

# **Health Law Quality & Liability**

**Course 3035 (Fall 2019)**

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**Mitchell Hamline School of Law**

**Time:** Tuesdays and Thursdays from 4:00 to 5:35 PM

**Place:** MHSU 223

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## I. Course Description

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

Both because of the rapid growth in the healthcare industry itself and because of comparatively tighter legal oversight, the health law field is evidencing a marked growth in legal employment. Commentators consistently tout it 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.

We can roughly divide Health Law into five subfields:

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

These subfields intersect and overlap. Some practitioners and authors may categorize the field differently. Nevertheless, this five-part classification is useful for clarifying our mission and emphasis. This course focuses on the Patient Care subfield, especially as the physician-patient relationship is regulated through common law liability. Sometimes, commentators describe this area of health law as “medical law.”

This course emphasizes legal doctrine over litigation strategy or public policy. The separate *Medical Malpractice* course emphasizes tactics and strategy. In contrast, this course focuses on issues anchored in two broad themes:

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

Ten specific subtopics within these two broad themes include:

1. Formation and termination of the treatment relationship (contracts, torts)
2. Non-discrimination and 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 (torts, agency, statutory)
8. Licensure, accreditation, and certification (statutory, administrative)

9. Credentialing and peer review
10. Outcome/quality focused payment mechanisms

Notwithstanding all this specialized substantive content, one might alternatively characterize this *Health Law Quality & Liability* course 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 healthcare quality. In other words, I have designed this class to prepare you for legal practice regardless of where your professional path takes you.

## **II. Course Competencies**

By the end of the course, you should be able to do the following:

- 1. Analyze and apply legal principles concerning the existence of a physician-patient treatment relationship.**
  - 1.1 Analyze and apply legal principles concerning when a physician has a duty to enter a treatment relationship and treat an individual.
  - 1.2 Analyze and apply legal principles concerning when a treatment relationship is formed/created between a physician and patient.
  - 1.3 Analyze and apply legal principles concerning when a (formal or informal) consulting physician enters a treatment relationship.
  - 1.4 Analyze and apply legal principles concerning when an IME physician enters a treatment relationship.
  - 1.5 Appreciate the minority rule followed by Minnesota and some states regarding informal consults and IME clinicians.
  - 1.6 Analyze and apply legal principles concerning the conditions under which a treatment relationship may be terminated.
  - 1.7 Analyze and apply legal principles concerning tortious abandonment (wrongful termination of the treatment relationship).
  - 1.8 Analyze and apply legal principles concerning the conditions under which the normal duties triggered by a treatment relationship may be limited.
  - 1.9 Appreciate that most of these principles also apply to other practitioners (like dentists).

**2 Analyze and apply key federal statutes and regulations concerning non-discrimination in healthcare.**

- 2.1 Analyze and apply key statutory, regulatory, and caselaw principles regarding EMTALA, including: (a) the duty to screen, (b) the duty to stabilize, and (c) the duty to accept transfers.
- 2.2 Analyze and apply key principles regarding how EMTALA is enforced by private litigants.
- 2.3 Analyze and apply key principles regarding how EMTALA is enforced by the DHHS.
- 2.4 Understand and apply key EMTALA specially defined terms, including: “hospital property,” “inpatient admission,” and “emergency department.”
- 2.5 Distinguish EMTALA enforcement against hospitals from enforcement against individual physicians.
- 2.6 Analyze and apply key statutory, regulatory, and caselaw principles regarding the ADA.
- 2.7 Analyze and apply the three *prima facie* elements of a claim under the ADA as well as key defenses like harm to others.
- 2.8 Distinguish how the ADA is enforced by private litigants from how it is enforced by the OCR and the DOJ.
- 2.9 Analyze and apply key statutory, regulatory, and caselaw principles regarding ACA section 1557.
- 2.10 Appreciate basic parameters of how other key non-discrimination statutes (like Title VI) apply to healthcare.
- 2.11 Analyze the impact of the May 2019 conscience regulations on the above duties.

