Exam Number __ __ __ __

Instructor	:	**Thaddeus Pope**
Course Title	:	**Medical Law at the End of Life**
Section	:	**7**
Format	:	**MC + Essay**
Date	:	**March 21, 2012 (Wednesday)**
Total Time for Exam	:	**1** hour **15** minutes
Total Number of Pages	:	**8**
Exam Password	:	

Reference Materials Allowed

Open Book (all reference materials allowed)

General Instructions

Please count the number of pages. **All** pages are sequentially numbered at the bottom right corner. If you are missing a page, you need a new exam. Contact the Office of the Registrar or your proctor as soon as possible.

Do not write your name on **any** examination materials. Write your four-digit 2012 Spring midterm exam number on the top right corner of the first page of this exam. If you don't know your exam number, get it from Piperline.

If you are using SofTest to write your exam answers, please read the instructions before you start your laptop. You must exit your exam immediately at the end time for the exam. If your laptop becomes inoperative you should start writing in a bluebook immediately. If you choose to restart the laptop you will lose time as **no extra time will be granted to compensate for technical problems**. There is no technical assistance available during the examination.

If you are using a bluebook to write your exam answers, please fully complete the cover information for all bluebooks. Before you turn them in, sequentially number and nestle them so that the first bluebook has any others inside.

At the conclusion of the examination, place all examination materials including scratch paper but not the receipt in the plastic bag, and return it to the proctor. If this is a self-scheduled exam, you must stop at the end of the time allotted for your exam and **immediately** return all exam materials to the Office of the Registrar. You will collect your receipt there.

Instructions Specific to This Examination

GENERAL INSTRUCTIONS:

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

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

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

4. **Exam Packet:** This exam consists of **eight (8) pages**, including this cover page. Please make sure that your exam is complete.

5. **Identification:** Write your exam number on all your exam materials.

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

7 **Timing:** This exam must be completed during class 11:00 – 12:15 p.m.

8 **Scoring:** There are 60 total points on the exam, approximately one point per minute. The final exam comprises 20% of your overall course grade, 60 of the 300 total course points.

9 **Open Book:** This is an OPEN book exam. You may use **any** written materials, including, but not limited to: any required and recommended materials, any handouts from class, PowerPoint slides, class notes, and your own personal or group outlines. You may not use a computer other than in its ExamSoft mode.

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

> **PART ONE** comprises 10 multiple choice questions worth two points each, for a **combined** total of 20 points. The suggested total completion time is **20 minutes** (2 minutes each).
>
> **PART TWO** comprises one essay question worth 40 points, and has a suggested completion time of **55 minutes**.

11 **Grading:** All exams will receive a raw score from zero to 60. The raw score is meaningful only **relative** to the raw score of other students in the class. Your course letter grade is computed by summing the midterm, final, and quiz scores. I will post an explanatory memo and a model answer to TWEN a few weeks after the exam.

SPECIAL INSTRUCTIONS FOR PART ONE:

1. **Circle the Best Answer:** For each question**, circle** the best answer choice on this exam itself, whether in hard copy or ExamSoft.

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

SPECIAL INSTRUCTIONS FOR PARTS TWO, THREE, & FOUR:

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

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

3. **Outlining Your Answer:** I strongly encourage you to use **at least** one-fourth of the allotted time per question to outline your answers on scrap paper **before** beginning to write in your exam booklet or ExamSoft file. Do this because you will be graded not only on the substance of your answer but also on its clarity and conciseness. In other words, organization, precision, and brevity count. If you run out of insightful things to say about the issues raised by the exam question, stop writing until you think of

something. Tedious repetition, regurgitations of law unrelated to the facts, or rambling about irrelevant issues **will** negatively affect your grade.

4. **Answer Format:** This is important. **Use headings and subheadings**. Use short single-idea paragraphs (leaving a blank line between paragraphs). Do **not** completely fill the page with text. Leave white space between sections and paragraphs.

