

UNIVERSITY OF MEMPHIS SCHOOL OF LAW

Law 520: LAW & MEDICINE

Spring 2007

Professor Thaddeus Pope

Time and place: Tuesdays & Thursdays 8:00 to 9:20 a.m. Room 252

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I. Course Description

Health Law can be divided into five subfields: (i) finance and regulation, (ii) public health, (iii) biotechnology, (iv) bioethics, and (v) patient care. This course focuses on several key patient care issues. But this course will also cover some important finance, regulation, and bioethics doctrines and principles.

Recently, a significant body of law, both judicial and statutory, has developed around end of life decision making. This course will address the legal issues engendered by our increasing control over the end of life. In particular, this class will consider: (i) the definition of death; (ii) informed consent; (iii) the refusal and withdrawal of life sustaining interventions by competent patients, (iv) the refusal and withdrawal of life sustaining interventions by incompetent patients through advance directives and surrogates; (v) formal and informal dispute resolution mechanisms, including health care provider liability; (vi) physician assisted suicide; and (vii) medical futility. The course will not cover special issues pertaining to newborns and children.

II. Course Objectives

Upon completion of the course, students will have:

- A. A basic systematic understanding of the legal principles surrounding death and dying health care decision making, including Tennessee statutory and common law;
- B. A basis systematic understanding of select fundamental legal principles and issues in contemporary health law and policy, including the scope and limits of patient rights, the doctrine of informed consent, the role of state and federal legislation, and the role of tort liability in defining and protecting patient rights;

- C. Further honed legal analysis and writing abilities, through (i) exposure to and critique of legal arguments in judicial opinions, legislative reports, and scholarly writing; (ii) participation in classroom discussion; (iii) completion of weekly written problems; and (iv) completion of a written final examination;
- D. Integration of material learned in other classes such as constitutional law, civil procedure, and tort law; and
- E. An awareness of death and dying as a personal, social, and psychological issue; and an appreciation of how death and dying are experienced at the individual, family, community and cultural levels.

III. Required Materials

- A. MARSHA GARRISON & CARL E. SCHNEIDER, THE LAW OF BIOETHICS: INDIVIDUAL AUTONOMY AND SOCIAL REGULATION (Thomson-West American Casebook Series 2003) (ISBN 0314252215).
- B. GARRISON & SCHNEIDER (2006 supplement) (ISBN 0314162550).
- C. End-of-life care is a rapidly developing area. Accordingly, I will regularly post additional appellate judicial opinions, legislative materials, law review articles, excerpts from legal treatises, and other current or local interest materials to the course TWEN site. I will clarify both in class and on the website whether these are required or suggested materials.

IV. Class Schedule

- A. The class will meet on Tuesdays and Thursdays from 8:00 to 9:15 a.m. in Room 252.
- B. The class will *not* meet on January 18th due to a conference conflict. The class will *not* meet on March 6th or 8th due to Spring Break.
- C. Depending on class interest, I am happy to schedule a “review” class during the weeks before the final exam.

V. 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. Preparation: Students must come to class prepared to discuss the material assigned. All assigned cases must be read and briefed, and all problems must be considered, before the applicable class session. 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 in the problems and questions.
- C. Class Participation: **All** students are expected to participate in class discussions. If illness or emergency prevents you from being fully prepared, please notify me *before* class. I reserve the right to reward exemplary class participation by raising your grade one step (*e.g.* B+ to A).
- D. 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 drop me a note or bring it up in class.

VI. 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 usual courtesies, kindly disable and refrain from using cell phones, pagers, and any other communication device other than your laptop computer.
- C. Visual: Please refrain from displaying wallpaper, screen savers, or other material on your laptop computer that you can reasonably expect to be offensive to other students.
- D. End Time: I will be diligent about starting the class precisely at 8:00 and ending it precisely at 9:20. In return, please do not begin to pack-up at 9:17 or 9:19 while others are still trying to be engaged in the class discourse.

