

Instructor	Professor Thaddeus Mason Pope
Course Title	Health Law: Quality & Liability
Format	Self-scheduled Take Home Final Exam
Total Time	24 hours
Total Pages	18 pages

Reference Materials Allowed

Open Book (all reference materials allowed)

Take-Home Exam Instructions

1. Please know your **correct Fall 2017 exam number** and include this number at the top of each page of your exam answer (for example, in a header).
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 Blackboard site any time after 12:01 a.m. on Monday, December 4, 2017. You must submit your exam answer file back to the Blackboard site within twenty-four (24) hours of downloading the exam but in no case later than 11:59 p.m. on Sunday, December 17, 2017.
4. Write your answers to all parts of the exam in a word processor. Save your document as a **single PDF file** before uploading to Blackboard.
5. 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 Mitchell Hamline Code of Conduct. You may not discuss it with anyone until after the end of the entire final exam period. It is a violation of the Code to share the exam questions. (There may be an accommodation student taking this exam at a different time.) Shred and delete the exam questions immediately upon completion of the exam. Professor Pope will repost the exam after the end of the midterm exam period.
2. **Competence:** Accepting this examination is a certification that you are capable of completing the examination. Once you have accepted (downloaded) the examination, you will be held responsible for completing the examination.

3. **Exam Packet:** This exam consists of eighteen (18) **pages**, including these instructions. Please make sure that your exam is complete.
4. **Identification:** Write your exam number on the top of each page of your exam answer document (in a header).
5. **Anonymity:** Professor Pope will grade the exams 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 5-point deduction.**
6. **Total Time:** Your completed exam is due within 24 hours of downloading it but in no case later than 11:59 p.m. on Thursday, December 17, 2017. If you upload your exam more than 24 hours after downloading the exam, then Professor Pope will lower your exam grade **by one point** for every minute in excess of the 24 hours. If the timestamp on your uploaded exam indicates that you have exceeded the 24-hour limit by more than 20 minutes, then Professor Pope may refer the situation for a Code of Conduct investigation and potential discipline. Please save sufficient time after editing to upload your exam.
7. **Timing:** Professor Pope has designed this exam for completion within four or five hours. That means you should be able to write complete answers to all the questions in four or five hours. Yet, since this is a take-home exam, you will want to take some extra time (perhaps 45 minutes) to outline your answers and consult your course materials. You will also want to take some extra time (perhaps one hour) to revise, polish, and proofread your answers, such that you will not be submitting a “first draft.” In short, while this is a 24-hour take home, you **DO NOT NEED** to spend more than around four or five hours on this exam.
8. **Scoring:** There are 135 total points on this exam. This final exam comprises 45% of your overall course grade, 135 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. You may **NOT** discuss the exam with anyone during the final exam period.
11. **Format:** The exam consists of two parts:

PART ONE comprises thirty (30) multiple choice questions.
These are worth 2 points each, for a combined total of 60 points.

PART TWO comprises three (3) essay questions.
These are worth 25 points each, for a combined total of 75 points.

12. **Grading:** All exams will receive a raw score from zero to 135. The raw score is meaningful only relative to the raw score of other students in the class. Professor Pope computes your course letter grade by summing the midterm, final, and quiz scores. He will post an explanatory memo and a model answer to Blackboard (and to thaddeuspope.com) 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 both
 - (a) Identify the ambiguity or problem in the question and
 - (b) 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:** Create clearly marked separate sections for each problem. You do not need to “complete” the exam in order. Still, structure your exam answer document in this order:
 - Essay 1
 - Essay 2
 - Essay 3
2. **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.
3. **Answer Format:** This is very 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.
4. **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.
5. **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?
 6. **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.
 7. **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.
 8. **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.
 9. **WRITING YOUR ESSAYS:** Since this is such an important exam writing rule, it is repeated in these instructions. **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.

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, worth a combined total of 60 points

- 1. ACCREDITATION is important for nursing homes to seek because:**
 - A. They can then charge more money to patients.
 - B. It ensures the consumer that the facility provides safe, quality care.
 - C. They only have to do it once, then the facility will never have to get inspected by the state again.
 - D. Non-accredited institutions will be shut down by the federal government.

