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| **Instructor** | **Professor Thaddeus Mason Pope** |
| **Course Title** | **Health Law: Quality & Liability** |
| **Format** | **Take Home Midterm Exam** |
| **Total Time** | **Four (4) hours** |
| **Total Pages** | **9 pages** |

**Reference Materials Allowed**

Open Book (all reference materials allowed)

**Take-Home Exam Instructions**

1. Please know your **correct Spring 2018 exam number** and include this number at the top of each page of your exam answer (for example, in a header).

2. Confirm that you are using and have typed the **correct exam number** on your exam document.

3. You may download the exam from the course Blackboard site any time after 12:01 a.m. on Sunday, March 4, 2018 and before 11:59 p.m. on Saturday, March 17, 2018. You must submit your exam answer file back to the Blackboard site within four (4) hours of downloading the exam but in no case later than 11:59 p.m. on Saturday, March 17, 2018.

4. Write your answers to all parts of the exam in a word processor. Save your document as a **single PDF file** before uploading to Blackboard.

5. Use your exam number as the **name** for the PDF file.

**Instructions Specific to This Examination**

**GENERAL INSTRUCTIONS:**

1. **Honor Code**: While you are taking this exam, you are subject to the Mitchell Hamline Code of Conduct. You may not discuss it with anyone until after the end of the entire midterm exam period. It is a violation of the Code to share the exam questions. (There may be an accommodation student taking this exam at a different time.) Shred and delete the exam questions immediately upon completion of the exam. Professor Pope will repost the exam after the end of the midterm exam period.

2. **Competence**: By downloading and accepting this examination, you certify that can complete the examination. Once you have accepted (downloaded) the examination, you will be held responsible for completing the examination.

3. **Exam Packet**: This exam consists of **nine (9) pages**, including these instructions. Please make sure that your exam is complete.

4. **Identification**: Write your exam number on the top of each page of your exam answer.

5. **Anonymity**: Professor Pope will grade the exams anonymously. Do **not** put your name or anything else that may identify you (except for your exam number) on the exam. **Failure to include your correct exam number will result in a 5-point deduction.**

6. **Total Time**: Your completed exam is due within 4 hours of downloading it but in no case later than 11:59 p.m. on Saturday, March 17, 2018. If you upload your exam more than 4 hours after downloading the exam, then Professor Pope will lower your exam grade **by one point** for every minute over the 4 hours. If the timestamp on your uploaded exam indicates that you have exceeded the 4-hout limit by more than 20 minutes, then Professor Pope may refer the situation for a Code of Conduct investigation and potential discipline. Please save sufficient time after editing to upload your exam.

7. **Timing:** Professor Pope has designed this exam for completion within three hours. That means you should be able to write complete answers to all the questions in three hours. Yet, since this is a take-home exam, you will want to take some extra time (perhaps one-half hour) to outline your answers and consult your course materials. You will also want to take some extra time (perhaps one-half hour) to revise, polish, and proofread your answers, such that you will not be submitting a "first draft."

8. **Scoring**: The midterm exam comprises 10% of your overall course grade. While the scoring includes 100 points, these points will be weighted.

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.

10. **Additional Research**: While you may use any materials that you have collected for this class, you are neither expected **nor are you permitted** to do any online or library research (e.g. on Lexis, Westlaw, Google, reference materials) to answer the exam questions.

11. **Format**: The exam consists of four essay questions. Each question is worth 25 points. The recommended time is 45 minutes per question. That adds up to 3 hours. Remember, you have 4 hours to complete this exam. So, you have time to proofread.

12. **Grading**: All exams will receive a raw score from zero to 100. The raw score is meaningful only relative to the raw score of other students in the class. Professor Pope computes your course letter grade by summing the midterm, final, and quiz scores. He will post an explanatory memo and a model answer to Blackboard a few weeks after the exam.

## SPECIAL INSTRUCTIONS

1. **Submission**: Create clearly marked separate sections for each problem. You do not need to "complete" the exam in order. Still, structure your exam answer document in this order:

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

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

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

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

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

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

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

**Exam Misconduct**

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

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

# Essay Question 1

- This question is worth 25 points
- Limit your response to 1200 words. This is only a limit, not a target or suggested length.
- Recommended time is 45 minutes.

Earlier this year (in January 2018), a controversial hospital discharge was widely reported by both national and international media. This massive media attention was fueled by two key factors. First, the discharge was captured on video. Second, the video depicts a rather startling scene.

