

Instructor : Professor Thaddeus Pope
Course Title : Health Law: Quality & Liability
Section : Law 9322, Section 1
Format : Take Home Final Exam
Total Time for Exam : 72 hours
Total Number of Pages : 19 pages

Reference Materials Allowed

Open Book (all reference materials allowed)

Self-Scheduled Take-Home Exam Instructions

1. Please know your **correct Fall 2013 final exam number** and include this number at the top of each page of your exam answer (for example, in a header). To locate your exam number, go to www.hamline.edu and follow the steps below. A graphic guide to locating your exam number is attached as an Appendix to these instructions.
 - Click on Logins in the header.
 - Go to Piperline
 - Log in to the secure area
 - Enter your Student ID and PIN
 - Click Student Services
 - Click Registration
 - Click Student Detail Schedule
 - Select the appropriate term from the drop down menu
 - Exam Numbers are listed below Total Credit Hours at the top of the page
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 TWEN site any time after 12:01 a.m. on Thursday, December 5, 2013. All exams must be submitted within 72 hours of download. But, in any case, all exams must be submitted by the end of the final exam period, i.e. by 5:00 p.m. on Wednesday, December 18, 2013. Therefore, you will want to download your exam no later than 5:00 p.m. on Sunday, December 15, 2013, to ensure that you have the full allowed 72 hours to complete your exam.
4. Write your answers to all three parts of the exam in a word processor. Save your document as a **single PDF file** before uploading to TWEN. Use your exam number as the name for the PDF file.

Instructions Specific to This Examination

GENERAL INSTRUCTIONS:

1. **Honor Code:** While you are taking this exam, you are subject to the Hamline University Code of Conduct. You may not discuss it with anyone until after the end of the entire exam period. It is a violation of the Honor Code to share the exam questions. Shred or delete the exam questions immediately upon completion of the exam. They will be reposted after the end of the exam period.
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 **19 pages**, including these instruction pages. Please make sure that your exam is complete.
4. **Identification:** Write your exam number on the top of each page of your exam answer (e.g. in the header).
5. **Anonymity:** The exams are graded 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 10-point deduction.**
6. **Total Time:** Your completed exam is due within 72 hours of downloading it. If your exam answers are uploaded more than 72 hours after downloading the exam, your exam grade will be **lowered by one point** for every minute in excess of the 72 hours. If the timestamp on your uploaded exam indicates that you have exceeded the 72-hour limit by more than 20 minutes, the situation may be referred for a Code of Conduct investigation and potential discipline. Please save sufficient time to successfully upload your exam.
7. **Timing:** The exam has been written as a 3-hour exam. A student could write basically complete answers to all the questions in 3 hours. But since this is a take-home exam, you will want to take some extra time (perhaps one hour) to outline your answers and consult your course materials. You will also want to take some extra time (perhaps two hours) to revise and polish your answers, such that you will not be submitting a "first draft." In short, while this is a 72-hour take home, you really need not spend more than six hours on this exam.
8. **Scoring:** There are 150 total points on the exam. The final exam comprises 50% of your overall course grade, 150 of the 300 total course points.
9. **Open Book:** This is an OPEN book exam. You may use any written materials, including, but not limited to: any required and recommended materials, any handouts from class, PowerPoint slides, class notes, and your own personal or group outlines.
10. **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.
11. **Format:** The exam consists of three parts:
 - PART ONE comprises 30 multiple choice questions worth 2 points each (60 points total).
 - PART TWO comprises three 15-point essay questions (45 points total).
 - PART THREE comprises one 45-point essay question (45 points total).
12. **Grading:** All exams will receive a raw score from zero to 150. The raw score is meaningful only relative to the raw score of other students in the class. Your course letter grade is computed by summing the midterm, final, and quiz scores. I will post an explanatory memo and a model answer to TWEN 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 30). Next to each number type the letter corresponding to the best answer choice for that problem.
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 (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:** In your exam document create clearly marked separate sections for each of the problems:
Part 2 - Short Essay 1 Part 2 - Short Essay 3
Part 2 - Short Essay 2 Part 3 - Long Essay
2. **Pagination:** Start each essay on a **separate** page.
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.
4. **Answer Format:** This is 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.
5. **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.
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 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?
7. **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.
8. **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.
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 (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

Part One: Multiple Choice Questions

- 30 questions worth 2 points each (60 total points)