5. **Answer Content:** Address **all** relevant issues that arise from and are implicated by the fact pattern and that are responsive to the "call" of the question. Do not just summarize all the facts or all the legal principles relevant to an issue. Instead, **apply** the law you see relevant to the facts you see relevant. Take the issues that you identify and organize them into a coherent structure. Then, within that structure, examine issues and argue for a conclusion.

6. **Citing Cases:** You are welcome but **not** required to cite cases. While it is sometimes helpful to the reader and a way to economize on words, do not cite case names as a complete substitute for legal analysis. For example, do **not** write: "Plaintiff should be able to recover under *A v. B.*" Why? What is the rule in that case? What are the facts in the instant case that satisfy that rule?

7. **Cross-Referencing:** You may reference your own previous analysis (*e.g.* B's claim against C is identical to A's claim against C, because __." But be very clear and precise what you are referencing. As in contract interpretation, ambiguity is construed against the drafter.

8. **Balanced Argument:** Facts rarely perfectly fit rules of law. So, recognize the key weaknesses in your position and make the argument on the other side.

9. **Additional Facts:** If you think that an exam question fairly raises an issue but cannot be answered without additional facts, state clearly those facts (reasonably implied by, suggested by, or at least consistent with, the fact pattern) that you believe to be necessary to answer the question. 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;

Using electronic devices (other than a laptop running SofTest);

Referencing unauthorized materials;

Reading the questions before the examination starts;

Exceeding the examination time limit;

Removing **any** examination materials from the room (including scratch paper); and

Ignoring proctor instructions.

DO NOT READ PAST THIS PAGE UNTIL INSTRUCTED TO DO SO

PART ONE

10 questions worth two points each = 20 points

Suggested time = two minutes each = 20 minutes

Questions 1 to 4 concern Ruth, a 59-year-old Minnesota resident.

1. Ruth has full decision-making capability. She has just had extensive diagnostic tests. Her physician advises that she has a serious form of cancer, but that certain treatments may well extend her life to 12 or more years. Without any treatment he estimates that Ruth will live from 2 to 2-1/2 years. The doctor explains side effects and alternative therapies. Ruth talks with her husband and children. She tells the doctor that she will not undergo the treatment on account of the side effects. She only wants comfort care.

   Does Ruth have the legal right to reject treatment even if—as here—that will bring on her death much sooner?

   A. Yes, in virtually all cases.
   B. Yes, but in only some rare cases.
   C. No, unless she has an advance directive specifically refusing this treatment.
   D. No.

2. The doctor talks further with Ruth and her husband and persuades her to undergo treatment. At one point it becomes necessary to install a feeding tube and intravenous administration of fluids. Ruth consents to this, but after a while changes her mind. She directs that the artificial administration of fluids and food be ended. The doctor warns Ruth and her husband that without them she will lapse into a coma and probably die in a week or so. Ruth persists in her demand that the tubes be taken out.

   Does Ruth have the right to have the tubes removed even if—as here—that will cause her death?

   A. Yes, in virtually all cases.
   B. Yes, but in only some rare cases.
   C. No, unless she has an advance directive specifically refusing this treatment.
   D. No.

3. Assume the previous facts are somewhat different. Ruth has lapsed into a coma with the tubes in place. Her husband, Finley, is her duly appointed agent for medical decisions. He consults fully with the physician and decides that Ruth would want the tubes removed were she awake. He talks with their two children. Sadly, they all concur, that "mom" would want the tubes taken out. Finley directs the physician to remove the tubes, although he well realizes that this will cause his wife's death in a week or so.

   Does Finley have the right to do this, such that the doctor and hospital must comply?

   A. Yes, in virtually all cases.
   B. Yes, but in only some rare cases.
   C. No, unless Ruth has an advance directive specifically refusing this treatment.
   D. No.