VII. Grading

- A. Quizzes and Problems (20%).
- B. Final Exam (80%).
- C. To make my calculations more objective and transparent, I convert all the above percentages into points. There are a total of 225 points for the course. The final exam is worth 180 points. The problem analyses are worth a total of 45 points. Grading methods are more fully explained in the next two sections.

VIII. Required Quizzes and Problems

- A. 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 final exam, provided several weeks *after* the end of the semester. Therefore, I will assign weekly multiple choice quizzes and/or short essay problems. These may often be quite short, consisting, for example, of just one question or just one paragraph.
- B. I will grade the quizzes. For the short essays, I will distribute a score sheet and/or a model answer. But I am happy to review and provide individualized feedback on your essay. Just ask.
- C. The ten quizzes and essays, in the cumulative, comprise 20% of your total course grade. Each one is worth 4.5 points or 2% of your total course grade.
- D. While I may ask you to complete some quizzes and essays during class, you will complete most of the quizzes and essays before class on the course TWEN site. I will announce and post the problems and questions at least three days in advance of the due date. I will either review the quiz/problem in class or pose a feedback memo. More details will be discussed when the first problem is assigned.

IX. Final Exam

- A. Date: The final exam is scheduled from 9:00 a.m. to 12:00 p.m. on Tuesday, May 1, 2007.
- B. Format and Length: The final examination will be comprised of three parts. The first part will include true/false and multiple choice questions. The second part will include short answer questions. The third part will include a long essay problem.
- C. Coverage: The exam will test those concepts and issues either covered in assigned readings or explored during class lectures and discussions.
- D. Open Book: On the exam, you will be allowed to use any written or printed materials you choose. No electronic devices are permitted.
- E. Grading and Feedback: All exams will receive a raw score from zero to 180. The raw score is meaningful only relative to the raw score of the other students in the class. The raw score will be converted to a scaled score, based on the class curve. For example, if the highest raw score in the class were 70, then that student would receive an A. I will provide an explanatory memo and/or a model answer after the exam.

X. 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 for an hour 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 particular time in advance.
- C. Email: Feel free to e-mail me at tmpope@memphis.edu if you are unable to come by in person. I will try to check my voicemail and email messages at least once each business day. I encourage you to write me comments or questions about the subjects we will be covering in class.
- D. Lunch: I have found that grabbing a quick lunch is a good way to get to know each other by class. If you and one or two other students want to share a bite, please let me know. In general, it would be best to suggest in advance a few proposed dates, so we can match our schedules.

XI. TWEN Site

- A. I have set up a TWEN (The West Education Network) web page for this course. Please register on that web page as soon as possible by going to www.westlaw.com, signing on with your student password, selecting first TWEN from the menu at the lower left-hand side of the screen, and then on the TWEN page selecting the web page for this course. TWEN will then walk you through registration. You will need to supply an email address that you check on a routine basis.
- B. When I add anything to the TWEN page, you will receive an email message notifying you of this addition. It is your responsibility to keep your TWEN email address current and to check your email frequently. Throughout the semester I will use the TWEN page to distribute course-related materials, to address administrative issues (including revisions to assignments or, if need be, cancellation and rescheduling of class sessions), and to answer student questions about the course. You are responsible for all material and information distributed via the TWEN page, without regard to whether I also mention the same in class. Should you have any difficulty using TWEN, please contact your student Westlaw representative. Please let me know should he or she prove unable to remedy any problems you
- C. The TWEN site will include the following materials:
1. PowerPoint slides for each class, posted shortly before each class
 2. Links to MP3 recordings of each class posted after each class
 3. Problems and Quizzes (see section VIII, *supra*)
 4. Statutes, cases, and other materials
- D. **Warning!!** Do not permit the availability of these materials to deter you from preparing and participating in class. I provide these materials to supplement and enhance classroom learning, not to substitute for it. It is important to remember that knowledge acquisition is only one small part of law school education. I plan to do little lecturing during classes. Lectures may seem to provide more value – more content, more certainty. It may seem like you are “learning” more. But this would be poor preparation for the practice of law where there is little certainty. Furthermore, nonattendance is not an option given University and ABA attendance requirements, and the grading policy described above.

