Exam ID # _____

WIDENER UNIVERSITY SCHOOL OF LAW

HEALTH LAW I MIDTERM EXAM

Professor Pope **Fall 2011**

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 **eleven (11) pages**, including this cover page. Please make sure that your exam is complete.

5. **Identification:** Write your exam number in three places:

   (1) Write it in the space provided in the upper-right hand corner of this page.
   (2) Write your exam number on the cover of each Bluebook (or your ExamSoft file) that you use for Part Two.
   (3) Write your exam number on the upper-right-hand corner of your envelope.

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

7 **Timing:** This exam must be completed within 85 minutes (6:30 – 7:55 p.m.).

8 **Scoring:** There are 60 total points on the exam, approximately 0.70 points per minute. The midterm 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 **30 minutes** (3 minutes each).
>
> **PART TWO** comprises one essay question worth 40 points. The suggested completion time is **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. But for informational purposes only, your total raw score will be converted into a scaled score and letter grade, based on the class curve. There are two separate curves: one for L.L.M and S.J.D. students and one for J.D. students. The applicable mandatory curve in this class permits a maximum average grade of 3.40 for the J.D. students. I will post an explanatory memo and a model answer to TWEN a few weeks after the exam.

12 **L.L.M. and S.J.D. Students ONLY:** The timing limits discussed elsewhere do **not** apply. I will email a PDF of the exam to L.L.M. and S.J.D. students on Thursday night. They must submit a hard copy of both this exam booklet and their typed exam answers to the law school Registrar before 5:00 p.m. on Wednesday, October 19. The essay answer must not exceed 1800 words. Please address any questions to the Registrar.

SPECIAL INSTRUCTIONS FOR PART ONE:

1. **Format:** This Part contains 10 multiple choice questions, worth two points each, for a combined total of 20 points. This part has a suggested completion time of 30 minutes. Please note that the questions vary in both length and complexity. You might answer some in 20 seconds and others in three minutes.

2. **Identification:** Write your Student ID on the first page of this exam booklet.

3. **Circle the Best Answer:** For each question**, circle** the best answer choice on this exam itself.

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

SPECIAL INSTRUCTIONS FOR PART TWO:

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

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

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

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

STOP !

Do NOT turn this page until the proctor signals

PART ONE

10 questions worth two points each = 20/60 points

Suggested Time = three minutes each = 30/85 minutes

1. Patty was treated for a form of thyroid cancer that is associated with multiple endocrine neoplasia, an autosomal dominant condition (meaning that you only need to get the abnormal gene from one parent in order for you to inherit the disease). Three years later, Patty's adult daughter, treated by a different physician, was found to have the same type of cancer. The daughter filed an informed consent lawsuit against the physician who had treated her mother. She argued that if she had known about the genetic risk of thyroid cancer earlier, then she would have taken steps to detect and treat her cancer at a potentially curable stage.

   In a material risk jurisdiction, will the daughter's action probably succeed?

   A. Yes, if the reasonably prudent physician would disclose the risk
   B. Yes, if the risk were important to a reasonable patient in the daughter's situation
   C. No, because the reasonable prudent person would not take steps to detect and treat potentially curable cancer
   D. No, because the physician had no duty to disclose to daughter

2. Virginia was admitted to the intensive care unit of Brandywine Hospital three weeks ago. Yesterday, the hospital discovered that Virginia's insurance has run out because she reached her maximum coverage limit of $250,000. Even though Virginia continues to need critical care services such as mechanical ventilation to stay alive, the hospital has discharged her home.

   The hospital's action in discharging Virginia probably constitutes:

   A. A violation of EMTALA
   B. Tortuous abandonment
   C. Both a violation of EMTALA and tortuous abandonment
   D. Neither a violation of EMTALA nor tortuous abandonment

3. Fareba went to Dr. Huxtable's private physician office after accidentally cutting off her finger while chopping carrots. Fareba quickly completed a new patient application (with her other hand). Before examining her and immediately upon realizing that Fareba had no health insurance, Dr. Huxtable said that he could not treat her.