**3 Analyze and apply legal principles concerning informed consent.**

- 3.1 Analyze and apply all four elements of an informed consent claim (duty, breach, causation, and damages).
- 3.2 Distinguish informed consent from medical battery.
- 3.3 Distinguish informed consent from medical malpractice.
- 3.4 Distinguish the two leading disclosure standards (measures of duty): reasonable patient and reasonable physician.

- 3.5 Distinguish, analyze, and apply three distinct sub-elements of causation.
  - 3.6 Analyze and apply informed consent principles to information other than the risks and benefits of an intervention, such as physician experience and cost.
  - 3.7 Appreciate the range of statutory and regulatory disclosure mandates.
  - 3.8 Assess the impact of certification on patient decision aids.
- 4 Analyze and apply civil liability legal principles concerning the provision of medical treatment by individual healthcare providers (primarily physicians).**
- 4.1 Appreciate the scope and nature of medical error in the United States.
  - 4.2 Analyze and apply all four elements of a medical malpractice cause of action (duty, breach, causation, and damages).
  - 4.3 Distinguish four geographic variations in how the standard of care (duty) is established.
  - 4.4 Analyze and apply legal principles concerning how the standard of care is established with expert witnesses.
  - 4.5 Analyze and apply legal principles concerning the qualification of expert witnesses.
  - 4.6 Analyze and apply legal principles concerning how a defendant can establish a school of thought (an alternative minority standard of care).
  - 4.7 Analyze and apply legal principles concerning how the standard of care is established both judicially and through clinical practice guidelines.
  - 4.8 Analyze and apply legal principles concerning *res ipsa loquitur*, as an alternative method for establishing breach.
  - 4.9 Distinguish traditional “but for” causation from “lost chance” causation.
  - 4.10 Analyze and apply legal principles concerning how economic, non-economic, and punitive money damages are calculated and statutorily limited.
  - 4.11 Analyze and apply legal principles regarding key affirmative defenses.
  - 4.12 Distinguish statutes of limitations from statutes of repose.
  - 4.13 Distinguish assumption of risk from comparative negligence.

- 4.14 Distinguish types of tort reform measures designed to reduce the frequency and size of medical malpractice claims as well as measures to increase their predictability.
- 4.15 Analyze and apply legal principles concerning breach of contract.
- 4.16 Analyze and apply legal principles concerning negligent infliction of emotional distress and intentional infliction of emotional distress.
- 4.17 Appreciate key alternative theories of liability like elder abuse and criminal penalties.

**5 Analyze and apply civil liability legal principles concerning the provision of medical treatment by institutional providers (primarily hospitals).**

- 5.1 Analyze and apply three theories of vicarious liability: respondeat superior, ostensible/apparent agency, and the non-delegable duty doctrine.
- 5.2 Analyze and apply four theories of direct liability: (a) negligent selection, (b) negligent retention, (c) negligent supervision (policies, procedures, training, equipment), and (d) ordinary negligence.

**6 Analyze and apply civil liability legal principles concerning the provision of medical treatment by managed care organizations.**

- 6.1 Analyze and apply three theories of vicarious liability: respondeat superior, ostensible agency, and the non-delegable duty doctrine.
- 6.2 Analyze and apply four theories of direct liability: (a) negligent selection, (b) negligent retention, (c) negligent supervision (policies, procedures, training, equipment), and (d) ordinary negligence.
- 6.3 Analyze and apply the theory of negligent utilization review.
- 6.4 Analyze and apply the doctrine of ERISA preemption under sections 502 and 514.

**7 Analyze and apply principles concerning credentialing and peer review.**

- 7.1 Understand the role and function of credentialing by hospitals and MCOs.
- 7.2 Analyze and apply the HCQIA.

**8 Analyze and apply principles of licensure, accreditation, and certification.**

- 8.1 Analyze and apply principles regarding the state licensure of individual providers, distinguishing the gatekeeping role and the discipline role of medical boards.
- 8.2 Distinguish licensing, Medicare certification, credentialing, and specialty board certification of individual clinicians.
- 8.3 Analyze and apply principles regarding the state licensure of healthcare facilities.
- 8.4 Distinguish licensing, Medicare certification, and TJC accreditation of healthcare facilities.