- 2. Which government agency provides nursing home CERTIFICATION?**
 - A. The Joint Commission
 - B. Centers for Medicare and Medicaid
 - C. Center for Disease Control and Prevention
 - D. The State Department of Health

- 3. Multiple patient safety studies have found that MEDICAL ERROR is likely the _____ leading cause of death in the United States?**
 - A. Second
 - B. Third
 - C. Fifth
 - D. Tenth

- 4. _____ is a rigorous, thorough, and systematic approach to collecting and verifying the qualifications of a health care professional:**
 - A. Recruiting
 - B. Interviewing
 - C. Qualifying
 - D. Credentialing
 - E. None of these answers is correct.

5. Which of the following is **PROBABLY** a case of medical malpractice?
- I. A doctor neither monitors nor diagnoses cerebral bleeding in a patient with a head injury, resulting in the patient's death.
 - II. A doctor does not examine a person with an eye injury, resulting in vision loss.
 - III. An incorrect diagnosis of cancer on a biopsy (pathology) inspection, leading to unnecessary surgery.
- A. III only
 - B. I, II, III
 - C. I only
 - D. II only
6. Which of the following is the element of a medical malpractice case that is the **MOST** difficult to prove and that refers to the relationship between the actions of the practitioner and the resulting injury to the patient?
- A. Causation
 - B. Duty
 - C. Damages
 - D. Breach of duty
7. Peers who are in the same profession as the practitioner accused of wrongdoing in a malpractice suit and who give testimony in the case are referred to as ____.
- A. Case reviewers
 - B. Jurors
 - C. Expert witnesses
 - D. Medical consultants
 - E. Medical staff
8. Which of the following is **NOT** an example of medical malpractice?
- A. A nurse develops a fever and cold after caring for sick patients without wearing a mask.
 - B. A confused patient falls out of the bed and breaks a leg because a physical therapist forgot to put the side rail up.
 - C. The doctor accidentally leaves a surgical instrument inside a patient leading to an infection in the body.
 - D. A bedbound patient in the nursing home develops a sore on her hip after being left on her back for several hours.

9. **Res ipsa loquitur** means _____.
- A. The thing speaks for itself.
 - B. A crime was committed.
 - C. An accident did not occur.
 - D. There is no negligence.
10. **Which of the following is NOT checked during a credentialing process?**
- A. Experience
 - B. Professional training
 - C. Licensing
 - D. Education
 - E. All of these are checked
11. **What does the U.S. Constitution's supremacy clause provide?**
- A. Local governments exclusively make local ordinances.
 - B. When a state statute and a local ordinance conflict, the state statute generally trumps the local ordinance.
 - C. State governments exclusively make state laws.
 - D. When a state statute and a federal statute conflict, the federal statute generally trumps the state statute.
12. **Which of the following is NOT a covered entity responsible for HIPAA compliance?**
- A. Company health plan administrator
 - B. Doctor
 - C. Dentist
 - D. Playground attendant
13. **To prove medical malpractice, the plaintiff MUST establish that:**
- I. The negligent person had a duty to the injured individual
 - II. The negligent person's actions or lack of action was not something a prudent practitioner would have done
 - III. Actual harm (injury) occurred
- A. I and II only
 - B. III only
 - C. I, II, and III
 - D. I and III only

14. **When may doctors be EXEMPT from being completely truthful with their patients?**
- A. When the doctor really does not want to give bad news.
 - B. Doctors are almost never exempt from being completely truthful.
 - C. When the doctor feels like withholding the truth might help the patient be happier.
15. **Which of the following is MOST likely an example of nursing malpractice?**
- A. The nurse administers penicillin to a patient with a documented history of allergy to the drug. The patient experiences an allergic reaction and has cerebral damage resulting from anoxia.
 - B. The nurse applies a hot water bottle or a heating pad to the abdomen of a patient with abdominal cramping.
 - C. The nurse assists a patient out of bed, but the patient slips and fractures his right humerus.
 - D. The nurse administers the wrong medication to a patient and the patient vomits. This information is documented and reported to the physician and the nursing supervisor
16. **If a clinician administers an injection to a patient who refused that injection, the clinician has MOST obviously committed:**
- A. Battery
 - B. Negligence
 - C. Malpractice
 - D. None of the above
17. **A registered nurse reaches to answer the telephone on a busy pediatric unit, momentarily turning away from a 2-month-old infant whom she has been weighing. The infant falls off the scale, suffering a skull fracture. The nurse could be charged with:**
- A. Breach of contract
 - B. Abandonment
 - C. Battery
 - D. Malpractice

