

<b>Instructor</b>	<b>Professor Thaddeus Mason Pope</b>
<b>Course Title</b>	<b>Health Law: Quality &amp; Liability</b>
<b>Format</b>	<b>Midterm Exam, Spring 2020</b>
<b>Total Time</b>	<b>Four (4) hours</b>
<b>Total Pages</b>	<b>14 pages</b>

#### Reference Materials Allowed

Open Book (all reference materials allowed)

#### Take-Home Exam Instructions

1. Please know your **correct Spring 2020 exam number** and include this number at the top of each page of your exam answer (for example, in a header).
2. Confirm that you are using and have typed the **correct exam number** on your exam document.
3. You may **download** the exam from the course Canvas site any time after 12:01 a.m. on Sunday, March 8, 2020 and before 11:59 p.m. on Wednesday, March 18, 2020.
4. You must **upload** (submit) your exam answer file to the Canvas site within four (4) hours of downloading the exam.
5. You must **upload** your exam answer file no later than 11:59 p.m. on Wednesday, March 18, 2020. Therefore, the latest time by which you will want to download the exam is 7:59 p.m. on Wednesday, March 18, 2020. Otherwise, you will have less time than the full permitted four hours.
6. Write your answers to all parts of the exam in a word processor. Save your document as a **single PDF file** before uploading to Canvas.
7. Use your exam number as the **file name** for the PDF file that you upload.

## Instructions Specific to This Examination

### GENERAL INSTRUCTIONS:

1. **Honor Code:** While you are taking this exam, you are subject to the Mitchell Hamline Code of Conduct. You may not discuss it with anyone until after the end of the entire final exam period. It is a violation of the Code to share the exam questions. (There may be an accommodation student taking this exam at a different time.) Shred and delete the exam questions immediately upon completion of the exam. Professor Pope will repost the exam after the end of the final exam period.
2. **Competence:** By downloading and accepting this examination, you certify that you can complete the examination. Once you have accepted (downloaded) the examination, you will be held responsible for completing the examination.
3. **Exam Packet:** This exam consists of fourteen (14) pages, including these instructions. Please make sure that your exam is complete.
4. **Identification:** Write your exam number on the top of each page of your exam answer.
5. **Anonymity:** Professor Pope will grade the exams anonymously. Do **not** put your name or anything else that may identify you (except for your exam number) on the exam. **Failure to include your correct exam number will result in a 5-point deduction.**
6. **Total Time:** Your completed exam is due within 24 hours of downloading it, but in no case later than 11:59 p.m. on Wednesday, March 18, 2020.
7. **Time Penalty:** If you upload your exam answer file more than 4 hours after downloading the exam, then Professor Pope will lower your exam grade **by one point** for every minute over the 4 hours. If the timestamp on your uploaded exam indicates that you have exceeded the 4-hour limit by more than 20 minutes, then Professor Pope may refer the situation for a Code of Conduct investigation and potential discipline. Please save enough time after editing to upload your exam.
8. **Timing:** Professor Pope has designed this exam for completion in two hours. That means you should be able to write complete answers to all the questions in two hours. Yet, since this is a take-home exam, you will want to take some extra time (perhaps one-half hour) to outline your answers and consult your course materials. You will also want to take some extra time (perhaps one-half hour) to revise, polish, and proofread your answers, such that you will not be submitting a “first draft.”
9. **Scoring:** This midterm exam comprises 15% of your overall course grade. While the scoring includes 100 points, these points will be weighted.
10. **Open Book:** This is an OPEN book exam. You may use any written materials, including, but not limited to: (a) any required and recommended materials, (b) any handouts from class, (c) PowerPoint slides, class notes, and (d) your own personal or group outlines.

11. **Additional Research:** While you may use any materials that you have collected for this class, you are neither expected **nor are you permitted** to do any online or library research (e.g. on Lexis, Westlaw, Google, reference materials) to answer the exam questions.
12. **Format:** The exam consists of three parts:
- Part One**      10 multiple choice questions  
Worth 2½ points each, for a combined total of 25 points  
Estimated time = 20 minutes (2 minutes each)
- Part Two**      4 short answer questions  
Worth 12½ points each, for a combined total of 50 points  
Estimated time = 80 minutes (20 minutes each)
- Part Three**    1 longer essay question  
Worth 25 points  
Estimated time = 40 minutes
- That adds up to two hours and twenty minutes. Remember, you have four hours to complete this exam. Therefore, you have time to revise, polish, and proofread.
13. **Grading:** All exams will receive a raw score from zero to 100. The raw score is meaningful only relative to the raw score of other students in the class. Professor Pope computes your course letter grade by summing the midterm, final, and quiz scores. He will post an explanatory memo and a model answer to Canvas a few weeks after the exam.

