

Exam Number _____

Instructor	:	Professor Thaddeus Mason Pope
Course Title	:	Health Law: Quality & Liability
Section	:	Law 9322, Section 1
Format	:	Take Home Midterm Exam
Total Time for Exam	:	6 hours
Total Number of Pages	:	12 pages

Reference Materials Allowed

Open Book (all reference materials allowed)

Take-Home Exam Instructions

1. Please know your **correct Fall 2015 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 TWEN site any time after 12:01 a.m. on Monday, October 19, 2015. All exam answers must be submitted within 6 hours of download. But, in any case, all exam answers must be submitted by the end of the midterm exam period, i.e. by 11:59 p.m. on Saturday, October 24, 2015. Therefore, you will want to download your exam no later than 5:59 p.m. on October 24, to ensure that you have the full allowed 6 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 **12 pages**, including this cover page. Please make sure that your exam is complete.
4. **Identification:** Write your exam number on the top of each page of your exam answer.

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 6 hours of downloading it. If your exam is uploaded more than 6 hours after downloading the exam, your exam grade will be **lowered by one point** for every minute in excess of the 6 hours. If the timestamp on your uploaded exam indicates that you have exceeded the 6-hour limit by more than 15 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 90-minute exam. A student could write basically complete answers to all the questions in 90 minutes. 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 one hour) to revise and polish your answers, such that you will not be submitting a “first draft.” In short, while this is a 6-hour take home, you really need not spend more than around three hours on this exam.
8. **Scoring:** There are 75 total points on the exam. The final exam comprises 25% of your overall course grade, 75 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 20 multiple choice questions
These are worth 1.5 points each, for a combined total of 30 points.
 - PART TWO** comprises two short answer questions.
These are worth 10 points each, for a combined total of 20 points.
 - PART THREE** comprises one long answer question.
It is worth 25 points.
12. **Grading:** All exams will receive a raw score from zero to 75. 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 20). 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 three problems:
 - Short Answer 1
 - Short Answer 2
 - Long Answer
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 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.

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

Multiple Choice Questions

- 20 Questions worth 1.5 points each = 30 total points.
- Mark the letter of the best answer in a vertical list in your exam document.

- 1. Colbert, a 23-year-old drunk law student, presents to the small and rural Red Wing Hospital with symptoms from a previous injury. His medical issues require a neurosurgery consult. Red Wing asks Regions Hospital in Saint Paul (which has a neurosurgery center of excellence) to authorize a transfer. But the on call specialist there knows Colbert and his non-compliance issues. So, she refuses to accept the transfer. Is Region's refusal an EMTALA violation?**
 - A. No, because Colbert never reached Regions Hospital property.
 - B. No, because Regions has no obligation to accept a transfer.
 - C. No, because Regions had not yet formed a treatment relationship with Colbert.
 - D. No, if Regions did not have a dedicated ED.
 - E. Yes, if Regions had the capacity to treat Colbert.

- 2. An obstetrical patient arrived at Hospital with a bleeding placenta previa (when the baby's placenta partially or totally covers the opening in the mother's cervix). Transfusions are needed to address the patient's significant bleeding. But the patient, a Jehovah's Witness, refuses the transfusions.**
 - A. Hospital should transfuse to stabilize a known emergency medical condition.
 - B. Hospital should not transfuse, and that will not violate EMTALA.
 - C. Hospital should not transfuse, because otherwise it would commit a battery.
 - D. Hospital should transfuse, because the patient's consent is excused under the emergency exception.
 - E. Both A and C.
 - F. Both A and D.
 - G. Both B and C.
 - H. Both B and D.

- 3. A Minnesota physician is a pain specialist and many of the patients she sees benefit from a combination of pain medication and other forms of therapy, such as physical therapy. In addition to the pain clinic, Physician is also part owner of an outpatient physical therapy clinic. If Physician prescribes physical therapy at the clinic where she is part owner, should she inform the patients that she has a direct financial interest in the clinic?**
 - A. No, because her patients will receive good care at the physical therapy clinic and do not need to know.
 - B. No, because the amount of money she receives from her ownership interest in the clinic is only 10% of her overall income.
 - C. Yes. She should inform patients of her financial interest and let them know they can receive therapy elsewhere.

