

Instructor	Professor Thaddeus Mason Pope
Course Title	Health Law: Quality & Liability
Format	Take Home Final Exam, Spring 2019
Total Time	Twenty-Four (24) hours
Total Pages	16 pages

Reference Materials Allowed

Open Book (all reference materials allowed)

Take-Home Exam Instructions

1. Please know your **correct Spring 2019 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 Canvas site any time after 12:01 a.m. on Sunday, May 5, 2019 and before 11:59 p.m. on Saturday, May 18, 2019.
4. You must **upload** (submit) your exam answer file to the Canvas site within twenty-four (24) hours of downloading the exam.
5. You must **upload** your exam answer file no later than 11:59 p.m. on Saturday, May 18, 2019. Therefore, the latest time by which you will want to download the exam is 11:59 p.m. on Friday, May 17, 2019. Otherwise, you will have less time than the full permitted twenty-four hours.
6. Write your answers to all parts of the exam in a word processor. Save your document as a **single PDF file** before uploading to Canvas.
7. Use your exam number as the **file name** for the PDF file that you upload.

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 final exam period.
2. **Competence:** By downloading and accepting this examination, you certify that you can complete 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 sixteen **(16) 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.
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 Saturday, May 18, 2019.
7. **Time Penalty:** If you upload your exam answer file more than 24 hours after downloading the exam, then Professor Pope will lower your exam grade **by one point** for every minute over 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 enough time after editing to upload your exam.
8. **Timing:** Professor Pope has designed this exam for completion in three hours. That means you should be able to write complete answers to all the questions in three hours. Yet, since this is a take-home exam, you will want to take some extra time (perhaps one-half hour) to outline your answers and consult your course materials. You will also want to take some extra time (perhaps one-half hour) to revise, polish, and proofread your answers, such that you will not be submitting a “first draft.”
9. **Scoring:** This final exam comprises 40% of your overall course grade. While the scoring includes 100 points, these points will be weighted.
10. **Open Book:** This is an OPEN book exam. You may use any written materials, including, but not limited to: (a) any required and recommended materials, (b) any handouts from class, (c) PowerPoint slides, class notes, and (d) your own personal or group outlines.

11. **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.
12. **Format:** The exam consists of three parts:
- Part One** 15 multiple choice questions
Worth 2 points each, for a combined total of 30 points
Estimated time = 30 minutes
- Part Two** 4 short answer questions
Worth 10 points each, for a combined total of 40 points
Estimated time = 100 minutes
- Part Three** 1 essay question
Worth 30 points, for a combined total of 30 points
Estimated time = 75 minutes
- That adds up to less than four (4) hours. Remember, you have 24 hours to complete this exam. Therefore, you have time to proofread.
13. **Grading:** All exams will receive a raw score from zero to 100. 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 Canvas 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 10). Next to each number type the letter corresponding to the best answer choice for that problem. For example:
1. A
 2. D
 3. B . . .
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:

3. **Outlining Your Answer:** I strongly encourage you to use at least one-fourth of the allotted time per question to outline your answers on scrap paper before beginning to write. Do this because you will be graded not only on the substance of your answer but also on its clarity and conciseness. In other words, organization, precision, and brevity count. If you run out of insightful things to say about the issues raised by the exam question, stop writing until you think of something. Tedious repetition, regurgitations of law unrelated to the facts, or rambling about irrelevant issues will negatively affect your grade.

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.

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

- Below are 15 multiple choice questions.
 - Each question is worth 2 points for a total of 30 points.
 - Recommended time is 30 minutes.
1. **Hospital arranges for its emergency department to be staffed and managed by an independent contractor. If hospital made it overwhelmingly and abundantly clear to patients that the ED clinicians are independent contractors, then any negligence of those clinicians:**
- A. Can be imputed to hospital on *respondeat superior* grounds
 - B. Can be imputed to hospital on ostensible agency grounds
 - C. Can be imputed to hospital on grounds of the non-delegable duty doctrine
 - D. More than one of the above
 - E. None of the above
2. **Patient, a fireman with the Saint Paul FD, was admitted to hospital while suffering major depression and drug dependency. His treating physician determined, in accord with generally accepted guidelines, that patient needed 25 days of inpatient treatment. After seven days, without even reviewing the patient's records, the insurance company (Aetna) announced it would not pay for any further hospital care. The patient could not afford to pay for the care and was discharged. Two weeks later, the patient committed suicide. Potential viable defendants include:**
- A. Aetna on a theory of negligent utilization review
 - B. The Aetna medical director on a theory of medical malpractice
 - C. The treating physician for medical malpractice
 - D. The Hospital under EMTALA
 - E. A and B
 - F. A and C
 - G. B and C
 - H. All of the above