### SPECIAL INSTRUCTIONS FOR PART ONE

1. **Numbered List of Letters:** In your exam document create a vertical numbered list (1 to 10). Next to each number type the letter corresponding to the best answer choice for that problem. For example:
1. A
  2. D
  3. B . . .
2. **Ambiguity:** If (and only if) you believe the question is ambiguous, such that there is not one obviously best answer, neatly explain why immediately after your answer choice. Your objection must both (a) Identify the ambiguity or problem in the question and (b) Reveal what your answer would be for all possible resolutions of the ambiguity. I do not expect this to be necessary.

**SPECIAL INSTRUCTIONS FOR PARTS TWO AND THREE**

1. **Submission:** Create clearly marked separate sections for each problem. You do not need to “complete” the exam in order. Still, structure your exam answer document in this order:
3. **Outlining Your Answer:** I strongly encourage you to use at least one-fourth of the allotted time per question to outline your answers on scrap paper before beginning to write. Do this because you will be graded not only on the substance of your answer but also on its clarity and conciseness. In other words, organization, precision, and brevity count. If you run out of insightful things to say about the issues raised by the exam question, stop writing until you think of something. Tedious repetition, regurgitations of law unrelated to the facts, or rambling about irrelevant issues will negatively affect your grade.
3. **Answer Format:** This is very important. **Use headings and subheadings.** Use short single-idea paragraphs (leaving a blank line between paragraphs). Do not completely fill the page with text. Leave white space between sections and paragraphs.
4. **Answer Content:** Address all relevant issues that arise from and are implicated by the fact pattern and that are responsive to the “call” of the question. Do not just summarize all the facts or all the legal principles relevant to an issue. Instead, apply the law you see relevant to the facts you see relevant. Take the issues that you identify and organize them into a coherent structure. Then, within that structure, examine issues and argue for a conclusion.
5. **Citing Cases:** You are welcome but not required to cite cases. While it is sometimes helpful to the reader and a way to economize on words, do not cite case names as a complete substitute for legal analysis. For example, do not write: “Plaintiff should be able to recover under A v. B.” Why? What is the rule in that case? What are the facts in the instant case that satisfy that rule?
6. **Cross-Referencing:** You may reference your own previous analysis (e.g. B’s claim against C is identical to A’s claim against C, because \_\_.” But be very clear and precise what you are referencing. As in contract interpretation, ambiguity is construed against the drafter.
7. **Balanced Argument:** Facts rarely perfectly fit rules of law. So, recognize the key weaknesses in your position and make the argument on the other side.
8. **Additional Facts:** If you think that an exam question fairly raises an issue but cannot be answered without additional facts, state clearly those facts (reasonably implied by, suggested by, or at least consistent with, the fact pattern) that you believe to be necessary to answer the question. Do not invent facts out of whole cloth.

**Exam Misconduct**

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

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

## MULTIPLE CHOICE QUESTIONS

- Below are 10 multiple choice questions.
  - Each question is worth 2½ points for a combined total of 25 points.
  - Recommended time is 20 minutes (2 minutes each).
1. In February 2020, the *New York Times* reported that many medical schools and medical students perform pelvic exams on unconscious, non-consenting female patients. Such exams probably constitute a battery UNLESS:
    - A. Deemed medically necessary
    - B. Done solely for the educational benefit of medical trainees
    - C. Either A or B
    - D. Neither A nor B
  