The video shows four security guards walking away from a bus stop next to the University of Maryland Midtown Hospital. The guards appear to have just left an African American female patient at the bus stop in the cold Baltimore winter. You can watch the video at NBC Nightly News with Lester Holt or through other venues. You do not need to watch the video to answer this question. But you are welcome and encouraged to watch it.
(https://www.youtube.com/watch?v=HbuArN_wFlQ)

The essential elements of the video are the following. You see the woman standing next to the bus stop in a thin yellow hospital gown and socks. She appears scared as she staggers and softly mutters. Several bags of what appear to be her belongings are sitting at the bus stop. The woman moans and cries and coughs, and her breath forms white clouds in the cold. A bystander calls 911, and rescue workers take the woman back to the hospital where she was discharged just moments before.

In everyday English language usage, it appears that this woman was "dumped" by the hospital. But was this "dumping" an EMTALA violation? Because of patient privacy laws, we do not know (nor does the media know) the exact content or course of the woman's treatment at the hospital before her initial (filmed) discharge. Therefore, accept the following additional facts.

1. Assume that while the woman seems to have some psychiatric issues, the hospital ED psychiatrist screened her and determined that she had no emergency medical condition.
2. Assume that while the hospital ED psychiatrist screened the woman in a manner consistent with University of Maryland policy, her screening failed to conform neither to Maryland statutes nor to the prevailing standard of care.
3. Assume that the hospital ED psychiatrist determined that the woman patient had decision making capacity.
4. Assume that the woman patient declined transfer to a shelter.
5. Assume that the woman patient had all her clothes and was encouraged to dress. But she refused to dress herself.

**The senior partner of the law firm representing the hospital has asked you to identify, analyze, and assess the legal sanctions that the University of Maryland might be facing for the discharge of this patient.**

# Essay Question 2

- This question is worth 25 points.
- Limit your response to 1200 words. This is only a limit, not a target or suggested length.
- Recommended time is 45 minutes.

On February 14, 2018, a pregnant Linda Booth awoke around 2:00 a.m. with cramps and pain. She called her OB/GYN to report the symptoms. Ms. Booth's doctor told her that she had nothing to worry about but to call back if her pain increased. Around 3:00 a.m., Ms. Booth's husband drove her to Mediocre Minnesota Medical Center (MMMC). Following its standard procedures, MMMC clinicians examined Ms. Booth and observed her for more than five hours. Eventually, MMMC diagnosed Ms. Booth with false labor (Braxton Hicks contractions) and, around 8:40 a.m., discharged her from the hospital.

After Ms. Booth returned home, she continued to experience increasingly painful cramps of both longer duration and increased frequency. Ms. Booth followed her discharge instructions, took a Tylenol, and tried to sleep. She also tried to relax in a warm bath. But painful cramps gave her an uncontrollable urge to scream and pound the wall with her fist. The family eventually called 911, and EMS personnel responded.

When an EMS technician entered the house, she heard Ms. Booth's screams coming from a bathroom on the other side of the house. The EMS technician said, "That's not Braxton Hicks." EMS personnel connected a fetal monitoring device to Ms. Booth and examined her on the bathroom floor. Based on this examination, EMS personnel determined that they would have to deliver the baby in the bathroom. At 10:25 a.m., Ms. Booth delivered a baby boy in her bathroom. This all happened just over one hour after MMMC had discharged Ms. Booth.

**The senior partner of the law firm representing MMMC has asked you to identify, analyze, and assess the legal sanctions that the MMMC might be facing for the discharge of Ms. Booth.**

# Essay Question 3

- This question is worth 25 points.
- Limit your response to 1200 words. This is only a limit, not a target or suggested length.
- Recommended time is 45 minutes.

On the morning of February 22, 2018, Arleen awoke with a severe headache and vision problems. While she did not have a regular primary care physician, she scheduled an appointment for later that day with Dr. Jackson to assess these symptoms. But because Arleen arrived fifteen minutes late, Dr. Jackson refused to see her.

Arleen then went to a nearby CVS urgent care center. She presented to the nurse practitioner there with a headache, disorientation, and vomiting. But CVS did not accept Arleen's discount insurance plan, so Aleen was again turned away.

Arleen next went to the ED at Worst Wisconsin Hospital (WWH). Upon her arrival at WWH at 12:00 p.m., Arleen was placed in a triage room. But Arleen was not seen by any medical personnel until 4:30 p.m. Shortly after 4:45 p.m., Arleen received a standard screening for headache, disorientation, and vomiting. That screening included a CT scan that revealed a "large right parietal hemorrhage." The ED physician, designated this as a "neurological emergency." While the ED physician did what little she could, stabilizing this type of hemorrhage was beyond the scope of WWH's resources. So, the ED physician ordered Arleen transferred by helicopter to the University of Wisconsin, where she remained hospitalized until February 28, 2018. Arleen has lost vision in both eyes from the hemorrhage.

**You have been retained by Arleen. Identify, analyze, and assess the claims that she can plausibly assert against any party.**

# Essay Question 4

- This question is worth 25 points.
- Limit your response to 1200 words. This is only a limit, not a target or suggested length.
- Recommended time is 45 minutes.