- 1. A patient with ongoing health needs is dangerous and threatening to a physician and her office staff. The physician can ask the patient to leave the office. The physician can call the police, if the patient refuses. But can the physician terminate the treatment relationship?**
 - A. Yes, on these grounds, the physician can terminate immediately.
 - B. Yes, the physician can terminate the treatment relationship but must provide notice sufficiently long in advance to permit the patient to secure another physician. Moreover, during the notice period, the physician must continue to treat the patient at a “safe location” such as a hospital emergency room.
 - C. No, the physician may not terminate, if the *reason* for the termination is the patient’s psychiatric disability.

- 2. Irene experienced a cardiac arrest and died in the emergency room of Stillwater Hospital. Irene’s husband claims that both the treating physician and nurse failed to properly implement a chest pain protocol that the hospital had adopted. Irene’s husband has the following potentially valid damages claims:**
 - A. EMTALA against the hospital
 - B. EMTALA against the physician
 - C. Vicarious liability against the hospital for the nurse’s negligence
 - D. Vicarious liability against the hospital for the physician’s negligence
 - E. Direct liability against the hospital for failing to adequately train on the protocol
 - F. Three of the above (A→E)
 - G. Four of the above (A→E)
 - H. All of the above (A→E)

- 3. Allen was out walking his dog in the Minnesota woods when he was bitten by a raccoon. Animal control bagged and transported the raccoon. It tested positive for rabies. Allen’s physician administered rabies vaccine and immune-globulin injections. Allen became seriously ill and was later diagnosed as being blind and having several immunological issues. Allen claims that his physician never informed him about these side effects of the rabies vaccine. On his informed consent action, Allen will probably:**
 - A. Succeed, because a reasonable prudent person would want to know about these serious side effects from the vaccine
 - B. Succeed, if Allen can credibly convince the jury that he would not have consented had the risks been disclosed
 - C. Fail, because a reasonable prudent person would not consider these side effects from the vaccine to be important or material
 - D. Fail, because a reasonable prudent person would still consent to the vaccine, even with disclosure, since rabies itself invariably leads to a dreadful death

4. Marie was 14 weeks pregnant when she attended Winona Hospital with vaginal bleeding. Marie told the doctor that she had developed chickenpox the day before, and that she did not believe she had ever contracted chickenpox previously. The doctor conferred with a gynecologist and an obstetrician to discuss whether Marie should be administered VaricellaZoster Immunoglobulin (VZIG) to reduce the severity of maternal chickenpox and prevent infection of the fetus. The decision was made that VZIG was not required that day. But a blood test would be carried out to check for antibodies to chickenpox, and to confirm if Marie had been infected. A blood sample was taken and the doctor told Marie that the results of the test would be discussed at her next appointment in a few days time.

At Marie's next appointment, her potential chickenpox exposure was not discussed as the issue had not been recorded on her hospital record. Not long after, Marie was diagnosed with chickenpox by her OB-GYN. Marie's daughter was born a few months later and was diagnosed with Congenital Varicella Syndrome.

Under Minnesota informed consent law, Marie should have been informed about VZIG. If she had been so informed, she would have been likely to have accepted this treatment, because there is a 40% chance that VZIG would have prevented Marie contracting chickenpox. Under *Dickhoff v. Green*, if the damages in this case are \$100,000, then Marie's recovery will be:

- A. \$0
 - B. \$40,000
 - C. \$60,000
 - D. \$100,000
5. Plaintiff sued Dr. Bundy for medical malpractice. Dr. Bundy is a pediatrician certified by the American Board of Pediatrics. To establish the standard of care, plaintiff MUST:
- A. Get an expert witness who is certified by the American Board of Pediatrics
 - B. Get an expert witness who is a pediatrician
 - C. Get an expert witness who, even if not a pediatrician, who knows by their training or experience, what a reasonably prudent physician would have done under the circumstances
 - D. Any of the above witnesses would be qualified to establish the standard of care. Any differences between them would concern the "credibility," not the "admissibility" of the testimony.
6. Which of the following physicians can a plaintiff can sue for medical malpractice?
- A. A specialist physician who provided a curbside consultation to the plaintiff's treating physician
 - B. The physician author of a medical treatise upon which the treating physician relied in treating plaintiff
 - C. An independent medical examiner who, while conducting a physical for life insurance, failed to advise the patient to have a dermatologist check out some odd shaped moles
 - D. Two of the above
 - E. All of the above
 - F. None of the above

