

Instructor	Professor Thaddeus Mason Pope
Course Title	Health Law: Quality & Liability
Format	Take Home Final Exam, Spring 2019
Total Time	Four (4) hours
Total Pages	14 pages

Reference Materials Allowed

Open Book (all reference materials allowed)

Take-Home Exam Instructions

1. Please know your **correct Spring 2019 exam number** and include this number at the top of each page of your exam answer (for example, in a header).
2. Confirm that you are using and have typed the **correct exam number** on your exam document.
3. You may **download** the exam from the course Canvas site any time after 12:01 a.m. on Wednesday, March 13, 2019 and before 11:59 p.m. on Saturday, March 23, 2019.
4. You must **upload** (submit) your exam answer file to the Canvas site within four (4) hours of downloading the exam.
5. You must **upload** your exam answer file no later than 11:59 p.m. on Saturday, March 23, 2019. Therefore, the latest time by which you will want to download the exam is 8:59 p.m. on Saturday, March 23, 2019. Otherwise, you will have less time than the full permitted four hours.
6. Write your answers to all parts of the exam in a word processor. Save your document as a **single PDF file** before uploading to Canvas.
7. Use your exam number as the **file name** for the PDF file that you upload.

Instructions Specific to This Examination

GENERAL INSTRUCTIONS:

1. **Honor Code:** While you are taking this 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 final exam period. It is a violation of the Code to share the exam questions. (There may be an accommodation student taking this exam at a different time.) Shred and delete the exam questions immediately upon completion of the exam. Professor Pope will repost the exam after the end of the final exam period.
2. **Competence:** By downloading and accepting this examination, you certify that you can complete the examination. Once you have accepted (downloaded) the examination, you will be held responsible for completing the examination.
3. **Exam Packet:** This exam consists of fourteen (14) pages, including these instructions. Please make sure that your exam is complete.
4. **Identification:** Write your exam number on the top of each page of your exam answer.
5. **Anonymity:** Professor Pope will grade the exams anonymously. Do **not** put your name or anything else that may identify you (except for your exam number) on the exam. **Failure to include your correct exam number will result in a 5-point deduction.**
6. **Total Time:** Your completed exam is due within 4 hours of downloading it but in no case later than 11:59 p.m. on Saturday, March 23, 2019.
7. **Time Penalty:** If you upload your exam answer file more than 4 hours after downloading the exam, then Professor Pope will lower your exam grade **by one point** for every minute over the 4 hours. If the timestamp on your uploaded exam indicates that you have exceeded the 4-hour limit by more than 20 minutes, then Professor Pope may refer the situation for a Code of Conduct investigation and potential discipline. Please save enough time after editing to upload your exam.
8. **Timing:** Professor Pope has designed this exam for completion in two hours. That means you should be able to write complete answers to all the questions in two hours. Yet, since this is a take-home exam, you will want to take some extra time (perhaps one-half hour) to outline your answers and consult your course materials. You will also want to take some extra time (perhaps one-half hour) to revise, polish, and proofread your answers, such that you will not be submitting a “first draft.”
9. **Scoring:** This midterm exam comprises 15% of your overall course grade. While the scoring includes 100 points, these points will be weighted.
10. **Open Book:** This is an OPEN book exam. You may use any written materials, including, but not limited to: (a) any required and recommended materials, (b) any handouts from class, (c) PowerPoint slides, class notes, and (d) your own personal or group outlines.

11. **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, reference materials) to answer the exam questions.
12. **Format:** The exam consists of three parts:
- Part One** 10 multiple choice questions
Worth 2 points each, for a combined total of 20 points
Estimated time = 20 minutes
- Part Two** 3 short answer questions
Worth 15 points each, for a combined total of 45 points
Estimated time = 45 minutes
- Part Three** 1 essay question
Worth 35 points, for a combined total of 35 points
Estimated time = 50 minutes
- That adds up to less than 2 hours. Remember, you have 4 hours to complete this exam. Therefore, you have time to proofread.
13. **Grading:** All exams will receive a raw score from zero to 100. The raw score is meaningful only relative to the raw score of other students in the class. Professor Pope computes your course letter grade by summing the midterm, final, and quiz scores. He will post an explanatory memo and a model answer to Canvas a few weeks after the exam.