4. If Ruth had not completed an advance directive appointing Finley as agent, would Finley still be able to make the treatment decision that he made in Question 3?

   A. Yes, in virtually all cases.
   B. Yes, but in only some rare cases.
   C. No, unless a court appointed him as Ruth's guardian.
   D. No.

Questions 5 and 6 concern George, a 54-year-old Minnesota resident.

5. George suffers from terminal AIDS. He has a valid advance directive that directs that "no heroic measures" be used to prolong his life in the event he is unable to participate in decision-making as to his medical care. The advance directive explicitly states that no feeding tubes or artificial administration of fluids are to be used. The hospital and his physician both have copies of the advance directive, and it is noted on his "chart." George lapses into a coma, and the hospital inserts a feeding tube and begins intravenous administration of fluids.

   May the hospital lawfully do this in order to continue his life?

   A. Yes, because this is an "emergency."
   B. Yes, because this is not a battery, since it is life-saving and not harmful.
   C. No, unless the hospital has a good faith belief that the advance directive is invalid.
   D. No, because advance directives are triggered only upon the patient's incapacity.

6. George's long-time companion, Robert, comes to visit and is deeply relieved to find that the hospital has disregarded George's advance directive in order to continue his life. Robert directs the hospital to continue with the artificial administration of fluids and food.

   May Robert lawfully make this treatment decision?

   A. Yes, but only if he has been appointed as agent in the advance directive.
   B. Yes, even if he has not been appointed as agent.
   C. No, unless he is George's domestic partner.
   D. No.

Questions 7 and 8 concern Dot, a 79-year-old Minnesota resident.

7. Dot is suffering from advanced diabetes and has a seriously gangrenous right leg. Her physician tells her that unless the leg is amputated she will die. She replies: "If I can't dance I don't want to live. The leg stays."

   Is Dot legally entitled to reject the necessary life-saving treatment?

   A. Yes, if she has capacity to make this decision.
   B. Yes, even if she lacks capacity.
   C. No, because the treatment is life-saving.
   D. No, because her condition is treatable.

8. Dot lapses into a coma. She has difficulty breathing, so a ventilator is installed. Dot's niece, who is her duly appointed agent for medical decisions, comes to visit and is horrified at this. The niece directs that the ventilator be turned off. The advance directive appointing the niece is on file with the hospital and noted on the chart. The physician protests that Dot can't breathe on her own and will die if that were done. The niece persists in directing that the ventilator be turned off, arguing that she well knows this is what Dot would want.

   Must the hospital follow the niece's direction although this will kill Dot?

   A. Yes, in virtually all cases.
   B. Yes, but in only some rare cases.
   C. No, unless Dot specifically rejected this treatment in an advance directive.
   D. No.

9. Rachael recently moved to Minnesota to attend law school. She was previously a resident of Ohio where she completed an advance directive clearly valid under Ohio law. Her directive does not provide for anything that would be unlawful under Minnesota law.

   If Rachael is admitted to a Minnesota hospital with her advance directive but without capacity, then:

   A. Providers MUST comply with the Ohio advance directive.
   B. Providers MAY comply with the Ohio advance directive.
   C. Providers MUST NOT comply with the Ohio advance directive.
   D. Providers MUST NOT comply with the Ohio advance directive, unless it has been witnessed by Minnesota residents.

10. Ms. Ashe has cancer. Her oncologist has discussed only radiation treatment with Ms. Ashe. But then, without Ms. Ashe's knowledge, he provided chemotherapy instead of radiation treatment. Ms Ashe's easiest to prove cause of action would be:

    A. Medical malpractice
    B. Battery
    C. Informed consent under the custom-based reasonable physician standard for disclosure (e.g. Culbertson)
    D. Informed consent under the material risk standard for disclosure (e.g. Canterbury)

PART TWO

1 essay question worth 40 points

Suggested time = 55 minutes

In September 2011, Mindy Ree, a 44-year-old mother of three young children, was diagnosed with advanced pancreatic cancer. Pancreatic cancer is a particularly painful form of cancer which usually causes progressively worse pain and other distressing symptoms over time. It requires careful, attentive, and personalized pain management responsive to the specific experience and symptoms of each patient.