7. Which of the following are legitimate grounds for terminating a physician-patient relationship?
- A. The patient fails to pay his/her bills.
 - B. The patient continually cancels or misses appointments.
 - C. The patient is rude, disruptive, uses improper language, exhibits violent behavior or threatens the safety of the office staff or other patients.
 - D. The patient is habitually uncooperative and refuses to comply with the treatment plan.
 - E. The physician develops a personal romantic interest in the patient.
 - F. The patient files a complaint or initiates a legal proceeding against the physician.
 - G. Any of the above.
8. Where is a physician LEAST “insulated” from potential liability due to the scarcity of potential plaintiff medical experts?
- A. Idaho, which follows a strict locality rule
 - B. Arizona, which follows a state-wide locality rule
 - C. Mississippi, which follows a national standard of care
9. While all of the following are desirable (and perhaps practically necessary) for a practicing physician to possess, which is always LEGALLY required?
- A. Hospital staff privileges
 - B. Participation in one or more managed care organizations or health insurance plans
 - C. A license from the state medical board
 - D. Board certification by a member board of the American Board of Medical Specialties
10. Jill chose Dr. Hope to be her obstetrician. Jill saw Dr. Hope at his home office for all prenatal visits. Jill never saw Dr. Hope at the Hospital prior to delivery. Dr. Hope did not have office space at the Hospital, billed for his own services, and did not share any revenue with the Hospital. Jill’s baby suffered injuries at his birth at the Hospital due to Dr. Hope’s negligence. Jill can recover against the Hospital on the basis of:
- A. Actual agency
 - B. Ostensible agency
 - C. Non-delegable duty doctrine
 - D. All of the above
 - E. Two of the above
 - F. None of the above

11. **Dr. Nick had failed board certification examinations. Many claims of medical negligence had been asserted against him. He has a history and practice of inappropriate referrals. He also had a history and practice of inadequate documentation in patient medical records, a history and practice of failing to perform appropriate and necessary diagnostic tests, and a history and practice of performing unnecessary and failed surgeries. In a new medical malpractice action against Dr. Nick and the hospital at which he practices, this evidence would most helpfully establish:**
- A. Dr. Nick's liability
 - B. The hospital's vicarious liability
 - C. The hospital's direct liability
 - D. None of the above
12. **Joey was a car accident victim taken to the emergency room. The ED physician observed a seatbelt abrasion stretching from Joey's shoulder to his upper abdomen. But despite this telling symptom, the physician failed to order an ultrasound or CT scan of Joey's abdomen. Instead, she sent Joey home with pain medications, where he died the next morning after suffering severe internal bleeding from a liver rupture. Even if they had known that his liver were lacerated, doctors might still have been unable to save Joey's life, but probably could have.**
- A. Plaintiff can establish that failure to order an ultrasound or CT scan constituted a breach of the standard of care without an expert witness.
 - B. Plaintiff cannot establish breach of the standard of care without an expert witness.
 - C. Plaintiff cannot establish but for causation, required in a majority of states.
 - D. Plaintiff can establish but for causation.
 - E. Both A and C
 - F. Both A and D
 - G. Both B and C
 - H. Both B and D
13. **Dr. Ross was examining a hearing impaired patient. While Dr. Ross recognized that her patient was hearing impaired, she failed to provide a sign language interpreter. This exposes Dr. Ross to which of the following risks:**
- A. ADA discrimination, for failure to provide reasonable accommodations
 - B. Lack of informed consent, if the patient could not hear the physician
 - C. Both A and B
 - D. Neither A nor B

14. Kevin has cystic fibrosis, a deadly disease clogging the lungs, causing dangerous infections, even internal bleeding. Studies show that a new drug called Kalydeco can slow the disease and extend life. But it is expensive: \$30,000 per month. Kevin is a beneficiary on the United Healthcare health insurance plan that his wife gets from her job at Land-of-Lakes. If Kevin can establish both the wrongfulness of the denial and causation between the denial and resulting injuries, then he can recover from United Healthcare:
- A. For those injuries under tort (negligent utilization review)
 - B. For those injuries under ERISA
 - C. For the cost of the wrongly denied Kalydeco under ERISA
 - D. More than one of the above

15. When Kevin first joined his United Healthcare MCO, UH sent him a Member Handbook containing information about the health insurance benefits provided by UH, how the member can obtain the covered health care services, how the services are paid, and the grievance procedure. Kevin also received a Provider Directory which lists the approximately 5000 providers in the UH network, including hospitals and pharmacies. Kevin selected a primary care physician from the list of providers in UH's network to provide the majority of his care.