3. **Healthcare clinic conducts employment-related physical examinations for a local company. Employee Suzanne was given an employment physical by a physician employed by the clinic. Suzanne subsequently developed cancer and dies. Her estate files a wrongful death medical malpractice claim against the clinic that conducted the examination, alleging that they should have diagnosed this cancer when it was still treatable. The clinic has filed a motion for summary judgment. The court will probably:**
- A. Grant the motion
 - B. Grant the motion but only if the defendant can establish the plaintiff cannot establish breach or causation
 - C. Grant the motion, because the clinic is not vicariously liable for its clinician's negligence (if any)
 - D. Deny the motion because material questions of fact are in dispute
4. **Hospital discharged plaintiff with un-stabilized emergency medical conditions. Hospital asserts that it did not violate the EMTALA because the conditions that allegedly were not stabilized before plaintiff's discharge were "newly presenting conditions," and not the "emergency medical condition" presented when patient first came to the emergency room. Only after her arrival did plaintiff begin suffering from additional medical conditions, including hypoxia, emesis, and abdominal pain. This hospital probably:**
- A. Violated its EMTALA stabilization duty, because patients may never be discharged with un-stabilized EMCs. They may only be transferred, and even then, only with appropriate certifications and special transfer precautions.
 - B. Did not violate its EMTALA stabilization duty, so long as the "newly presenting conditions" had not been identified
 - C. Did not violate its EMTALA duty so long as it stabilized the initially identified emergency medical condition
 - D. Violated its duty to admit or transfer
5. **Plaintiff asserts that patient was admitted to hospital and then diagnosed with the following medical conditions: (1) severe hypernatremia, (2) decreased oral intake, (3) malnutrition, (4) chronic kidney disease stage IV, and (5) hypertension. Plaintiff further asserts that, just nine days after her admission, hospital transferred patient to a rehabilitation facility when her medical condition was still unstable and her condition inappropriate for such transportation. This hospital most likely:**
- A. Violated its EMTALA screening duty
 - B. Violated its EMTALA stabilization duty
 - C. Did not violate its EMTALA stabilization duty, only so long as the transfer was made with appropriate equipment and personnel
 - D. Did not violate its EMTALA duties

6. Which of the following is most correct:
- A. If a patient can establish an EMTALA violation, she can most probably also establish malpractice
 - B. If a patient can establish malpractice, she can most probably also establish an EMTALA violation
 - C. Both A and B
 - D. Neither A nor B
7. Which of the following terms most typically refers to a private (rather than governmental) process whereby a medical practitioner's training, licensure, and professional practice patterns and history are evaluated for purposes of determining eligibility for privileges with an institutional entity (such as a hospital or large physician group) or participation in a payer program (such as an HMO).
- A. Licensure
 - B. Credentialing
 - C. Certification
 - D. Screening
 - E. Enrollment
8. Which of the following terms most typically refers to who or which entities may provide healthcare services as a matter of law.
- A. Licensure
 - B. Credentialing
 - C. Certification
 - D. Screening
 - E. Enrollment
9. Plaintiff sought a \$2,000,000 life insurance policy from Colonial Life. Before writing the policy, Colonial obtained pre-insurance blood samples from plaintiff. Those tests showed that plaintiff was HIV positive. Plaintiff did not know that. She has sued Colonial for not telling her. The most viable theory is:
- A. Malpractice
 - B. Informed consent
 - C. Battery
 - D. Abandonment
 - E. None of the above

10. Congress created the National Practitioner Data Bank in 1986 as a central repository for malpractice payments, state disciplinary actions, restrictions from health plans or hospitals and other limits on any healthcare professional. This helps prevent doctors disciplined in state A from beginning or continuing to practicing in states B or C. The database now has more than 1.3 million records of “adverse actions” going back to 1990. Yet, oddly, one-quarter of intended users did not use the NPDB at all last year. Who should be querying the NPDB?

- A. State medical boards
- B. Managed care organizations
- C. Hospitals
- D. All of the above

11. Patient sought emergency medical treatment at hospital for abdominal pain, diarrhea, nausea, and difficulty breathing. Patient attributed these symptoms to food poisoning or an accidental drug overdose. Hospital personnel performed an EKG and a CT scan before discharging patient. Within seven hours of his discharge, patient was admitted to another hospital in acute renal failure.

