THE UNIVERSITY OF ALABAMA SCHOOL OF LAW

HEALTH CARE LIABILITY (Law 815) – Spring 2017
Mon 5:30 – 7:20, Room 172

INSTRUCTOR: **William W. Horton**
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SYLLABUS AND CLASS POLICIES

TEXTS: Hall, Bobinski & Orentlicher, *Medical Liability and Treatment Relationships* (Aspen 3d ed. 2013) ("HBO", in the syllabus below)

Supplemental materials available on TWEN course website ("TWEN", in the syllabus below, and subject to additions, subtractions and general updating on the TWEN course website).

Note: The authors of our casebook maintain a website at http://mckinneylaw.iu.edu/instructors/orentlicher/public_html/home_MLTR.html. There are materials on that website that may be useful to you. However, you are not specifically responsible for any of those materials unless they are assigned in the syllabus below, as may be modified from time to time.

TWEN Website:

https://lawschool.westlaw.com/manage/homepage.aspx?task=coursehomepage&courseid=233223

Please register for the TWEN website as soon as possible. Course materials, including materials for the first class, will be on the site.

Twitter Feed: While this is affirmatively not required for this course (and generally not relevant to this course), the instructor tweets about (mostly) health care issues, particularly health care reform, on Twitter at @WilliamWHorton. If you are generally interested in health care issues, you may find useful information there, but again, this is definitely not required for this course.

COURSE OBJECTIVES: This course is intended to:

- Provide students with a basic understanding of the formation, dynamics and termination of provider-patient relationships
- Introduce students to key legal concepts in treatment relationships and professional liability (individual and institutional), including theories of liability, medical errors, informed consent, standards of care, and issues of causation, evidence, damages and settlement in professional liability litigation
- Provide students with an opportunity to develop and apply analytical skills in the context of a particular, highly regulated industry

There are no specific prerequisites for the course, although the course assumes a knowledge of torts, and basic familiarity with major concepts concerning the organization of the healthcare delivery and payment systems, such as those taught in Health Care Law (Law 696) will be very helpful.

ATTENDANCE: The Law School's attendance policy will apply to this course. There will be a sign-in sheet in each class session, and you are responsible for signing in to verify your attendance (and no student may sign in for another student). Beyond that, healthcare law, including that portion of it we study in this class, is a discipline with a lot more questions than answers. A major part of learning to "do" health law is learning effective approaches to struggling with those questions. Students who miss significant portions of class discussion will likely miss a significant practical benefit of the course.

PARTICIPATION AND PREPARATION: Consistent with the foregoing, active and thoughtful class participation is both required and essential to the learning process. It is particularly important with a small class, as this one will be. Accordingly, adequate preparation for each class period is critical. I expect to call upon one or more students (at random) in most, if not all, class periods to brief and/or discuss the assigned material and related questions and problems. Consistent with Law School policy, substantial and/or repeated lack of preparation may result in the reduction of your final grade by up to one grade level (i.e., .333). Similarly, truly extraordinary contributions to class discussion (quality being significantly more important than quantity) may result in an upward adjustment of up to one grade level in your final grade (however, it is my expectation that the general level of contributions to class discussion will be sufficiently high that truly extraordinary contributions are relatively unlikely to occur).

In that regard, I am aware that life happens. If you are going to be unavoidably absent or are seriously unprepared for a particular class period, please let me know **by email** not later than 4:30 on class day to avoid potential adverse consequences. I would prefer that you come to class even if you are seriously unprepared; just let me know so that I will not call upon you. Note, however, that repeated use of this mechanism may be deemed to constitute substantial and/or repeated lack of preparation for purposes of the immediately preceding paragraph.

A final note on preparation: There is a good bit of reading for this class, by page count. Much of it is not terribly heavy intellectual lifting, however. For the most part, non-case reading is intended to offer background and perspective, and you should read it as you would an interesting magazine article or blog post – with care and attention, but not as if you were going to have a pop quiz on the details. Focus more detailed attention on the cases. That does not mean that you are not responsible for the other assigned material, but it does suggest the relative level of brainpower to devote to the different categories of material.

SCHEDULE: Class will generally meet as regularly scheduled, **except on March 27, when class will not meet**. A make-up class will be scheduled in accordance with Law School policy, and I will notify you as soon as practicable of the time and date, which may be before March 27. If any other cancellations are necessary, I will notify you as soon as practicable and will post a notice on the TWEN course website. Please note that we will continue straight through the syllabus in order, irrespective of any make-up date(s). In other words, follow the schedule of the assignments, not the dates.

In that regard, please note that our scheduled class on April 3 will shortly precede tip-off in the NCAA Men's Basketball Championship. If the Duke Blue Devils are still playing at that point, the content, and perhaps the location, of that particular class period may be modified. If somebody gives the instructor tickets, the instructor of that particular class period may be modified as well.