XII. Students with Disabilities

If you have a disability that requires assistance, you must contact Associate Dean Kritchevsky for coordination in your academic accommodations.

XIII. Study Aids and Reference Materials

Despite the prevalence of health law courses in U.S. law schools, there are, as yet, few student-oriented ancillary materials. But 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. 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 on certain issues.

A. Study Aids

1. BARRY R. FURROW, THOMAS L. GREANEY, SANDRA H. JOHNSON, TIMOTHY STOLTZFUS JOST & ROBERT L. SCHWARTZ, *HEALTH LAW* (2d ed. West Hornbook series 2000) (adapted from the three-volume practitioner series).
2. MARK A. HALL, IRA MARK ELLMAN & DANIEL S. STROUSE, *HEALTH CARE LAW AND ETHICS IN A NUTSHELL* (2d ed. West 1999).
3. GEORGE D. POZGAR & NINA SANTUCCI, *LEGAL ASPECTS OF HEALTH CARE ADMINISTRATION* (Aspen 7th ed. 1999) (directed toward non-lawyers).

B. Reference Materials

This is, of course, a highly select list. I have not included CLE or practitioner-oriented materials. Nor have I included materials more narrowly focused on specific issues.

1. AMERICAN COLLEGE OF LEGAL MEDICINE TEXTBOOK COMMITTEE (SANDY SANBAR ET AL.), *LEGAL MEDICINE* (Mosby 5th ed. 2001).
2. AMERICAN HEALTH LAWYERS ASSOCIATION, *FUNDAMENTALS OF HEALTH LAW* (West 3d ed. 2004), Westlaw database AHLA-PAPERS.
3. AMERICAN HEALTH LAWYERS ASSOCIATION, *HEALTH LAW PRACTICE GUIDE* (West CBC looseleaf) (3 volumes), Westlaw database HTHLPG.

4. ALISON BARNES ET AL., HEALTH CARE LAW DESK REFERENCE (ALI-ABA 2001).
5. SCOTT BECKER, HEALTH CARE LAW: A PRACTICAL GUIDE (Lexis 2005), available on LEXIS.
6. ALEXANDER M. CAPRON & IRWIN M. BIRNBAUM EDS., TREATISE ON HEALTH CARE LAW (Matthew Bender 2005) (5 volumes), available on LEXIS.
7. DEAN M. HARRIS, CONTEMPORARY ISSUES IN HEALTHCARE LAW AND ETHICS (Health Admin. Press 2003).
8. BRYAN A. LIANG, HEALTH LAW & POLICY: A SURVIVAL GUIDE TO MEDICOLEGAL ISSUES FOR PRACTITIONERS (Butterworth Heinemann 2000).
9. ALAN D. LIEBERSON, ADVANCE MEDICAL DIRECTIVES (1992 & SUPP. 2004).
10. ALAN MEISEL & KATHY CERMINARA, THE RIGHT TO DIE: THE LAW OF END-OF-LIFE DECISIONMAKING (3d ed. Aspen 2005 & Supp. 2006).
11. NATIONAL CENTER FOR STATE COURTS COORDINATING COUNCIL ON LIFE-SUSTAINING MEDICAL TREATMENT DECISION MAKING BY THE COURTS, GUIDELINES FOR STATE COURT DECISION MAKING IN LIFE SUSTAINING MEDICAL TREATMENT CASES (West 2d ed. 1993).
12. CLAIRE C. OBADE, PATIENT CARE DECISION MAKING: A LEGAL GUIDE FOR PROVIDERS (West CBC looseleaf), Westlaw database PCAREDM.
13. FAY A. ROZOVSKY, CONSENT TO TREATMENT: A PRACTICAL GUIDE (3d ed. Aspen 2006).

