. Stat. 549.20

3. Loss of Consortium

- Hochfelder, *NY Injury Cases Blog* (2009)

H. Affirmative Defenses

1. Overview

- Hudson, *J. Emergency Med.* (2011)

2. Statutes of Limitation

- *Rock v. Warhank* (Iowa 2008)
- *Stuard v Jorgenson* (Idaho 2011)

3. Statutes of Repose

- *Jewson v. Mayo Clinic* (8th Cir. 1982)

4. Statutes of Repose: Course of Treatment

- *Wells v. Billars* (S.D. 1986)
- *Gomez v. Katz* (N.Y.A.D. 2009)
- *Cunningham v. Huffman* (Ill. 1993)

5. **Assumption of Risk**
   - *Anaya- Burgos v. Lasalvia-Prisco* (D.P.R. 2008)

6. **Comparative Negligence**
   - *Schneider v. Revici* (2d Cir. 1987) (not II.A)

7. **Arbitration & Settlement**
   - *Madden v. Kaiser Hosp.* (Cal. 1976)
   - Levine, *ABA Health eSource* (2010)

I. Alternative Theories of Liability – Tort Based

1. **Res Ipsa Loquitor**
   - *Locke v. Pachtman* (Mich. 1994)
   - *Jones v. Gaes* (Ky. 2011)
   - *Freeman v. X-Ray Assocs*. (Del. 2010)
   - *Harder v*. Clinton (Okla. 1997)

2. **Ordinary Negligence (*e.g.* Non-Patients)**
   - *Bradshaw v. Daniel* (Tenn. 1993)
   - Flashback: see the material on formation above

3. **IIED & NIED**
   - *Marsala v. Yale* (Conn. Super. 2015)
   - *Rideout v. Hershey Med.* (Pa. D&C 1995)

4. **Battery**
   - Flashback: we covered this above under informed consent.

J. Alternative Theories of Liability – Not Tort Based

1. **Breach of Contract**
   - *Kaplan v. Mayo Clinic* (8th Cir. 2011)
   - *Sullivan v. O'Connor* (Mass. 1973)

2. **Elder Abuse**
   - *Winn v. Pioneer Med.* (Cal. App. 2013)
   - *In re Wyatt* (Ariz. 2014)

3. **Vicarious/Captain of the Ship**
   - Spring, *MLMIC Dateline* (2010)
   - *Franklin v. Gupta* (Md. App. 1990)

4. **Criminal**
   - *Queen v. Reeves* (NSWCCA 2013) (excepts)

6. Licensing, Accrediting & Certifying Facilities

A. Overview

- Johnson, *Oxford HB US Healthcare Law*

B. Licensure

- Minnesota Health Facilities Code (excerpts)
- Cal. DOH, Administrative Penalties Report

C. Accreditation

- The Joint Commission, *Fact Sheet*

D. Certification

- Medicare Conditions of Participation (excerpts)
- Donabedian, *JAMA* (1980)
- *Smith v. Heckler* (10th Cir. 1984)
- *Smith v. Bowen,* (D. Colo. 1987)
- *Cospito v. Heckler* (3d Cir. 1984)

7. 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 (see sections above). 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)
    - Restatement (Third) Agency 2.04 & 7.07

2. **Ostensible Agency**
    - *Adamski v. Tacoma Hosp.* (Wash. App. 1978)
    - *Thomas v. Oldfield* (Tenn. 2008)

3. **Non-delegable Duty Doctrine**
    - *Renown v. Vanderford* (Nev. 2010)

C. Direct Liability

In contrast to vicarious liability which concerns only a basis for making the hospital responsible for an individual clinician's negligence, direct liability entails developing a theory of liability against the hospital (the corporate entity) itself. This will often require getting an expert to establish the hospital's standard of care just as we discussed with malpractice against individual clinicians.