18. A physician being sued for medical malpractice claims that a patient did not follow the treatment regimen she prescribed, thereby contributing to his own injury. This physician is **MOST** probably using which of the following defenses?
- A. Contributory negligence
 - B. Denial
 - C. Comparative negligence
 - D. Assumption of risk
19. A jury determined in a professional liability suit that the patient plaintiff contributed 25% to the patient's injury and the physician contributed 75%. Which of the following would **MOST** probably be the outcome of this case?
- A. The patient's damage award would be reduced by 25%.
 - B. No damages would be awarded
 - C. The patient would be given 25% of the damage award.
 - D. The patient would be awarded full damages, since the percentage of her fault is under 50%.
20. In which of the following types of defenses to professional liability suits is informed consent one of the **MOST** important elements?
- A. Contributory negligence
 - B. Comparative negligence
 - C. Denial
 - D. Assumption of risk
21. Establishing when the statute of repose begins varies with state law, but one of the **MOST** common dates for marking the beginning of the statutory period is:
- A. The day that the alleged act was committed
 - B. One week after the alleged act was committed
 - C. One month after the injury from the alleged act was discovered
 - D. The day the physician-patient relationship began
 - E. The day the patient discovers her injury
22. A hospital examines the qualifications and experience of physicians seeking staff privileges to admit and treat patients at the hospital. What is the **TERM** for this practice?
- A. Credentialing
 - B. Accreditation
 - C. Certification
 - D. Licensing

23. A Tennessee statute requires: “In a malpractice action, the plaintiff shall prove . . . that the defendant did not supply appropriate information to the patient in obtaining informed consent . . . in accordance with the recognized standard of acceptable professional practice in the profession and in the specialty, if any, that the defendant practices in the community in which the defendant practices and in similar communities.” To establish the duty of disclosure in an informed consent action against a Nashville hepatologist, a patient will probably need:
- A. No expert witness, because the duty is measured by what the reasonable patient would find material, a question within the ken of the lay jury
 - B. Testimony from a hepatologist in the United States
 - C. Testimony from a hepatologist in Tennessee
 - D. Testimony from a hepatologist in Nashville
24. Patient underwent a surgical procedure with a medical device. Representatives of the device manufacturer were present during the procedure to help “train” the physician on its use. Something went wrong. The patient has sued the manufacturer for medical malpractice, contending that its representatives should have ensured that the physician used the device appropriately. The defendant moved to dismiss. The court will probably:
- A. Grant the motion
 - B. Deny the motion
 - C. Deny the motion, only if the representatives were not licensed healthcare professionals
25. Claudia sought obstetric care from Dr. Baybee when she learned that she was pregnant. While Dr. Baybee was not an employee of Minnesota Memorial Maternity Hospital (MMMh), his office was located on the MMMh campus. Dr. Baybee informed Claudia that she would deliver at MMMh, and provided her with a brochure about the maternity program at MMMh entitled “We Believe in Great Beginnings: The Maternity Suite at MMMh.” Dr. Baybee was featured as a member of MMMh’s “team of physicians” in the brochure. If Dr. Baybee commits medical malpractice, then:
- A. MMMh may be liable under respondeat superior
 - B. MMMh may be liable under ostensible agency
 - C. MMMh may be liable under the non-delegable duty doctrine
 - D. MMMh cannot be held vicariously liable for Dr. Baybee’s negligence

USE THIS FACT PATTERN FOR BOTH 26 AND 27

Kayla suffered from morbid obesity and sought treatment from Dr. Phatt. Dr. Phatt performed gastric bypass surgery on Kayla on December 9, 2009, at Hospital. The surgery was apparently uneventful, although Kayla claimed that she started suffering discomfort in her abdomen approximately 1 year after the surgery. She later testified in her deposition that “when [the sponge] was in there it was so large that I could barely bend over without it getting caught on my ribs and the pain was very, very intense. I felt like I was carrying a child in my abdomen.” She further stated that she felt that “something was pushing out ... and it felt like somebody was stabbing me. ... [W]henever I had to have a bowel movement, it felt like somebody was twisting something inside of me. ...”