XIV. Course Reading Outline

The outline below is intended to give you a sense of the course coverage. It is *not* a reading schedule. Following its sequence, I will give the specific assignment for the following week during the prior week.

1. Introduction

2. The Definition of Death

- a. The Traditional Heart-Lung Definition of Death
 1. PRESIDENT'S COUNCIL FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL RESEARCH: DEFINING DEATH: A REPORT ON THE MEDICAL, LEGAL, AND ETHICAL ISSUES IN THE DETERMINATION OF DEATH (1981).
 2. A REPORT OF THE AD HOC COMMITTEE OF THE HARVARD MEDICAL SOCIETY TO EXAMINE THE DEFINITION OF BRAIN DEATH, 205 JAMA 85 (1968).
- b. Development of the Brain Death Definition
 1. Uniform Determination of Death Act (1980).
 2. Tennessee Determination of Death Act, Tenn. Code Ann. § 68-3-501
- c. Higher Brain Death
 1. David Randall Smith, *Legal Recognition of Neocortical Death*, 71 CORNELL L. REV. 850 (1986).
- d. Anencephalic Infants
 1. *In re T.A.C.P.*, 609 So. 2d 588 (Fla. 1992).
 2. *In re Baby K*, 16 F.3d 590 (4th Cir. 1994).
- e. Allowing Individuals to Choose their Own Definition of Death
 1. N.J. Stat Ann. § 26:6A-5.
 2. Paul Armstrong & Robert Olick, *Innovative Legislature Initiatives: The NJ Declaration of Death and Advance Directives for Health Care Act*, 16 SETON HALL LEGIS. J. 172 (1992).
- f. Process for Declaration of Death

3. The Right to Make Health Care Decisions: Informed Consent

- a. Doctrine of Informed Consent
 1. Peter Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899 (1994).
 2. *Canterbury v. Spence*, 464 F.2d 722 (D.C. Cir. 1972).
 3. *Culbertson v. Mernitz*, 602 N.E.2d 98 (Ind. 1992).
 4. *Ashe v. Radiation Oncology Assocs.*, 9 S.W.3d 119 (Tenn. 1999).
- b. Standards of Disclosure
- c. Factors to be Disclosed
- d. Exceptions to Duty to Disclose

4. The Right To Forgo Life-Sustaining Treatment: Competent Adults

- a. Introduction
 - 1. Dax Cowart
- b. Federal Constitutional Basis
 - 1. *Cruzan v. Director, Missouri Dept. Health*, 497 U.S. 261 (1990).
- c. Common Law Basis
 - 1. *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127 (1986).
 - 2. *Bartling v. Superior Court*, 163 Cal. App. 3d 186 (1984).
 - 3. *McKay v. Bergstedt*, 801 P.2d 617 (Nev. 1990).
- d. State Interests that Limit the Right to Forgo
 - 1. *Application of the President and Directors of Georgetown College*, 331 F.2d 1000 (D.C. Cir. 1964)
 - 2. *Public Health Trust of Dade Cty. v. Wons*, 541 So. 2d 96 (Fla. 1989).
- e. Statutory Basis
 - 1. Tennessee Health Care Decisions Act, Tenn. Code Ann. §§ 68-11-1801 to -1815.
 - 2. Patient Self Determination Act, 42 U.S.C. §§ 1395cc, 1396a.