1. **Background: National Practitioner Database**
    - HRSA, *NPDB Guidebook* (2001) (excepts)

2. **Negligent Selection**
    - *Johnson v. Misericordia Hosp.* (Wis. 1981)
    - Restatement (Third) Agency 7.05

3. **Negligent Retention**
    - *Engelhardt v. St. John Health System* (Mich. App. 2012)
    - *Frigo v. Silver Cross* (Ill. 2007) (edited)
    - Film clip: *Ghost Town* (2008) (3 strikes)

4. **Negligent Supervision (Policies, Procedures, Equipment)**
    - *Darling v. Charleston Hosp.* (Ill. 1965)
    - *Stroud v. Abington Hosp.* (E.D. Pa. 2008) (4-5, 9-12)
    - *Scampone v. Grane Healthcare* (Pa. Super. 2010)

5. **Ordinary Negligence (Premises)**

6. **Negligence *Per Se***
    - *George v. Northern Health* (E.D. Pa. 2011)

8. 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)
- *Shannon v. McNulty* (Pa. Super. 1998)
- *Petrovich v. Share Health* (Ill. 1999)

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)
- *Pagarigan v. Aetna* (Cal. App. 2005)

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 deny coverage/payment for treatment.

- *Wickline v. State* (Cal. App. 1986)
- *LACMA v. Healthnet* (LASC 2012)
- Parody insurance videos

C. ERISA Preemption (502 Complete Preemption)

Since most people have health insurance from their (or a family member's) job, an MCO's denial of coverage is often the denial of an employee benefit. Consequently, claims regarding such coverage denials must ordinarily be brought under the federal ERISA statute instead of state tort or contract law. 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)
- 28 U.S.C. 1441
- 29 U.S.C. 1132
- U.S. Const., Art. VI
- *Aetna v. Davila* (U.S. 2004)
- *Sarkisyan v. CIGNA* (C.D. Cal. 2009)

C. ERISA Preemption (514 Conflict Preemption)

- 29 U.S.C. 1144
- *Gallagher v. CIGNA* (D. Me. 2007)

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9. Medical Malpractice Reform

A. Overview

- Leflar, *Chest* (2013)
- Shepherd, *Vanderbilt L. Rev.* (2014)
- Schwartz, *NYU L. Rev*. (2013)
- Williams, *Stan. L. & Pol'y Rev*. (2012)

B. Defensive Medicine (Positive & Negative)

- Mello, *Health Affairs* (2010)
- Mass. Med. Society, *Report* (2008)
- Bishop et al., *Archives Internal Med.* (2010)

C. Medical Malpractice Reform

- Kachalia & Mello, *NEJM* (2011)
- Widman, *Cal. L. Rev.* (2010)
- CRS, *Reform* (2006)

D. Initiatives to Reform Medical Malpractice Litigation

1. Reducing Claims Frequency

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

2. **Reducing Claims Severity**

Damage caps | Collateral source offset
Periodic payments | Limit joint & several

- *Fein v. Permanente* (Cal. 1985) (majority)
- *Perry v. Shaw* (Cal. App. 2001)

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

Damage caps | Codify law
Health courts | Arbitration
CPG safe harbor

E. **Alternatives to Malpractice Litigation**

1. **Overview**

- Exploring Alternatives, *Health Affairs* (Jan. 2014)

2. **No-Fault Compensation Schemes**

- Florida Birth-Related Neurological Injury Compensation Assn
- Virginia Birth-Related Neurological Injury Compensation Pgm

3. **Informal & Intramural Dispute Resolution**

- "Benevolent gesture" laws
- "I'm Sorry" programs (e.g. University of Michigan)
- *Lawrence v. MountainStar Health* (Utah App. 2014)
- Mediation programs

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10. Financial Incentives for Quality

A. Never events
B. Pay for performance

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11. Privacy & Confidentiality

A. **HIPAA & HITECH**

- DHHS OCR, *Summary of HIPAA Privacy Rule* (2003)
- DHHS OCR, *Summary of 2013 Amendments*
- Online module

B. **State Law**

- Minn. Stat. 144.291 to 144.34
- *Yath v. Fairview Clinics* (Minn. App. 2009)