

# Health Law Quality & Liability

Course 3035 (Spring 2023)

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Mitchell Hamline School of Law

**Time:** Tuesday & Thursday from 6:00 to 7:25 PM

**Place:** MHSL Room 125 and Hy-Flex via Zoom

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# I. Course Description

The healthcare industry accounts for nearly 20% of the U.S. gross domestic product. Yet size is not its only distinguishing feature. The healthcare industry has become the most regulated in the United States (compared to even heavily regulated sectors like energy and securities). Clinicians, hospitals, payers, and other industry players are responding to this increasingly complex regulatory environment, making the health law field a dynamic and highly specialized area of law.

Both because of rapid growth in the healthcare industry itself and because of comparatively tighter legal oversight, the health law field is evidencing a marked growth in legal employment. Commentators consistently tout it as the “hottest” legal practice area (*see, e.g.,* recent articles in *Wall Street Journal*; *New York Times*; *Student Lawyer*; *National Jurist*). Indeed, health law has become such a distinct field of recognized expertise that some state bars have developed certification programs in healthcare.

One can roughly divide *Health Law* into five subfields:

1. Finance & Regulation
2. Public Health
3. Biotechnology & Life Sciences
4. Bioethics
5. Patient Care

These subfields intersect and overlap. Some practitioners and authors may categorize the field differently. Nevertheless, this five-part classification is useful for clarifying our mission and emphasis. This course focuses on the *Patient Care* subfield, especially as the physician-patient relationship is regulated through common law liability. Sometimes, commentators describe this area of health law as “medical law” or “medical jurisprudence.”

This course emphasizes legal doctrine over litigation strategy or public policy. The separate *Medical Malpractice* course emphasizes tactics and strategy. In contrast, this course focuses on issues anchored to two broad themes:

1. Quality: Legal mechanisms to assure medical quality
2. Autonomy: Legal mechanisms to protect and promote patient self-determination

Ten specific subtopics fit within these two broad themes. They include:

1. Treatment Relationship: Formation and Termination (contracts, torts)
2. Treatment Relationship: IME, Formal, Curbside Consults (contracts, torts)
3. Non-Discrimination: ADA, EMTALA, Section 1557 (statutory, regulatory)
4. Informed Consent (torts, statutory)

5. Privacy and Confidentiality (torts, statutory)
6. Medical Malpractice (torts, evidence, civil procedure, agency)
7. Entity Liability: Direct and Indirect, Hospitals and Nursing Homes (torts, agency)
8. Managed Care Liability: UR, ERISA Preemption (torts, agency, statutory)
9. Credentialing: Licensure, Accreditation, Certification (statutory, administrative)
10. Pay for Performance: Outcome and Quality Incentives

Notwithstanding all this specialized substantive content, one might characterize this *Health Law Quality & Liability* course as an advanced torts class in which healthcare is just a “vehicle” for more generally exploring liability (and some regulation) as a means for assuring healthcare quality. In other words, I have designed this class to prepare you for legal practice regardless of where your professional path takes you.

## II. Course Competencies

By the end of the course, you should be able to do the following:

### 1. Analyze and apply legal principles concerning the existence of a physician-patient treatment relationship.

- 1.1 Analyze and apply legal principles concerning when a physician has a **duty** to enter a treatment relationship and treat an individual.
- 1.2 Analyze and apply legal principles concerning **how and when** a treatment relationship is formed/created between a physician and patient.
- 1.3 Analyze and apply legal principles distinguishing formal and informal (curbside) **consults**. Recognize that only physicians offering formal consults enter a treatment relationship.
- 1.4 Analyze and apply legal principles concerning when an **IME** physician enters a treatment relationship.
- 1.5 Appreciate the minority rule followed by **Minnesota** and some states regarding informal consults and IME clinicians.
- 1.6 Analyze and apply legal principles concerning the conditions under which a treatment relationship may be **terminated**.
- 1.7 Analyze and apply legal principles concerning tortious **abandonment** (wrongful termination of the treatment relationship).

- 1.8 Analyze and apply legal principles concerning the conditions under which the normal duties triggered by a treatment relationship may be **limited**.
- 1.9 Appreciate that while our course materials focus on physicians, most of these formation and termination principles also apply to **non-physician** practitioners (like dentists and APRNs).

## **2 Analyze and apply key federal statutes and regulations concerning non-discrimination in healthcare.**

- 2.1 Analyze and apply key statutory, regulatory, and caselaw principles regarding EMTALA, including: (a) duty to screen, (b) duty to stabilize, (c) duty to accept certain transfers, (d) duty to report bad transfers, and (e) duty to post signage.
- 2.2 Analyze and apply EMTALA permissible alternatives to stabilizing an emergency medical condition, including good faith admission and pre-stabilization transfers.
- 2.3 Recognize special rules and requirements when using either of these two exceptions.
- 2.4 Analyze and apply key principles regarding how EMTALA is enforced by private litigants through **lawsuits**.
- 2.5 Analyze and apply key principles regarding how EMTALA is enforced by the DHHS OIG through **CMPs** and terminating Medicare participation.
- 2.6 Analyze and apply key principles regarding how a **hospital** may have EMTALA claims against another hospital.
- 2.7 Understand and apply key EMTALA specially defined **terms**, including: “hospital property,” “inpatient admission,” and “emergency department.”
- 2.8 Distinguish EMTALA enforcement against hospitals from enforcement against individual physicians.
- 2.9 Analyze and apply key statutory, regulatory, and caselaw principles regarding the ADA.
- 2.10 Analyze and apply the three *prima facie* elements of a claim under the **ADA** as well as key defenses like harm to others.

- 2.11 Distinguish how the ADA is enforced by private litigants from how it is enforced by the OCR and the DOJ.
- 2.12 Analyze and apply key statutory, regulatory, and caselaw principles regarding ACA section 1557 and implementing DHHS regulations, especially as applied to (a) limited English proficiency, (b) hearing impairment, and (c) gender identity.
- 2.13 Appreciate basic parameters of how other key non-discrimination statutes (like Title VI) apply to healthcare.
- 2.14 Analyze the impact of new OCR conscience regulations on the above duties.