Patient's intake blood pressure was 133/52 (hypotension). Patient's recorded blood pressure at the time of discharge was 143/77 (hypertension). Patient's recorded blood pressure at discharge denotes stage 1 hypertension which leads to stroke, heart failure, heart attack and kidney failure to name a few conditions. Patient experienced a few of these conditions just a few hours after leaving the first hospital.

The most likely theory of liability is

- A. Failure to screen
 - B. Failure to stabilize
 - C. Failure to admit
 - D. More than one of the above
 - E. No EMTALA violation
12. A physician cannot refuse medical services to a patient because of the patient's disabilities. But the ADA not only prohibits discrimination. It also requires healthcare entities to take proactive steps to offer equal opportunity to persons with disabilities. Suppose a physician has an appointment with a deaf patient. Which of the following is true?
- A. Physician can require patient to bring a sign language interpreter to the clinical appointment.
 - B. Physician can charge this patient more, since the visit may take longer.
 - C. Physician must secure the appropriate interpreter, but can charge the patient for the accommodation.
 - D. None of the above

13. **The employed medical director at Aetna determined that patient did not have a condition that, under the terms of the patient's insurance, warranted the therapy requested by patient's physician. This diagnosis was erroneous. Patient was, in fact, eligible for the requested therapy. Patient's condition worsened. For personal injuries caused by the wrongful coverage denial, patient may bring potentially successful claims against:**
- A. The Aetna medical director for medical malpractice, if the error was negligently made
 - B. The Aetna medical director for medical malpractice, if the error was made with gross negligence
 - C. Aetna because it is vicariously liable for the Aetna medical director's negligence (or gross negligence)
 - D. Both A and C
 - E. Both B and C
 - F. None of the above
14. **Who is protected by EMTALA?**
- A. The uninsured
 - B. Medicare patients
 - C. Medicaid patients
 - D. Patients with private insurance
 - E. B and C only
 - F. A, B, and C
 - G. A, B, C, and D
15. **Patient arrives at the ED with appendicitis. Hospital treated patient differently based on sexual orientation but appropriately diagnosed and treated the presenting condition. What potentially successful claims might patient assert against the hospital?**
- A. EMTALA
 - B. ADA
 - C. Section 1557
 - D. A and C only
 - E. A and B only
 - F. B and C only
 - G. A, B, and C

Short Answer Question 1

- This question is worth 10 points
- Limit your response to 500 words. This is only a limit, not a target or suggested length.
- Recommended time is 25 minutes.

In May 2018, doctors at the University of Colorado Hospital removed BOTH of Linda Woolley's kidneys. Surgery appeared necessary because Linda likely had kidney cancer based on pathology reports. But, in fact, those reports state: "no evidence of malignancy" and results "consistent with a benign process."

Therefore, not surprisingly, after her kidneys were removed, doctors discovered Woolley did not have kidney cancer after all ("no evidence of carcinoma" and "no mass lesion identified"). Before she died in May 2019, Woolley had been receiving dialysis several times a week while sitting on the seven-year waiting list for a kidney transplant.

Assess whether Woolley may bring a claim against the University of Colorado without an expert witness.

Short Answer Question 2

- This question is worth 10 points
- Limit your response to 500 words. This is only a limit, not a target or suggested length.
- Recommended time is 25 minutes.

Patient received most of her prenatal care from a women's clinic. But on at least seven occasions patient visited hospital for prenatal stress testing. On each occasion, she signed a "Conditions of Admission" form. On the first page in bold type is a heading that states "**PHYSICIANS ARE INDEPENDENT MEDICAL PRACTITIONERS.**" This is followed by the following paragraph:

All physicians and surgeons providing services to me, including the radiologist, pathologist, emergency physician, anesthesiologist and others, are not employees or agents of the hospital. They have been granted the privilege of using the hospital for the care and treatment of their patients, but they are not employees or agents of the hospital.

At the end of the form, above patient's signature, is a statement certifying patient had read and received a copy of the form. In addition, on each hospital visit, patient watched a brief video and completed a brief quiz on an iPad concerning the content of the "Conditions of Admission" form.

Mother seeks to sue hospital for injuries that her baby sustained during birth solely on grounds that the hospital is vicariously liable for the physicians who delivered her baby.