At one point, Kevin's PCP referred him to a specialist. This specialist performed surgery on Kevin's left foot to remove a bunion. At follow-up visit, the specialist performed a cursory examination that did not involve removing all of Kevin's bandages. Later, Kevin's PCP discovered that Kevin's toes were gangrenous. His toes and part of his left foot were amputated. It was undisputed that the specialist was negligent. Assuming that Kevin can establish causation between the negligence and the amputation, Kevin can recover from United Healthcare:

- A. For amputation injuries under vicarious liability
 - B. For amputation injuries under ERISA
 - C. For the cost of the negligent surgery under ERISA
 - D. None of the above
16. Nurse practitioners (NPs), sometimes called advanced practice nurses (APNs) are registered nurses with specialized qualifications, usually at the postgraduate level. They are trained to make diagnoses, to order tests and referrals, and to write prescriptions. But in many states, their scope of practice is limited and they are not permitted to work independently. This may change both as 30 million more Americans get access to healthcare under the ACA and as the shortage of family doctors grows to 40,000. But right now, many states impose restrictions on NPs doing their full range of services. Today, if a NP provides services outside her scope of practice, she risks:
- A. Discipline by the nursing board (e.g. under Minn. Stat. 148.261)
 - B. Criminal sanctions (for the unlicensed practice of medicine)
 - C. Both A and B
 - D. Neither A nor B

17. **A Minnesota physician's violation of her duties under EMTALA puts the physician at risk for:**
- A. A lawsuit by the affected patient
 - B. Civil monetary penalties by the Office of Inspector General, U.S. Department of Health & Human Services
 - C. Disciplinary action by the Board of Medical Practice
 - D. A and B
 - E. B and C
 - F. All of the above
18. **Under the Minnesota Medical Practice Act the Board may do which of the following to a physician who commits medical malpractice?**
- A. Revoke the license
 - B. Suspend the license
 - C. Impose limitations or conditions on the physician's practice of medicine (e.g. requiring practice under supervision)
 - D. Impose a civil penalty of \$10,000
 - E. Mandate the provision of pro bono services
 - F. Any of the above
 - G. None of the above, because medical malpractice is not grounds for disciplinary action
19. **Tina got an HIV test from Dr. Dizeeze. But due to his sloppy recordkeeping, Dr. Dizeeze failed to follow-up with Tina and inform her about the results of the test. Tina then had unprotected sex with her partner and transmitted the disease. Tina's partner can sue Dr. Dizeeze for:**
- A. Violation of the ADA, since HIV is a disability
 - B. Medical malpractice, if the reasonably prudent physician would have followed-up
 - C. Both A and B
 - D. Neither A nor B
20. **Robin's cardiologist failed to warn him to stay away from strenuous activity, given the weakened condition of his heart. Several weeks later, Robin was involved in a three-way sex romp at a motel near the airport with women other than his wife. During this rendezvous, Robin collapsed and died. Through formal civil discovery, the cardiologist's attorney has discovered that Robin is a compulsive sex addict. With respect to Robin's wife's informed consent action, this evidence:**
- A. Is not relevant, because a reasonable patient would want to know this information (about the risks of strenuous activity). The cardiologist's failure to disclose it was breach.
 - B. Is not relevant, because the doctrinal tests are objective. A reasonable patient would have changed their conduct based on this information, avoiding the injury.
 - C. Is relevant, because the cardiologist may convince the jury that Robin himself probably still would have engaged in the sex romp even had there been no breach and the disclosure were made.