4. A patient has been in Dr. Coben's practice for about 10 years, has faithfully made regular visits, but has not been compliant with Dr. Coben's medical regime for taking hypertension medications. Dr. Coben has repeatedly explained the issues of noncompliance, and has rescued the patient on many occasions with emergent medications, usually in the local emergency room over a weekend. Dr. Coben is convinced that the patient understands but stubbornly refuses to comply. Dr. Coben may:
- A. Terminate this patient immediately
 - B. Terminate only if the patient persists being noncompliant
 - C. Terminate with notice sufficient for the patient to get another physician
 - D. Dr. Coben may not terminate this treatment relationship, since the patient has an ongoing need for medical services
5. Ostensibly to protect public safety, the Texas Medical Board has recently proposed new regulations that limit the ability of physicians to provide medical services by phone or internet. Specifically, the new regulations provide that before a physician can prescribe medications, the physician must establish a "defined physician patient relationship." A "defined physician patient relationship" requires that the physician establish a "diagnosis through the use of acceptable medical practices, which includes documenting and performing: a physical examination that must be performed by either a face-to-face visit or in person evaluation ... and appropriate diagnostic and laboratory testing." Suppose a physician diagnosed the patient's symptoms solely through SMS texting and then prescribed a medication. This physician:
- A. Can be sanctioned by the Medical Board
 - B. Can be sued for inadequate informed consent, if a risk of the medication was not disclosed and materialized
 - C. Both A and B
 - D. Neither A nor B
6. An ER doctor suspected that a severe neurological disease was causing a patient's lower back pain. So, she called the on-call neurosurgeon. The neurosurgeon came down and examined the patient. The neurosurgeon recommended that she be admitted but said that surgery was not needed. Three days later, it was determined that the patient did require the surgery, following which she was permanently impaired. The patient sued the neurosurgeon for malpractice.
- A. The claim fails. The neurosurgeon owed the patient no duty because she did not expressly agree to form a patient-physician relationship.
 - B. The claim fails. The neurosurgeon owed the patient no duty because this was a mere informal consult.
 - C. The claim fails. The neurosurgeon owed the patient no duty because this was an IME exam and there was no new injury caused by the exam.
 - D. A patient-physician relationship was formed because the physician took an affirmative action in rendering an opinion on the course of the patient's care.

7. Clayton advertises his services as a hypnotist in Saint Paul, claiming that he can use hypnosis to help people lose weight or get rid of unwanted habits. Clayton is not a licensed medical professional but is careful not to represent that he is a physician. Nobody is harmed. Indeed, his “customers” are very pleased with the results.
- A. Clayton is probably guilty of a gross misdemeanor.
 - B. Clayton is probably guilty of a felony.
 - C. Clayton is probably subject to a fine from the medical board.
 - D. Clayton is probably not subject to any criminal or administrative sanction.
8. Ashton Kucher and other investors recently launched “Pager,” a New York City based doctor-on-demand service. Patients can forgo the emergency room or urgent care center. Instead, they can summon a doctor for a house call for treatment of, for example, common infections such as bronchitis. A home visit costs \$200. But for just \$25, patients can exchange text messages with photos in the case of a condition such as a rash or insect bite. That is what patient did. Unfortunately, patient was injured as a result of a misdiagnosis by a Pager physician.
- A. Patient can sue the physician for malpractice
 - B. Patient cannot sue the physician for malpractice, because a treatment relationship cannot be formed through text messages.
 - C. Patient cannot sue the physician for malpractice, because this was a mere informal consult.
 - D. Patient cannot sue the physician for malpractice, because the physician had no duty to treat the patient.
9. Refer to the Pager program described in Question 8. Patient was suffering what she thought was an emergency. Rather than going to the emergency room, patient called Pager and paid the \$200 home visit fee through the Apple-Pay app on her phone. But no doctor came. Fortunately, it was just gas in her belly that she later farted out. Patient’s EMTALA claim:
- A. Fails, because patient was not on Pager property.
 - B. Fails, because the patient did not actually have an emergency medical condition.
 - C. Fails, because Pager has no obligation to comply with EMTALA.
 - D. Might succeed, because the Pager physician did not even do a screening.
10. Which of these patients is NOT entitled to a medical screening exam under EMTALA?
- A. A child is brought into the ED by ambulance and has a complaint.
 - B. A woman collapses on the sidewalk in front of (and about 75 feet away from) the ED.
 - C. A man gets chest pain in the hospital’s gift shop.
 - D. All of the above are entitled to a medical screening exam.

