

| | |
|---------------------|--|
| Instructor | Professor Thaddeus Mason Pope |
| Course Title | Health Law: Quality & Liability |
| Format | Midterm Exam, Spring 2022 |
| Total Time | Four (4) hours |
| Total Pages | 16 pages |

Reference Materials Allowed

Open Book (all reference materials allowed)

Take-Home Exam Instructions

1. Please know your **correct Spring 2022 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 Thursday, March 10, 2021, and before 11:59 p.m. on Sunday, March 20, 2022.
4. You must **upload** (submit) your exam answer file to the Canvas site within four (4) hours of downloading the exam.
5. You must **upload** your exam answer file no later than 11:59 p.m. on Sunday, March 20, 2022. Therefore, the latest time by which you will want to **download** the exam is at 7:59 p.m. on Sunday, March 20, 2021. Otherwise, you will have less time to write your answers than the full permitted four (4) 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 **midterm exam period**. It is a violation of the Code to share the exam questions. (There may be an accommodation student taking this exam at a different time.) Shred and delete the exam questions immediately upon completion of the exam. Professor Pope will repost the exam after the end of the midterm exam period.
2. **Competence:** 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 four (4) hours of downloading it, but in no case later than 11:59 p.m. on Monday, March 20, 2022.
7. **Time Penalty:** If you upload your exam answer file more than four (4) hours after downloading the exam, then Professor Pope will lower your exam grade **by one point** for every minute over the 4 hours. If the timestamp on your uploaded exam indicates that you have exceeded the 4-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 about 4 hours. That means you should be able to write complete answers to all the questions in 4 hours. Yet, since this is a take-home exam, you will want to take some extra time (perhaps 45 minutes) to outline your answers and consult your course materials. You will also want to take some extra time (perhaps 45 minutes) to revise, polish, and proofread your answers, such that you will not be submitting a “first draft.”

9. **Scoring:** This midterm exam comprises 15% 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 unless specifically directed to do so.
12. **Format:** The exam consists of three main parts:
- Part One** 25 multiple choice questions
Worth 2 points each, for a combined total of 50 points
Estimated time = 50 minutes (2 minutes each)
- Part Two** 3 essay questions
Worth 10, 15, and 25 points each, for a combined total of 50 points
Estimated time = 100 minutes
- That adds up to less than 3 hours. Remember, you have four hours to complete this exam. Therefore, you have time to revise, polish, and 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. Professor Pope 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 25). Next to each number type the letter corresponding to the best answer choice for that problem. For example:
1. A
 2. D

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 PART TWO

1. **Submission:** Create clearly marked separate sections for each problem. You do not need to “complete” the exam in order. Still, structure your exam answer document in this order:
 - Essay Question 1
 - Essay Question 2
 - Essay Question 3
2. **Outlining Your Answer:** I strongly encourage you to use at least one-fourth of the allotted time per question to outline your answers on scrap paper before beginning to write. Do this because you will be graded not only on the substance of your answer but also on its clarity and conciseness. In other words, organization, precision, and brevity count. If you run out of insightful things to say about the issues raised by the exam question, stop writing until you think of something. Tedious repetition, regurgitations of law unrelated to the facts, or rambling about irrelevant issues will negatively affect your grade.
3. **Answer Format:** This is very important. **Use headings and subheadings.** Use short single-idea paragraphs (leaving a blank line between paragraphs). Do not completely fill the page with text. Leave white space between sections and paragraphs.
4. **Answer Content:** Address all relevant issues that arise from and are implicated by the fact pattern and that are responsive to the “call” of the question. Do not just summarize all the facts or all the legal principles relevant to an issue. Instead, apply the law you see relevant to the facts you see relevant. Take the issues that you identify and organize them into a coherent structure. Then, within that structure, examine issues and argue for a conclusion.
5. **Citing Cases:** You are welcome but not required to cite cases. While it is sometimes helpful to the reader and a way to economize on words, do not cite case names as a complete substitute for legal analysis. For example, do not write: “Plaintiff should be able to recover under A v. B.” Why? What is the rule in that case? What are the facts in the instant case that satisfy that rule?

