

WIDENER UNIVERSITY SCHOOL OF LAW

HEALTH LAW II (710)

Spring 2009

Professor Thaddeus Pope

Contacts: Room 325; tmpope@widener.edu; 302-477-2230

Time & Place: Mondays 6:30 – 7:55 p.m. & Wednesdays 8:20 – 9:45 p.m. in L-248

Midterm Exam: Monday, March 16, 2009, from 6:30 to 7:55 p.m.

Final Exam: Monday, May 4, 2009, from 6:30 to 9:30 p.m.

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. In contrast to *Health Law I* which focuses on liability and patient care issues, *Health Law II* addresses the regulation, structure, and financing of the U.S. health care system.

Regulation and structure issues include: (i) how health care institutions are legally organized as business associations; (ii) the charitable tax exemption doctrine; (iii) professional relationships, including medical staff structure and disputes; (iv) federal fraud and abuse, including the False Claims Act, the Antikickback statute, and Stark regulations; (v) health care transactions, and (vi) antitrust.

Access and financing issues include: (i) common law and statutory obligations to provide access; (ii) health care spending, coverage, and reimbursement methods by private insurers; (iii) contract and tort liability of private insurers; (iv) state regulation of private insurance, including ERISA preemption; and (v) public health benefits programs, including Medicare, Medicaid, and SCHIP.

II. Course Objectives

Upon completion of the course, students will have:

- A. A basic systematic understanding of the core legal principles surrounding health care finance and regulation;

- B. 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; (iv) completion of a written midterm examination; and (v) completion of a written final examination; and
- C. Integration of material and skills learned in other classes such as business organizations, tax, civil procedure, and torts.

III. Required Materials

- A. BARRY R. FURROW ET AL., THE LAW OF HEALTH CARE ORGANIZATION AND FINANCE (6th ed. Thomson/West American Casebook Series 2008) (ISBN-13: 9780314184771) (a blue paperback).
- B. Alternatively, you can use FURROW ET AL., HEALTH LAW: CASES, MATERIALS, AND PROBLEMS (6th ed. Thomson/West American Casebook Series 2008) (ISBN-13: 9780314184740), which is the larger, brown hardback casebook from which the above blue paperback is derived.
- C. Health Law is a rapidly developing area. Accordingly, I will regularly post additional current and local print and multimedia 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 Mondays from 6:30 to 7:55 p.m. and on Wednesdays from 8:20 to 9:45 p.m. in Room L-248.
- B. The class will *not* meet on the following four dates: (i) Monday, January 19th due to MLK Day, (ii) Monday, March 2nd due to spring break, (iii) Wednesday, March 4th due to spring break; and (iv) Wednesday, April 1st because Friday classes meet that day. The last class meets on Wednesday, April 29th.
- C. Depending on class interest, I am happy to schedule a “review” class during the weeks before the final exam. Please email your questions to me 24 hours before such a session, to better enable me to answer them.

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:** I employ little lecture but lots of case method questions and problems. Consequently, students must come to class prepared to discuss the material assigned. All assigned cases must be read and briefed. Analyze each case using the following headings: (i) essential substantive facts, (ii) procedural posture, (iii) issue(s), (iv) legal principle(s), (v) reasoning and (vi) holding. All note 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.
- C. **Warning about 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. . . . [I]t is by listening carefully to your work that you will gradually improve.”
- D. **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-). Typically, 10% of the class receives such a grade “bump.”
- E. **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 the dialogue with the student who was initially called on. Nonetheless, to move things along I may let the volunteer help. Please be sensitive to the fact that the student who is called on often suffers from stage fright, and the most obvious things slip from their mind.
- F. **Ask Questions:** I 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. Alternatively, send an email or start a discussion thread on TWEN.

- G. 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 start a discussion on TWEN.

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 or distracting to other students.
- D. End Time: I will be diligent about starting the class precisely at 6:30 and 8:20 p.m. and ending it precisely at 7:55 and 9:45 p.m. In return, please do not begin to pack-up while others are still trying to be engaged in the class discourse.