21. Patient consulted physician about a growth in her abdomen. The physician examined the area of the lesion and determined that it was a wart. Patient visited another physician six months later who diagnosed the lesion as malignant melanoma and removed it. The first physician's diagnosis was negligent. But the cancer had already spread by the time of the FIRST visit including with lymph node involvement. Patient died shortly thereafter. In a jurisdiction like Minnesota that has adopted lost chance causation, if the chance of survival with a non-negligent diagnosis were 60% and the wrongful death damages were \$500,000, then plaintiff can recover:
- A. \$500,000
 - B. \$300,000
 - C. \$200,000
 - D. \$0
22. Under the Minnesota Medical Practice Act the Board may do which of the following to a physician convicted of possessing child pornography?
- A. Revoke the license
 - B. Suspend the license
 - C. Impose limitations or conditions on the physician's practice of medicine (e.g. requiring practice under supervision)
 - D. Impose a civil penalty of \$10,000
 - E. Mandate the provision of pro bono services
 - F. Any of the above
 - G. None of the above, because possessing child pornography is unrelated to the practice of medicine and is not grounds for disciplinary action
23. Each year, hundreds of foreign objects are left inside patients after surgery. When these patients sue for injuries caused by these foreign objects, such claims are difficult, if not impossible, to defend, because of which legal theory:
- A. Battery
 - B. Informed consent
 - C. Res ipsa loquitor
 - D. EMTALA

24. Currently, hospitals do a manual count and intra-operative or post-operative x-rays to identify foreign objects. But some hospitals have begun using radio frequency identity chips (RFI) on all towels and sponges (the most frequent type of foreign object). By waving a wand type device over the patient, any objects can be readily identified. RFI kits like Clearcount are inexpensive and make “zero . . . the achievable standard for retained surgical sponges.” In Minneapolis, if you were injured by a retained foreign object and the surgeon failed to use RFI, you could probably establish liability, other than through *res ipsa*:
- A. By showing that a reasonable physician should use RFI, because it is very effective, yet very inexpensive
 - B. By showing that the reasonably prudent physician in Minneapolis uses RFI
 - C. By showing that the reasonably prudent physician in the United States uses RFI
 - D. More than one of the above
 - E. None of the above
25. Eddie arrived at the hospital complaining of chest pain. The ED physician determined that Eddie was NOT having a heart attack. The ED physician diagnosed Eddie as having a muscle strain, and sent him home with a muscle relaxant. Eddie died two days later from an aortic aneurysm. Eddie’s risk of heart attack would have been clear, at the time of his ED visit, from his history of heart problems. But the ED physician was new, and did not know how to use the electronic health records (EHR) system. Eddie has potentially valid claims for:
- A. EMTALA (failure to stabilize)
 - B. Medical malpractice
 - C. Both A and B
 - D. Neither A nor B
26. Ken went into a Saint Cloud, MN hospital for surgery on his right hand. He came out with a 3rd degree burn on his right shoulder. In his medical malpractice claim against the surgeon, Ken will need:
- A. An expert witness familiar with the relevant standard of care in Saint Cloud
 - B. An expert witness familiar with the relevant standard of care in the state of Minnesota
 - C. An expert witness familiar with the relevant standard of care in the United States
 - D. No expert witness
27. Sharon was at a Christmas party when she overheard a physician say that the best thing for dropsy (edema) is intermittent pneumatic compression. Sharon tried this and it only made her condition worse. She sued the physician for medical malpractice and was able to secure appropriate expert witnesses that could definitively establish that the physician’s advice was outside the standard of care. The defendant filed a motion for summary judgment. The court should:
- A. Grant the motion.
 - B. Deny the motion, if there are disputed questions of material fact regarding causation.
 - C. Deny the motion, because Sharon has established duty, breach, and injury.

28. On November 5, 2010, Don had a procedure performed on his ear. On November 5, 2013, after purchasing a new pair of earbud headphones, Don learned that the procedure had not been performed appropriately. In a jurisdiction with a one-year statute of limitations and a three-year statute of repose, by when must Don file a non-barred lawsuit against the clinician that performed the procedure?
- A. November 5, 2011
 - B. November 5, 2012
 - C. November 5, 2013
 - D. November 5, 2014
 - E. November 5, 2015
 - F. November 5, 2016
29. Plaintiff suffered from a gunshot wound in his left leg. He was hospitalized and placed under the care of a physician. One week later, the plaintiff's leg was amputated at a point eight inches above the knee. Plaintiff initiated a lawsuit charging the physician with negligence in his care and treatment. Plaintiff asserted that the physician's negligence necessitated amputation of the leg. During the trial, one medical expert testified that in light of the plaintiff's age, the attendant level of arteriosclerosis, the caliber of the bullet, and the close range of the gunshot, the plaintiff's leg was "inevitably" lost. Another expert testified that regardless of the care given, there was a 50 percent chance of loss of the leg.
- A. Direct a verdict in favor of defendant
 - B. Direct a verdict in favor of plaintiff
 - C. Allow plaintiff to proceed to the jury
30. Patient arrives at the private medical office of Dr. Hardy, bleeding profusely and in urgent need of medical attention.
- A. Dr. Hardy has a duty to treat, as a condition of having been granted a license and the privilege to practice medicine.
 - B. Dr. Hardy has a duty to treat, because the patient has an emergency medical condition.
 - C. Dr. Hardy has a duty to treat, because she had treated the patient for an unrelated condition just a few months earlier.
 - D. Dr. Hardy has no duty to treat the patient.