Mindy's pain and symptoms escalated quickly. She was soon referred to Seesonz Hospice in Rochester, Minnesota. Mindy entered Seesonz in November 2011. At Seesonz, Mindy was noted to be in severe and unbearable pain. One chart entry reads:

> Pt. upright having difficulty finding comfortable way to be-severe pain when sitting or lying down, pt. standing. pt's severe pain is biggest issue- pt. needs relief.. ...

Other Seesonz records record over 40 pain scale reports of 6, 7, 8, 9, and 10 (out of 10). While treated with morphine and other drugs, this was insufficient to address Mindy's pain.

Mindy entered Seesonz with the goal of bringing her pain and symptoms under control and to have a peaceful death. Instead, in January 2012, Mindy died in misery. Mindy's final weeks were underscored by terrible and almost continuous pain. Mindy was never told about some generally-accepted pain-management options. In particular, she was never told about PSU. PSU (palliative sedation to unconsciousness) is the use of sedative medications to relieve extreme (refractory) suffering by pharmacologically making the patient unaware and unconscious (as in a coma or deep sleep) while the disease takes its course, eventually leading to death. In contrast to other palliative therapy, unconsciousness is the intended goal of PSU rather than a side effect.

1. **Mindy's parents are distressed at the manner in which Minday died. Fully argue and evaluate the best private cause(s) of action that they might bring against Seesonz. (32 points)**

2. **Now, contrary to the actual facts above, suppose that Mindy got PSU. Since PSU renders the patient unconscious and unable to orally ingest food and fluid, the patient must be maintained on clinically-assisted nutrition and hydration (CANH), a feeding tube. If Mindy left no advance instructions, can Mindy's parents direct the withdrawal of CANH even though it was required only by Mindy's decision for PSU and not by her underlying condition? (8 points)**

END OF EXAM

Pope, *Medical Law at the End of Life*
Midterm Exam Scoring Sheet (Spring 2012)

Multiple Choice (2 points each)

1	**A**	**6**	**D**
2	**A**	**7**	**A**
3	**A**	**8**	**A**
4	**A**	**9**	**A**
5	**C**	**10**	**B**

Essay

Duty

Material risk standard:

Has been adopted in Minnesota. 2

Would the RPP in the patient's circumstances think this information re PSU is material, significant? 2

Application of duty standard:

RPP is one in the position of the patient.
Patient had bad pain, and it was getting worse.
She had no chance of any meaningful recovery. 6

RPP would especially want to know about PSU, if GAHCS. 2

Breach

PTF was never told about PSU. 4

Injury

Patient had significant physical pain and suffering. 4

Causation

RPP in the patient's shoes would (probably) choose PSU.

Patient's pain was very bad.
Other options for pain control were ineffective.
In contrast, PSU would effectively control the pain. 4

The whole point of hospice was comfort. 2

Unconsciousness is a negative. But she did not have Much opportunity for meaningful interaction anyway. 2

PSU would avoid pain & suffering. 4

Sedation to unconsciousness avoids awareness.

Decision maker

Patient lacks capacity.
But she still has the right to refuse.
Parents are authorized decision makers. 2

Decision-making standard

Substituted judgment

It is unclear what the patient would do.
But she did choose hospice and PSU. 2

Best interest

Patient had a limited prognosis.
She was not "living" her life anyway.
She was terminal and already unconscious. 2

Evidentiary standard

Unclear
State interests are outweighed where patient is terminal.
(CANH is more controversial, especially where not necessitated by the patient's underlying condition.) 2

TOTAL 40

OUTCOME

- The scores ranged from 39 to 51.
- The average score was 42.