VII. Grading

- A. Weekly Problems (20%).
- B. Midterm Exam (20%)
- C. Final Exam (60%).
- D. To make my calculations more objective and transparent, I convert all the above percentages into points. There are a total of 300 points for the course. The final exam is worth 180 points. The midterm exam is worth 60 points. The weekly problem analyses are worth a total of 60 points. Grading methods are more fully explained in the next three sections.

VIII. Required Quizzes and Problems

- A. I will provide informal, oral feedback during class discussions. But 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. Grading: 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. Weight: The ten quizzes and essays, in the cumulative, comprise 20% of your total course grade. Each one is worth six points or roughly 2% of your total course grade.
- D. TWEN: 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 four days in advance of the due date. I will either review the quiz/problem in class or post a feedback memo. More details will be discussed when the first problem is assigned.

IX. Midterm Exam

- A. Date: The midterm exam is scheduled from 6:30 to 7:55 p.m. on Monday, March 16, 2009.
- B. Weight: The midterm exam comprises 20% of your course grade, 60 of the 300 total course points.
- C. Everything else about the midterm exam is the same as for the final exam except that the midterm is only one-hour instead of three hours.

X. Final Exam

- A. Date: The final exam is scheduled from 6:30 to 9:30 p.m. on Monday, May 4, 2009.
- B. Weight: The final exam comprises 60% of your course grade, 180 of the 300 total course points.
- C. Format and Length: The final examination will be comprised of three roughly equal parts. The first part will include multiple choice questions. The second part will include short answer questions. 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, and (iii) come to a reasonable conclusion.

- D. 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 on topics in the course. For example, Medicare will be tested more heavily than SCHIP.
- E. Open Book: On the exam, you will be allowed to use *any* written or printed materials you choose. No electronic devices are permitted.
- F. 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 as you would for a closed-book exam, then you will do very poorly and perhaps not pass.
- G. ExamSoft: I strongly encourage you, *as soon as possible*, to register to *type* your midterm and final exams, using your own laptop and special security software that you can download from the Law School's website. Typing your exam allows you to create a work product in a way that will be least distracting from the substance.
- H. Grading: 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 110, then that student would receive an A.
- I. Grading Curve: The final grades will comport with Law School's grading policies and suggested grading curve. Page 69 of the *Student Handbook* states that the mean grade of J.D. students must fall between 3.1 and 3.1 (or 3.4 if fewer than 20 students are enrolled). M.J. and L.L.M. students are graded on separate curves not specified in the *Handbook*.
- J. Exam Review and Feedback: Several weeks after the exam, I will post on the TWEN site both a copy of the exam and an explanatory memo and/or a model answer. All grades are final; there will be no negotiations regarding revisions, except to correct any mathematical or clerical errors in computing the final score. Of course, I will be happy to go over the exam with anyone who schedules an appointment to review the exam. I will give you a copy of your exam answers. If – after reviewing these against the exam, the feedback memo, and your notes – you have questions about your exam, please email those to me in advance of our meeting so that I can be sufficiently prepared for a productive session.
- K. Grading Criteria: I will post my old *Health Law* exams and my old exam feedback memos and score sheets on TWEN. These should also be available from the library. While some of those exams (especially before

2007) had a broader coverage than we will have in this course, you can get a good sense of the criteria that I employ in grading. In short, I look for (i) an ability to muster relevant evidence and authority to make arguments cogently and clearly; (ii) an understanding of substantive legal doctrine; and (iii) an appreciation for broader policy concerns that influence how legal doctrine applies to novel situations.

XI. 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. Email: Feel free to e-mail me at tmpope@widener.edu. I will try to answer promptly any question you have as soon as possible. To transmit larger files I use thaddeus.pope@gmail.com. But since I rarely use this account, inform me at tmpope@widener.edu so I know to retrieve your file.
- D. TWEN: Whether you want to elaborate or clarify the casebook materials or class discussions, you can start a discussion thread on the TWEN site. You are encouraged to provide constructive comments within each other's threads.
- E. Lunch or Coffee: I have found that grabbing a quick lunch (or given the time of this class, 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.