### **3 Analyze and apply legal principles concerning informed consent.**

- 3.1 Analyze and apply all four elements of an informed consent claim (duty, breach, causation, and damages).
- 3.2 Distinguish informed consent from medical battery.
- 3.3 Distinguish informed consent from medical malpractice.
- 3.4 Distinguish the two leading disclosure standards (measures of duty) adopted by state statutes or state supreme courts: reasonable patient and reasonable physician.
- 3.5 Distinguish, analyze, and apply three distinct sub-elements of causation.
- 3.6 Analyze and apply informed consent principles to information other than the risks, benefits, and alternatives of an intervention, such as physician experience and cost.
- 3.7 Appreciate the growing range of statutory and regulatory disclosure mandates.
- 3.8 Assess the impact of certification on patient decision aids.

### **4 Analyze and apply civil liability legal principles concerning the provision of medical treatment by individual healthcare providers (primarily physicians).**

- 4.1 Appreciate the scope and nature of medical error in the United States.
- 4.2 Analyze and apply all four elements of a medical malpractice cause of action (duty, breach, causation, and damages).

- 4.3 Distinguish four geographic variations in how the standard of care (duty) is established (locality, state, same or similar, nationwide).
- 4.4 Analyze and apply legal principles concerning how the standard of care is established with expert witnesses.
- 4.5 Analyze and apply legal principles concerning the qualification of expert witnesses distinguishing qualification from credibility.
- 4.6 Analyze and apply legal principles concerning how a defendant can establish a school of thought (an alternative minority standard of care) and how that affects breach analysis.
- 4.7 Analyze and apply legal principles concerning how the standard of care is established both judicially and through clinical practice guidelines.
- 4.8 Analyze and apply legal principles concerning *res ipsa loquitur*, as an alternative method for establishing breach.
- 4.9 Distinguish traditional “but for” causation from “lost chance” causation, including how lost chance is available in only some jurisdictions and how it limits damages.
- 4.10 Analyze and apply legal principles concerning how nominal, economic, non-economic, punitive money damages are calculated.
- 4.11 Analyze and apply legal principles concerning how non-economic and punitive (and sometimes even economic) money damages are statutorily limited in many states.
- 4.12 Analyze and apply legal principles regarding key affirmative defenses.
- 4.13 Distinguish statutes of limitations from statutes of repose.
- 4.14 Analyze and apply statutes of repose and statutes of limitations.
- 4.15 Distinguish assumption of risk from comparative negligence.
- 4.16 Distinguish types of tort reform measures designed to reduce the frequency and size of medical malpractice claims (especially caps on non-economic damages) as well as measures to increase their predictability.
- 4.17 Analyze and apply legal principles concerning breach of contract.

- 4.18 Analyze and apply legal principles concerning negligent infliction of emotional distress and intentional infliction of emotional distress.
- 4.19 Appreciate key alternative theories of liability like elder abuse and criminal penalties.

**5 Analyze and apply civil liability legal principles concerning the provision of medical treatment by institutional providers (primarily hospitals).**

- 5.1 Analyze and apply three theories of vicarious liability: (a) *respondeat superior*, (b) ostensible/apparent agency, and (c) the non-delegable duty doctrine.
- 5.2 Appreciate state to state variability in tests for ostensible agency.
- 5.3 Analyze and apply five theories of direct liability: (a) negligent selection, (b) negligent retention (jointly known as negligent credentialing), (c) negligent supervision (policies, procedures, training), (d) negligently maintained premises or equipment, and (e) ordinary negligence.

**6 Analyze and apply civil liability legal principles concerning the provision of medical treatment by managed care organizations.**

- 6.1 Analyze and apply two theories of vicarious liability: (a) *respondeat superior* and (b) ostensible agency.
- 6.2 Analyze and apply six theories of direct liability: (a) negligent selection, (b) negligent retention (jointly known as negligent credentialing), (c) negligent supervision (policies, procedures, training), (d) negligently maintained premises or equipment, (e) ordinary negligence, and (f) negligent utilization review.
- 6.3 Analyze and apply the theory of negligent utilization review (wrongful denial of coverage).
- 6.4 Analyze and apply the doctrine of ERISA preemption under sections 502 and 514, appreciating when the plaintiff may not bring state statutory, tort, or contract claims.
- 6.5 Recognize the different remedies available under ERISA as compared to remedies available under tort, contract, or state statutes.

**7 Analyze and apply principles concerning credentialing and peer review.**

7.1 Understand the role and function of credentialing by hospitals and MCOs.

7.2 Analyze and apply the HCQIA.

7.3 Appreciate the role of the NPDB.

**8 Analyze and apply principles of licensure, accreditation, and certification.**

8.1 Analyze and apply principles regarding the state licensure of individual providers, distinguishing the gatekeeping role and the discipline role of medical boards.

8.2 Distinguish licensing from Medicare certification of individual clinicians.

8.3 Distinguish licensing from hospital and MCO credentialing of individual clinicians.

8.4 Distinguish licensing from specialty board certification of individual clinicians.

8.5 Analyze and apply principles regarding the state licensure of healthcare facilities.

8.6 Distinguish licensing, Medicare certification, and TJC accreditation of healthcare facilities.

**9 Analyze and apply legal principles concerning the maintenance of patient health information.**

9.1 Analyze and apply key HIPAA provisions on privacy and security.

9.2 Assess how and when HIPAA is enforced.

9.3 Distinguish state law principles of privacy, confidentiality, and privilege.

**10 Describe payment mechanisms directed at assuring and improving healthcare quality.**

10.1 Appreciate that since healthcare providers are primarily paid fee for service, they earn more by doing more.



- 10.2 Identify four relatively new key Medicare Part A (hospital) programs that link payment to quality and outcomes.
- 10.3 Identify major federal, state, and private agencies, entities, and initiatives that are directed at ensuring and improving the quality of medical care.