11. **A Minnesota physician and her patient develop mutual feelings for each other during the course of treatment. Physician begins dating the patient and they mutually agree to begin a sexual relationship. Physician asks you whether she should continue to medically treat the patient.**
- A. Yes. The treatment began before a sexual relationship was developed. Therefore, it is appropriate to continue treating the patient as before.
 - B. Yes. Physician can maintain a boundary between her personal feelings for the patient and her professional practice.
 - C. No. The physician-patient relationship must be terminated before engaging in sexual conduct.
 - D. No. A physician should never establish a sexual relationship with a current or former patient.
12. **Serena, the new wife of your law school roommate (who is a Minnesota licensed physician) wants to open a laser clinic and perform varicose vein removal in Maplewood, Minnesota. Serena is not a licensed doctor in Minnesota. But she holds a medical license in Delaware. Based on the vast clinical knowledge that you gained from taking health law classes, you are confident that Serena has the education and training to safely perform varicose vein removal. You decide to help Serena out and draft papers allowing her to operate the laser clinic in her husband's name.**
- A. Yes. Even though Serena is not licensed in Minnesota, she is a doctor and you know she will do a good job.
 - B. Yes. The clinic operates under your former roommate's name and you know that either he or Serena will call you with any problems.
 - C. No. Varicose vein removal is probably considered to be the practice of medicine and Serena is not licensed to practice medicine in Minnesota.
 - D. No. The state where Serena is licensed may have different regulations for operating a laser clinic than Minnesota and you can't be sure if Serena's clinic will meet Minnesota regulations.
13. **You are a phlebotomist (a technician trained to draw blood from a patient for clinical or medical testing, transfusions, donations, or research) working in Minnesota. Which of the following is probably a FALSE statement?**
- A. You may not call yourself a "nurse." This by itself violates the law.
 - B. You may call yourself a "nurse," if you are licensed as a nurse in another state.
 - C. If a patient incorrectly refers to you as a "nurse," you should correct them and advise them that you are not licensed in the state of Minnesota or that you are not a nurse.
 - D. The doctors, clinic administrators, and office managers with whom you work should not refer to you as "nurse" or "the nurse."
 - E. These are all probably TRUE statements.

14. **A gynecologist refuses to treat a woman with HIV out of a fear of contracting HIV.**
- A. This is not a violation of the ADA, because of the “direct threat” defense.
 - B. This is not a violation of the ADA, because the ADA only applies once a treatment relationship is formed and the physician has no obligation to form one.
 - C. This is a violation of the ADA, because so long as the physician utilizes universal precautions, it is generally safe to treat persons with HIV or AIDS.
 - D. This is a violation of the ADA, because physicians must treat prospective patients with disabilities, so long as they have the capacity to do so.
15. **You work at Hospital B. Hospital A has, without first asking, transferred a patient to you with an un-stabilized emergency medical condition. You are sure that the transfer was motivated by non-clinical reasons. You may:**
- A. Immediately transfer the patient back to Hospital A
 - B. Discharge the patient without stabilizing the emergency medical condition
 - C. Report the violation to CMS
 - D. Delay stabilizing treatment until Hospital A sends you its risk-benefit certification.
16. **In a material risk (reasonable patient) state like Minnesota, which of the following types of information are patients LEAST likely to have the right to know about their healthcare team.**
- A. Experience
 - B. Marital status
 - C. Years of practice
 - D. Education and board certification status
17. **Which of the following is consistent with the doctrine of informed consent?**
- A. Physicians may protect terminally ill patients from emotional stress by giving them inaccurate information about their illness.
 - B. Physicians should not discuss the possible risks and benefits of no treatment, unless the patient asks.
 - C. If a patient refuses treatment, physicians should give the patient information about the possible consequences of not having treatment.
 - D. All of these are consistent with the doctrine of informed consent.
 - E. None of these are consistent with the doctrine of informed consent.

18. Patient visited Physician's premises after being discharged from the hospital and referred for follow-up care. Upon his arrival, Patient was not able to find adequate parking or safely exit his vehicle because the access aisle was blocked and improperly marked. Patient was unable to enter the building unassisted, because the "accessible" entrance had a "sloped entry." Patient was also unable to use the restroom, had difficulty reaching call buttons in the elevator, and was unable to transfer to an examination table due to the lack of a proper examination table. Patient filed a claim under the Americans with Disabilities Act. Two days later, Physician fired Patient due to a "Conflict of Interest" and notified Patient via Certified Letter. Physician advised Patient that she would no longer see him, and that he must immediately find another physician to care for his needs. Patient has asked you to represent him.
- A. This is not tortious abandonment, because Patient already terminated the treatment relationship, first, by filing suit.
 - B. This is not tortious abandonment, because Physician has no duty to treat a patient who is suing her.
 - C. This is not tortious abandonment, because Physician is unable to appropriately treat this patient in any case, given the architecture of her office.
 - D. This is probably tortious abandonment.
19. Cozen went to the rural Red Wing Hospital for an elective inpatient surgical procedure at a scheduled appointment. During this procedure, a complication occurred. The surgeon accidentally perforated Cozen's intestine causing various contents to leak into his abdomen. This placed Cozen's life and health in jeopardy and placed him at risk for serious impairment of a body function. Hospital was aware of the injury but failed to adequately treat Cozen or transport him to a larger hospital. Cozen suffered devastating and permanent injuries. Which of the following is MOST true?
- A. Cozen may have an EMTALA claim against Hospital for failure to screen.
 - B. Cozen may have an EMTALA claim against Hospital for failure to stabilize.
 - C. Cozen may have an EMTALA claim against Hospital for failure to transfer to a facility with better resources to stabilize his emergency medical condition.
 - D. More than one of the above.
 - E. None of the above.
20. Sean Orr is a Minnesota physician. But he deliberately misdiagnosed patients with multiple sclerosis so that he could bill for painful and pricey treatments they did not need. One patient, JoAnn, quit her job and borrowed \$50,000 to renovate her home to accommodate a wheelchair. Dr. Orr put her on Copaxone, injections that cost \$5000 a month and left stinging welts all over her body. She suffered shortness of breath, tightness in her chest and burning in her throat. What legal theory of relief can JoAnn most probably bring successfully against Orr?
- A. Informed consent
 - B. Abandonment
 - C. ADA, because he treated her "as if" she had MS
 - D. Battery