5. The Right To Forgo Life-Sustaining Treatment: Incompetent Adults

- a. Competency
 - 1. *Lane v. Candura*, 376 N.E.2d 1232 (Mass. App. 1978).
 - 2. *DHS v. Northern*, 563 S.W.2d 197 (Tenn. App. 1978).
- b. Advance Directives
 - 1. Tennessee Health Care Decisions Act
 - 2. Tennessee Dept. Health Rules 1200-8.1-13
- c. Proxy Decision Making
 - 1. *Juan-Terregosa v. Garcia*, 80 S.W.3d 539 (Tenn. App. 2002).
 - 2. *In re Eichner*, 420 N.E.2d 64 (NY 1981).
 - 3. *In re Conroy*, 486 A.2d 1209 (NJ 1985).
 - 4. *In re Martin*, 538 N.W.2d 399 (Mich. 1995).
 - 5. *In re Jobes*, 529 A.2d 434 (NJ 1987).
 - 6. *In re Schiavo*, 780 So. 2d 176 (Fla. App. 2001).
- d. Persistent Vegetative State
- e. Patients who Have Never Been Competent
 - 1. *Superintendent of Belchertown State School v. Saikewicz*, 370 N.E.2d 417 (Mass. 1977).
 - 2. *In re Storar*, 420 N.E.2d 64 (NY 1981).

6. The Right To Forgo Life-Sustaining Treatment: Particular Treatments

- a. Nutrition and Hydration
- b. Withholding vs. Withdrawing
- c. Ordinary vs. Extraordinary
- d. CPR

7. The Right To Forgo Life-Sustaining Treatment: Resolving Disputes

- a. Guardianship/Conservatorship Process
- b. Judicial Process
 - 1. *Conservatorship of Wendland*, 26 Cal. App. 4th 529 (2001).
 - 2. *Conservatorship of Wanglie*, No. PX-91-238 (Minn. Hennepin Cty. 1991).
- c. Ethics Committees
- d. Tort Liability
- e. Administrative Sanctions

8. The Right to Active versus Passive Assistance: Death with Dignity

- a. Active vs. Passive Euthanasia
- b. Constitutional Status
 - 1. *Washington v. Glucksberg*, 521 U.S. 702 (1997).
 - 2. *Vacco v. Quill*, 521 U.S. 793 (1997).
- c. State Statutory Status
 - 1. Oregon Death with Dignity Act, Or. Rev. Stat. § 127.800

9. The Right to Hospice Care

- a. Diane Rosen, *A Hospice Primer*, N.J. Law, Apr. 1998, at 12
- b. Medicare Coverage
 - 1. Centers for Medicare & Medicaid Services ("CMS"), *Memorandum: Promising Practices for Implementing the Medicare Hospice Benefit for Nursing Home (NH) Resident*, May 10, 2002.
 - 2. 42 C.F.R. Part 418, especially §§ 418.03, 418.20, 418.22(b) & 418.24
- c. Pain Management and Liability
 - 1. Joseph P. Pestaner, *End-of-Life Care: Forensic Medicine versus Palliative Medicine*, 31 J. L. Med. & Ethics 365 (2003).
 - 2. Safe harbors: Tenn. State Bd. of Med. Exam'rs, ch. 0880-2-.14(6)(e)(1).

10. The Right to Receive Medical Treatment versus Health Care Providers' Rights to Refuse: Medical Futility

- a. Introduction: Patient vs. Provide Over-treatment
- b. Liability
 1. *Causey v. St. Francis Med. Ctr.*, 719 So. 2d 1072 (La. App. 1998).
 2. *Gilgunn v. Massachusetts General Hospital*, No. SUCV 92-4280-H (Mass. Super. Ct. Suffolk Cty. Apr. 21, 1995) (jury verdict).
 3. *Wendland v. Sparks*, 574 N.W.2d 327 (Iowa 1998).
- c. Statutory Safe Harbors
 1. Texas Advance Directive Act, Tex. Health & Safety Ann. Code § 166.046 et seq.
 2. Hearing before Committee on Public Health, Texas House of Representatives (August 9, 2006).
 3. Tennessee Health Care Decisions Act, Tenn. Code Ann. § 68-11-1808
 4. California Health Care Decisions Law, Cal. Probate Code § 4740