Exam ID # _____

WIDENER UNIVERSITY SCHOOL OF LAW

HEALTH LAW I MIDTERM EXAM

Professor Pope **Fall 2009**

GENERAL INSTRUCTIONS:

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

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

3. **Exam Packet:** This exam consists of twelve pages, including this cover page. Please make sure that your exam is complete.

4. **Identification:** Write your exam number in the space provided in the upper-right hand corner of this page. Write your exam number on the cover of each Bluebook (or your ExamSoft file) that you use for Parts Two and Three.

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

6. **Timing:** This exam must be completed within seventy-five minutes.

7. **Scoring:** There are 60 points on the exam, one point per minute. (You have 75 minutes to complete a 60-minute exam.)

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

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

PART ONE comprises twelve multiple choice questions worth one point each, for a ***combined*** total of twelve points. The suggested completion time is **12 minutes**.

PART TWO comprises two short essay questions worth a combined total of ten points. The suggested completion time is **10 minutes**.

PART THREE comprises one long essay question worth thirty-eight points. The suggested completion time is **38 minutes**.

10. **Grading:** All exams will receive a raw score from zero to 60. The raw score is meaningful only relative to the raw score of the other students in the class. The raw score will be converted into a scaled score, based on the class curve. For example, if the highest raw score in the class were 40 of 60, then that student would typically receive an "A." I will post an explanatory memo and/or a model answer to TWEN a few weeks after the exam.

11. **Special Instructions:** Instructions specific to each exam section are printed immediately below.

SPECIAL INSTRUCTIONS FOR PART ONE:

1. **Format:** This Part contains twelve multiple choice questions worth one point each, for a combined total of 12 points. This part has a suggested completion time of 12 minutes. Please note that the questions vary in both length and complexity. You might answer some in 30 seconds and others in two minutes.

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

3. **Circle the Best Answer:** ***Circle*** the best answer choice on the exam itself.

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

SPECIAL INSTRUCTIONS FOR PARTS TWO AND THREE:

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

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

3. **Outlining Your Answer:** I strongly encourage you to use one-fourth of the allotted time per question to outline your answers on scrap paper ***before*** beginning to write in your exam booklet or ExamSoft file.

   Do this because you will be graded not only on the substance of your answer but also on its clarity and conciseness. In other words, organization, precision, and brevity count. If you run out of insightful things to say about the issues raised by the exam question, stop writing until you think of something. Tedious repetition, regurgitations of law unrelated to the facts, or rambling about irrelevant issues ***will*** negatively affect your grade.

4. **Answer Format:** This is important. ***Use headings and subheadings***. Use short single-idea paragraphs (leaving a blank line between paragraphs). Much less important, but sometimes helpful, are introductory roadmaps.

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

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

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

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

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

STOP !

STOP !

DO NOT TURN THIS PAGE UNTIL THE PROCTOR SIGNALS

PART ONE

12 questions worth one point each = 12 points

Suggested time = 12 minutes

1. **A physician who operates without the patient's consent commits _____, even if the operation is performed skillfully and to the benefit of the patient.**

   A. A violation of informed consent

   B. A tortious abandonment

   C. A battery

   D. Medical malpractice

2. **Under *Tarasoff v. Regents Univ. Calif.* and *Bradshaw v. Daniel,* a healthcare provider must warn a third party of potential danger due to a patient's medical or psychological condition when:**

   A. There is any possibility that the patient may cause any harm to a third party.

   B. The patient poses a serious danger of harm to an identified foreseeable person.

   C. The provider believes that it is in the best interest of the patient to inform the third party.

   D. The provider has obtained the permission of the patient to do so.

3. **A hospital failing to comply with EMTALA may be subject to:**

   A. Civil monetary penalties

   B. Termination from the Medicare program

   C. Private lawsuits for damages

   D. Two of the above

   E. All of the above

4. **An on-call physician failing to comply with EMTALA may be subject to:**

A. Civil monetary penalties

B. Termination from the Medicare program

C. Private lawsuits for damages

D. Two of the above

E. All of the above

F. None of the above

5. Which of the following statements is the MOST accurate?

A. EMTALA creates a general duty to provide medical treatment that is enforceable by the federal government against a health care professional at a federally-funded hospital.