  2. The February 2020 *New York Times* story on pelvic exams offers the case of Ashley. She drove to an emergency room, suffering from uncontrollable vomiting. She was given an ultrasound and blood work, the standard approach. Her attending physician ran through a list of possible ailments. Then he asked if he could run a test for sexually transmitted infections. Ashley declined, explaining that she was celibate and a childhood abuse survivor, and that she preferred to forgo the exam. The doctor gave Ashley Phenergan, a sedative. Later, she returned to consciousness with her feet in metal stirrups and a speculum inside of her, cold and foreign. Ashley cried out discomfort. She recalled that the doctor responded, “Hang on, I’m almost finished.” In a claim against the physician, Ashley could probably successfully assert a claim for:
    - A. EMTALA
    - B. ADA
    - C. Battery
    - D. Abandonment
    - E. More than one of the above
    - F. None of the above, because she consented to examination by arriving at the ED

3. Lisa presented at the Minneapolis Memorial Hospital emergency room, complaining of abdominal pain. She was examined by a physician and administered medications to reduce her pain. These included a narcotic medication. A few hours later, Lisa was discharged without being advised of the soporific effects of her medication.

While driving home, Lisa became unconscious, crossed the double yellow line, and struck Davis. Later, Davis sued the physician and hospital for medical malpractice. The defendants moved to dismiss. The court should:

- A. Grant the motion
  - B. Grant the motion, because drowsiness is not a material risk of the medication
  - C. Grant the motion, if the undisputed evidence shows a reasonably prudent physician would not have disclosed the medication's side effect
  - D. Deny the motion
4. Aria asked to be tested for sexually transmitted diseases at the Minneapolis Public Clinic. The test report shows that she had herpes, but the physician's office mistakenly informed Aria that the test report came back negative. Aria infected her boyfriend with herpes. The boyfriend then sued the physician on a variety of legal theories all based on professional negligence. The physician moved to dismiss. The court should:
- A. Grant the motion
  - B. Grant the motion, because STD infection is not a material risk
  - C. Grant the motion, if the undisputed evidence shows a reasonably prudent physician would not have disclosed the medication's side effect
  - D. Deny the motion
5. The Americans with Disabilities Act defines a person with a disability as someone:
- A. With a physical or mental impairment that substantially limits one or more life activities
  - B. With a record of such an impairment
  - C. Who is "regarded" as having such an impairment, even if they do not really have such an impairment,
  - D. A and B
  - E. B and C
  - F. A and C
  - G. A, B, and C

6. Deena was experiencing severe pain in her right leg and knee. With Deena's agreement, her physician doctor ordered x-rays. The radiology technologist told Deena that if she experienced too much pain, she would stop. In fact, during the sequence of x-rays, Deena pleaded "please, please, please, please stop." But the technologist did not end early. The technologist proceeded to complete the sequence of all seven x-rays. The x-rays revealed that Deena had a new fracture in her left femur. This information enabled Deena to get properly treated with an immobilization brace.

While she retained no expert witnesses, Deena sued the hospital for battery and informed consent. This hospital is in Indiana, a state that follows the reasonable physician disclosure standard. The hospital moved for summary judgment on all claims. Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.

- A. Grant the motion on both claims
  - B. Grant the motion on the battery claim, but deny on the informed consent claim
  - C. Grant the motion on the informed consent claim, but deny on the battery claim
  - D. Deny the motion on both claims
7. "Wet reads" are informal opinions rendered by radiological or imaging physicians to their colleagues, to aid in patient care. Most academic practices have a longstanding tradition of providing these "courtesy" consults, which are not only appreciated but expected. The process typically entails a brief informal chat between colleagues, often about a very specific question. This amount of interaction is
- A. Enough to create a treatment relationship
  - B. Enough to create a treatment relationship, but not enough to expose the consulting physician to malpractice liability if they are negligent in their advice
  - C. Not enough to create a treatment relationship
  - D. Not enough to create a treatment relationship, but still enough to expose the consulting physician to malpractice liability if they are negligent in their advice
8. Which of the following are accurate statements about EMTALA?
- A. EMTALA guarantees free or low-cost care to those who arrive at the hospital.
  - B. EMTALA guarantees that the ability to pay cannot be used as a reason for denying emergency care to patients arriving on hospital property.
  - C. After a hospital ED visit, screening, stabilization, and potential hospitalization, a patient can be sent a full charge bill.
  - D. A and B
  - E. B and C
  - F. A and C
  - G. All the above