Part Two: Short Essay Questions

- 3 short essay questions worth 15 points each (45 points total)
- Limit your answer to 2500 words each.
- NOTE: This is an outside, outer limit that does not imply that anywhere near this length is necessary to provide a full and adequate response.

Short Essay Question One

Keith is admitted for surgery to the hospital with a potentially life-threatening cardiovascular disorder. Prior to the procedure, both Keith and his wife demand that the hospital prohibit “black men” from entering the operating room during the surgery. The surgeon does NOT accommodate the request. The surgeon is assisted during the procedure by an African American nurse. Keith and his wife are deeply offended and disgusted by the failure and refusal to honor their request.

Assess Keith’s claims against any and all parties.

Short Essay Question Two

In October 2013, David underwent heart surgery at Lindstrom Hospital. Unfortunately, David developed a number of complications after surgery. Since David was having trouble breathing, a critical care specialist intubated and sedated him in the intensive care unit. An infectious disease specialist was called in to address pneumonia and bacteria in David’s blood, since an infection in David’s heart probably would have been fatal. Later, when a nurse noticed that David could not bend his foot, she measured the pressure within his muscles at a dangerously high level. This pressure, a known complication from a long surgery, can decrease blood flow, which prevents nourishment and oxygen from reaching nerve and muscle cells. An orthopedic specialist was called in to address this condition. But it had already progressed to the point of necrosis and permanent injury to David’s leg.

David sued all these clinicians and the hospital for medical malpractice, alleging that his team of providers failed to properly monitor him and, consequently, failed to timely detect the muscle pressure complication. David’s expert witness, Dr. Spock, was a heart surgeon who testified that David’s “team” of clinicians dropped the ball. Dr. Spock testified that proper post-surgical monitoring would have consisted both of interviewing David when he was awake and of examining his leg on every round. Dr. Spock testified that had this been done, the complication would have been detected earlier, and the damage would have been avoided.

While Lindstrom Hospital employs its nurses, it does not employ any physicians. It simply grants them staff privileges after an exceptionally thorough and exhaustive credentialing process.

Assess David’s claims against Lindstrom Hospital.

Short Essay Question Three

In an effort to reduce its uncompensated care burden, Red Wing Hospital is planning to adopt a new policy. The policy is this: once a health care assistant has determined that an emergency department patient is not in an emergency condition, further treatment will be provided to that patient **only if** the patient shows evidence of having health insurance or pays a deposit of \$250 (by cash, check or charge).

The administrator for the emergency department has received conflicting advice as to whether this policy exposes the medical center to EMTALA liability, and comes to you for your opinion.

Part Three: One Long Essay Question

- One long essay questions worth 45 points each (45 points total)
- Where applicable, use the Eyeowah statutory appendix on the next three pages.
- Limit your answer to 5000 words.
- NOTE: This is an outside, outer limit that does not imply that anywhere near this length is necessary to provide a full and adequate response.

TO: Junior Associate
FROM: Senior Partner
DATE: December 5, 2013
RE: Preliminary case analysis in *Gabriela Marco v. Defendants*

Gabriela Marco, a former regional manager for the Chipotle restaurant chain, is a potential new client. Our paralegal and nurse consultant conducted a preliminary, initial client intake interview and collected the following facts about her case. Please identify all potential causes of action and assess their strengths and weaknesses. If a cause of action seems implicated by these facts but will not succeed, please go ahead and identify it and explain why it will fail. That way, I can be sure that you considered all potential avenues for relief. Otherwise, I will not know whether an omission is due to your oversight or due to the weakness of the claim.