## **11 Integrate material learned in other classes.**

- 11.1 Integrate material from civil procedure, contracts, and torts.
- 11.2 If applicable, integrate material from business organizations, evidence, and statutory interpretation.

## **12 Demonstrate honed legal analysis and writing abilities.**

- 12.1 Demonstrate honed legal analysis and writing abilities through exposure to and critique of legal arguments in judicial opinions, legislative reports, and scholarly writing.
- 12.2 Demonstrate honed legal analysis and writing abilities through participation in both classroom discussion and group-based exercises.
- 12.3 Demonstrate honed legal analysis and writing abilities through completion of, and feedback on, weekly problems.
- 12.4 Demonstrate honed legal analysis and writing abilities through completion of, and feedback on, a written midterm examination.
- 12.5 Demonstrate honed legal analysis and writing abilities through completion of, and feedback on, a written final examination.

## **III. Prerequisites**

- A. There are no prerequisites.
- B. The class will draw heavily on *Torts*, as well as from *Civil Procedure* and *Contracts*. Every student will have already completed these three courses in their 1L year.
- C. Familiarity with *Agency* and *Evidence* is recommended but not required.

## IV. Required Materials

- A. You do not need a traditional, published, bound casebook. There is nothing to purchase.
- B. Reading “Packets”
  - 1. I have posted all the reading materials on the CANVAS course management system.
  - 2. For each of the fourteen weeks in the semester you will have a roughly 50-page “packet” of materials in a single PDF document. The packet’s cover sheet explains the core objectives for the week and summarizes the included materials.
  - 3. While we will use a fair number of traditional appellate court opinions, a substantial portion of the written course materials (distributed in 14 PDF “packets”) is comprised of: (1) statutes; (2) regulations; (3) government reports; and (4) medical, law, and policy journal articles.
  - 4. Due to the rapid and current changes in this area, I may add or substitute other materials.
- D. PowerPoint Videos
  - 1. To enable us to focus most of our class time on problems and exercises, I have recorded narrated PowerPoint slides providing an overview of key rules and doctrines. I have posted these within each CANVAS module.
  - 2. There are approximately two to four videos each week. The average length is 15 minutes.
  - 3. Please watch these videos before the live class.
- E. Summary and Feedback Videos
  - 1. After most classes, I will prepare an audio or video summary of the main points from that class. These will normally be just 5 to 10 minutes in length.
  - 2. In addition to recapping the key points of the day, I will expand on questions left unanswered and provide additional case examples.

F. Upcoming Assignments

1. The immediately upcoming assignments (readings, quizzes) will always be on the course home page as an “announcement.”
2. Please ask if you are ever unsure where we are. I am like a mountain tour guide. I do not want to “lose” any hikers.

## V. Class Schedule

- A. The class will generally meet on Tuesday and Thursday afternoons from 6:00 p.m. to 7:25 p.m.
- B. This is a Hy-Flex class. It is synchronous for all students for all class sessions. Students registered for an in-person class will meet in the MHS� classroom. Students registered for Hy-Flex will meet on Zoom.
- C. The first class meets on Tuesday, January 17, 2023. The last class meets on Thursday, April 20, 2023. The class will meet twenty-six times.
- D. The class will **not meet** (in any modality) on Tuesday, January 31, 2023. I have a previously scheduled hospital presentation.
- E. The class will on **Zoom only** on the following two dates. This affects **only** the students who normally would be physically in the classroom. Most of the students in this class meet only on Zoom anyway.
1. Thursday, February 16, 2023
  2. Thursday, April 6, 2023
- F. **Flipped Classroom.** While we will not meet on some of the regular Tuesday and Thursday dates, this omitted class time is more than “covered.” As described above, you will have dozens of web-based lectures and exercises.
- G. **Bar Association Networking.** While not required, I encourage you to participate in the health law events of your local bar associations (e.g., MSBA, Hennepin, Ramsey, and specialty bars). While you may learn some law, the key value is meeting lawyers who can connect you to jobs and opportunities.

- H. **Required Extracurricular Meeting 1 of 2.** I would like to get to know each of you outside class. Therefore, before the end of February 2023, please schedule a 15-minute meeting at a convenient time, perhaps before or after class.
- I. **Required Extracurricular Meeting 2 of 2.** Sometime, during the span of this semester (between January 15 and April 20), please attend a meeting of any health licensing board in any state. There are dozens and they have a variety of weekday and weekend meeting times (e.g., <http://mn.gov/health-licensing-boards>).
1. You may attend for only the portion of the agenda that you find of interest.
  2. Please prepare a short (~3 minute) report for the class.
  3. If making one of these meetings is burdensome, please propose another field trip that relates to the subject matter of this course. Given the growth of remote meetings because of COVID, some students attended board meetings from other states.
- J. **Extra Review Session.** Depending on class interest, I am happy to schedule an extra “review” class during the weeks before the final exam.
1. Please email your questions to me at least 24 hours before such session to better enable me to answer them.
  2. I am also happy to meet, at any time during the semester, both with individual students in my office, and with small groups. For example, last year, several students found it useful to review essays that they wrote on extra practice problems.

## VI. What to Do First - in January

- A. Confirm that you are registered for the course with the email address that you use most regularly.
- B. Review this syllabus.
- C. Read the initial class assignments (for module 1).
- D. Calendar key course dates into your planning and calendaring systems.
- E. Review my old exams at [www.thaddeuspope.com](http://www.thaddeuspope.com).