8. Suppose you learned the following additional information about wet reads. Does this change your assessment? Wet reads come with their own risks as they do not occur under ideal circumstances. Time constraints are a major concern, generally interrupting routine workflow. Since they are not compensated, some radiologists may act more expeditiously than with work that impacts their income. The urgent, targeted question may also make the radiologist discard their routine search patterns, increasing the risk of error. This amount of interaction is
- A. Enough to create a treatment relationship
  - B. Enough to create a treatment relationship, but not enough to expose the consulting physician to malpractice liability if they are negligent in their advice
  - C. Not enough to create a treatment relationship
  - D. Not enough to create a treatment relationship, but still enough to expose the consulting physician to malpractice liability if they are negligent in their advice
10. Patient arrives at Minnesota Regional Hospital with multiple complaints and receives a standard screening for that presentation. While the screening revealed that patient does not have an emergency medical condition, it revealed that she needs care for several chronic diseases, including diabetes, hypertension, and asthma. MRH next determined that patient is uninsured, so does not want to provide any additional services. Under EMTALA, may Minnesota Hospital now discharge patient WITHOUT treating these chronic diseases?
- A. No, the hospital may not discriminate against patient primarily or partially because of her insurance status
  - B. No, since the patient is already on hospital property, the hospital must treat at least the more serious conditions with which patient presents
  - C. Yes
  - D. Yes, because of the patient's insurance status, the hospital did not even need to do the screening in the first place

## Short Answer Question 1

- The following questions is worth 12½ points
- Limit your response to 500 words. This is only a limit, not a target or suggested length.
- Recommended time is 20 minutes.

As March 2020 begins, the coronavirus (COVID-19) threatens to send hordes of patients to hospital emergency departments. The only way to ascertain whether a patient has COVID-19 is to use the CDC-developed diagnostic test. But this takes time. Meanwhile, the symptoms (e.g. fever and cough) for COVID-19 look much like symptoms for other, less serious conditions. (<https://www.cdc.gov/coronavirus/2019-ncov/about/symptoms.html>)

This means that many patients with simple head colds, for example, will come to hospital EDs, because they are afraid that they might have COVID-19. But this is dangerous. These patients will get worse, not better, by coming to the hospital, because they will get exposed to sicker patients in the waiting room and in treatment areas. To avoid this bad result and to minimize the spread of COVID-19, your hospital wants to turn away patients who “do not look dangerously ill.” This “pre-triage” would be done by hospital security staff in a roped-off area 50 feet outside the hospital entrances.

**You work in the hospital’s office of general counsel. Identify and assess the key risks in this proposed plan of action.**

## Short Answer Question 2

- The following questions is worth 12½ points
- Limit your response to 500 words. This is only a limit, not a target or suggested length.
- Recommended time is 20 minutes.

Dr. Jacobs is a retina specialist. She has diagnosed moderate lattice degeneration in Diane's left eye and more serious degeneration in her right eye. Lattice degeneration is a disease of the human eye where the peripheral retina becomes atrophic in a lattice pattern and may develop tears, breaks, or holes, which may further progress to retinal detachment and vision loss. Lattice degeneration is typically treated with lasers to strengthen the retina in areas where it is weak.

Because Diane is an older patient, Dr. Jacobs decides to "stage" the laser treatment, doing the right eye first and then the left eye on a separate visit. Diane agrees. But during the first visit, Dr. Jacobs reassesses Diane and determines (correctly) that the risk of vision-threatening detachment is greater in Diane's left eye. So, she reverses the sequence and administers the laser treatment for the left eye, saving the right eye for the second visit.

During this time, to stay relaxed during the procedure, Diane is listening to relaxing music with the clinic's complimentary "Dr. Dre Beats" headphones. Dr. Jacobs does not want to upset Diane. So, she neither disturbs Diane's music nor informs her about the change. Diane suffers an adverse outcome from the left eye procedure.

**You are a plaintiff's side medical malpractice and personal injury attorney. Diane has contacted you regarding a potential lawsuit against Dr. Jacobs. Please identify and assess Diane's BEST cause of action against Dr. Jacobs.**

## Short Answer Question 3

- The following questions is worth 12½ points
- Limit your response to 500 words. This is only a limit, not a target or suggested length.
- Recommended time is 20 minutes.

A provider network is a list of the doctors, other health care providers, and hospitals that a health insurance plan has contracted with to provide medical care to its members. These providers are called “network providers.” In February 2020, Anthem, one of the largest insurers in the country, dropped 175 physicians from its network in the northern part of Iowa, so that it could push patients to Des Moines Medical Group which is affiliated with Anthem. This is an example of “vertical integration,” when entities at different levels of the health care supply chain combine, such as when hospitals acquire physician practices or when health plans acquire pharmacy benefit managers.