SPECIAL INSTRUCTIONS FOR PART ONE

1. Multiple choice items will be completed directly on Canvas.
2. **Ambiguity:** If (and only if) you believe the question is ambiguous, such that there is not one obviously best answer, identify the question number and your answer choice in the PDF that you upload for parts two and three. Neatly explain why. Your objection must both (a) Identify the ambiguity or problem in the question and (b) Reveal what your answer would be for all possible resolutions of the ambiguity. I do not expect this to be necessary.

SPECIAL INSTRUCTIONS FOR PARTS TWO AND THREE

1. **Submission:** Create clearly marked separate sections for each problem. You do not need to “complete” the exam in order. Still, structure your exam answer document in this order:
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. 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.
3. **Answer Format:** This is very 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 between sections and paragraphs.
4. **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.
5. **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?
6. **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.
7. **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.
8. **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.

Exam Misconduct

The Code of Conduct prohibits dishonest acts in an examination setting. Unless specifically permitted by the exam or proctor, prohibited conduct includes:

- Discussing the exam with another student
- Giving, receiving, or soliciting aid
- Referencing unauthorized materials
- Reading the questions before the examination starts
- Exceeding the examination time limit
- Ignoring proctor instructions

MULTIPLE CHOICE QUESTIONS

- Below are 10 multiple choice questions.
- Each question is worth 2 points for a total of 20 points.
- Recommended time is 20 minutes.
- **Multiple choice questions are to be completed on Canvas, but are also pasted below for reference.**

1. Plaintiff agreed to undergo a Da Vinci robotic hysterectomy performed by Dr. Antwerp. She signed a written consent form authorizing that very surgical procedure. Plaintiff does not claim that Dr. Antwerp performed a different surgical procedure, or that a different physician performed the surgery (a so-called “ghost surgery”). Rather, plaintiff alleges that she would not have consented to the Da Vinci robotic hysterectomy had she known about Dr. Antwerp’s utter and complete lack of experience with that procedure. After all, Dr. Antwerp’s inexperience significantly increased the risks of injury from the procedure.

Plaintiff’s best cause of action is:

- A. Battery
 - B. Informed consent
 - C. Abandonment
 - D. EMTALA
 - E. ADA
2. Patient with mental disabilities was taken to Breda Hospital following a sexual assault. Hospital admitted patient to treat her mental illness. Patient claims that the hospital neither administered a rape kit nor conducted its medical rape examination as it does for other rape victims.

Under EMTALA, patient probably can state a claim for:

- A. Failure to stabilize
- B. Failure to screen
- C. Both A and B
- D. Neither A nor B

3. Under the facts in the previous problem, plaintiff further asserts that clinicians provided inadequate treatment because they misattributed her physical symptoms to her mental illness. Suppose that clinicians did, in fact, assess patient in a manner differently from other sexual assault patients because of her mental illness.

To obtain relief in the form of money damages, plaintiff could assert a claim under:

- A. ADA
 - B. EMTALA
 - C. ACA Section 1557
 - D. Both B and C
 - E. None of the above
4. Mrs. Wilmott is a deaf individual who communicates primarily through American Sign Language. Her husband was admitted for treatment at Ghent Hospital twenty-five times over the past two years. During this time, he was so ill that Mrs. Wilmott acted as his healthcare agent making treatment decisions on his behalf. Unfortunately, the hospital did not provide a qualified sign language interpreter. Consequently, Mrs. Wilmott missed out on information like her husband's shortening life-expectancy and how to press a call button for a nurse. In unrelated proceedings, hospital witnesses testified that they felt they had no problems communicating with Mrs. Wilmott.

Mrs. Wilmott may assert claims under:

- A. Section 1557
- B. EMTALA
- C. Informed consent
- D. Abandonment
- E. A and B
- F. A and C

5. Patient was at a rehabilitation hospital after knee replacement surgery. One day, the hospital hired a medical transportation company to take patient to a doctor's appointment. Before the transport, the company's driver required the patient to sign an agreement that, in part, released the company from any liability. After the appointment, the patient fell as he was getting into the company's van. He sued the medical transportation company. The transportation company moved to dismiss based on the exculpatory provisions of the agreement.