XII. TWEN Site

The TWEN site will include the following materials:

- A. PowerPoint slides for each class, posted shortly before each class;
- B. Links to MP3 recordings of selected classes;

- C. Problems and Quizzes (see section VIII, *supra*); and
- D. Statutes, cases, and other materials

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.

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, or alternative explanations of, certain issues.

A. Study Aids for Students

1. MARCIA M. BOUMIL ET AL., *MEDICAL LIABILITY IN A NUTSHELL* (West 2d ed. 2003).
2. 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 3-volume practitioner series).
3. MARK A. HALL, IRA MARK ELLMAN & DANIEL S. STROUSE, *HEALTH CARE LAW AND ETHICS IN A NUTSHELL* (2d ed. West 1999).
4. ROBERT D. MILLER, *PROBLEMS IN HEALTH CARE LAW* (9th ed. Jones & Bartlett 2006).
5. 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 materials, law review articles, bar journal articles, medical journal articles, or monographs. Many of these types of sources are suggested in the casebook. Plus, I will post or link many of these shorter sources on the TWEN site.

1. ABA, ANTITRUST HEALTHCARE HANDBOOK (3rd ed. 2005).
2. AMERICAN COLLEGE OF LEGAL MEDICINE, LEGAL MEDICINE (7th ed. Elsevier 2007).
3. AMERICAN HEALTH LAWYERS ASSOCIATION, FUNDAMENTALS OF HEALTH LAW (4th ed. 2008), Westlaw database AHLA-PAPERS.
4. AMERICAN HEALTH LAWYERS ASSOCIATION, HEALTH LAW PRACTICE GUIDE (West CBC looseleaf) (3 volumes), Westlaw database HTHLPG.
5. ALISON BARNES ET AL., HEALTH CARE LAW DESK REFERENCE (ALI-ABA 2001).
6. JULIE A. BARNES, MANAGED CARE LITIGATION (ABA-BNA 2005 & Supp. 2008).
7. LINDA A. BAUMANN, HEALTH CARE FRAUD AND ABUSE: PRACTICAL PERSPECTIVES (2d ed. ABA-BNA 2007 & Supp. 2008).
8. SCOTT BECKER, HEALTH CARE LAW: A PRACTICAL GUIDE (Lexis 2005), available on LEXIS.
9. BNA HEALTH LAW AND BUSINESS LIBRARY, WEB PORTFOLIOS LIBRARY (BNA Online) (also available in print or CD-ROM).
10. CHRISTINA W. FLEPS, HEALTH CARE FRAUD AND ABUSE COMPLIANCE MANUAL (Aspen looseleaf).
11. ALICE GOSFIELD, MEDICARE AND MEDICAID FRAUD AND ABUSE (Thomson/West 2008).
12. DEAN M. HARRIS, CONTEMPORARY ISSUES IN HEALTHCARE LAW AND ETHICS (Health Admin. Press 2003).
13. KAISER FAMILY FOUNDATION, <http://www.kff.org> (excellent reports on Medicare, Medicaid, and access issues).
14. CAROL C. LAM, PROSECUTING AND DEFENDING HEALTH CARE FRAUD CASES (ABA-BNA 2002 & Supp. 2008).