If there is no non-delegable duty doctrine in this jurisdiction, should the trial court grant summary judgment in favor of the hospital? Explain why or why not.

Short Answer Question 3

- This question is worth 10 points
- Limit your response to 500 words. This is only a limit, not a target or suggested length.
- Recommended time is 25 minutes.

In April 2019, *JAMA* reported that uninsured emergency department patients were more frequently discharged or transferred to another hospital than insured patients. The study looked at 200,000 patients with acute pulmonary disease. The study grouped these patients into three categories:

1. 10% of these patients were uninsured
2. 26% were on Medicaid
3. 64% had Medicare or private insurance

The study further categorized the 200,000 patients into three categories depending on their treatment pathway after arrival at the hospital.

1. 66% were discharged
2. 2% were transferred to another hospital
3. 32% were admitted

Notably, the study determined that the discharge and transfer rate for the uninsured patients was higher than that for the insured patients. Hospitals discharged 90% of uninsured patients but less than 80% of privately insured patients.

How strongly does this data suggest an EMTALA violation? Suppose that you represent a Hospital. Further suppose that the DHHS OIG has ascertained that your hospital is at one end of the continuum in this *JAMA* study (i.e. it has an even higher discharge/transfer rate for uninsured patients than the average). If the OIG sends your hospital a letter asking for an explanation, how might you explain how this data is consistent with fulfilling your obligations under EMTALA?

Short Answer Question 4

- This question is worth 10 points
- Limit your response to 500 words. This is only a limit, not a target or suggested length.
- Recommended time is 25 minutes.

We saw that a single patient may have multiple viable claims against each of several defendants. For example, against a single clinician, patient may have multiple malpractice claims (e.g. negligent diagnosis, negligent performance), multiple informed consent claims (e.g. failure to disclose risk A, failure to disclose risk B, failure to disclose alternative X), as well as other claims.

Does a physician's negligence at a hospital automatically mean that the hospital is also *probably* liable on a theory of direct liability? Explain why or why not.

Essay Question 1

- This question is worth 30 points
- Limit your response to 1600 words. This is only a limit, not a target or suggested length.
- Recommended time is 75 minutes.

Many health insurance companies make it harder to prescribe an increasing number of medications or medical services until the treating doctor has submitted documentation justifying the recommended treatment. Under many medical and prescription drug plans, certain medications need approval from the patient's health insurance carrier before they are covered. This is called "prior authorization" or "pre-authorization." The drugs selected for PA are usually those that:

- May be unsafe when combined with other medications
- Have lower-cost, equally effective alternatives available
- Should only be used for certain health conditions
- Are often misused or abused
- Are often used for cosmetic purposes

Medications that require PA will only be covered by the health plan, if the patient's doctor both requests and receives approval from the patient's health insurance company.

Unfortunately, PAs have become increasingly burdensome for providers. They contribute to major of care delays and an estimated 80 million are submitted each year. In practice, insurers eventually authorize most requests, but the process can be a lengthy administrative nightmare of recurring paperwork, multiple phone calls, and bureaucratic battles that can delay or disrupt a patient's access to vital care. This is a problem that has yet to be resolved despite the development of new technology and software — such as electronic prior authorizations (ePAs) — that have tried to streamline the process.

Last year, sixty-four percent of providers reported waiting at least one business day for a prior authorization request. Thirty percent waited at least three business days. Ten percent said they waited for more than a week. Furthermore, seventy-eight percent of providers reported that long prior authorization processes are linked to patients abandoning their treatments (due to the aggravation of additional trips to the pharmacy or to the doctor). Whatever the exact scope of the problem, the result is the same. Patients find themselves leaving the pharmacy counter empty-handed, despite having a valid prescription.

Things are rough for clinicians too. Uncompensated work for physicians and staff, which translates into increased overhead costs for practices, many of which are already financially stressed. Dealing with the insurers often consumes at least 1 physician hour per week, 13 nursing hours per week, and 6 clerical hours per week.

The PA process has become so burdensome that many physicians get fed up with the process. They end up writing less-effective prescriptions, because they know the preferred drug will require a prior authorization. In other words, the burdens of PA are forcing providers to face a frustrating decision:

1. Prescribe the best medication and risk delays in care by submitting a PA that may be denied?
- or*
2. Avoid the PA from the start and write a less-effective, though automatically pre-approved prescription?

Your client is a physician. She is grappling with this very choice. What is your legal advice?

END OF EXAM