The court should:

- A. Deny the motion to dismiss
 - B. Deny the motion to dismiss only if this accident occurred in Florida or Iowa
 - C. Grant the motion to dismiss
 - D. Grant the motion to dismiss, but only if the exculpatory language is sufficiently clear to put the patient on notice
6. Your client, a physician, explains that a colleague approached her in the hallway and said, "I have a patient with heart failure. Can I run something by you?" Your client further explains that after listening to a 30-second description from her colleague, she offered a few words of advice. That patient was later injured by the treating physician (your client's colleague).

Which of the following is most likely true?

- A. Your client is liable for malpractice, because her advice was sloppy and incomplete.
 - B. Your client is liable for malpractice, if her advice influenced the treating physician's treatment plan.
 - C. Both A and B.
 - D. Your client is not liable for medical malpractice.
7. Your client is an ED physician. Patient arrives at the ED by ambulance complaining of a racing heart. Your client assesses patient in the same way that similarly situated patients are assessed at this hospital. Based on this assessment, your client diagnoses patient as suffering from a thyroid storm. Patient is treated for that condition. But her condition deteriorates, and she later dies. In fact, patient had a cardiac condition.

Under EMTALA, your client:

- A. Is potentially civilly liable
- B. Is potentially subject to administrative sanctions
- C. Both A and B
- D. Neither A nor B

8. In late 2018, the *New York Times* reported that Hedda Martin was denied a heart transplant because of her finances. The transplant itself costs over \$1,000,000. Plus, the patient will need to buy \$2500 worth of anti-rejection drugs each month for the rest of her life. Suppose that Hedda's cardiologist referred her to Mid Minnesota Health, the closest transplant center, for evaluation. Further suppose that Hedda qualified clinically. In fact, she will die without a transplant. Nevertheless, because of her poor financial situation, Mid Minnesota Health would not list Hedda unless she first made a cash deposit of \$50,000.

Mid Minnesota's conduct probably constitutes:

- A. An EMTALA violation
 - B. An ADA violation
 - C. Tortious abandonment
 - D. None of the above
9. In February 2019, the *New York Times* "ethicist" column asked: "Can a doctor refuse to treat a patient who takes cannabis?" Suppose your client is a physician who no longer wants to treat her patient, because of her cannabis use. Can your client fire her patient?
- A. Yes, because cannabis is illegal under federal law, even though it is legal under many state laws.
 - B. Yes, so long as she provides sufficient notice that enables the patient to find a new physician.
 - C. No, the use of cannabis is not an adequate reason for firing a patient, especially since its use is specifically authorized under the state's medical marijuana law.
 - D. No, the physician must continue to treat the patient either until the end of the course of treatment or until the patient terminates the relationship.

10. Luke had a scheduled cardiac ablation procedure at North Minnesota Memorial. Soon after the procedure, while Luke was still admitted as a patient at NMM, his condition worsened. He complained of upper back pain, and his creatinine levels increased, clear signs of things to come.

The following day, Luke was acutely hypertensive, and his legs felt weak and heavy. Luke's kidneys were failing. His back pain worsened, his creatinine levels continued to rise, and he was unable to urinate. By the end of the day, Luke's lower extremities were paralyzed. Spinal surgery was conducted to relieve the spinal cord compression. But Luke is now paralyzed and suffers from severe neurological deficits.

Which of the following is most likely true?

- A. NMM has violated EMTALA, because it failed to stabilize Luke's emergency medical condition.
- B. NMM has violated EMTALA, because Luke was on hospital property and in apparent need of medical attention.
- C. NMM has not violated EMTALA, because it had no actual knowledge of Luke's emergency medical condition.
- D. NMM has not violated EMTALA.

Short Answer Question 1

- This question is worth 15 points
- Limit your response to 500 words. This is only a limit, not a target or suggested length.
- Recommended time is 15 minutes.

In 2019, one of the largest medical associations in the United States, the American College of Physicians, published the seventh edition of its *Ethics Manual* (Ann Intern Med. 2019;170:S1-S32). On the third page of this 32-page document, the *Ethics Manual* states the following:

An individual patient–physician relationship is formed on the basis of mutual agreement. In the absence of a preexisting relationship, the physician is not ethically obliged to provide care to an individual person unless no other physician is available, as is the case in some isolated communities, or when emergency treatment is required. Under these circumstances, the physician is ethically bound to provide care and, if necessary, to arrange for proper follow-up. Physicians may also be bound by contract to provide care to beneficiaries of health plans in which they participate.