## VII. Attendance, Preparation, Participation

- A. **Attendance.** Under American Bar Association rules, 80% attendance is required to allow you to write the final exam. Attendance will be taken at the start of each class session.
- B. **Class Preparation.** I employ only a moderate amount of lecture but lots of case method and problem method questions and problems. Consequently, students must come to class prepared to discuss the material assigned. You should read and brief the assigned cases. It is useful to analyze each case using the following headings: (i) essential substantive facts, (ii) procedural posture, (iii) issues, (iv) legal principles, (v) reasoning, and (vi) holding. You do not need to know the correct answer (if there is one) but know the reading material and make a reasonable effort to think about the issues raised.
- C. **Preparation Time.** It is impossible to say exactly how much time you will need for class preparation, since each person's needs are different. Still, it is likely that you will need around **two hours** of preparation for each hour of class. This time includes: (i) reading the materials, (ii) briefing the cases, (iii) consolidating prior class and margin notes, and (iv) taking the weekly quiz. Since the class meets for three hours per week, your total time for the class should be average nine hours per week. This is consistent with the general law school formula which estimates 45 hours of total work per J.D. credit. Since this course is three credits, it should require 135 total hours of your time. Over a 14-week semester, that is just over nine hours per week.
- D. **Warning about Class Preparation.** Brief the cases **yourself**. Do not make use of commercially prepared outlines before writing your own brief. As Professor DeWolf (at Gonzaga Law) explains, "they are like narcotics. Initially they make you feel good (by taking away your anxiety), but precisely for that reason they have a corrosive effect upon your learning. It is as though you were taking violin lessons, and instead of playing the scales you were assigned by your teacher, you bought a tape of Itzak Perlman playing those scales."
- E. **Class Participation.** Every student is expected to participate in class discussions. Sometimes this will be through "clickers" like Poll Anywhere. Other times, it will be by "cold calling." If illness or emergency prevents you from being fully prepared, please notify me **before** class. As explained in Section IX below, 5% of your course grade is based on class participation.

- F. **Meandering Discussion.** I leave discussion sufficiently free so that you discover key points on your own and feel ownership in lessons learned. Still, I must exert control over class discussion to ensure that you are exposed to key points and to ensure that you are not confused by a discussion that runs too long or too tangentially. It is inappropriate and unfair to hold others hostage to the too-peculiar line of inquiry of just one or two students. If we did not get to them, I am happy to explore your questions outside class in any of the ways described below.
- G. **Clicker Quizzes & Laptops.** We will use an instant-poll tool (probably Poll Anywhere) in which the entire class “votes” on the answers to orally posed problems through a browser-supported template. Accordingly, laptops are welcome. If you do not bring a laptop, I expect that you can “vote” either through a neighbor’s laptop (after refreshing the browser) or through your cell phone. After clicking-in, students will discuss their answers in small groups and then re-vote. Then, we review the problems.
- H. **Online Participation.** Students are encouraged to participate not only in class but also through the course discussion boards. Start a new thread or comment on one already in progress. The best posts: (i) are full of insight and analysis (critical thinking), (ii) reference the course materials, and (iii) are clearly written (organization & style).
- I. **Volunteering.** I will frequently ask a question that stumps the person on whom I have called. I will give that person time to think about the question and see if they can come up with an answer. It will sometimes happen that you have an answer, and instinctively raise your hand to volunteer. I may or may not call on you at that moment. I would prefer your attempt to answer than mine, but best is continuing dialogue with the student on whom I initially called. Nonetheless, to move things along I may let the volunteer help. Please be sensitive to the fact that the called student often suffers from stage fright, and the most obvious things slip from their mind.
- J. **Ask Questions.** I begin each class by asking for both administrative and substantive questions. If you want to know what pages we will cover, please ask. If you are having trouble grasping a particular doctrine, please ask or send an email. **Never hesitate** to seek more clarity about any substantive topic or administrative matter concerning this course.
- K. **Show & Tell.** The topics in this class are constantly in the news and in the plot lines of movies and broadcast shows. If you notice a story that illustrates or discusses a class topic, please send me an email, or bring it up in class. It is both fun and rewarding to work through legal problems in the context of a visually compelling, dramatic audio or film clip.

- L. **Outlining.** The traditional method of exam preparation for law students involves making an outline of all course material. Accordingly, after every unit of material (*e.g.* formation and termination), but at least every two weeks, you should review and **consolidate** your case notes, class notes, and other material into an outline, flowchart, or other document. Furthermore, you should aim to edit and revise this growing document every time you add to it, both to improve the organization and to clarify the content. In short, the more **actively** you engage the materials, the better your grasp and retention will be.

## VIII. Classroom Etiquette

- A. The classroom environment must be conducive to learning for all students. Distractions made possible by advances in technology may undermine that goal.
- B. **Audial.** During class, in addition to the usual courtesies, kindly disable and refrain from using cell phones, pagers, and any other communication device other than your laptop computer. Please mute your phone and laptop.
- C. **Visual.** Please refrain from displaying wallpaper, screen savers, or other material on your laptop computer that you can reasonably expect to be offensive or distracting to other students.
- D. **End Time.** I will be diligent about starting the class precisely at 6:00 and ending it precisely at 7:25. In return, please do not begin to pack-up early while others are still trying to be engaged in the class discourse.

## IX. Grading Summary

- A. **100 Points:** This course comprises four components from which you can earn a total of 100 points.

Course Component	Percent	Points	Explanation
12 Quizzes	35%	35	<i>see</i> section X
Class Participation	5%	5	<i>see</i> section XI
Midterm Exam	20%	20	<i>see</i> section XII
Final Exam	40%	40	<i>see</i> section XIII
	100%	100	

- B. **Curve:** Your total point sum (of 100) is meaningful only relative to the point sums of other students in the class. I will convert your total to a scaled score, based on the class curve. For example, if the highest raw score in the class were 72/100, then that student would receive an A. The final grades will comport with Law School's grading policies. Please review the *Student Catalog*. <https://mitchellhamline.edu/catalog/>.
- C. **Mandatory Mean:** The final grades must comport with Law School's grading policies. Note that the 2022-2023 *Student Catalog* states that the Law School "mandates a mean of between 2.7 and 3.3 for all Upper Level (non-1L) classes." That is a mean roughly between a B- and B+.