Kayla had follow-up visits with Dr. Phatt on January 15, 2010; May 12, 2010; October 23, 2010; May 11, 2011; November 17, 2011; December 18, 2013; and March 21, 2014. She advised him of her abdominal discomfort at every visit. On August 7, 2015, Kayla was diagnosed with breast cancer and underwent a computerized tomography (CT) scan of her chest, abdomen, and pelvis. The CT scan showed foreign material in her abdomen, and she returned to Dr. Phatt, who diagnosed the foreign material as a retained surgical sponge. Dr. Phatt removed the sponge on December 19, 2015.

26. If Kayla comes to you seeking to file a claim against Dr. Phatt in a jurisdiction with a two-year statute of repose, you **SHOULD** advise her:
- A. Her claim is barred
 - B. Her claim is barred, because the malpractice occurred more than two years ago.
 - C. Her claim is not barred, because she filed within two years of discovering the negligence
 - D. Her claim is not barred
27. Kayla’s **BEST** theory to use in her case against Dr. Phatt is
- A. Breach of contract
 - B. Informed consent
 - C. Res ipsa loquitor
 - D. Abandonment

28. Once a drug is approved by the FDA for its intended use, physicians are free to prescribe that drug for any other uses. Indeed, around one-third of all U.S. prescriptions are written for off-label uses even though there is often no scientific evidence as to safety and efficacy for that unapproved use. A recent *Consumer Reports* survey shows that 64% of Americans “would not take a doctor prescribed medication that has been approved by the FDA, but not for their specific condition.” But 95% of Americans have never been told that they were given a drug off label. Which of the following is **PROBABLY** true?
- A. Physicians have a duty to disclose a drug’s off-label status in Wisconsin, Indiana, and Tennessee.
 - B. Physicians have a duty to disclose a drug’s off-label in Minnesota, California, and Washington, DC.
 - C. Physicians have a duty to disclose a drug’s off-label status in all jurisdictions.
 - D. Physicians have no duty to disclose a drug’s off-label status in any jurisdiction.

29. Ellis a 56-year-old female, suffered from end-stage renal disease and sought a kidney transplant at Minnesota Hospital. She was a follower of the Jehovah’s Witness faith and made clear her intention to refuse any transfusion of whole blood or blood products. The kidney transplantation was performed on August 15, 2017, and went well. She was discharged from the hospital on August 18, 2017.

Ellis returned to the hospital on August 24, 2017, complaining of abdominal pain. She received IV immune globulin and Solu-Medrol but no blood products. Clinicians performed a needle biopsy of the renal graft and the presence of antibody-mediated vascular rejection was confirmed. Although her hematocrit and hemoglobin were within normal limits on admission, by the morning of August 28, they had fallen to 16.4 and 6.4, respectively. A CT scan indicated a large mass around the kidney, and internal bleeding was suspected.

Ellis was returned to the OR after the CT scan and internal bleeding was confirmed, including bleeding from the biopsy site, which was sutured. The kidney was completely decapsulated and was removed as unsalvageable. The operation was completed, and she was taken to a post-anesthesia care unit. She died the next day.

Expert testimony, including the testimony of the expert witness hired by the estate of Ellis, confirmed that Ellis probably would have survived if blood products had been administered. In a wrongful death action, the estate of Ellis will **PROBABLY** recover:

- A. Nothing
- B. 50% of her damages
- C. 100% of her damages

30. A trial judge bifurcated a trial involving one claim of malpractice against the physician and one claim against the hospital for negligent credentialing of the same physician. The claim against the physician is tried first and the jury renders a verdict for the defendant. Is the subsequent trial against the hospital either necessary or warranted?
- A. No, the plaintiff must prove physician negligence to prove causation in the case against the hospital.
 - B. No, the plaintiff must prove physician negligence to prove vicarious liability of the hospital.
 - C. Yes, even if the physician has not herself been negligent, the hospital may be liable for negligence for allowing the physician to join/remain on staff.

PART TWO

Essay Questions

- 3 questions worth 25 points each
- Worth a combined total of 75 total points
- Limit each response to 1500 words. This is only a limit, not a target or suggested length.

Essay Question 1 of 3

Melanie underwent spine surgery at Minnesota Mediocre Hospital (MMH) on October 11, 2017. The surgery did not go as planned and Melanie suffered serious injuries. She has hired your law firm to represent her in possible civil actions to obtain compensation from any and all culpable parties.