Because the Anthem plan will not cover physician visits out of network, many Anthem patients in northern Iowa will lose established relationships with their physicians. They must “start over” with new physicians. This may be a tough adjustment. Indeed, the transition presents patient safety risks as the new physicians and their staff scramble to obtain and review the medical records and become familiar with each new patient’s treatment plan.

**You are a plaintiff’s side medical malpractice and personal injury attorney. One of the affected patients has contacted you. Assess whether these patients have a reasonable tortious abandonment claim against any party.**

## Short Answer Question 4

- The following questions is worth 12½ points
- Limit your response to 500 words. This is only a limit, not a target or suggested length.
- Recommended time is 20 minutes.

Determining a clinician's legal duties is hard enough when medical malpractice law is developed case-by-case through court decisions. Each case is decided under specific facts, and it is unclear how each case applies to other situations. But suppose that you have determined your Minnesota surgeon client's legal duties. A separate challenge is communicating your advice to the client.

Your client finds it unhelpful when you say: "disclose all risks that a reasonable patient would find material." In fact, she tells you, exasperated, "if I tell them all that, nobody will ever get surgery." Your client is confident that fuller informed consent will deter patients from getting surgery and that she will lose business if her disclosures are "too thorough." Therefore, she plans not to patients that there is a 1 in 3400 risk of death from surgery. The surgeon acknowledges that there is some legal risk in such an approach. But she estimates that it is less than the business risk of making disclosures that "scare away" patients.

**Suppose that you agreed with the surgeon's plan. Write a memo to the file explaining the basis for your advice. Why would the risk of informed consent medical malpractice liability be low?**

## Longer Essay Question

- This question is worth 25 points
- Limit your response to 750 words. This is only a limit, not a target or suggested length.
- Recommended time is 40 minutes.

Fran had a history of a chronic periprosthetic joint infection following a left total hip arthroplasty, chronic pain, and chronic lung disease. Fran presented to Saint Paul Hospital (a small community hospital) from a nursing facility with altered mental status and concerns for systemic sepsis. On examination, Fran's left hip had a foul-smelling, open, draining, and granulating wound with an exposed orthopedic implant and a stage-IV decubitus ulcer.

Fran had previously undergone 16 surgeries on her left hip. She had a known chronic periprosthetic joint infection following a left total hip arthroplasty and had chronic osteomyelitis of the left femur. The nursing facility was no longer able to care for Fran's worsening medical issues and stated an inability to care for her current medical needs. So, Fran was transferred to the Saint Paul Hospital. Orthopedic and hospitalist consults were ordered. Both services confirmed that Fran's medical needs (i.e., the need for an arthroplasty specialist and the ability to handle postoperative complications) were outside the capability scope of Saint Paul Hospital and recommended transfer to a tertiary care center.

The nearest tertiary care trauma center (Minneapolis Hospital) had previously taken care of Fran and performed the original procedures. It clearly had the capability (surgical staff and relevant specialists). Eight calls were placed on four separate occasions three days apart, but Fran was never accepted for transfer. Saint Paul Hospital was given the same explanation each time: "The hospital is at the maximum capacity." But census records indicate this was not really the case.

Frustrated, Saint Paul Hospital put Fran in an ambulance and transported drove her to Saint Cloud Hospital, 75 miles away. While annoyed that no transfer had been arranged, Saint Cloud admitted Fran for resection of her implant and her other needs. Fran spent 55 days in the Saint Cloud ICU and required ten operative procedures. Seventeen medical specialties and nine ancillary medical consulting teams were involved in Fran's care. She underwent 1377 laboratory and 91 radiographic studies. Saint Cloud Hospital charges totaled \$4,694,552. Reimbursement from Medicaid was only \$399,172. Nevertheless, Saint Cloud absorbed these costs quietly, because it did not want to interrupt ongoing merger talks with a Twin Cities area system affiliated with Minneapolis Hospital.

**You are an attorney for the DHHS Office of Inspector General. This case was referred to you by a whistleblower at one of the involved hospitals. Identify and assess the potential EMTALA violations and the potential penalties for each.**