## X. Required Weekly Quizzes

- A. You will complete twelve (12) quizzes, one each week of the semester.
- B. **Rationale:** I assign frequent quizzes for three reasons.
1. First, while I will provide informal, oral feedback during class discussions, I do not want the first **formal** feedback that you receive to be your (more heavily weighted) graded midterm or final exam.
  2. Second, I want you to approach the material **actively**.
  3. Third, because later topics in this course build on and interrelate to earlier ones, I want to provide some external motivation to stay current and "connected" to the material.
- C. **Format:** Most quizzes will be comprised of around ten multiple choice questions. A few may entail drafting a roughly 300- to 500-word essay. These (along with the midterm) constitute "formative assessment," while the final exam constitutes "summative assessment."
- D. **Submission:** Submit your quiz answers through the course CANVAS site). The quizzes are not timed. But they are designed to take less than 20 minutes to complete.
- E. **Due Date:** A quiz is due by 11:59 PM almost every Saturday night of the semester. See the schedule of deliverables at the end of this Syllabus (in Section XVIII).
- F. **Feedback:** We will review the quiz in the following Tuesday's class and/or I will post a feedback memo.



- G. **Coverage:** I have designed these weekly quizzes to test basic understanding of legal principles covered at about the time of the quiz. They are simpler than questions on the midterm and final exams that require more analysis.
- H. **Grading:** I will grade the quizzes. The twelve quizzes, in the cumulative, comprise 35% of your total course grade (35 of 100 points). While the quizzes may have different numbers of questions, your score will be weighted. Each individual quiz is worth 3 points, 3% (actually, 2.92%) of your total course grade (100 points).

## **XI. Class Participation**

- A. Class participation comprises 5% of your course grade, 5 of the 100 total course points.
- B. The typical student who regularly, meaningfully participates will earn all 5 points. Most students will earn all these points. In legal terms, you have a presumption of earning these points. But the presumption is rebuttable. Those who are regularly unprepared or frequently absent will earn either half or none of these points.
- C. The required extracurricular meetings described in sections V.G and V.H are factored into the participation points.

## **XII. Midterm Exam**

- A. **Date:** The midterm exam is a take-home exam that you can self-schedule to take during *any* four-hour period in the eleven-day period between 12:01 a.m. on Tuesday, March 9, 2023, and 11:59 p.m. on Sunday, March 19, 2023.
- B. **Method:** Download the PDF exam from a special separate module on the course management CANVAS site. This module will appear chronologically between Module 7 and Module 8. Upload your anonymous answers in a PDF file back to that site.
- C. **Duration:** I have designed this exam for completion within just two hours. The four-hour window permits you to step away and refresh. That way, you can revise and polish your answer to make it complete and lucid.
- D. **Weight:** The midterm exam comprises 20% of your course grade, 20 of the 100 total course points.

- E. **Grades:** The only letter grade for this course is the final course grade based on the total 100 points. Nevertheless, to help you gauge your relative performance, I will assign letter grades to the midterm exams. While the numeric scores compute into the “course” grade (20 of 100 points), midterm letter grades are informational only.
- F. **Overall Design:** Everything else about the midterm exam is the same as the final exam (see below), except that the midterm is shorter.
- G. **Feedback:** I will post all the (anonymous) exams and all the completed score sheets to the CANVAS site.
- H. **Review:** We will review the exam in class. We will focus on the issues common to most students. If you need more guidance than this and your own completed score sheet, I happy to discuss one on one.
- I. **Sample Midterm Exams:** I have posted fifteen years of my *Health Law* midterm exams and exam feedback memos to [www.thaddeuspope.com](http://www.thaddeuspope.com).

### **XIII. Final Exam**

- A. **Date:** The final exam is a take-home that you may obtain and complete during any 24 hours within the final exam period (Thursday, May 4, 2023, to Wednesday, May 17, 2023).
- B. **Method:** Complete the final exam in the same way as the midterm exam. Download the PDF exam from CANVAS. Upload your PDF answer document to CANVAS.
- C. **Duration:** This exam is designed to be completed within just five hours. The 24-hour hour window is designed to permit you to step away and refresh. That way, you can revise and polish your answer to make it complete and lucid.
- D. **Weight:** The final exam comprises 40% of your course grade, 40 of the 100 total course points.
- E. **Format and Length:** The final examination will be comprised of three roughly equal parts. This three-part structure maximizes the exam’s reliability and validity.
  - 1. The first part will include around 25 multiple choice questions.
  - 2. The second part will include around two short or “directed” essay questions focused on one or two specific issues.

3. The third part will include a long essay problem. The essays are essentially hypothetical factual circumstances in which you will be expected to: (i) identify the legal issues, (ii) analyze the problems by applying the correct legal principles to the facts, and (iii) argue for a reasonable conclusion.
- F. **Coverage:** The exam will test those concepts and issues either covered in assigned readings or explored during class lectures and discussions. The exam will roughly reflect the relative time and emphasis devoted to topics in the course. For example, malpractice will be tested more heavily than licensure.
- G. **Cumulative:** The final exam is cumulative. Topics already tested on the midterm may also appear on the final exam. But the emphasis will be on topics covered **after** the midterm.
- H. **Open Book:** The midterm and final exams are OPEN book exams. You may use any written or printed 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. But no consultation or discussion with any other person is permitted.
- I. **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, Bing, reference materials) to answer the exam questions.
- J. **Warning about Open Book:** Having your notes and materials will **not** relieve you of the need to already know the material. Indeed, it is very probable that if you do not study for this exam **exactly** as you would for a closed-book exam, then you will do very poorly and perhaps not pass.
- K. **Grading:** All exams will receive a raw score from zero to 100. The raw score is meaningful only relative to the raw score of the other students in the class. The raw score will be weighted (at 40%) and added to the weighted midterm and quiz scores. That total will then be converted to a scaled score, based on the class curve. For example, if the highest raw score in the class were 72/100, then that student would receive an A.