**9 Analyze and apply legal principles concerning the maintenance of patient health information.**

- 9.1 Analyze and apply key HIPAA provisions on privacy and security.
- 9.2 Assess how and when HIPAA is enforced.
- 9.3 Distinguish state law principles of privacy, confidentiality, and privilege.

**10 Describe payment mechanisms directed at assuring and improving healthcare quality.**

- 10.1 Appreciate the dominant way by which health care is paid: fee for service.
- 10.2 Identify major federal, state, and private agencies, entities, and initiatives that are directed at ensuring and improving the quality of medical care.

**11 Integrate material learned in other classes, such as: business organizations, civil procedure, contracts, evidence, statutory interpretation, and torts.**

**12 Demonstrate honed legal analysis and writing abilities.**

- 12.1 Demonstrate honed legal analysis and writing abilities through exposure to and critique of legal arguments in judicial opinions, legislative reports, and scholarly writing.
- 12.2 Demonstrate honed legal analysis and writing abilities through participation in classroom discussion and group-based exercises.
- 12.3 Demonstrate honed legal analysis and writing abilities through completion of, and feedback on, weekly problems.

12.4 Demonstrate honed legal analysis and writing abilities through completion of, and feedback on, a written midterm examination.

12.5 Demonstrate honed legal analysis and writing abilities through completion of, and feedback on, a written final examination.

### **III. 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.

### **IV. Required Materials**

- A. You do not need a traditional, published, bound casebook. There is nothing to purchase.
- B. Reading “Packets”
  - 1. I have posted all the reading materials on the CANVAS course management system.
  - 2. For each of the fourteen weeks in the semester you will have a roughly 50-page “packet” of materials in a single PDF document. The packet’s cover sheet explains the core objectives for the week and summarizes 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 14 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, I may add or substitute other materials.

C. PowerPoint Videos

1. To enable us to focus most of our class time on problems and exercises, I have recorded narrated PowerPoint slides providing an overview of key rules and doctrines. I will post these in both PPT format and usually also as links to Vimeo videos.
2. There are approximately two to four videos each week. The average length is 15 minutes.
3. Please watch these videos before the live class in MHSL 223.

D. Summary and Feedback Videos

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. Upcoming Assignments

1. The immediately upcoming assignments (readings, quizzes) will always be on the course home page as an “announcement.”

## V. Class Schedule

A. The class will generally meet on Tuesday and Thursday afternoons from 4:00 p.m. to 5:35 p.m. in MHSL 223.

B. The first class meets on Tuesday, August 20, 2019. The last class meets on Thursday, November 21. The class will meet, in person, twenty-one times.

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

1. Thursday, August 22 due to a conference conflict
2. Thursday, September 12 due to a conference conflict
3. Tuesday, October 8 due to a conference conflict
4. Tuesday, October 17 due to mid-semester break
5. Thursday, October 22 due to mid-semester break
6. Tuesday, October 24 due to a conference conflict
7. Thursday, October 31 due to health law moot court

- D. **Flipped Classroom.** While we will not meet on some of the regular Tuesday and Thursday dates, this omitted class time is more than “covered.” As described above, you will have dozens of web-based lectures and exercises.
- E. **Bar Association Networking.** While not required, I encourage you to participate in the health law events of the local bar associations.
- F. **Required Extracurricular Meeting 1 of 2.** I would like to get to know each of you outside class. Therefore, before October, please schedule a 15-minute meeting at a convenient time, perhaps before or after class.
- G. **Required Extracurricular Meeting 2 of 2.** Sometime, during the span of this semester, please attend a meeting of any 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>. You may attend for only the portion of the agenda that you find of interest. Please prepare a short (~3 minute) report for the class. If making one of these meetings is burdensome, please propose another field trip that relates to the subject matter of this course.
- H. **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 with the email address that you use most regularly.
- B. Review this syllabus.
- C. Read the initial class assignments.
- D. Calendar key course dates into your planning and calendaring systems.
- E. Review the instructions for my old exams (available at [www.thaddeuspope.com](http://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. You should read and brief the assigned cases. 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. Still, it is likely that you will need around **three hours** of preparation for each hour of class. This time includes: (i) reading the materials, (ii) briefing the cases, (iii) consolidating prior class and margin notes, and (iv) 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. **Online Participation.** Students are encouraged to participate not only in class but also through the course 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 on whom I initially called. Nonetheless, to move things along I may let the volunteer help. Please be sensitive to the fact that the called student 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 or send an email. **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 bring it up in class. 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. Please mute your phone and 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 4:00 and ending it precisely at 5:35. 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. **300 Points:** This course is comprised of four components from which you can earn a total of 300 points.