B. EMTALA generally prohibits the transfer, from a federally-funded hospital to another health care facility, of a woman in labor who is about to give birth.

C. EMTALA prohibits discrimination against an emergency room patient based on the nature of the patient's medical condition or the patient's race, religion, or ethnicity.

D. All of the above statements are accurate.

6. Regarding the law of informed consent, which of the following is TRUE?

A. The duty to obtain informed consent is restricted to surgeons.

B. It does not matter what a health care provider discusses with a patient about proposed treatment as long as the written consent form gets signed.

C. Major legal decisions in the 1970s dramatically accelerated the evolution of informed consent cases.

D. Informed consent law is uniform among all U.S. jurisdictions.

7. Doogie arrived at the Emergency Department on October 4, 2009 at 2:30 p.m. He complained of chest pain. At 2:52 p.m. Doogie was seen by Dr. House. Dr. House ordered an electrocardiogram, an x-ray, and extensive lab work for Doogie. But Dr. House did not order additional screening tests that were routinely given to patients at the hospital who had "current chest pain." Specifically, Dr. House failed to consult a cardiologist as he did for patients with similar symptoms. Doogie was discharged by the Emergency Department, and the medical records state that his "symptoms resolved." The next day, Doogie was found passed out. He was transported to the Emergency Department, examined, and pronounced dead.

In subsequent litigation, the plaintiff:

A. Has a weak EMTALA claim, because the ER actually did a rather detailed screening.

B. Has a weak EMTALA claim, because the ER did a screening and found no emergency medical condition that would trigger a stabilization duty.

C. Has a strong EMTALA claim, if the ER negligently missed the emergency condition that a reasonable ER would have caught.

D. Has a strong EMTALA claim because the ER's screening was disparate treatment.

8. Physician unilaterally severs the professional relationship between herself and patient without reasonable notice. This conduct constitutes:

A. No legal violation because a healthcare provider can terminate a treatment relationship at any time, so long as the reason does not constitute illegal invidious discrimination.

B. A breach of informed consent

C. Tortious abandonment

D. Tortious abandonment only if patient was still in need of continuing attention

Use the following fact pattern for questions 9 and 10.

In a DC-CA-NJ "*Canterbury"* jurisdiction, *A* ten-year-old boy died of injuries sustained when he was struck by an automobile driven by an eighty-five-year-old man. The driver was taking several prescription medications. The boy's estate sued the driver's physician, asserting that the medications had rendered the driver unable to drive safely and caused him to lose consciousness while driving.

9. The legal theory that can support plaintiff's claim is

A. Informed consent

B. Medical malpractice

C. Negligence

D. EMTALA

10. The plaintiff's claim is likely to:

A**.** Fail, because the physician owed no duty to warn plaintiff because physician and plaintiff were not in a treatment relationship.

B. Fail, because any duty owed by the physician was owed to the patient, not to plaintiff.

C. Succeed, because a reasonable person in the plaintiff's position would consider the information material.

D. Succeed, because the risk to plaintiff was foreseeable.

11. On the element of causation in an informed consent action, the plaintiff's testimony is typically:

A. Dispositive, since she is the only source of information about whether she would have still consented had the proper disclosure been made.

B. Presumptively dispositive (for the reason stated in A), but can be rebutted if the plaintiff lacks credibility.

C. May be considered by the factfinder

12. Philip is suing doctors after claiming that he did not give surgeons consent to amputate his penis. (This is a real case.) Surgeons said they had to take the drastic action after discovering a life-threatening cancer. Philip's lawsuit states he consented to "a circumcision and only a circumcision." Philip's expert witness states there was no emergency: "The surgeon could have very easily closed him up and said 'here are your options. You have cancer.'" Philip's best cause of action is:

A. Malpractice

B. Battery

C. Informed consent

D. None of the above, if no treatment relationship had formed between Philip and the defendant doctor

---------- END OF PART ONE ----------

PART TWO

2 short essay questions worth a combined 10 points

Suggested time = 10 minutes

Use the following fact pattern for short essay questions 1 and 2.