EXAMINATION: Subject to the provisions set forth under "Participation", 100% of your grade will be based on a final exam, which will be graded anonymously in accordance with Law School policy. The details of that exam will be announced later in the semester. However, my current expectations are that it will be a "floater" exam of 2-3 hours and will likely be open-book (to the extent of "official" class texts and materials only; no commercial outlines or other third-party materials). These current expectations may be modified. The exam will primarily be an essay exam, but will likely include some objective components (multiple choice/short-answer, etc.). I will provide more information about exam format later in the semester. Any material assigned or otherwise covered in class is fair game for an exam topic.

(NON-)OFFICE HOURS: Because I practice in Birmingham, I will not have regularly scheduled office hours. I will generally be in the Law School about half an hour before class, and will generally be willing to remain for a reasonable period of time after class (said time being very brief, however, on the date of the aforesaid NCAA Men's Basketball Championship). If you wish to schedule a specific appointment during those periods, please call or (more preferably) email me by noon on the Friday before class on Monday. Alternatively, you can take your chances with catching me before or after class, but be aware that I may have other schedule commitments that limit my time then. If you would like to arrange a telephone conference outside of class, please email me and I will try to schedule a mutually convenient time.

TECHNOLOGY: Computers may be used in class for note-taking only. Use of computers or other Internet/communications devices (iPhones, iPads, Android devices, cell phones, etc.) for email, game-playing, tweeting, Facebook-ing, Web-surfing, writing assignments for other classes, and so forth is prohibited and will be subject to the Law School's disciplinary policies. In addition, I reserve the right to (a) require that laptops be closed at any given time for pedagogical reasons (or non-pedagogical reasons, for that matter) or (b) impose additional specific requirements if I deem it necessary to prevent disruption of the class. No audio recording is permitted (whether by tape recorder, computer or handheld device).

If special and unavoidable circumstances (parenting responsibilities, serious family illness, etc.) require that you be available by cell phone, text message or the like at any time, please notify me of that before class so that I will not assume that you are disregarding this policy.

VISITORS: Visitors are generally welcome, so long as they do not present unreasonable distractions or disruptions. I would appreciate it if you would advise me in advance if you plan to have visitor(s) in class, or at least be prepared to introduce them.

DISABILITY ACCOMMODATIONS: The Law School is committed to meeting the needs of students with physical, learning, and other disabilities, and provides appropriate accommodations and services tailored to each person's specific requirements. The Law School's assistant deans and the University's Office of Disability Services work together to help individuals with

disabilities achieve and maintain individual autonomy. Students with disabilities are encouraged to contact Vice Dean James Leonard at (205) 348-5927 or jleonard@law.ua.edu so that the individual's needs for support services can be evaluated and accommodated in a timely manner.

CODE OF ACADEMIC CONDUCT: All students in attendance at the University of Alabama are expected to be honorable and to observe standards of conduct appropriate to a community of scholars. The University expects from its students a higher standard of conduct than the minimum required to avoid discipline. Academic misconduct includes all acts of dishonesty in any academically related matter and any knowing or intentional help or attempt to help, or conspiracy to help, another student. The Academic Misconduct Disciplinary Policy will be followed in the event of academic misconduct.

CLASS ASSIGNMENTS

The Class will meet for two 50-minute hours (with a 10-minute break) each Monday evening.[1] Set forth below are the topics to be covered and reading assignments (marked with bullet points) for each class date. These assignments are subject to change; any change will be announced in class and posted on the TWEN course website. Unless a change is so announced, you should read the materials assigned for each week, even if we did not complete the prior week's assignment in the prior week's class period; some of these topics will take more or less time than is allotted for them below. However, I will generally try to either stay on schedule or expressly change the schedule. You should regularly check the TWEN course website for updates, schedule or assignment changes, supplemental materials and general information. I will feel entitled to assume that you are aware of any information that is posted on the TWEN course website as long as it is posted at least 24 hours in advance of the next scheduled class. In addition, I will ordinarily post PowerPoints for each class on the website on the day of class.

Supplemental materials posted on the TWEN course website are, for the most part, intended as user-friendly aids to enhance your understanding and communicate basic ideas in a comparatively straightforward way. You will benefit from reading them, but you will not be expected to be prepared to discuss supplemental materials in class unless they are marked with a "*" below or are otherwise identified in class and/or on the TWEN course website. TWEN materials marked with a "*" are required reading and will be fair game for class discussion.