15. PAUL C. LASKY ED., HOSPITAL LAW MANUAL (Aspen 5-vol. looseleaf).
16. BRYAN A. LIANG, HEALTH LAW & POLICY: A SURVIVAL GUIDE TO MEDICOLEGAL ISSUES FOR PRACTITIONERS (Butterworth Heinemann 2000).
17. ROBERT W. LUNDY ET AL. EDS, TREATISE ON HEALTH CARE LAW (Matthew Bender 5-vol. looseleaf) (available on Lexis).
18. JOHN P. MARREN, MANAGED CARE LAW MANUAL (Aspen looseleaf).
19. JOHN J. MILES, HEALTH CARE AND ANTITRUST Law (West/CBC 2008 (4 volumes)).
20. MARK M. MOY, EMTALA ANSWER BOOK (Aspen 2008).
21. CLAIRE C. OBADE, PATIENT CARE DECISION MAKING: A LEGAL GUIDE FOR PROVIDERS (West CBC looseleaf), Westlaw database PCAREDM.
22. STEVEN E. PEGALIS, AMERICAN LAW OF MEDICAL MALPRACTICE (West CBC 3d ed. 2005).
23. FAY A. ROZOVSKY, CONSENT TO TREATMENT: A PRACTICAL GUIDE (3d ed. Aspen 2006).

C. Reference Materials by Topic

Medicare	Medicaid	Private Insurance
Becker ch.7 Furrow ch.11 Kaiser primers, tutorials Miller ch.9	Becker ch.7 Furrow ch.12 Kaiser primers, tutorials Miller ch.9	Kaiser primers, tutorials Miller ch.10
Antitrust ABA ACLM ch.8 Becker ch.9 BNA Furrow ch.14 Hall ch.4 Lasky ch.3 Lundy ch.9 Marren ch.5 Miles Miller ch.13	Corporate Practice of Medicine BNA Hall ch.5	Charitable tax exemption Becker ch.4 BNA Furrow ch.2 Hall ch.5 Lasky ch.19 Lundy ch.3 Miller ch.9
	EMTALA Furrow ch.10 Lundy ch.11 Moy	

False Claims Act	Antikickback	Stark
Baumann Becker ch.5 BNA Fleps ch.2 Furrow ch.13 Gosfield ch.5 Lam Lasky ch.22 Marren ch.12	Baumann Becker ch.5 BNA Fleps ch.3 Furrow ch.13 Gosfield ch.2 Lam Lasky ch.22 Marren ch.12	Baumann Becker ch.5 BNA Fleps ch.4 Furrow ch.13 Gosfield ch.3 Lam Lasky ch.22 Marren ch.12
Labor & Employment	Medical staff	ERISA
Furrow ch.4 Hall ch.3 Lasky ch.10 Lundy ch.5	ACLM ch.3 Becker ch.16 Furrow ch.4 Hall ch.3 Lasky ch.15 Lundy ch.6 Miller ch.5	J. Barnes Furrow ch.8 Hall ch.5 Marren ch.7

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.

Note that the reading below is from the Furrow et al. casebook. I will also assign other, typically more recent and mor local, materials (to be posted in PDF on TWEN) to reinforce and link legal concepts presented in the casebook materials. The page numbers on the right, below, refer to the complete hardback edition.

1. Health Care Cost and Access (1st class)

1.1.	Problems in the Policy Context	176-191	560-574
1.2.	Expanding Access	191-201	575-585
1.3.	Controlling Costs	201-211	585-595

2. Obligations to Provide Access (2-3 classes)

2.1.	Common Law Duties	212-225	596-609
2.2.	Statutory Duties	225-253	609-637
2.2.1.	EMTALA		
2.2.2.	ADA		
2.2.3.	GINA		
2.2.4.	Title VI		