Sometime after the surgery, Melanie discovered that her surgeon was “running two rooms” at the time of her operation. This means that Melanie’s surgeon was double-booked and was seeing another patient in another MMH room during Melanie’s surgery. In fact, most of Melanie’s procedure was performed by a fellow (a post-residency trainee) and not by the senior surgeon to whom Melanie had explicitly given consent.

Through some initial informal discovery, you have learned five things:

1. That the MMH consent form that Melanie signed states “your surgeon will be assisted by a care team that includes doctors in training.” Nevertheless, Melanie told you that she would never have agreed to the MMH operation, if she had known her surgeon would be double-booked.
2. This probably is not a case of “ghost surgery,” because Melanie’s surgeon was present during “crucial” parts of the procedure.
3. It is unclear what exactly went wrong during the procedure. But you are sure that Melanie’s procedure lasted longer than necessary, because the fellow periodically had to wait for the surgeon to return to review her work.
4. There is no consensus within the medical community on the propriety of the double-booking practice. Some doctors see running two operating rooms as inappropriate, undermining the trust of patients who believe that their chosen surgeon will be the one at their bedside during the entire case. After all, many things can go wrong even during noncritical portions of a surgical procedure. Other doctors say the practice is necessary so that sought-after surgeons can utilize their skills efficiently while more junior surgeons handle less-important parts of each case.

5. Similarly, there is variability among hospitals. Some hospitals like the Mayo Clinic and MMH allow overlapping surgery. But in response to a growing body of literature on risks/complications, an increasing number, like the University of Virginia, have adopted policies prohibiting it.

YOUR JOB: Assume that every involved clinician performed her part of Melanie's surgical procedure non-negligently. Assess all reasonably potential claims that Melanie can assert against any party.

Essay Question 2 of 3

On June 15, 2015, Lisa presented to the emergency department at Saint Nigel Hospital. She presented with complaints of abdominal and right-sided kidney pain, nausea, and vomiting. Lisa was examined by Dr. Washington, who ordered a urinalysis, complete blood workup, and imaging studies. Dr. Washington diagnosed Lisa with a 7mm obstructive kidney stone and consulted with the urologist on call, Dr. Adams.

Dr. Adams took the call and Dr. Washington reported the results of the tests that he had ordered. Dr. Adams listened to Dr. Washington recite other specific information regarding Lisa's history, symptoms, and diagnostic test results. Dr. Adams took notes on a notepad and noted that the patient did not have a fever, had a normal white blood count and that the patient's pain was controlled by the administration of Dilaudid.

Dr. Adams advised Dr. Washington that the patient could be discharged with a prescription for Flowmax and instructions to make an appointment with his office for the next Tuesday. Dr. Adams was compensated for his consulting services.

Notably, during this consultation, Dr. Adams formed the medical opinion that Lisa was not in danger of sepsis. So, he did not advise Dr. Washington to admit Lisa. He also did not advise Dr. Washington to prescribe antibiotics. Based on subsequent review with consulting expert witnesses, it appears that Dr. Adams' treatment plan was negligent. In fact, Lisa developed severe septic shock secondary to urosepsis. This resulted in multi-system organ failure and other serious injuries.

This jurisdiction has a 2-year statute of limitations and a five-year statute of repose. It has not adopted lost chance causation. This jurisdiction follows the reasonable patient standard of disclosure, and the majority rule for determining the qualifications of expert witnesses.

You have consulted with two eminent urologists who do not practice in the community where Saint Nigel is located. They both opined that Dr. Adams should have prescribed the antibiotics. They further opined that the timely prescription of antibiotics may have prevented the septic shock. Urologist A opined: "It could have made all the difference." Urologist B opined: "It likely would have prevented the septic shock, but I must admit that the septic shock might still have occurred despite Adams' negligence."

Lisa sued Dr. Washington in March 2016. She did not discover Dr. Adams' involvement until she took Dr. Washington's deposition in December 2016. Lisa has hired your law firm to pursue claims against Dr. Adams.

YOUR JOB: Assess all of Lisa's reasonably potential claims against Dr. Adams. The senior partner has also asked you to consider a negligent credentialing claim against Saint Nigel. His past record of discipline is such that he should not have been granted privileges under the standards in Saint Nigel's bylaws. On the other hand, Dr. Adams' record is sufficient that most other hospitals would grant him privileges.

