

# UNIVERSITY OF MEMPHIS SCHOOL OF LAW

## Law 336: HEALTH LAW

Fall 2006

Professor Thaddeus Pope

**Contacts:** Room 233; tmpope@memphis.edu; 901-678-1623

**Time and place:** M W 3:00 to 4:15 p.m. Room 314

**Exam:** Monday, December 11, 2006, 9:00 a.m. to 12:00 p.m.

### I. Course Objectives

While health law is an incredibly broad and growing field, this course surveys most of the major topics in health law, especially those pertaining to patient care, insurance, and some regulation. Topics include: (i) the formation and termination of the treatment relationship; (ii) informed consent; (iii) professional, institutional, and managed care liability, including ERISA preemption; (iv) health care spending, coverage, and reimbursement methods by private insurers, Medicaid, and Medicare; (v) professional and institutional licensure and accreditation; (vi) health care business associations; and (v) medical staff structure and disputes.

The course does not directly cover topics in either bioethics or public health law. Separate courses on each of these subjects will be offered in the Spring 2007 semester.

### II. Required Materials

- A. MARK HALL, MARY ANNE BOBINSKI & DAVID ORENTLICHER, HEALTH CARE LAW AND ETHICS (6<sup>th</sup> ed. Aspen 2003) ["HBO"].
- B. The current supplement to the HBO casebook is freely available at [www.health-law.org](http://www.health-law.org). I will indicate which supplement materials to read.
- C. Health Law is a rapidly developing area. Accordingly, from time to time, I will post additional current materials to the course TWEN site. I will clarify both in class and on the website whether these are required or suggested materials.

### III. Class Schedule

- A. The class will meet on Mondays and Wednesdays from 3:00 to 4:15 p.m. in Room 314.
- B. The class will *not* meet on Monday, September 4<sup>th</sup> due to Labor Day. The last class meets on Wednesday, November 29th.
- C. Depending on class interest, I am happy to schedule a “review” class during the weeks before the final exam.

### IV. 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.

### V. 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 3:00 and ending it precisely at 4:15. In return, please do not begin to pack-up at 4:12 or 4:13 while others are still trying to be engaged in the class discourse.

## VI. 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.

## VII. 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.

## VIII. Final Exam

- A. Date: The final exam is scheduled from 9:00 a.m. to 12:00 p.m. on Monday, December 11, 2006.
- 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.

## IX. 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 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](mailto:tmpope@memphis.edu) if you are unable to come by in person.
- 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.

## X. 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 each class posted after each class
- C. Problems and Quizzes (see section VII, *supra*)
- 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.

## XI. 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. 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 three-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. 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 health law issues.

1. AMERICAN COLLEGE OF LEGAL MEDICINE TEXTBOOK COMMITTEE (SANDY SANBAR ET AL.), LEGAL MEDICINE (Mosby 5<sup>th</sup> 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. CLAIRE C. OBADE, PATIENT CARE DECISION MAKING: A LEGAL GUIDE FOR PROVIDERS (West CBC looseleaf), Westlaw database PCAREDM.
10. STEVEN E. PEGALIS, AMERICAN LAW OF MEDICAL MALPRACTICE (West CBC 3d ed. 2005).
11. FAY A. ROZOVSKY, CONSENT TO TREATMENT: A PRACTICAL GUIDE (3d ed. Aspen 2006).

## **XII. 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**

**HBO 591-595, 1-5, 7-36, 52-65**

### **2. Treatment Relationship**

#### **2.1. Formation, Structure, Termination**

**HBO 101-162**

##### 2.1.1. Duty to Treat

###### 2.1.1.1. Duty to Accept

###### 2.1.1.2. Wrongful Rejection

##### 2.1.2. Treatment Relationship

###### 2.1.2.1. Forming

###### 2.1.2.2. Limiting

###### 2.1.2.3. Terminating

#### **2.2. Consent and Conflicts of Interest**

**HBO 185-228**

##### 2.2.1. Informed Consent

###### 2.2.1.1. Theory

###### 2.2.1.2. Disclosure Standards

###### 2.2.1.3. Limiting Liability

##### 2.2.2. Conflicts of Interest

### **3. Liability**

#### **3.1. Errors and Theories of Liability**

**HBO 255-310, 328-358**

##### 3.1.1. Medical Mistakes and Quality

###### 3.1.1.1. Nature and Extent of Error

###### 3.1.1.2. Quality of Care

##### 3.1.2. Physician Liability

###### 3.1.2.1. Custom Standard of Care

###### 3.1.2.2. Variations in Standard of Care

##### 3.1.3. Alternative Theories of Liability

###### 3.1.3.1. Res ipsa

###### 3.1.3.2. Negligence

###### 3.1.3.3. Breach of Contract

###### 3.1.3.4. Vicarious

###### 3.1.3.5. Strict

###### 3.1.3.6. Products

- 3.2. Institutional Liability **HBO 418-466**
  - 3.2.1. Hospitals
    - 3.2.1.1. Vicarious
    - 3.2.1.2. Direct
  - 3.2.2. Managed Care
    - 3.2.2.1. ERISA Preemption
  - 3.2.3. Medical Malpractice Reform

#### **4. Health Care Insurance**

- 4.1. Right to Coverage **HBO 42-51, 887-911**
- 4.2. Sources of Insurance **HBO 912-954**
  - 4.2.1. Private Sources
  - 4.2.2. Public Sources
    - 4.2.2.1. Medicare
    - 4.2.2.2. Medicaid
  - 4.2.3. Insurance Regulation
  - 4.2.4. ERISA
- 4.3. Coverage **HBO 955-997**
  - 4.3.1. Rationing
  - 4.3.2. Medical Appropriateness
- 4.4. Provider Payment **HBO 997-1035**
  - 4.4.1. Cost Reimbursement
  - 4.4.2. Prospective Payment & DRGs
  - 4.4.3. Capitation
- 4.5. Insurance Reform **HBO 1036-1050**

#### **5. Regulation of Health Care Facilities and Transactions**

- 5.1. Licensure of Providers **HBO 809-820**
- 5.2. Facility Regulation **HBO 1065-1087**
  - 5.2.1. Licensure/Accreditation
  - 5.2.2. CON
- 5.3. Corporate Form **HBO 1065-1071, 1087-1134**
  - 5.3.1. Nonprofit & Public
  - 5.3.2. Charitable Tax Exemption
  - 5.3.3. Corporate



5.4. Medical Staff

**HBO 1135-1168**

- 5.4.1. Medical Staff Bylaws
- 5.4.2. Medical Staff Disputes
- 5.4.3. Managed Care Networks

5.5. Antitrust

**HBO 1169-1230**

- 5.5.1. Staff Boycotts
- 5.5.2. Price Fixing
- 5.5.3. Mergers