

FINAL EXAMINATION

INSTRUCTIONS

1. You may have access to any outline, notes, or similar course review materials in the preparation of which you have substantially participated, as well as Handout # 5 and writing implements (pens, pencils, paper, bluebooks, and ExamSoft-qualified word processors and diskettes). Access to other materials, such as the coursebook, commercially-prepared outlines, outlines prepared by former students, or parts or copies thereof, is prohibited. Cell phones must be switched off for the duration of the exam. If you have prohibited materials in your possession, please place them in the aisles or at the front of the room now. Switch off your cell phones.

2. You have THREE HOURS to write this exam. There are four parts to the exam, with the following suggested times:

- Part I: Eleven short answer questions of which you are to answer ten, 60 minutes
Part II: One essay question, 25 minutes
Part III: Three multiple choice/explanation questions, 25 minutes
Part IV: One essay question, 70 minutes, set in Arkansas

The questions are weighted roughly in accordance with these suggested times.

3. Write your exam number on this page. Turn in these questions together with your answers.

4. If you are writing by hand, you will probably need four or five bluebooks. Write your exam number on each bluebook you plan to use. Do that now. Write each part of the exam in a separate bluebook. Number the bluebooks in this fashion: Part I, Part II, Part III, Part IV # 1, Part IV # 2.

5. Handwritten answers either should be double spaced or should use only one side of each page. (This will make later-added insertions possible.) Write legibly so that I can credit your ideas. Leave at least a one-inch margin on the left of each page.

6. Part III contains three multiple choice/explanation questions. Each question has one or more correct answers. For each question, first, state clearly the letter or letters (A, B, C, D, E) that you select as correct. You will be slightly penalized for incorrect answers, so guess at your own risk. Second, explain each correct answer in one or two simple sentences. If your selection is "E", that none of the answers given is correct, you may take one sentence to explain why each answer given is incorrect – four sentences total. (These instructions are repeated at the beginning of Part III.)

→ 7. Work quickly, and keep to (or ahead of) your schedule. This is a rigorous exam, and there is not a moment to lose.

PART I. SHORT ANSWER QUESTIONS (60 minutes). Maximum limit: 5 sentences each

Please identify 10 of the following 11 phrases or concepts, briefly explaining their meaning and significance to health law in no more than five straightforward sentences. (Run-on sentences will count as two or three sentences, as appropriate. No extra credit will be given for answering all 11 questions.)

1. Adverse selection
2. Autonomy vs. beneficence in informed consent theory
3. Continuing treatment rule
4. “Deemer clause”
5. Locality rule
6. Managed care’s two basic functions
7. National Practitioner Data Bank
8. “One can accomplish more . . . by raising the mean of the performance curve than by chopping off the tail.”
9. Peer review privilege
10. Quality control mechanisms in hospitals vs. in nursing homes
11. Risk adjustment

PART II. ESSAY QUESTION (25 minutes)

Discuss the independent contractor doctrine as it relates to medical liability. Include in your discussion information about any recognized exceptions to the doctrine, their nature and significance; the current status of the doctrine in Arkansas; and the likely effects of the doctrine relating to patient safety.

PART III. MULTIPLE CHOICE/EXPLANATION QUESTIONS (25 minutes).

Each question has one or more correct answers. For each question, first, state clearly the letter or letters (A, B, C, D, E) that you select as correct. You will be slightly penalized for incorrect answers, so guess at your own risk. Second, explain each correct answer in one or two simple sentences. If your selection is “E”, that none of the answers given is correct, you may take one sentence to explain why each answer given is incorrect – four sentences total.

1. The standard of care for medical professionals:

- A. in most cases is for courts to determine, in keeping with the principles set out in The T.J. Hooper, the “tugboat case.”
- B. in most cases is derived from clinical practice guidelines established by committees of nationally recognized expert specialists.
- C. in Arkansas must always be established by testimony from a medical care provider of the same specialty as the defendant.
- D. , in cases about mistaken drug prescriptions, is defined by the Physicians Desk Reference.
- E. None of the above is correct.

2. Which if the following reform proposals would not be of benefit to defendants in medical liability cases?

- A. Modifying EMTALA so that “appropriate medical screening examination” would be defined not by federal law, but by the medical malpractice law of the state in which the screening took place
- B. Abolition of the collateral source rule
- C. Typical modifications of the traditional common-law rule on time bars for obstetrical cases
- D. Making apologies to patients inadmissible in court
- E. All of the above proposals would tend to benefit defendants in medical liability cases.