**I recently published the following article (slightly edited below) in the *ASCO Post*, a publication for the American Society of Clinical Oncology. I argue that clinicians have a duty to discuss the costs of treatment with their patients. My argument is an outlier and is stronger than that supported by almost any other legal commentator. Therefore, it is probably vulnerable to attack. Make two arguments why I am wrong. There are probably more than two. So, I am looking at the cogency of your justification. I am not looking for any specific arguments.**

For 50 years, clinicians in the United States have had a legal duty to disclose to patients with cancer the risks, benefits, and alternatives to a proposed cancer treatment. Until recently, however, it has been unclear whether clinicians have a similar duty to discuss the costs of that treatment. Today, to mitigate the risks of civil liability and disciplinary sanctions, the ethical and, arguably, legal consensus is that the prudent clinician should discuss the costs of treatment with his or her patients. Here is a brief history of how this consensus evolved.

For decades, legal commentators maintained that clinicians had no legal duty to discuss costs with their patients. Many pointed to a 1993 decision from the Supreme Court of California to support their position. The patient in that case, Miklos Arato, sued his oncologists for negligent nondisclosure, claiming that his near futile pursuit of pancreatic cancer treatments resulted in the "failure of his contracting business and to substantial real estate and tax losses." The court rejected Mr. Arato's claim, holding that physicians have no duty to disclose risks that might affect the patient's "nonmedical rights and interests."

The law is different today. Subsequent legal developments have eclipsed the holding in the Arato case. Over the past 25 years, appellate courts in many states have expanded the scope of required disclosure beyond information pertaining solely to medical treatment. For example, clinicians now also often have legal duties to disclose information about themselves, such as their experience, their substance abuse and health conditions that might affect treatment, and their financial conflicts of interest. In short, informed consent duties are no longer limited to purely clinical risks, benefits, and alternatives.

Moreover, even if some courts were to continue the "therapeutic limitation" in the Arato case, overwhelming evidence now shows that financial toxicity has a direct and substantial impact on a patient's health. Obviously, a patient's finances are impacted by the high cost of cancer treatment, such as medications costing over $100,000, combined with higher deductibles of $6,000 or more, 20% copays, and lower income earnings. But "financial toxicity" also negatively impacts treatment and medical outcomes because patients frequently skip or adjust chemotherapy doses and appointments to reduce their oncology care costs.

The way courts measure the scope and extent of informed consent duties varies from state to state. Most states follow one of two dominant disclosure standards. About 25 states follow the

malpractice (also known as "physician-based," "professional," or "custom-based") standard. The other 25 states follow the material risk (also known as "patient-based" or "lay") standard. There is probably now a duty to discuss costs under both standards for the following reasons.
The medical malpractice standard requires physicians to provide only the information to patients that a hypothetical reasonably prudent physician would disclose in the same circumstances. The custom and practice of the medical profession set the standard. While a minority of states set geographical limitations, in most states a physician must disclose the same information that a reasonable physician in the United States would disclose under the same circumstances.

Duty is based on professional custom. Traditionally, physicians typically did not discuss costs of treatment with their patients. Consequently, there was no duty to have such discussions. Today, however, professional standards have changed. Therefore, so, too, have physician disclosure duties. First, a significant percentage of oncologists discuss costs of treatment with their patients. Second, recognizing the clear consequences of "financial toxicity," leading professional oncology societies, such as ASCO, have published guidance statements encouraging clinicians to discuss costs of treatment with their patients and so has the Institute of Medicine.

Because of these two developments, it is now likely that physicians have a legal duty to discuss the costs of cancer treatment with their patients, because that is what the reasonably prudent physician already does or would do. Indeed, survey evidence shows that nearly a majority of physicians are discussing treatment costs with their patients. Because the professional custom is to discuss costs, physicians have a legal duty to discuss costs.

While the medical malpractice standard is physician-defined, the material risk standard is patient-defined. It requires physicians to provide all the information that a hypothetical reasonable patient would consider important or significant in making a treatment decision.10 This disclosure duty is broader than the malpractice standard and increases the burden on physicians. After all, a reasonable patient may deem information material even if the medical profession does not customarily discuss that information.

Indeed, significant survey evidence shows that with substantial increases in health-care cost sharing, most patients deem financial information important. One study reports that 59% to 80% of patients want to discuss health-care costs with their physicians. Another shows that more than 80% of patients report it is "extremely important" or "quite important" to know what they will personally be responsible to pay. Because the reasonable patient wants to discuss costs, physicians have a legal duty to discuss costs.

Today's cancer treatments are more effective and less toxic. But just as clinicians have a legal duty to warn patients about physical side effects like vomiting, neutropenia, and hair loss; they also have a duty to warn patients about the financial side effects of treatment.

# END OF EXAM