There is a Glossary on the TWEN course website that contains a number of the acronyms and shorthand terms used by health law practitioners in day-to-day communication (this is a glossary prepared for the broader Health Care Law course, and many of the terms may not be used in this course; however, some of them will). This is provided for your convenience. It is not assigned reading, and you are welcome to use the terms or not in class discussion, exam answers, etc. However, you are free to so use them, which will likely save some ink and paper on the exam, and your fellow students and I will generally be permitted to assume that you are familiar with them.

[1] At the first class meeting, I will offer the class the opportunity to decide, by vote, whether to take the 10-minute break or go straight through and finish at 7:10, rather than 7:20. If there is a clear majority either way, we will honor that. If the majority is narrow (in either direction), we will honor the published schedule and take the 10-minute break.

Note: The assignments below are posted according to the dates that would apply if there were no missed classes and no make-ups. If it becomes necessary to reschedule any class, we will still proceed through the syllabus in this order.

Date	Assignment
January 9	Introduction, Overview and Basic Themes • HBO 1 – 10, 13 – 14, 15 – 24, 26 – 30, 36 – 43 and 46 - 54 • Hecht, *Miracle of the Fifteen Murderers* (TWEN)* • Ruggieri, *The White Coat Code of Silence* (from CONFESSIONS OF A SURGEON) (TWEN)* • Wachter & Shojania, *The Wrong Patient* (from INTERNAL BLEEDING: THE TRUTH BEHIND AMERICA'S TERRIFYING EPIDEMIC OF MEDICAL MISTAKES) (TWEN)*
January 16	NO CLASS – MLKJr. Holiday
January 23	The Treatment Relationship: Duty to Treat • HBO 67 – 105
January 30	Formation of the Physician-Patient Relationship • HBO 105 – 119 Limiting the Scope of the Relationship • HBO 119 – 123 Terminating the Treatment Relationship • HBO 123 – 130 Regulating the Treatment Relationship: Professional Licensure • HBO 130 – 143
February 6	Regulating the Treatment Relationship: Facility Licensure and Accreditation • HBO 144 – 154 Regulating the Treatment Relationship: Regulating Access to Drugs • HBO 162 – 168 (Read for background only; do not read for detail) The Fiduciary Nature of the Treatment Relationship: Confidentiality of Medical Information • HBO 169 – 197 • *Horne v. Patton* (Ala. 1973) (TWEN)* • *Rosen v. Montgomery Surgical Center* (Ala. 2001) (TWEN)*

February 13	The Fiduciary Nature of the Treatment Relationship: Confidentiality of Medical Information • Continued discussion if necessary Informed Consent • HBO 197 – 246, 246 – 248 • *Fain v. Smith* (Ala. 1984) (TWEN)*
February 20	Introduction to Medical Malpractice • Gawande, *The Malpractice Mess* (TWEN) Medical Mistakes and Quality • HBO 282 – 294 , 292 – 304 • Gawande, *The Checklist* (TWEN) Physician Liability: The Custom-Based Standard of Care • HBO 308 – 324
February 27	Physician Liability: Variations in the Standard of Care • HBO 324 – 342 Other Negligence-Based Theories HBO 343 – 350; 353 – 358
March 6	Physician Liability: Qualification and Examination of Medical Experts • HBO 359 - 386 • Ala. Code § 6-5-548 (TWEN)* • *Johnson v. Price* (Ala. 1999) (TWEN)* • *Ex parte Waddail* (Ala. 2001) (TWEN)* • *Holcomb v. Carraway* (Ala. 2006) (TWEN)*
March 13	NO CLASS – Spring Break
March 20	Alternative Theories of Liability • HBO 387 – 414
March 27 **CLASS WILL NOT MEET ON THIS DATE. A MAKE-UP WILL BE SCHEDULED**	Causation and Affirmative Defenses • HBO 413 – 446

April 3	Damages and Settlement • HBO 446 – 462 • An Ex-English's Major's Guide to DAMAGES, by Barry Werth (TWEN) [NOTE: This is a student outline of Barry Werth's book DAMAGES, a non-fiction account of a specific medical malpractice case. The outline was downloaded from www.boalt.org, a database for student-prepared outlines at Boalt Hall School of Law, University of California. The author is not identified in the database, alas. You should not read this for detail, but it provides a very good overview of the actual litigation and settlement process for a complex malpractice case.]
April 10	Institutional Liability: Hospitals • HBO 464 – 486 • *Health Care Authority for Baptist Health v. Davis* (Ala. 2013) (TWEN) (Do not read for detail)
April 17	Institutional Liability: Managed Care • HBO 487 – 510
April 20 (THURSDAY)	Medical Malpractice Reform • HBO 511 – 525 Review • The last hour or so of class will consist of a review of questions raised by students in advance of the exam. Please email any questions to me by Monday, April 17; questions received after that date will not be thrown out, but the likelihood that I will have prepared a meaningful response will diminish by the day.