3. A claim for denial of benefits under ERISA:

- A. permits recovery of pain & suffering damages demonstrably caused by the denial of benefits.
- B. permits recovery of attorneys’ fees if successful.
- C. must first be filed in federal court.
- D. cannot successfully be brought as a state-law breach of contract claim.
- E. None of the above is correct.

PART IV. ESSAY QUESTION (70 minutes).

Congratulations on passing the Arkansas bar, and obtaining employment as an associate in the Fayetteville general practice firm of Guzman & Norvell. None of the other lawyers in the firm has any acquaintance with health law, so the two partners have been asking for your help on all the firm's cases with a medical angle.

Mr. Guzman called you into his office, and told you the following: "I talked with a potential client yesterday, Anna Aguilar. Ms. Aguilar is 30 years old, unmarried, no kids, cleans people's houses for a living, no health insurance. She got a Pap smear at Dogwood House, a low-income program run by St. Brigid's Hospital, the nonprofit Catholic hospital in Rogers.¹ The results came out positive. Further diagnostic tests indicated that she had stage 1A cervical cancer, and she went to St. Brigid's last month for a total hysterectomy, or removal of the uterus, which is medically justified with that diagnosis. The surgery was performed by Dr. Ben Brown. It went fine, and her recovery appears normal.

"The problem is that one of her friends, a licensed practical nurse at St. Brigid's, told her that while she was under anesthesia, just before the surgery, four male medical students did pelvic exams on her for practice. Apparently that's a fairly routine practice in medical education in this state. She says neither Dr. Brown nor anyone else ever told her she was going to have students messing around with her private parts, and she finds it really offensive. Seems kind of weird to me too, but what do I know? Her friend the nurse is absolutely unwilling to say anything about this to anyone, out of fear for her job. There's no union at that hospital, of course.

"Ms. Aguilar brought in the St. Brigid's admission form, which she signed. It reads:

I have come to St. Brigid's Hospital for medical treatment. I ask the health care professionals at the hospital to provide care and treatment that they find necessary for me. . . . I understand that my health care team is made up of hospital personnel under the direction of my attending physician and his/her assistants and designees (to include interns, residents, fellows, and medical students).

"I'm sympathetic to Ms. Aguilar's complaint, but I have a sense we may run into some legal and practical difficulties here. I want you to write me a memo advising what causes of action might be available, against whom, what the advantages and difficulties of each cause of action are, what further facts we ought to obtain and why, and how to obtain those facts. If you have any thoughts at this stage about whether this case is likely to be worth taking, write those down too."

Your initial research turned up a recent article, excerpted on the next page. After reviewing that material, consider Mr. Guzman's instructions and write the memo.

¹ The hospital is fictional, as are the facts of the case.

[These are excerpts from the recent article² on the subject of Ms. Aguilar’s concern.]

To the surprise of many people and the consternation of some medical school faculty and students, a media firestorm erupted last year over teaching hospitals’ practice of allowing medical students to perform pelvic exams on anesthetized patients without their express consent.

This practice, common since the late 1800s, was largely unchallenged until a 2003 study reported that 90% of medical students who completed obstetrics and gynecology (ob-gyn) rotations at four Philadelphia-area medical schools performed pelvic exams on anesthetized women for educational purposes.

Although medical students performing educational exams on anesthetized women do not receive feedback and thus cannot hone critical communication skills, teaching faculty argue that being unconscious relaxes the patient’s muscles, making it easier to palpate anatomy, and spares the patient the humiliation of being examined multiple times while conscious. . . .

[The authors observe that “pelvic exams performed on an anesthetized patient present some risk – usually resulting from keeping the patient anesthetized longer than she would be otherwise and the distress of discovering that one’s body was used in this way.”]

[After controversy arose, the American College of Obstetrics & Gynecology (ACOG) declared that] if the pelvic exam . . . offers a woman “no personal benefit and is performed solely for teaching purposes, it should be performed only with her specific informed consent, obtained when she has full decision-making capacity.” . . . California enacted new legislation making unauthorized examinations a misdemeanor and grounds for revoking a physician’s license. . . . At the same time a handful of schools revamped their policies, an equal number of hospitals and medical schools publicly dug in, defending the practice: . . . An ob-gyn professor . . ., Steven Swift, acknowledged that medical students who are directly involved in a patient’s care perform pelvic exams . . . [without securing] specific consent for the exam, . . . as it is considered regular medical practice in the field, like helping with surgical staples. Furthermore, he said, “patients understand this is a teaching hospital and that residents and medical students are involved in their care.”

² Duncan J, Luginbill D, Richardson M, Wilson RF. *Trial*, Oct. 2004, at 42.