Dr. Huxtable's refusal to treat constitutes:

A. A violation of EMTALA
B. Tortuous abandonment
C. A breach of informed consent, if Dr. Huxtable failed to at least apprise Fareba of the risks from not getting appropriate treatment
D. None of the above

4. Mr. Villines presented at the hospital with kidney stones. When the stones did not pass overnight, the physician recommended surgery. While Mr. Villines was awaiting surgery, a nurse presented him with a form titled "Consent for Anesthesia." The form listed several different types of anesthesia along with their techniques and risks. It also recited that the risks had been explained to the patient; that the type of anesthesia "checked below" would be used for the procedure; and that the patient consented to the designated anesthesia service.

The form, however, was completely blank when presented to Mr. Villines and specified no particular type of anesthesia service; neither had Mr. Villines met with an anesthesia provider at that point. Nevertheless, Mr. Villines signed the form at the nurse's request, and was taken to the preoperative area of the hospital. The anesthesiologist then arrived and immediately proceeded to administer anesthesia. But the anesthesiologist experienced difficulty administering the spinal block and made a large number of punctures in Mr. Villines's back which later caused a serious inflammatory condition called arachnoiditis.

Mr. Villines probably has a successful action against the anesthesiologist for:

A. Informed consent
B. Battery
C. Both informed consent and battery
D. Neither battery nor informed consent, because he signed the form

5. Which of the following is true?

A physician-patient relationship can be terminated:

A. Only with the consent of the patient
B. Only if the physician can demonstrate a pattern of abusive behavior by the patient
C. By the physician only when the patient no longer needs the medical services that the physician was providing
D. By the physician with sufficient notice

6. The ADA protects not only patients but also healthcare providers. In 2009, Dr. James was hired by the Temple University Hospital. In 2010, Temple fired Dr. James after she disclosed that she was diagnosed as having bipolar disorder and neurocardiac syncope, a heart condition requiring a pacemaker. Although Temple did not research or identify what risks Dr. James posed or whether reasonable modifications would eliminate the risk, Temple explained: "It is clear and obvious that Dr. James poses a potential significant risk to the health and safety of others."

If Dr. James sues Temple for violating the ADA, what will be the likely result?

A. Plaintiff wins, because it is sufficient that an ADA plaintiff establishes: (1) she is disabled, (2) she was discriminated because of her disability, and (3) she can competently practice medicine (i.e. is otherwise qualified).
B. Plaintiff wins, because defendant has failed to make an individual assessment of the risk posed.
C. Defendant wins, because the defendant has articulated a plausible risk to others defense.
D. Defendant wins, because the plaintiff failed to bear her burden of establishing that she is **not** a risk to others.

7. On August 23, 2011, Ramos arrived at Widener Hospital with a history of abdominal problems and experiencing abdominal pain. He subsequently vomited blood and was diagnosed with upper gastrointestinal bleeding. Because Widener Hospital did not have gastroenterologic services available, the emergency room physician, Dr. Finn, arranged with a doctor from the Chester Medical Center (CMC) to have Ramos transferred. Dr. Finn then prepared and signed a "Clinical Summary and Examination at the Moment of Transfer." In the space provided, he wrote that Ramos needed a gastroenterologist, none was present at Widener, and, therefore, he needed to be transferred, because the benefits of a gastroenterologist outweighed the dangers of transportation.

   Ramos and his medical records were then transported to CMC in an ambulance staffed with appropriate medical technicians. Following a drop in Ramos's hemoglobin level, a gastroenterologic team at CMC performed an endoscopic procedure that stopped Ramos's bleeding ulcer. Unfortunately, his bleeding began again later. Blood transfusions and an attempted surgical procedure were unsuccessful in saving his life.