6. **Cross-Referencing:** You may reference your own previous analysis (e.g. B's claim against C is identical to A's claim against C, because __.") But be very clear and precise what you are referencing. As in contract interpretation, ambiguity is construed against the drafter.
7. **Balanced Argument:** Facts rarely perfectly fit rules of law. So, recognize the key weaknesses in your position and make the argument on the other side.
8. **Additional Facts:** If you think that an exam question fairly raises an issue but cannot be answered without additional facts, state clearly those facts (reasonably implied by, suggested by, or at least consistent with, the fact pattern) that you believe to be necessary to answer the question. Do not invent facts out of whole cloth.

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 25 multiple choice questions.
 - Each question is worth 2 points for a combined total of 50 points.
 - Recommended time is 50 minutes (2 minutes each).
1. **During the COVID-19 pandemic, ambulances have experienced extended patient offload times. These are sometimes called “wall times.” If the ambulance cannot drop-off the current patient, then it cannot get back on the road and into service. This causes longer 911 response times. Suppose a non-hospital owned ambulance arrives at the hospital but the ED staff fails or refuses to take over care of that patient. Which of the following is MOST correct under EMTALA?**
- A. The hospital is not responsible until it accepts or takes over care.
 - B. The hospital is not responsible until the patient is physically transferred from the ambulance into the ED.
 - C. The hospital is not responsible unless this patient has a prior relationship (e.g. outpatient) with this hospital.
 - D. The hospital is responsible for this patient.
2. **Same question as in Question 1. But now assume that the ambulance is owned by the same hospital as the ED.**
- A. The hospital is not responsible until it accepts or takes over care.
 - B. The hospital is not responsible until the patient is physically transferred from the ambulance into the ED.
 - C. The hospital is not responsible unless this patient has a prior relationship (e.g. outpatient) with this hospital.
 - D. The hospital is responsible for this patient.
3. **In *Warren v. Dinter* (Minn. 2019), the court ruled that Dr. Dinter owed the patient (Susan Warren) a duty of care because:**
- A. He was her treating physician.
 - B. He offered a formal consult to her treating NP.
 - C. He offered an informal/curbside consult to her treating NP.
 - D. It was foreseeable that the NP would rely upon his advice.

4. Which of the following are NOT duties of a hospital under EMTALA?
- A. Provide an appropriate medical screening examination within the capability of the Hospital's Dedicated Emergency Department, including ancillary services routinely available, to determine if an "emergency medical condition" exists.
 - B. Provide to an individual who is determined to have an emergency medical condition such further medical examination and treatment as is required to "stabilize" the emergency medical condition or arrange for transfer of the individual to another medical facility in accordance with the procedures set forth below.
 - C. Accept to the Emergency Department from a referring hospital within the boundaries of the United States the appropriate transfer of individuals who require the Hospital's specialized capabilities or facilities if the Hospital has the "capacity" to treat the individual's emergency medical condition.
 - D. Report to the appropriate regulatory agency when it has reason to believe that it has received an individual who was transferred in violation of the requirements of federal law regarding the transfer of an individual with an emergency medical condition. This report to the appropriate regulatory agency will occur within 72 hours after the determination of receipt of an inappropriate transfer.
 - E. These are all duties under EMTALA.
5. For EMTALA purposes, when does a patient "come to the emergency department" and thereby trigger the hospital's duty to screen?
- A. When the individual presents at a dedicated emergency department licensed by the state as such.
 - B. When the individual presents at a facility of the hospital held out to the public as a place that provides care for emergency medical conditions even if that facility is not licensed as such.
 - C. When the individual presents at a facility of the hospital that provides at least one-third of its visits for treating emergency medical conditions even if that facility is neither licensed as an emergency department nor held out to the public as such.
 - D. A, B, and C
 - E. When the individual presents on hospital property other than a dedicated emergency department
 - F. A, B, C, and E
6. Bertrand gets into a hospital owned ambulance. He is FIRST and EARLIEST considered to be on that hospital's property for EMTALA purposes when:
- A. The ambulance parks or gets within 100 yards of the hospital building.
 - B. He is transferred from the ambulance into the ED.
 - C. He gets into the ambulance.
 - D. He gets into the ambulance, only so long as the ambulance is within 1 mile of the main hospital building.
 - E. None of the above.