- L. **Exam Feedback:** Several weeks after the exam, I will post:
1. Copy of the exam
  2. Blank scoring sheet
  3. Explanatory memo
  4. Model answers
  4. Scan of all anonymous exam answers and scoring sheets
- M. **Exam Review:** I will be happy to go over the exam with anyone who schedules an appointment to review the exam. Please first review my scoring and notes on your exam, the feedback memo, model answers, and your own notes. If you still have questions about your exam, please email those to me in advance of our meeting so that I can be sufficiently prepared to ensure a productive and efficient meeting.
- N. **Grade Finality:** All grades are final. While sometimes seemingly unfair in application, pursuant to school rules, there will be no negotiations regarding revisions, except to correct any mathematical or clerical errors in computing the final score.

## **XIV. Exam Taking Tips**

- A. **Old Exams:** I have posted fifteen years of my *Health Law* midterm and final exams and exam feedback memos to [www.thaddeuspope.com](http://www.thaddeuspope.com). Some of those exams (especially before 2007) had a broader coverage or different relative emphases than we will have in this course. Indeed, the coverage in none of these prior classes will be identical to yours. Your exams will be **based only** on what we cover in this class. Still, by working through these old exams, you can get a good sense of the criteria that I employ in grading.
- B. **Grading Criteria:** In your exam answer, I look for:
1. An ability to muster relevant evidence and authority to make arguments both cogently and clearly
  2. An understanding of substantive legal doctrine
  3. An appreciation for broader policy concerns that influence how legal doctrine applies to novel situations
  4. A practical appreciation for the context of care in a hospital setting and for the context of tort litigation

- C. **Outline Your Answer:** I strongly encourage you to use at least one-fourth of the allotted time per question to outline your answers 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.
- D. **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 between paragraphs.
- E. **Headings & Subheadings:** Use headings and subheadings to divide different legal theories and distinct types and parts of analysis.
- F. **Short Paragraphs.** Keep your paragraphs short – to around three to eight lines. Do not address distinct matters in the same paragraph. For example, separate elements (like breach and causation) should be discussed in separate paragraphs.
- G. **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. If you are writing whole paragraphs of pure law or pure fact, that is a symptom that you may not be engaged in legal analysis.
- H. **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.” Explain why that holding controls. What is the rule in that case? What are the facts in the instant case that satisfy that rule?
- I. **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.

- J. **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. While some issues and sub-issues may straightforward, some will be gray and fuzzy such that rules do not clearly and neatly apply to the facts.
- K. **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. But do not invent facts out of whole cloth. In other words, please answer my exam rather than writing your own.
- L. **Honor Code:** While you are taking a midterm or final 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 exam period. It is a violation of the Honor Code to share the exam questions. Shred or delete the exam questions (hard and e-copies) immediately upon completion of the exam. They will be reposted after the end of the exam period to CANVAS and thaddeuspope.com.
- M. **Exam Misconduct.** The Code of Conduct prohibits dishonest acts in an examination setting. Unless specifically permitted, prohibited conduct includes: (1) discussing the exam with another student; (2) giving, receiving, or soliciting aid; (3) referencing unauthorized materials; (4) reading the questions before the examination starts; (5) exceeding the examination time limit; and (6) ignoring proctor instructions.

## **XV. Office Hours**

I look forward to talking to you outside class. There are several means of doing this:

- A. **After Class:** I will remain in the classroom after each class for all trailing questions, until or unless we are kicked out by another class. If required by COVID-19 times, this means that we can remain on the Zoom call or in breakout room of the class Zoom call.
- B. **Office:** I can typically be found in my office before and after class. If this is not a convenient time, just let me know in class or by email and we can make an appointment with each other. You are welcome to drop in my office anytime, but it is best to confirm a specific time in advance. If you have a specific question, I recommend that you send me the question via email ahead of time. In this way, I can think about your question and offer my best assistance.

- C. **Walks:** Discussing health law while walking around campus or the neighborhood is a great way to get exercise and to assure a creative and alert discussion.
- D. **Email:** Feel free to e-mail me anytime at [thaddeus.pope@mitchellhamline.edu](mailto:thaddeus.pope@mitchellhamline.edu). Please use a descriptive subject heading.
- E. **Text:** In urgent circumstances cc [thadmpope@aol.com](mailto:thadmpope@aol.com) or [thaddeus.pope@gmail.com](mailto:thaddeus.pope@gmail.com), and text 310-270-3618. I will try to promptly answer any question as soon as possible.
- F. **Lunch or Coffee:** I have found that grabbing a quick breakfast, lunch or coffee/tea is a good way to get to know each other. If you and one or two other students want to share a bite/coffee/tea, please let me know. But this may need to wait until safety guidelines are revised.

## **XVI. Law School Policies**

- A. **MHSL Disability Services.** Mitchell Hamline is committed to ensuring equal access and providing reasonable and appropriate accommodations in accordance with the ADA and Section 504 of the Rehabilitation Act. Students with a documented disability who would like to request accommodations should contact Disability Services in the Dean of Students office. Students will be asked to complete an accommodation request form, provide documentation regarding their disability, and meet with Disability Services and Student Services to discuss their request. For more information should contact [disabilityservices@mitchellhamline.edu](mailto:disabilityservices@mitchellhamline.edu). The Disability Services office is in the Student Services suite, room 119.
- B. **Names and Pronouns.** Please be sure to record the pronunciation of your name using NameCoach software that allows students and faculty to easily save a recording of their name, share their pronouns and their preferred name. You can find this service in the Canvas course navigation titled 'Student Name Recordings.' This will display your entry, a class roster along with other entries, and a list of those who haven't decided to provide their information yet. You can also go to your Account options to manage your personal entry. Students should be addressed according to their personal identity. In this class, you will have the chance to indicate your how you would like to be addressed in class, and, if you so choose, to identify pronouns with which you would like to be addressed. I will do my best to address and refer to all students accordingly and support your colleagues in doing so as well.

## **XVII. Study Aids & Reference Materials**

Despite the prevalence of health law courses in U.S. law schools, there are still few student-oriented ancillary materials. However, there are numerous clear and lucid law review articles and background reports. I will provide copies of, or links to, the more useful of these materials on a topic-by-topic basis. Plus, you have direct free access to most of these through Hein-Online, Westlaw, Lexis, and other databases.