3. Private Health Insurance: State Regulation (3-4 classes)			
3.1.	Introduction to Insurance	254-264	638-648
3.2.	Contract Liability of Private Insurers	264-268	648-653
3.3.	Tort Liability of Private Insurers		
3.3.1.	Vicarious Liability	269-290	437-456
3.3.2.	Direct Liability	291-296	456-504
3.3.3.	Physician Incentive Systems	296-303	504-539
3.4.	State Regulation of Private Insurers	303-310	653-660
3.5.	State Regulation of Managed Care	310-328	660-678
3.6.	Perspectives on Regulation and Mandates	328-332	678-682
3.7.	Consumer-Directed Health Care	332-337	682-687
4. Private Health Insurance: Federal Regulation (3-4 classes)			
4.1.	ERISA & State Regulation	338-354	688-704
4.2.	ERISA & State Health Care Reform	354-360	704-710
4.2.1.	Patricia A. Butler, <i>ERISA Implications for State Pay or Play Laws</i> (CHCF 2007).		
4.2.2.	<i>Golden Gate Restaurant Ass'n v. San Francisco</i> , 546 F.3d 639 (9th Cir. 2008).		
4.3.	ERISA Fiduciary Obligations	360-371	710-721
4.4.	ERISA & Tort Litigation	371-384	721-734
4.5.	ERISA Remedies	384-396	734-746
4.6.	ERISA Administrative Procedure	396-398	746-748
4.7.	HIPAA & COBRA	399-403	748-752
4.8.	ADA	403-413	753-763
4.9.	Other Antidiscrimination Laws	413-416	763-766
5. Public Health Financing (2 classes)			
5.1.	Introduction	417-420	767-770
5.2.	Medicare	420-464	770-814
5.2.1.	Eligibility		
5.2.2.	Benefits		
5.2.3.	Payment for Services		
5.2.4.	Administration & Appeals		
5.2.5.	Funding		
5.3.	Medicaid	464-495	814-845
5.3.1.	Eligibility		
5.3.2.	Benefits		
5.3.3.	Payment for Services		
5.3.4.	Administration & Financing		
5.4.	SCHIP	495-497	845-848

6. Professional Relationships (1-2 classes)			
6.1.	Staff privileges	498-522	849-873
6.2.	Managed Care Contracts	523-527	874-878
6.3.	Labor & Employment	527-549	878-899
6.3.1.	Employment-at-Will		
6.3.2.	NLRA		
6.4.	Discrimination Law	549-557	900-908
7. Structure of the Health Care Enterprise (2 classes)			
7.1.	Forms of Business Entity	558-594	909-945
7.2.	Corporate Practice of Medicine	594-601	945-952
7.3.	Integration, New Structures	601-615	952-966
7.4.	Tax-Exempt Organizations		
7.4.1.	Introduction: Senate Joint Committee on Taxation, <i>Present Law and Background Relating to the Tax-Exempt Status of Charitable Hospitals</i> (Sept. 12, 2006).		
7.4.2.	Charitable Purpose: Hospitals	615-630	966-981
7.4.3.	Charitable Purpose: HMOs	630-638	981-989
7.4.4.	Charitable Purpose: Integrated Systems	638-642	989-993
7.4.5.	Joint Ventures	642-658	993-1009
7.4.6.	Inurement, Private Benefit	658-665	1009-1016
7.4.7.	Excess Benefit	665-671	1016-1022
8. Fraud & Abuse (3 classes)			
8.1.	Introduction: Paul E. Kalb, <i>Health Care Fraud and Abuse</i> , 282 JAMA 1163 (1999).		
8.2.	False Claims Act		
8.2.1.	Government Enforcement	672-698	1023-1049
8.2.2.	Qui Tam Actions	699-702	1050-1053
8.3.	Anti-Kickback Statute	702-730	1053-1081
8.4.	Stark I, II, and III	730-743	1081-1094
8.4.1.	Patricia A. Rogers, <i>Stark for Beginners</i> , 78 Okla. B.J. 1957 (2007).		
8.5.	State Statutes	743	1094
9. Antitrust (1-2 classes)			
9.1.	Introduction	744-749	1095-1100
9.2.	Cartels and Professionalism	749-775	1100-1126
9.2.1.	Classic Cartels		
9.2.2.	Collective Action with Justifications		
9.3.	Integration and Financing		
9.3.1.	Provider-Controlled Networks and Plans	775-798	1126-1149
9.3.2.	Payors with Market Power	798-808	1149-1159
9.3.3.	Mergers & Acquisitions	809-834	1160-1185