Essay Question 3 of 3

After her initial cancer diagnosis, Sabrina began seeing Dr. Peaches, a Minnesota oncologist employed by Minnesota Cancer Centers. As you would expect, cancer treatment is very expensive. Chemotherapy can cost tens of thousands of dollars per month. Similarly, imaging, such as a PET scan, can cost upwards of five thousand dollars per test. Fortunately, Sabrina has health insurance from CIGNA through Peter's Pianos, the company where she works as a piano tuner. Still, even though Sabrina is largely insulated from the costs of her treatment, CIGNA is not.

In efforts to control cost, insurance companies like CIGNA have implemented numerous policies and practices to reduce the number of what they consider to be "nonindicated" tests. At least weekly, and occasionally daily, CIGNA denies payment for some cancer treatment that Dr. Peaches prescribes. Over the past year, for various patients, CIGNA has denied: surgery, chemotherapy, consultations to other medical professionals such as physical therapy, medications to cover chemo induced nausea, and imaging such as CT scans and PET scans. Because the cost of treatment is so high, CIGNA's denial of payment usually equates to a denial of service. Most patients, like Sabrina, cannot afford to pay 100% of their treatment costs out-of-pocket, especially since they work and earn less because of the cancer.

Dr. Peaches recently prescribed a PET scan for Sabrina. After a series of denials and re-requests, which already delayed treatment for weeks, the final step in the process of getting the service paid for is the "peer to peer consultation." Here is an excerpt of the transcript from that exchange between Dr. Peaches and the CIGNA physician reviewer.

CIGNA: I've reviewed your patient's case and see that you would like to appeal the denial of services for her PET scan overturned. Is that right?

Peaches: Yes that's right. Let me tell you her story.

CIGNA: Sure.

Peaches: This patient has a history of recurrent metastatic cervical cancer. She is presently in remission. She was initially treated for stage Ib squamous cell carcinoma with radical surgery. She recurred in the pelvis a year later and was treated with concurrent chemoradiation therapy and was in remission for another year. A PET scan then found two lung lesions. These were NOT seen on a CT scan prior to that. These lung lesions were removed surgically, and she's been in remission for the past year. I would like to do a PET scan to make sure no small recurrence is present as she is at such HIGH risk having recurred twice already.

CIGNA: You said she's in remission, so there's no need for a PET scan.

Peaches: Her CT from three months ago was normal, but as I mentioned, in the past her CT was falsely negative, and her recurrence was ONLY identified on a PET scan, giving us time to effectively treat her and get her back into remission.

CIGNA: The policy states that if the CT is positive, then the PET will be covered. So, I will approve a CT scan.

Peaches: That ignores the data indicating the most effective treatment and follow up. Clearly, CT scanning is suboptimal in this patient. She really needs a PET scan.

Ultimately, CIGNA denied the PET. Despite using all available dispute resolution pathways, Dr. Peaches just could not convince the CIGNA physicians, by scientific reasoning or rational argument, that his circular logic was faulty, and the patient may pay with her life for CIGNA's inability to look beyond policy. CIGNA approved Sabrina's CT and it was performed. The CT was normal.

But since a CT is not as diagnostically accurate (Dr. Peaches' point all along), it failed to detect that Sabrina's lung lesions had, in fact, recurred. The PET would have detected those lesions. Dr. Peaches did not discover the recurrence until three months later. While those lesions were surgically removed at that time, they had already metastasized to other parts of Sabrina's body. Careful scientific studies of thousands of cancer patients show that had the lesions been detected earlier (when Dr. Peaches originally ordered the PET), then Sabrina would have had a 30% better chance of avoiding spread of the cancer and again achieving remission.

Sabrina has hired your law firm to pursue liability claims against any and all responsible parties. In your initial discussion with consulting experts, you have learned that unlike Dr. Peaches, many other oncologists "game the system." They administer other measures (such as admission to intensive care or increased medication) to the patient that are not medically indicated. Because it makes the patients look sicker, they are more likely to qualify for coverage under protocols and policies at CIGNA and other insurers.

As insurers become stricter, such an approach has become more common. Indeed, it may no longer be an aberration but standard strategy. In other words, dishonesty has become normal. It appears that had Dr. Peaches administered certain unnecessary treatments to Sabrina (thereby making her appear in greater medical need), then CIGNA would probably have approved the PET scan. Your discussions with several area oncologists shows that they would have done "whatever it takes" to get the PET approved for Sabrina.

Assess Sabrina's reasonably potential claims against all parties.

END OF EXAM