7. **Bertrand gets into a non-hospital owned ambulance. He is FIRST and EARLIEST considered to be on that hospital's property for EMTALA purposes when:**
- A. The ambulance gets within 100 yards of the hospital building.
 - B. He is transferred from the ambulance into the ED.
 - C. He gets into the ambulance.
 - D. He gets into the ambulance, only so long as the ambulance is within 1 mile of the main hospital building.
 - E. None of the above.
8. **Under EMTALA an individual with an emergency medical condition may be transferred (to another hospital or discharged) only if:**
- A. Upon request, if the individual or the person acting on the individual's behalf is fully informed of the risks of the transfer, the alternatives (if any) to the transfer, and of the hospital's obligations to provide further examination and treatment sufficient to stabilize the individual's EMC, and to provide for an appropriate transfer
 - B. A physician has certified that the medical benefits expected from transfer outweigh the risks.
 - C. A or B
 - D. Neither A nor B. Individuals may not be transferred unless or until their emergency medical condition has been stabilized.
9. **A general pediatrician in Kentucky relied on an informal consult with a neurologist after providing the neurologist with relevant information. But the consulting neurologist failed to flag a key concern that would have been obvious to any competent neurologist (but not to a general pediatrician). The neurologist:**
- A. May be liable for malpractice because there was a treatment relationship.
 - B. May be liable for malpractice whether (or not) there was a treatment relationship.
 - C. Is probably not liable for malpractice because there was no treatment relationship.
 - D. None of the above.

10. **Duncan was scheduled to receive a magnetic resonance imaging (MRI) study. She consented to pre-imaging injection with sedation but explicitly informed the imaging staff that she did not want to receive the narcotic fentanyl, a request she repeated three times. The nurse assured Duncan that only Demerol or morphine would be administered. During the procedures, after receiving fentanyl, Duncan experienced severe complications including severe headache, projectile vomiting, breathing difficulties, post-traumatic stress disorder, and vocal cord dysfunction. Following the procedure, Duncan learned that she had been administered fentanyl for the procedure. Duncan's BEST cause of action is:**
- A. Informed consent
 - B. Battery
 - C. Abandonment
 - D. ADA
11. **In this course we have not examined healthcare financing which is a critical element that defines access to medical care. But we have examined how access is equally shaped by legal requirements that create treatment obligations for doctors or hospitals, regardless of how (or if) someone pays for care. The best example of such a law is:**
- A. Informed consent
 - B. ADA
 - C. EMTALA
 - D. None of these are good examples of imposing treatment obligations regardless of ability to pay.
12. **Jointly with the staff at her surgeon's office, patient has called the local hospital to schedule coronary bypass surgery for the following week. The cost is \$86,000 and patient has inadequate insurance coverage. So, the hospital refuses to schedule the surgery.**
- A. This is permissible under EMTALA because the patient is not on hospital property.
 - B. This is permissible under EMTALA even if the patient were not on hospital property.
 - C. This is permissible under EMTALA so long as the patient is not a Medicare beneficiary.
 - D. Both A and B are correct.
 - E. A and B and C are correct
 - F. This is not permissible under EMTALA because the hospital must treat patients without first inquiring about insurance.

13. **How MUCH involvement between a doctor and patient does the law require before finding that a treatment relationship has been formed?**
- A. None
 - B. Slight
 - C. Substantial
 - D. A formal, written agreement
14. **Outside Minnesota, WHEN will physicians' informal "curbside" consultations with colleagues normally establish a treatment relationship between the patient and the consultee-physician?**
- A. Almost never
 - B. Almost always
 - C. Roughly half the time
15. **Hospital has failed to do an expensive diagnostic test on one patient with chest pains and on another patient with a headache. Consequently, the hospital failed to detect a heart attack in the first patient and a brain aneurysm in the second. Those patients were subsequently discharged without treatment for those conditions. Hospital violated its EMTALA screening duty if:**
- A. Other hospitals would have done the test.
 - B. It provided these tests to similarly situated persons.
 - C. Providing these tests is reasonable, good practice.
 - D. None of the above.
16. **In the previous question (Question 15), if a heart attack and a brain aneurysm are emergency medical conditions, then the hospital violated its stabilization duty because:**
- A. It did not provide a level of treatment likely to prevent "material deterioration" of those conditions during transfer.
 - B. It did not stabilize the emergency medical conditions.
 - C. Both A and B
 - D. None of the above