Course Component	Percent	Points	Explanation
10 Quizzes	30%	90	<i>see section X</i>
Class Participation	5%	15	<i>see section XI</i>
Midterm Exam	20%	60	<i>see section XII</i>
Final Exam	45%	135	<i>see section XIII</i>
	100%	300	

- B. **Curve:** Your total point sum (of 300) is meaningful only relative to the point sums of other students in the class. I will convert your total 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/>.
- C. **Mandatory Mean:** The final grades must comport with Law School's grading policies. Note that the *2019-2020 Student Handbook* states that the Law School "mandates a mean of between 2.7 and 3.3 for all Upper Level (non-1L) classes." That is a mean roughly between a B- and B+.

## **VIII. Required Weekly Quizzes**

- A. **Rationale:** I will assign quizzes for three reasons.
1. 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.
  2. Second, I want you to approach the material **actively**.
  3. 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 300 to 500-word essay. These (along with the midterm) constitute “formative assessment,” while the final exam constitutes “summative assessment.”
- C. **Submission:** You will submit your quiz answers through the course CANVAS site). The quizzes are not timed. But they are designed to take less than 20 minutes to complete.
- D. **Due Date:** A quiz is due by 11:59 PM on most Sundays of the semester. See the schedule of deliverables at the end of this Syllabus (in Section XVII). There is no quiz due during either the mid-semester break or the midterm exam period.
- E. **Feedback:** We will review the quiz in the following Tuesday’s class and/or I will post a feedback memo.
- F. **Coverage:** I have designed these weekly quizzes 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 ten quizzes, in the cumulative, comprise 30% of your total course grade (90 of 300 points). Therefore, each quiz is worth 9 points, 3% of your total course grade (300 points).

## **IX. 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 will earn all these points. Those who are regularly unprepared or frequently absent will earn either half or none of these points.
- C. The required extracurricular meetings described in sections V.F and V.G are factored into the participation points.

## **X. Midterm Exam**

- A. **Date:** The midterm exam is a take-home exam that you can self-schedule to take during *any* four-hour period between 12:01 a.m. on Friday, October 4, 2019 and 11:59 p.m. on Wednesday, October 9, 2019. You will download the exam from the course management CANVAS site and upload your anonymous answers to that site.
- B. **Duration:** I have designed this exam for completion within just two hours. The four-hour window permits 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 20% of your course grade, 60 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. **Overall Design:** Everything else about the midterm exam is the same as the final exam, except that the midterm is shorter.

## **XI. Final Exam**

- A. **Date:** The final exam is a take-home that you may obtain and complete during any 24 hours within the final exam period (Wednesday, December 4 to Monday, December 16, 2019) in a method approved by the Law School Registrar. This will probably be the same as the midterm exam: download the exam from CANVAS and upload your answer document to CANVAS.
- B. **Duration:** This exam is designed to be completed within just five hours. The 24-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 45% of your course grade, 135 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 maximizes the 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 135. 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 100/135, then that student would receive an A.

K. **Exam Feedback:** Several weeks after the exam, I will post:

1. A copy of the exam
2. A blank scoring sheet and explanatory memo
3. Model answers.

On request, I will also email you directly a scanned copy of your own marked exam with your individual scoring sheet. You must request this, because I cannot correlate exam numbers with names.

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.

## XII. Exam Taking Tips

A. **Old Exams:** I have posted twelve years of my *Health Law* midterm and final exams and exam feedback memos to [www.thaddeuspope.com](http://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.

### **XIII. 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](mailto:thaddeus.pope@mitchellhamline.edu). Please use a descriptive subject heading. In urgent circumstances cc [thadmpope@aol.com](mailto:thadmpope@aol.com) and [thaddeus.pope@gmail.com](mailto:thaddeus.pope@gmail.com), and text 310-270-3618. I will try to promptly answer any question as soon as possible.
- E. **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.