Short Answer Questions

- 2 Questions worth 10 points each = 20 total points.
- Limit each response to 300 words.

1. Saint Josephine is a “boutique” hospital. It is a women’s hospital that has no ED but delivers lots of babies. Under EMTALA, must clinicians at Saint Josephine stabilize a pregnant woman who arrives on its property in active labor?
2. Kris goes to Abbott Northwestern Hospital to seek emergency treatment for a serious allergic reaction to a medicine received earlier in the day (anaphylactic shock from antibiotic therapy). Epinephrine would have effectively counteracted the allergic reaction. But it was not provided for over one hour while Hospital attempted to determine who would pay. Identify what, if any, legal duties Hospital violated.

Long Answer Question

- 1 Question worth 25 points.
- Limit your response to 1000 words.

During 2014, Arden had daily pain in his legs. This pain stopped him from working and from enjoying many of his daily activities. He generally avoided going outside his home with my friends because of the pain. The pain interfered with his ability to drive, walk, and sleep. In short, Arden felt like his world had become smaller because of the pain. So, during the summer and fall of 2014, Arden and his physician tried a number of curative or mitigating measures, including: losing weight to reduce the stress on his knee joint, using assistive devices, using prescription medicines, and doing exercises to strengthen his knee.

None of these worked. So, in February 2015, Arden underwent a total knee replacement procedure at the Mayo Clinic in Rochester, Minnesota. While it is major surgery, a total knee replacement surgery is usually a complete fix for joint degeneration and pain. It removes damaged bone and cartilage from the knee joint and replaces both the bone and cartilage with an artificial joint (prosthesis). The artificial knee provides a smooth surface for bones to touch and move together. While Arden’s knee replacement surgery was a success, he died six days later from a massive fatal pulmonary embolism related to the procedure. (A pulmonary embolism is a sudden blockage of a major blood vessel in the lung, usually by a blood clot.)

In January 2015, pre-operatively, the surgeon had a discussion with Arden regarding the increased risk of deep vein thrombosis and pulmonary embolism, particularly as Arden had a previous history of these a few years earlier. After this discussion, Arden consented to the total knee replacement. He told the surgeon that he desperately wanted to be more physically active, as fishing and hunting in Minnesota was part of his core personal identity.

Hospital patients can develop deep vein thrombosis in the legs and pelvic veins immediately after surgery or if they are not mobile because of a medical illness. These blood clots (thrombus) can move up from the leg to the lungs, with the danger of pulmonary embolism and death. Accordingly, intra-operatively, Arden’s surgeon used pneumatic boots to encourage venous flow. Post-operatively, Arden’s surgeon prescribed Warfarin, an anti-coagulant designed to reduce the risk of blood clots.

While Arden's surgeon took the aforementioned precautionary measures, she did not prescribe or discuss post-operative use of graduated compression stockings. "Graduated compression stockings" are special stockings that help promote circulation in a patient's legs. In your leg veins, blood must flow upward to the heart. Graduated compression stockings apply a certain amount of pressure near your ankle and then apply gradually less and less pressure as they move up the leg. In this way, they help to squeeze or push blood back up the leg from the ankle to the thigh in an effort to counteract pooling of blood in the leg and the resultant swelling. In short, graduated compression stockings help prevent blood clots forming in the legs by applying varying amounts of pressure to different parts of the leg.

Both of the leading U.S. orthopedic surgical organizations strongly recommend use of graduated compression stockings after a total knee replacement. Arden's surgeon was aware of these established, published clinical practice guidelines. But she chose to depart from them and can show good justification for doing so. In other words, it was not malpractice for Arden's surgeon to not prescribe graduated compression stockings. The guidelines do not say that graduated compression stockings must be used 100% of the time.

Arden's family has come to you, because they are contemplating a lawsuit against the Mayo Clinic surgeon. **Identify and evaluate their best claims.**

END OF EXAM