   Against Widener Hospital, Ramos' estate can probably establish a violation of:

   A. EMTALA's screening obligation
   B. EMTALA's stabilization obligation
   C. Both EMTALA's screening and stabilization obligations
   D. None of the above

8. On June 14, 2011, Ms. Welch was thirty-four weeks pregnant. Early that morning, around 5:25 a.m., Ms. Welch awoke, felt a gush of water, and felt the umbilical cord protruding between her legs. Ms. Welch had suffered a prolapsed umbilical cord, wherein part of the umbilical cord drops through the cervix into the vagina and possibly protrudes outside of the vagina. This may impede oxygen flow to the unborn baby, resulting in brain damage or death. Ms. Welch called 911. An ambulance owned by Wishard Hospital arrived at the scene at 5:31 a.m.

   The paramedics positioned Ms. Welch in the kneechest face down position to relieve pressure on the umbilical cord. They then transported her to the closest hospital, St. Francis, even though it did not have obstetrical facilities. Unfortunately, when the baby was delivered a short while later, he suffered severe brain damage due to a lack of oxygen

   Wishard has most likely violated:

   A. EMTALA's screening obligation
   B. EMTALA's stabilization obligation
   C. Both EMTALA's screening and stabilization obligations
   D. None of the above

Please use this fact pattern for BOTH problems 9 and 10.

Macamaux was in a traffic accident and was transported by ambulance to Kimball Hospital. At Kimball's emergency department, Macamaux complained of neck and back pain and pain between the shoulders. Subsequently, Macamaux was examined by Dr. Nelson, a board certified emergency physician on duty, and Macamaux was registered in Day Kimball's computer system as complaining of "upper back pain."

Dr. Nelson ordered x-rays for cervical spine trauma and x-rays of the chest. At the time the x-rays were ordered, no radiologists were scheduled to be on duty. In such circumstances, Kimball policy calls for the x-rays to be read in the first instance by the emergency department, i.e., by Dr. Nelson, and reviewed later by a radiologist during a subsequent shift. Dr. Nelson interpreted these x-ray images and found that Macamaux had scapula pain, but no neck pain or tenderness. Macamaux was discharged with a diagnosis of "MVA, Back strain."

Kimball's Diagnostic Services Manual contains a policy regarding the images that must be taken when cervical spine trauma x-rays are ordered. That policy states, "C7-T1 junction MUST be clearly visualized." The policy further provides that "physician will notify the x-ray technician whether or not the patient needs any additional films." The day after Macamaux was discharged, his x-rays were reviewed by Dr. Millard, a board certified radiologist at Kimball. Dr. Millard's report noted that, the "C7 vertebral body is not included on examination." A few days after discharge, Macamaux began to experience neck pain, arm pain, swelling of his throat, and difficulty breathing. At another hospital he underwent emergency surgery to stabilize his spine.

9. Macamaux can probably establish a violation of:

   A. EMTALA's screening obligation
   B. EMTALA's stabilization obligation
   C. Both EMTALA's screening and stabilization obligations
   D. None of the above

10. Dr. Nelson owed Macamaux:

   A. A duty of informed consent
   B. A duty of informed consent and malpractice
   C. Only a duty of informed consent
   D. Neither a duty of informed consent nor malpractice

PART TWO

1 essay question worth 40 points (of 60 total exam points)

Suggested time = 55 minutes (of 85 total exam minutes)

INTRODUCTION

In January 2011, Rita filed a lawsuit in New Jersey (a material risk jurisdiction) against two physicians who treated her. The physicians' lawyers have already taken Rita's deposition. But the lawyer who was handling Rita's case was hit by a train and died. You have agreed to take over Rita's case and represent her.