17. An auto accident victim came to the emergency room of a private hospital with multiple deep facial lacerations, a possible head injury, traumatic damage to the teeth and multiple bruises and contusions of the body, resulting in considerable loss of blood. The hospital bandaged him, took X-rays, monitored for shock, and administered IV fluids to stabilize his blood pressure before transferring him to a public hospital for further treatment. This conduct **PROBABLY**:
- A. Complies with EMTALA because the hospital provided stabilizing treatment.
 - B. Violates EMTALA because even if stabilized, the hospital must certify that the benefits of transfer outweigh the risks before transferring.
 - C. Violates EMTALA unless the patient requested or consented to transfer.
 - D. Violates EMTALA because the patient has ongoing medical needs.
18. Physicians enjoy substantial legal discretion to refuse patients for “good” reasons, “bad” reasons, or no stated reason at all. But in a limited number of areas federal law specifically disapproves certain bases for treatment refusals. These prohibited bases do **NOT** include:
- A. Race
 - B. Gender
 - C. Ability to pay
 - D. Ethnicity
 - E. Disability
19. Dr. Choolwe operates a medical office that does not participate in Medicare, Medicaid, or any other federal payment or loan program. She must provide interpreters for her deaf and LEP patients under:
- A. Section 1557 regulations
 - B. ADA
 - C. Both A and B
 - D. Neither A nor B
20. A patient with end-stage renal disease is seeking a kidney transplant. But the patient has advanced lung cancer. If the transplant team denies the transplant for that reason, that:
- A. Does not violate the ADA because the patient’s cancer precludes a successful outcome from treatment.
 - B. Does not violate the ADA because the patient is not disabled.
 - C. Does not violate the ADA because the patient is not being denied treatment on account of her disability
 - D. More than one of the above.

21. Physicians may, with proper notice, stop ongoing treatment because:
- A. They want to retire.
 - B. They want to go on vacation.
 - C. They simply they dislike the patient.
 - D. They are unable to collect payment from the patient.
 - E. A and D
 - F. All the above
22. Suppose an individual visits a physician to get a medical practitioner's perspective of her medical condition because benefits, compensation, disability issues, or custody access issues are being considered or requested by a third party. The individual and physician are PROBABLY:
- A. In a treatment relationship because this is an IME
 - B. In a treatment relationship because this is a formal consult
 - C. Not in a treatment relationship because this is only an informal consult
 - D. Not in a treatment relationship because this is an IME
23. In early 2022, surgeon Simon Bramhall lost his license because he branded his initials on two patients' livers. He used an argon beam machine to "autograph" the patient's organs without asking or discussing it with the affected patients. The medical board said that while no physical damage was caused to either patient, it was an "act borne out of a degree of professional arrogance." While Dr. Bramhall has already been disciplined by the regulators, do Dr. Bramhall's patients have a viable private cause of action?
- A. Informed consent
 - B. Battery
 - C. A or B
 - D. Neither A nor B
24. In November 2021, the U.S. Supreme Court heard oral arguments in *Cummings v. Premier Rehab Keller*. A deaf and blind patient sought physical therapy services for back pain. But the PT clinic refused to provide the patient with a sign language interpreter. Under Section 1557, plaintiff should:
- A. Lose because there is no private cause of action under section 1557; only OCR can enforce these regulations.
 - B. Lose because the defendant did not violate section 1557.
 - C. Win but be limited to injunctive relief.
 - D. Win and get not only injunctive relief but also economic compensatory damages.

25. A patient does not show up for an appointment for the third time in a row. The first time, she said she miswrote the appointment date. The second and third time, she said she missed the bus. The physician wants to terminate this relationship.
- A. This is not allowed because these are not sufficiently compelling, weighty enough reasons (like violent behavior).
 - B. This is not allowed if the patient still has ongoing health needs.
 - C. This is allowed with sufficient notice.
 - D. This is allowed with sufficient notice only after first warning the patient and diligently investigating whether recovering the relationship is possible.

Essay Question 1

- This question is worth 10 points
- Limit your response to 1000 words. This is only a limit, not a target or suggested length.
- Recommended time is 20 minutes.

Across the country, both individual clinicians and healthcare facilities ask this question:

How do we handle our unvaccinated patients?

While some clinicians read “unvaccinated” as shorthand for “anti-vaccine” or “against the COVID-19 vaccine,” the unvaccinated population includes adults and children with certain medical conditions that preclude vaccination. Nevertheless, most clinician concerns about unvaccinated patients pertain to those who are eligible for a COVID-19 vaccine but have deliberately declined it for various reasons.