Patient went to the hospital emergency room after a crocodile took a big bite from his leg. The physician who began to examine patient asked him how he planned on paying for the care. When the patient said that he had no money or insurance, the physician stopped the exam, and told the patient that he needed care that was available only at the county hospital. Physician then asked an orderly to drive the patient to the county hospital in the orderly's pickup truck. The physician signed a certification claiming that the patient was stabilized and would be better off with care at the county hospital. The physician threw away the records so DHHS would not find out. The patient was injured by the delay in getting proper care.

Short Essay 1 (2 points, 2 minutes)

You are the physician's defense attorney. What is your primary **defense** against a claim brought by the patient under EMTALA?

Short Essay 2 (8 points, 8 minutes)

You are the hospital risk manager. List all the different ways in which the hospital has **violated** EMTALA. One simple declarative sentence per violation is fine. You need not "argue" or "defend" each violation as a violation.

---------- END OF PART TWO ----------

PART THREE

1 long essay question worth 38 points

Suggested time = 38 minutes

Nadine suffered from cardiac arrhythmia, or irregular heartbeat. After three years of "annual hospitalizations" from the effects of arrhythmia, Nadine consulted the eminent cardiologist and electrophysiologist, Dr. Swerdlow, to discuss the possibility of treating her condition with a cardiac catheter ablation. This procedure involves inserting a catheter, or wire, into a blood vessel and winding the catheter into the heart. Electrodes on the tip of the catheter measure the heart's electrical activity and determine the location of the "short circuit" that interrupts the heart's normal rhythms. Once doctors identify the area of the abnormal electrical activity, energy is applied to destroy a small amount of heart tissue. This results in the formation of lesions that halt the abnormal electrical disturbances from that area and restore the heart's natural rhythm.

Swerdlow and Dr. Shivkumar, who had worked as a team for decades, arranged to perform Nadine's catheter ablation procedure at UCLA Medical Center (in California). The evening before the procedure, Shivkumar met with Nadine and her husband to explain the procedure. Nadine reviewed and executed various informed consent forms during this meeting. Nadine consented to a limited empirical pulmonary vein isolation (LEPVI) procedure to minimize the number of burns, and conditioned her consent upon Swerdlow and Shivkumar performing the surgery as a team.

One of the forms included the warning, "You may die from the procedure" and stated the probability of death as "1 in 1000." Nadine pointed out to Shivkumar that warning was ambiguous and vague, and asked him to qualify this warning with what kinds of conditions might result in the death of a patient undergoing a catheter ablation. Shivkumar replied with a list of infirmities which he believed could compromise a patient's chances of having a safe ablation. Nadine asked him if she was at risk for any of these problems. Shivkumar answered "no."

On August 11, 2009, Dr. Swerdlow performed the ablation procedure, assisted by Dr. Cesario, though instead of the LEPVI they performed a wide area circumferential or "Pappone Technique" procedure. At that time, Cesario was an electrophysiology fellow (in training) who had graduated from medical school eight years earlier, and had completed an internship and cardiology residency. Swerdlow and Cesario completed the procedure with no apparent complications, and Nadine went home the following day.

While at home, Nadine began experiencing visual disturbances along with tingling and numbness in her hands and arms. She called 911, and an ambulance transported Nadine to the emergency room. Doctors concluded she had suffered a transient ischemic attack,

sometimes referred to as a mini-stroke, and transferred her to a telemetry unit for continuous electronic monitoring. A few days later, Nadine suffered brain death.

An autopsy revealed that Nadine had died from the effects of an atrio-esophageal fistula, a rare, but usually fatal, complication of the cardiac catheter ablation procedure. Many in the electrophysiology community believe that the incidence of atrio-esophageal fistula is as high as one percent.