On January 2, 2008 (but it might be 2009 due to an error on the medical records from, understandably, forgetting to use the new year, right after December 31), Gabriela underwent surgery in Eyeowah with Dr. Wright to donate a kidney to her cousin Scott Connolly. The surgery was successful and there were no reported complications. The same day, in a separate surgery, Dr. Maccabee transplanted Gabriela's donated kidney into Scott.

In the subsequent days, Scott experienced some complications with the donated kidney. Additional surgical procedures were required. On January 10, Dr. Maccabee performed an exploratory surgery on Scott and apparently mistakenly stitched the renal artery which supplied blood to the donated kidney. On January 12, Dr. Daly performed yet another surgery on Scott. Dr. Daly observed Dr. Maccabee's sutures transgressing the renal artery and determined that the donated kidney could not be saved. Dr. Daly ordered the kidney to be removed. All these surgeries were performed at the Eyeowah Memorial Medical Center (EMMC), an integrated not-for-profit medical group practice, employing more than 900 physicians.

At the time, Gabriela was obviously disappointed that her organ donation was unable to help Scott. But it was only a few months ago, when she returned to EMMC for some tests, that she learned this was due to surgical error. She is now not just disappointed but really disgusted that she subjected herself to serious risks from surgery for Scott, and it was all for nothing.

Gabriela has some physician friends. (Given our current budget situation at the firm, it would be ideal if we could use them as our expert witnesses, since they may testify for a free or reduced fee given their relationship with Gabriela.) Dr. Lucy is a cardiologist at Johns Hopkins in Baltimore. She opined that it was negligent to stitch the renal artery during the exploratory surgery. Dr. Apple is a surgeon at the Mayo Clinic in Rochester, MN. Dr. Apple also opined that it was negligent to stitch the renal artery during the exploratory surgery. Dr. Apple further opined that both Dr. Maccabee and Dr. Daly were negligent for failing to monitor and supervise Scott properly and detect the decreased blood flow to his transplanted kidney after the exploratory surgery. Dr. Apple said that if the decreased flow had been detected, there would have been a

“good chance” the kidney could have been saved.

As I mentioned, in September 2013, Gabriela went to EMMC for some tests. She had been experiencing fatigue and urination problems. Dr. Sean diagnosed Gabriela with kidney disease. While medicine cannot reverse chronic kidney disease, it is often used to help treat symptoms and complications and to slow further kidney damage. Since Gabriela only has only one remaining kidney, Dr. Sean prescribed Soobent, a drug that has proven effectiveness for her condition. But apparently because of the \$4000 per month cost, Gabriela’s health insurer, Wellpoint, denied coverage.

Wellpoint explained that Soobent is still a new drug and has only significant proven effectiveness with patients who have kidney disease more serious and more advanced than Gabriela. Therefore, using it with someone like Gabriela is “experimental” and falls within the insurance contract’s coverage exclusion for “experimental therapies.” Dr. Sean appealed the denial. But WellPoint would not change its decision. Dr. Sean told Gabriela that there was nothing else he could do for her. Since then, Gabriela’s kidney disease progressed. Because of the pain and other symptoms, she had to quit her job and thereby lose her health insurance.

Dr. Apple had an opinion on this as well. She explained that a majority of physicians regularly “embellish” symptoms to get approval for medications, testing, physical therapy and other interventions. She conceded that most physicians would not lie for a patient who wanted elective cosmetic surgery. But they would to get a patient heart surgery or drugs to treat a serious chronic disease. In short, physicians change insurance billing codes to get around rules and get coverage authorization. Dr. Apple opines that Dr. Sean could and should have gotten the Soobent.