Do these duties described by the American College of Physicians differ from the duties that a physician has under the law? If so, explain the difference.

Short Answer Question 2

- This question is worth 15 points
- Limit your response to 500 words. This is only a limit, not a target or suggested length.
- Recommended time is 15 minutes.

Consider the following survey result from the annual *Medscape Internist Ethics Report* published in 2019. One in seven physicians would (and one in three physicians might) either avoid a new patient or fire an existing patient, if they thought that the patient would not be adherent to the physician's treatment plan.

Does this conduct necessarily expose the physician to legal risk? If yes, explain why. If no, explain why not. Does the legal analysis for cherry-picking differ from the legal analysis for lemon-dropping?



WOULD YOU EVER "CHERRY-PICK" OR "LEMON-DROP" PATIENTS TO AVOID THOSE WITH COMORBID DISEASE OR WHO ARE LEAST LIKELY TO ADHERE TO TREATMENT REGIMENS?

14%
YES

64%
NO

21% IT
DEPENDS

Short Answer Question 3

- This question is worth 15 points
- Limit your response to 500 words. This is only a limit, not a target or suggested length.
- Recommended time is 15 minutes.

In February 2019, the DHHS Office for Civil Rights announced that it had resolved a complaint against the University of North Carolina Health Care System. OCR alleged that UNC unlawfully denied an individual to be placed on the national organ donor waiting list because of the complaining individual's intellectual disability.

Specifically, UNC transplant clinicians determined that the complaining individual needed a heart transplant and would die without one. Nevertheless, those same UNC clinicians also determined that the complaining individual was not a good candidate because of her developmental disabilities. OCR has not released additional details about this case.

After a facilitated negotiation, UNC settled this matter and agreed to list the complaining individual on the organ donor waiting list. But suppose that UNC instead had decided to fight the complaint. Was UNC's initial conduct necessarily illegal? How might UNC have defended itself?

Essay Question 1

- This question is worth 35 points
- Limit your response to 1500 words. This is only a limit, not a target or suggested length.
- Recommended time is 50 minutes.

Celia is a 28-year-old female patient with Crohn's disease. Crohn's disease is an inflammatory bowel disease. It causes inflammation of the digestive tract, which can lead to abdominal pain, severe diarrhea, fatigue, weight loss and malnutrition. Inflammation caused by Crohn's disease can involve different areas of the digestive tract in different people.

Chronic inflammation, like that which Celia has, can lead to open sores (ulcers) anywhere in the digestive tract, including the mouth and anus, and in the genital area (perineum). Sometimes ulcers can extend completely through the intestinal wall, creating a fistula, an abnormal connection between different body parts. Fistulas can develop between the intestine and skin, or between the intestine and another organ. Fistulas near or around the anal area (perianal) are the most common kind. When fistulas develop in the abdomen, food may bypass areas of the bowel that are necessary for absorption. Fistulas may occur between loops of bowel, into the bladder or vagina, or out through the skin, causing continuous drainage of bowel contents to the skin. This is a serious condition that requires immediate medical attention.

In April 2018, Celia went to see Dr. Rotter, a gastroenterologist with Howard University Health System in Washington, DC. At the beginning of the office visit, Celia explained to Dr. Rotter that she prefers the least risky therapy, because she is especially keen on avoiding side effects from treatment. Celia has this risk averse attitude, because she witnessed her sister suffer terribly from severe nausea and constipation caused by her chemotherapy treatment for cancer.

Dr. Rotter explained to Celia that the least risky therapy was mesalamine only. However, Dr. Rotter did not provide Celia with a thorough discussion of the risk of disease progression. Nor did Dr. Rotter explain that other therapies (like corticosteroids, antibiotics, and immunosuppressants) have demonstrated dramatically more conclusive maintenance of inflammation remission. Based on her discussion with Dr. Rotter, Celia chose the mesalamine only therapy. Dr. Rotter competently administered the mesalamine therapy.

Fast forward eight months. Dr. Rotter's treatment plan accomplished Celia's stated goals. Celia developed no side effects from the mesalamine therapy. However, Celia did develop fistulas that required surgery. Moreover, Celia suffered complications associated with the fistula repair procedures, including bowel blockage (obstruction), infection, and loss of bowel control (incontinence).

Celia has hired you to sue Dr. Rotter. Describe and assess Celia's strongest claims.

END OF EXAM