There are also some good reference books. You really **do not** need to use any of these sources. I list them here **only** should you want to consult them to get more depth or breadth on certain issues.

### **A. Study Aids for Law Students**

1. MARK A. HALL & DAVID ORENTLICHER, HEALTH CARE LAW AND ETHICS IN A NUTSHELL (4<sup>th</sup> ed. West 2020).
2. MARCIA M. BOUMIL & PAUL HATTIS, MEDICAL LIABILITY IN A NUTSHELL (West 4<sup>th</sup> ed. 2017).
3. BARRY R. FURROW, THOMAS L. GREANEY, SANDRA H. JOHNSON, TIMOTHY STOLTZFUS JOST & ROBERT L. SCHWARTZ, HEALTH LAW (3d ed. West Hornbook series 2014).
4. SANDRA H. JOHNSON, ROBERT L. SCHWARTZ ET AL., BIOETHICS AND LAW IN A NUTSHELL (West 2d ed. 2016).
5. JOHN E. STEINER JR., PROBLEMS IN HEALTH CARE LAW: CHALLENGES FOR THE 21<sup>ST</sup> CENTURY (10<sup>th</sup> ed. Jones & Bartlett 2014).

### **B. Study Aids for Non-Lawyers**

1. TONIA D. AIKEN, LEGAL AND ETHICAL ISSUES IN HEALTH OCCUPATIONS (Elsevier 2008).
2. GEORGE J. ANNAS, THE RIGHTS OF PATIENTS: THE AUTHORITATIVE ACLU GUIDE TO THE RIGHTS OF PATIENTS (3d ed. NYU 2004).
3. CAROLYN BUPPERT, NURSE PRACTITIONER'S BUSINESS PRACTICE AND LEGAL GUIDE (4<sup>th</sup> ed. Jones & Bartlett 2011).
4. BONNIE FREMGEN, MEDICAL LAW AND ETHICS (6<sup>th</sup> ed. Pearson 2019).
5. GINNY WACKER GUIDO, LEGAL AND ETHICAL ISSUES IN NURSING (6<sup>th</sup> ed. Pearson 2014).
6. CARL HORN, LAW FOR PHYSICIANS: AN OVERVIEW OF MEDICAL LEGAL ISSUES (AMA 2000).
7. JANICE L. KAZMIER, HEALTH CARE LAW (Cengage Learning 2008).
8. MARCIA A. LEWIS & CARL D. TAMPARO, MEDICAL LAW, ETHICS, AND BIOETHICS (6<sup>th</sup> ed. F.A. Davis 2007).



9. GEORGE D. POZGAR & NINA SANTUCCI, *LEGAL ASPECTS OF HEALTH CARE ADMINISTRATION* (13<sup>th</sup> ed. Jones & Bartlett 2018).
10. RONALD W. SCOTT, *PROMOTING LEGAL AND ETHICAL AWARENESS: A PRIMER FOR HEALTH PROFESSIONALS AND PATIENTS* (Elsevier 2008).

### C. **General Health Law Reference Materials**

This is, of course, a highly select list. I have not included many CLE or practitioner-oriented materials.

1. AMERICAN COLLEGE OF LEGAL MEDICINE TEXTBOOK COMMITTEE, *LEGAL MEDICINE* (Mosby 7<sup>th</sup> ed. 2007).
2. AMERICAN HEALTH LAWYERS ASSOCIATION, *FUNDAMENTALS OF HEALTH LAW* (6<sup>th</sup> ed. 2014).
3. AMERICAN HEALTH LAWYERS ASSOCIATION, *HEALTH LAW PRACTICE GUIDE* (West CBC 3-vol. looseleaf).
4. ALISON BARNES ET AL., *HEALTH CARE LAW DESK REFERENCE* (ALI-ABA 2001).
5. SCOTT BECKER, *HEALTH CARE LAW: A PRACTICAL GUIDE* (Lexis 1-vol. looseleaf), on LEXIS.
6. BNA HEALTH LAW AND BUSINESS LIBRARY, *WEB PORTFOLIOS LIBRARY* (BNA Online) (also available in print or CD-ROM).
7. CALIFORNIA MEDICAL ASSOCIATION, *CALIFORNIA PHYSICIANS LEGAL HANDBOOK* (2022).
8. CANADIAN MEDICAL PROTECTIVE, *MEDICAL LEGAL HANDBOOK FOR PHYSICIANS IN CANADA* (7<sup>th</sup> ed. 2010).
9. DEAN M. HARRIS, *CONTEMPORARY ISSUES IN HEALTHCARE LAW AND ETHICS* (Health Admin. Press 2003).
10. PAUL C. LASKY ED., *HOSPITAL LAW MANUAL* (Aspen 5-vol. looseleaf).
11. BRYAN A. LIANG, *HEALTH LAW & POLICY: A SURVIVAL GUIDE TO MEDICOLEGAL ISSUES FOR PRACTITIONERS* (Butterworth Heinemann 2000).
12. MICHAEL G. MACDONALD ED., *TREATISE ON HEALTH CARE LAW* (Matthew Bender 5-vol. looseleaf), on LEXIS.

### D. **Medical Malpractice Reference Materials**

1. LEE S. GOLDSTEIN, *MEDICAL MALPRACTICE: GUIDE TO MEDICAL ISSUES* (Lexis 2013).
2. DAVID S. GREENBERG & BRIAN P. SCHNEIDER EDS., *HEALTHCARE LITIGATION AND RISK MANAGEMENT ANSWER BOOK* (PLI 2015).
3. DAVID W. LOUISELL, *MEDICAL MALPRACTICE* (Matthew Bender 5-vol. looseleaf), on LEXIS.