## XIV. Study Aids & Reference Materials

Despite the prevalence of health law courses in U.S. law schools, there are still few student-oriented ancillary materials. However, 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. Plus, 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 21<sup>ST</sup> CENTURY (10<sup>th</sup> 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 (4<sup>th</sup> ed. Jones & Bartlett 2011).
4. BONNIE FREMGEN, MEDICAL LAW AND ETHICS (4th ed. Prentice Hall 2011).
5. GINNY WACKER GUIDO, LEGAL AND ETHICAL ISSUES IN NURSING (6<sup>th</sup> 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. TAMPAZO, MEDICAL LAW, ETHICS, AND BIOETHICS (6<sup>th</sup> ed. F.A. Davis 2007).
9. GEORGE D. POZGAR & NINA SANTUCCI, LEGAL ASPECTS OF HEALTH CARE ADMINISTRATION (11<sup>th</sup> 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 7<sup>th</sup> ed. 2007).
2. AMERICAN HEALTH LAWYERS ASSOCIATION, **FUNDAMENTALS OF HEALTH LAW** (6<sup>th</sup> 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** (7<sup>th</sup> 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 (40<sup>th</sup> 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 (4<sup>th</sup> 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 (4<sup>th</sup> ed. ABA 2013)
4. ALICE G. GOSFIELD ED., HEALTH LAW PRACTICE GUIDE (Thomson/West annual), Westlaw: HTLPG.
5. JOHN P. MARREN, MANAGED CARE LAW MANUAL (Aspen looseleaf).
6. ALAN MEISEL, KATHY CERMINARA, THADDEUS POPE, THE RIGHT TO DIE (3<sup>rd</sup> 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. **American Health Lawyers Association:** AHLA is the largest professional association for this legal practice area. AHLA has some great newsletters that it delivers daily, weekly, and/or monthly. Cheap student memberships are available.
3. **Other Professional Associations:** Other national and regional societies 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. **Legal News Aggregators:** Several newsletters compile health law developments from other sources. Most deliver customized daily briefings for free. These include *Lexology*, *Medscape*, and *Stat*.

5. **Government Agencies:** Government websites often provide useful guidance on their enforcement activities and priorities. For example, check out the websites of CMS and the Minnesota Board of Medicine.
6. **Articles:** You can find more in-depth legal articles through Westlaw, Lexis, Hein Online, LegalTrac, SSRN, Legal Resource Index, Index to Legal Periodicals, and Index to Foreign Legal Periodicals.
7. **Blogs:** There are some great blawgs on health law. I have collected many of these at [medicalfutility.blogspot.com](http://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. Other county bar associations and specialty bar associations also regularly have health law events. Getting engaged and networking is a great way both to find a job and to advance your professional development.

## XVII. Checklist of Deliverables in Fall 2019

ASSESSMENT	DUE DATE	GRADE
Quiz 1 of 10	Sun. Sept. 1	3%
Quiz 2 of 10	Sun. Sept. 8	3%
Quiz 3 of 10	Sun. Sept. 15	3%
Quiz 4 of 10	Sun. Sept. 22	3%
Quiz 5 of 10	Sun. Sept. 29	3%
Quiz 6 of 10	Sat. Oct. 13	3%
Midterm Exam (during any 4-hour period)	Between Fri. Oct. 4 & Wed. Oct. 9	20%
<i>Note: No quizzes are due during either the midterm exam period or the mid-semester break.</i>		
Quiz 7 of 10	Sun. Oct. 27	3%
Quiz 8 of 10	Sun. Nov. 3	3%
Quiz 9 of 10	Sun. Nov. 10	3%
Quiz 10 of 10	Sun. Nov. 17	3%
15-minute informational meeting with Prof. Pope	Any time before Mon. Sept. 30	§ XI
Attend any health licensing board meeting	Any time before Wed. Dec. 4	§ XI
Final Exam (during any 24-hour period)	Between Wed. Dec. 4 & Mon. Dec. 16	45%