BACKGROUND

In 1973, Rita was born with spina bifada. In 2010, she was diagnosed with a syndrome associated with spina bifada: tethered spinal cord syndrome. This is a neurological disorder caused by tissue attachments that limit the movement of the spinal cord within the spinal column. These attachments cause an abnormal "stretching" of the spinal cord. It is estimated that 20 to 50 percent of children with spina bifida defects will require surgery at some point to "untether" the spinal cord. Because of this and other conditions, Rita has had quite a lot of interaction with the medical profession her whole life. She has tended to actively seek diagnosis of her health problems, and follow punctiliously and with great discipline the medical advice that she receives.

Medical experts agree that surgery is the only answer to an untethered cord syndrome. There is no more conservative treatment to alleviate this condition. In fact, conservative management implies nothing other than a period of further observation. In time, surgery would have to be performed before even further deterioration and degradation, because without surgery, the natural course of the spinal cord being stretched is probable paralysis.

MEDICAL TREATMENT

In 2007, Rita visited her local emergency room complaining of urinary problems. The physician on duty, Dr. Ackman, performed the standard diagnostic tests and assessments for a urinary problem complaint. Based on those results, Dr. Ackman diagnosed Rita with a simple bladder control issue and discharged her with instructions to follow-up with her family physician. In her deposition, and complaint Rita charges that Dr. Ackman should have investigated her condition more thoroughly and more aggressively.

Had he done so, Rita alleges, Dr. Ackman would have diagnosed a neurogenic bladder and referred her to a neurologist. She argues that she could have then taken the necessary precautions and measures to avoid or prevent the deterioration of her condition over the next three years. Alternatively, Rita testified that she could have chosen to undergo surgery at that

time rather than in July 2010 after her condition had deteriorated.

In June 2010, Rita met with Dr. Mohr, a neurosurgeon, to discuss her spina bifada and whether she had tethered spinal cord syndrome. Dr. Mohr recommended surgery to untether her spinal cord. But he did not tell Rita that the risks of surgery he was recommending included partial or complete paralysis. After the surgery, all of Rita's lower body functions were severely and permanently impaired. This has seriously disrupted her life, both personal and professional.

YOUR ASSIGNMENT

1. Identify and assess Rita's claim(s) against Dr. Mohr.
2. Identify and assess Rita's claim(s) against Dr. Ackman.

Remember that medical malpractice is not being tested on this midterm.

Exam ID _____

Pope – Health Law I: Fall 2011 Midterm Exam Scoring Sheet

Multiple Choice Questions (2 points each)

Question	Correct	Distractors	Question	Correct	Distractors
1	D		6	B	A (7)
2	B	C (6)	7	D	
3	D		8	B	D (9), C (3)
4	A	B (4), C (3)	9	A	C (2)
5	D	C (2)	10	B	D (7), A (2)

Score Distribution

Mean = 12.5 of 20
Highest = 18 of 20

Explanations

Q1 The physician never treated the daughter. The physician only treated the mother. Therefore, the physician and daughter were not in a treatment relationship. The physician owed the daughter no duty of informed consent.

Q2 Virginia was an inpatient. Therefore, EMTALA does not apply. But the hospital did end its treatment of Virginia without sufficient notice while she still needed treatment.

Q3 This is not a hospital, so EMTALA does not apply. There was no treatment relationship formed, so there is no duty of non-abandonment or informed consent.

Q4 Plaintiff did consent to the procedure, so he has no battery claim. But the disclosures concerning the procedure were inadequate.

Q5 While a treatment relationship can be terminated in the situations described in A, B, and C; those answer choices all state that those reasons are the "only" legitimate reasons. That is false.

Q6 The defendant is trying to assert a risk to others defense. But they failed to substantiate it.

Q7 There is no EMTALA violation. This is a proper transfer to a better equipped facility.

Q8 The ambulance was "owned by Wishard Hospital." Therefore, Wishard's EMTALA duty was triggered upon entering the ambulance. Dropping the patient at St. Francis was a transfer/discharge but without the documentation described in Question 7.

Q9 The ER physician did not to a standard/uniform screening.

Q10 Since the ER physician began to treat plaintiff, that formed a treatment relationship and triggered informed consent and malpractice duties.