Your physician client is reluctant to treat unvaccinated patients. Therefore, she has asked you, her attorney, these three questions:

1. **May I refuse to accept NEW patients unless they are “fully” vaccinated?**
2. **May I refuse to continue to see my EXISTING patients unless they are “fully” vaccinated?**
3. **Does the REASON to refuse to see unvaccinated patients matter? Is it better that the reason for refusal concerns potential harm to the physician, staff and other patients involved in the practice? Or is it enough that the physician finds that refusing to get vaccinated is an offensive rejection of sound medical advice?**

Essay Question 2

- This question is worth 15 points
- Limit your response to 1000 words. This is only a limit, not a target or suggested length.
- Recommended time is 30 minutes.

A two-month-old baby stopped breathing. Her mother calls 911. A non-hospital-owned ambulance arrives and picks up the baby. While driving, the ambulance crew calls the University of Minneapolis Hospital by radio and says they are “in-bound with a pediatric cardiac arrest patient.” Even though the ambulance is now only six blocks away, the ED nurse tells the ambulance crew that the Hospital is on “partial bypass” due to a lack of PICU (pediatric intensive care unit) beds. The ambulance diverts to Saint Paul Regional Medical Center. Only after the ambulance arrives and parks (but before unloading the patient), does the crew discover that SPRMC is also on diversion for the same reason. (They did not have time to radio ahead like they did for UMH.) So, the ambulance leaves and goes to Mississippi River Hospital.

The ambulance drops the baby at MRH and leaves. The ED staff at MRH did not even need to complete their standard screening exam to determine the baby had an emergency medical condition. So, without further delay either to complete the assessment or to provide treatment, the hospital immediately transfers the baby to Saint Paul Regional Medical Center because it had a PICU and MRH did not. ED clinicians at SPRMC try to save the baby, but he is pronounced dead less than an hour later. While none of these three hospitals filed any complaints or reports, the mother has filed a complaint with the DHHS OIG.

You are an attorney in the DHHS OIG Office of General Counsel. Your supervisor has asked you to identify the most likely EMTALA violations committed by these hospitals that would support civil monetary penalties.

Essay Question 3

- This question is worth 25 points
- Limit your response to 1500 words. This is only a limit, not a target or suggested length.
- Recommended time is 50 minutes.

Massachusetts General Hospital is one of the most eminent and prestigious hospitals in the world. In February 2022, MGH agreed to pay \$15 million to settle a lawsuit concerning overlapping surgeries. This is also known as “concurrent surgery,” “double-booked surgery,” or “running two rooms.”

Basically, this means that attending surgeons were overseeing more than one surgery at the same time. Since one surgeon cannot be in two different places at once, the trainees performed surgeries without proper supervision. The supervising surgeons were not present to supervise surgery ‘A’ because they were working on surgery ‘B’ on another patient in another operating room. The patients booked for surgery with a specific surgeon were unaware that the surgeon would not be there from start to finish, or that some parts (including some “critical” parts) of the procedure would be performed by trainees.

The lawsuit settled for \$15 million concerning billing fraud, a Top-5 important issue in health law but not within the scope of this course or midterm exam. The lawsuit was brought by a *qui tam* relator (whistleblower) who was recovering money on behalf of the U.S. government. In short, MGH submitted “false claims” by billing Medicare more than it should have. Costs were higher because the surgeries took much more time. Patients stayed under anesthesia longer than necessary (and were thereby endangered, especially from stroke and heart attack) because their surgeons were performing surgeries in two operating rooms at once.

Moreover, MGH should not have billed for procedures performed in violation of Medicare rules that require surgeons to be present for critical parts of operations. Those rules exist because some peer-reviewed studies found increased complications for patients whose hip replacement surgery or coronary artery bypass surgery were being performed as overlapping surgeries. As you might expect, the risks are even higher for surgical patients who have multiple underlying conditions, such as diabetes or hypertension. They must be monitored more closely than is possible during concurrent surgeries.

Suppose that you are a private medical malpractice plaintiff’s attorney. You have a prospective new client: one of the patients involved in the surgeries referenced in the February 2022 lawsuit. This former MGH patient wants to bring their own lawsuit against their MGH surgeon. While you do not yet have all the facts or all the law, identify and assess the most viable claims that this patient might assert. Assume that Massachusetts state law is identical to that in Minnesota and Iowa in all relevant respects.