1. **Evaluate Nadine's claims against Swerdlow.**

2. **Evaluate Nadine's claims against Shivkumar.**

---------- END OF PART THREE ----------

Pope – Health Law I **Exam ID _____**
Fall 2009 Midterm Scoring Sheet

Multiple Choice

Question	Correct	Answered	Explanation	Points	Earned
1	C		Battery = touching with no consent	1	
2	B		Duty to warn (and breach confidentiality) if specific risk	1	
3	E		EMTALA against H = fine, termination, lawsuit	1	
4	D		EMTALA against P = fine, termination only	1	
5	B		A and C are state obligations too broad.	1	
6	C		A, B, D are false.	1	
7	D		The test for screening is uniformity.	1	
8	D		D is more complete than C.	1	
9	C		Plaintiff is not a patient, so can only sue for negligence here.	1	
10	D		This flows from #9.	1	
11	C		A and B are wrong given objective standard for causation.	1	
12	B		Battery = touching with no consent	1	
Total				**12**	

Short Essay 1

	Issue	Points	Earned
EMTALA	EMTALA provides for no private cause of action against a physician (as opposed to against a hospital). Physicians can be fined and sanctioned by CMS. But they cannot be sued for an EMTALA violation by a private party.	**2**	
Total		**2**	

Short Essay 2

	Issue	Points	Earned
Screening	Talked money before screening.	**2**	
	Failure to provide screening (plus one that is uniform and comparable).		
Stabilization	Failure to stabilize (very probable EMC) before transfer.	**2**	
Transfer	Failure to call and get permission to transfer from transferee (or ensure capable of providing necessary treatment)	**1**	
	Failure to send records with patient. Falsification of records to cover up the dumping.	**1**	
	Falsification of certification.	**1**	
	Improper and unsafe transport to transferee (equipment and personnel).	**1**	
Total		**8**	

Long Essay

NOTE: This essay problem was adapted from *Secarea v. Regents of University of California*, No. G037651, 2008 WL 4951050 (Cal. App. Nov 20, 2008). A copy is posted in PDF under the "exam" tab on TWEN.

	Issue		Points	Earned
Plaintiff v. Swerdlow				
Battery 1	The patient did not consent to treatment by Swerdlow and Cesario but only to treatment by Swerdlow and Shivkumar as a team.		**5**	
Battery 2	The patient did not consent to the specific "wide area" procedure that was performed. She consented to LEPVI only.		**5**	
Informed consent	Swerdlow depended on Shivkumar to get informed consent (see below). But Shivkumar did not actually get (any) informed consent for the procedure that was actually performed.		---	---
Plaintiff v. Shivkumar				
Treatment relationship	The patient and physician were in a treatment relationship because she had received treatment, she had specific discussions about her treatment, and/or she made specific plans to get further treatment. Therefore, a duty of informed consent applies.		**3**	
Abandonment	Shivkumar did not show-up and gave no notice. The patient still needed treatment and wanted it from Shivkumar. On the other hand, he got Ceasrio to substitute.		**4**	
Informed consent	Duty	This is California. So, the duty is to disclose information that a reasonable patient would consider material to the decision about whether to have the procedure.	**2**	
		The reasonable patient would consider material that the risk might actually be 1 in 100, not 1 in 1000.	**2**	
		The reasonable patient would want to know if she was within or without of the class potentially subject to the risks, though she might not need to know about the fistula specifically.	**1**	
		The reasonable patient would want to know about Cesario, if his inexperience materially increased the risks.	**1**	
	Breach	Dr. Shivkumar did not disclose some of the above risks.	**3**	
		Plaintiff did sign a **form** that disclosed risks. But the DEF **orally** suggested that these risks did not apply to her. And he may have misstated the risks.	**2**	
	Causation (scientific)	While she had preexisting problems, patient's death appears (from the autopsy) to be a direct result of this procedure.	**2**	
		On the other hand, patient did not actually have the **same procedure** that the informed consent addressed, though it is unclear whether the risks were materially different between the two. Moreover, the risks may be higher with the less experienced Cesario.	**2**	
	Causation (behavioral)	A reasonable patient **would not** consent to a procedure posing a 1% risk of death where she was apparently able to still function ("three years of annual hospitalizations").	**3**	
		The reasonable patient (in patient's circumstances) may **still have proceeded** with the surgery even if the correct information had been disclosed. The patient had a serious problem and the risks may not have been that bad relative to her status quo baseline risk.	**2**	
	Damages	Patient is dead.	**1**	
Total			**38**	

Total for Exam: _____ (of 60)