Exam ID _____

Essay Question (40 points)

NOTE: This problem was adapted from *R.K. v. Ackman*, 2010 QCCA 2180 (CanLII).

RITA v. MOHR			
Informed consent			
Treatment relationship	Rita and Dr. Mohr discussed the surgery. He made the recommendation. This is sufficient to form a treatment relationship and trigger a duty of informed consent. Rita clearly "relied" upon Dr. Mohr's recommendation.	**2**	
Duty	The disclosure standard in New Jersey requires a physician to disclose what a reasonable person in the plaintiff's position would deem material or important in making the treatment decision.	**2**	
	Apply that standard to the facts of the case. Given the severity of paralysis, any reasonable patient would want to know about that risk.	**4**	
Breach	Dr. Mohr did not disclose the risk of paralysis from the surgery.	**2**	
Injury	Rita is now paralyzed, the very same type of risk that Dr. Mohr failed to disclose.	**2**	
Causation (scientific)	Rita was not paralyzed before the surgery and now she is paralyzed. It seems that her paralysis resulted from the surgery.	**4**	
	On the other hand, Rita had preexisting spine problems. Her condition was going to progressively lead to paralysis in any case. While the timing suggests causation, proof may be somewhat complicated.	**1**	
Causation (behavioral)	Rita must establish that the **reasonable patient in her situation** would not have had the surgery had Dr. Mohr disclosed the risk of paralysis.	**2**	
	This is difficult to establish. There was no reasonable alternative to the surgery. Her condition would progressively deteriorate to paralysis in any case. The choice was between certain paralysis (without surgery) and possible paralysis (with surgery).	**4**	
	Moreover, the evidence strongly suggests that Rita herself would have still consented to the surgery even with disclosure. She normally follows medical recommendations. And in her case against Dr. Ackman, she alleges that she would have done the surgery.	**4**	
	On the other hand, Rita need not argue that the **reasonable patient** would not have had the surgery **at all**. She could argue that the reasonable person, upon hearing the risk of paralysis, would **delay** the surgery to maximize her paralysis-free time.	**4**	
Exception to Duty	Dr. Mohr might argue that given Rita already knew the relevant risks given her active involvement with her treatment and interaction with medicine her whole life.	**2**	

RITA v. ACKMAN			
EMTALA			
No private COA against physician	Rita can sue the hospital but not Dr. Mohr under EMTALA. She could make a complaint to initiate an OIG investigation of Dr. Mohr.	**4**	
EMTALA triggered	Rita arrived at the ED, thus triggering the screening obligation.	**1**	
No EMTALA violation	Dr. Ackman did the "standard" screening. He followed the normal, regular protocol. Even if it was deficient, uniformity is all that EMTALA requires.	**1**	
	Since Dr. Ackman did not discover an EMC from the screening, no stabilization duty was triggered. There is only a duty to stabilize those EMCs about which one is aware.	**1**	
TOTAL		**40**	

Score Distribution

Mean = 23 of 40
Highest = 32 of 40

Pope – Health Law I Midterm Scores (Fall 2011)

ID	MC (20)	ESSAY (40)	TOTAL (60)	GRADE
012787	16	32	48	A
046184	14	32	46	A-
069783	18	27	45	A-
053440	16	24	40	B+
046156	14	26	40	B+
069780	14	25	39	B+
076166	16	22	38	B+
016541	14	24	38	B+
082448	12	24	36	B+
083357	8	27	35	B+
944102	12	17	29	B+ (Non-JD)
46553	10	19	29	B
016670	10	17	27	B
963921	4	7	11	C+ (Non-JD)
945801	10	20	30	B+ (Non-JD)

The Student Handbook requires that "the mean grade in each section of an upper level elective course with an enrollment of more than five students but no more than 20 students, a seminar or a skills course must fall within the 2.600 to 3.400 range." The above grades average to 3.375.