END OF EXAM

EYEWOWAH CONSOLIDATED STATUTES

** Use these statutes ONLY for the long essay question. **

** Eyeowah is a fictitious state that, for purposes of this exam, is geographically located where the real state of Iowa is located. **

E.C.S. 100

- (a) Any physician who treats a patient shall inform the patient about the availability of all alternate, viable medical modes of treatment and about the benefits and risks of these treatments.
- (b) No recovery shall be allowed in any court in this state against any physician, osteopathic physician, chiropractic physician, podiatric physician, dentist, advanced registered nurse practitioner, or physician assistant in an action brought for treating, examining, or operating on a patient without his or her informed consent when:
 - (b)(1) The action of the physician, osteopathic physician, chiropractic physician, podiatric physician, dentist, advanced registered nurse practitioner, or physician assistant in obtaining the consent of the patient or another person authorized to give consent for the patient was in accordance with an accepted standard of medical practice among members of the medical profession with similar training and experience in the same or similar medical community as that of the person treating, examining, or operating on the patient for whom the consent is obtained; and
 - (b)(2) A reasonable individual, from the information provided by the physician, osteopathic physician, chiropractic physician, podiatric physician, dentist, advanced registered nurse practitioner, or physician assistant, under the circumstances, would have a general understanding of the procedure, the medically acceptable alternative procedures or treatments, and the substantial risks and hazards inherent in the proposed treatment or procedures, which are recognized among other physicians, osteopathic physicians, chiropractic physicians, podiatric physicians, or dentists in the same or similar community who perform similar treatments or procedures; or
- (c) The patient would reasonably, under all the surrounding circumstances, have undergone such treatment or procedure had he or she been advised by the physician, osteopathic physician, chiropractic physician, podiatric physician, dentist, advanced registered nurse practitioner, or physician assistant in accordance with the provisions of paragraph (a).
- (d) A consent which is evidenced in writing and meets the requirements of subsection (a) shall, if validly signed by the patient or another authorized person, raise a rebuttable presumption of a valid consent.
- (e) A valid signature is one which is given by a person who under all the surrounding circumstances is mentally and physically competent to give consent.

E.C.S. 200

- (a) An action for health care liability must be brought within two years of when the cause of action accrues. Such action does not accrue until there has been discovery of the facts constituting the health care liability or facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which would lead to such discovery.
- (b) A claimant must bring a health care liability claim not later than five years after the date of the act or omission that gives rise to the claim. This subsection is intended as a statute of repose so that all claims must be brought within five years or they are time barred.

E.C.S. 300

In an action on a health care liability claim where final judgment is rendered against a physician or health care provider or health care institution, the limit of civil liability for noneconomic damages shall be limited to an amount not to exceed \$250,000 for each claimant, regardless of the number of defendant physicians or health care providers against whom the claim is asserted or the number of separate causes of action on which the claim is based.

E.C.S. 400

- (a) In any proceeding against a physician, clinical psychologist, podiatrist, dentist, nurse, hospital or other health care provider to recover damages alleged to have been caused by medical malpractice where the acts or omissions so complained of are alleged to have occurred in Eyeowah, the standard of care by which the acts or omissions are to be judged shall be that degree of skill and diligence practiced by a reasonably prudent practitioner in the same field of practice or specialty and the testimony of an expert witness, otherwise qualified, as to such standard of care, shall be admitted.
- (b) In a health care liability action, the claimant shall have the burden of proving by evidence as provided by subsection (c):
 - (1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred;
 - (2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and
 - (3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.

- (c) No person in a health care profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established by subsection (a), unless the person was licensed to practice in the state or a contiguous bordering state a profession or specialty which would make the person's expert testimony relevant to the issues in the case and had practiced this profession or specialty in one (1) of these states during the year preceding the date that the alleged injury or wrongful act occurred. This rule shall apply to expert witnesses testifying for the defendant as rebuttal witnesses. The court may waive this subsection (b) when it determines that the appropriate witnesses otherwise would not be available.

E.C.S. 500

A plaintiff who cannot establish that probably (more likely than not) she would have suffered the same harm had proper medical treatment been rendered, is entitled to no recovery for the increase in the risk of harm or for the loss of a chance of obtaining a more favorable medical result.

E.C.S. 600

- (a) Contributory negligence is abolished. All actions shall be governed by the doctrine of pure comparative negligence.
- (b) Implied assumption of risk, as an independent complete affirmative defense, is abolished. It shall be considered as an element in the comparative negligence calculus.
- (c) Express assumption of risk (waiver), where not prohibited by public policy, remains an independent complete affirmative defense.

E.C.S. 700

- (a) The state of Eyeowah rejects the existence of any "limited" treatment relationship as has been recognized in some jurisdictions, *e.g. Bazakos v. Lewis* (N.Y. 2009).
- (b) Physicians either are in a treatment relationship with an individual, or they are not in a treatment relationship with that individual.