4. JAMES T. O'REILLY & MICHELLE L. YOUNG, *MEDICAL MALPRACTICE: AVOIDING, ADJUDICATING, AND LITIGATING IN THE CHALLENGING NEW CLIMATE* (2014).
5. STEVEN E. PEGALIS, *AMERICAN LAW OF MEDICAL MALPRACTICE* (West CBC 3d ed. 2005 & Supp. 2014) (3 volumes), Westlaw: ALMM.

**E. Consent and Confidentiality Reference Materials**

1. CALIFORNIA HOSPITAL ASSOCIATION, *CONSENT MANUAL* (40<sup>th</sup> ed. 2013).
2. PATRICIA CARTER, *HIPAA COMPLIANCE HANDBOOK* (2015).
3. CLAIRE C. OBADE, *PATIENT CARE DECISION MAKING: A LEGAL GUIDE FOR PROVIDERS* (West CBC looseleaf), Westlaw: PCAREDM.
4. FAY A. ROZOVSKY, *CONSENT TO TREATMENT: A PRACTICAL GUIDE* (4<sup>th</sup> ed. Aspen 2009).

**F. Reference Materials on Other Issues**

1. JULIE A. BARNES, *MANAGED CARE LITIGATION* (ABA-BNA 2005 & Supp. 2008).
2. DAN DOBBS, *THE LAW OF TORTS: PRACTITIONER TREATISE* (2d ed. Thomson West 2011 & Supp. 2014) (4 volumes).
3. WILLIAM D. GOREN, *UNDERSTANDING THE ADA* (4<sup>th</sup> ed. ABA 2013)
4. ALICE G. GOSFIELD ED., *HEALTH LAW PRACTICE GUIDE* (Thomson/West annual), Westlaw: HTHLPG.
5. JOHN P. MARREN, *MANAGED CARE LAW MANUAL* (Aspen looseleaf).
6. ALAN MEISEL, KATHY CERMINARA, THADDEUS POPE, *THE RIGHT TO DIE* (3<sup>rd</sup> ed. Aspen looseleaf).
7. JEFFREY C. MOFFAT, *EMTALA ANSWER BOOK* (Wolters Kluwer 2015).

## **XVIII. Staying Current in Health Law**

In addition to looking up rules when confronted with a problem, most lawyers proactively monitor legal and policy developments in their practice area. Here are some of the more popular resources.

**A. Legal Developments**

1. **BNA Newsletters:** *Health Law Reporter* and *Health Care Daily* cover the latest legal developments that influence the health care industry, including new cases, federal and state legislation, rules from federal regulators, and enforcement trends.

2. **American Health Law Association:** AHLA is the largest professional association for this legal practice area. AHLA has some great newsletters that it delivers daily, weekly, and/or monthly. Cheap student memberships are available.
3. **American Bar Association:** The ABA Health Law section has *Health Lawyer*, *Health eSource*, free webinars, and other great resources.
4. **Law-360.** Law360 covers litigation, policy developments, corporate deals, and more across dozens of practice areas, including health.  
<https://www.law360.com/health>
5. **Other Professional Associations:** Other national and regional societies also often have valuable materials, from articles to podcasts. The Minnesota Medical Association also tracks legal developments pertaining to quality as part of its advocacy efforts. Their monthly magazine *Minnesota Medicine* is freely available.
6. **Legal News Aggregators:** Several newsletters compile health law developments from other sources. Most deliver customized daily briefings for free. These include *Lexology*, *Medscape*, and *Stat*. Many law firms also publish these as client development tools.
7. **Government Agencies:** Government websites often provide useful guidance on their enforcement activities and priorities. For example, check out the websites of CMS, DHHS OIG, and the Minnesota Board of Medicine.
8. **Articles:** You can find more in-depth legal articles through Westlaw, Lexis, Hein Online, Legal-Trac, SSRN, Legal Resource Index, Index to Legal Periodicals, and Index to Foreign Legal Periodicals.
9. **Blogs:** There are some great blawgs on health law. I have collected many of these at [medicalfutility.blogspot.com](http://medicalfutility.blogspot.com). I especially recommend Harvard's *Bill of Health* and the *Health Affairs* blog.

## B. Health Policy Developments

1. *PubMed* comprises more than 22 million citations for biomedical literature from MEDLINE, life science journals, and online books.

2. You can also create alerts for new articles in PubMed and in the journals of key publishers like Springer, Sage, Science Direct, Project MUSE, JSTOR, and similar databases.

### C. **Networking**

1. **MSBA:** The Minnesota State Bar Association Health Law section holds monthly breakfast CLE meetings. Breakfast is included and these events are always free for law students. MSBA also has sections on Food & Drug Law and Elder Law.
2. **County Bars:** County bar associations also regularly have health law events. Getting engaged and networking is a great way both to find a job and to advance your professional development.
3. **Specialty Bars:** I mentioned AHLA above. But there are also regional specialty bar associations with health law sections, such as the Minnesota Defense Lawyers Association.

## XIX. Checklist of Your Deliverables in Spring 2023

TASK	DUE	GRADE
Quiz 1 of 12	Sat. Jan. 21	3%
Quiz 2 of 12	Sat. Jan. 28	3%
Quiz 3 of 12	Sun. Feb. 4	3%
Quiz 4 of 12	Sat. Feb. 11	3%
Quiz 5 of 12	Sat. Feb. 18	3%
Quiz 6 of 12	Sat. Feb. 25	3%
15-minute informational meeting with Prof. Pope	Any time before Thur. Feb. 28	§§ V.G, XI
Quiz 7 of 12	Sat. March 4	2%
<b>Midterm Exam</b> (during any 4-hour period)	Between Thur. Mar. 9 & Sun. Mar. 19	20%
Quiz 8 of 12	Sat. March 25	3%
Quiz 9 of 12	Sat. April 1	3%
Quiz 10 of 12	Sat. April 8	3%
Quiz 11 of 12	Sat. April 15	3%
Quiz 12 of 12	Sat. April 22	3%
Attend any health licensing board meeting	Any time before Wed. May 17	§§ V.H, XI
<b>Final Exam</b> (during any 24-hour period)	Between Thur. May 4 & Wed. May 17	40%