THE UNIVERSITY OF ALABAMA SCHOOL OF LAW

HEALTH CARE LIABILITY (Law 815) – Fall 2021
Mon 5:30 – 7:20, Room 172

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

TEXTS: Hall, Orentlicher, Bobinski, Bagley & Cohen *Medical Liability and Treatment Relationships* (Aspen 4th ed. 2018) ("Hall", 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).

TWEN Website:

https://lawschool.westlaw.com/manage/homepage.aspx?task=coursehomepage&courseid=300268

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

Casebook Supplemental Website: The casebook authors maintain a supplement website with additional background materials and such at https://law.unlv.edu/book/health-law/medical-liability-and-treatment-relationships-4th-ed. The material on that website is not assigned and will likely not be referred to, but there are some interesting things there for anyone moved to explore them.

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 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" healthcare 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 or by prior assignment) in most, if not all, class periods to discuss the assigned material and related questions. It is my hope that, especially given the class size, this will mostly take the form of interactive discussion. 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: It is my current plan that class will meet as scheduled, although there is some possibility that we may have to reschedule a class later in the fall. If any 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.

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 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. 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 are welcome to 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 or Zoom 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, social media (reading or posting), 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) unless you get my express permission in advance.

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 and so long as they comply with all applicable COVID-19 precautions. 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 Associate Dean for Academic Affairs Grace Lee at (205) 348-7190 or glee@law.ua.edu so that the individual's needs for support services can be evaluated and accommodated in a timely manner.

SPECIAL NOTE ABOUT COVID-19: We will comply with the University's and the Law School's policies concerning COVID-19, as in effect at any given time. Obviously, that may be a moving target, and so we will adapt as necessary. In any event, for so long as we are meeting in person, you will be expected to follow all masking and social distancing requirements, and under no circumstances should you come to class in person if you have reason to believe that doing so will present a danger to others or yourself. As with any other absence, please let me know in advance to the extent you can. There will be remote participation options available for those who cannot attend in person to the extent consistent with Law School policy, but as I write this syllabus I am not quite sure of the logistics on that; in any event, so long as the Law School permits it, safe in-person attendance will be more helpful to you and to me.

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. 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.

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
August 16	Introduction, Overview and Basic Themes • Hall 1 – 10, 13 – 14, 15 – 24, 26 – 29, and 36 – 50 • 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)*
August 23	The Treatment Relationship: Duty to Treat • Hall 55 – 95
August 30	Formation of the Physician-Patient Relationship • Hall 95 - 109 Limiting the Scope of the Relationship • Hall 110 – 115 Terminating the Treatment Relationship • Hall 115 – 122 Regulating the Treatment Relationship: Professional Licensure • Hall 122 – 134
September 6	**NO CLASS – LABOR DAY**
September 13	Regulating the Treatment Relationship: Facility Licensure and Accreditation • Hall 135 – 145 Regulating the Treatment Relationship: Regulating Access to Drugs • Hall 154 – 161 (Read for background only; do not read for detail) The Fiduciary Nature of the Treatment Relationship: Confidentiality of Medical Information • Hall 163 – 193

September 20	Informed Consent • Hall 194 – 197, 204 – 225, 229 – 239, 250 – 255, 271 – 281 (through note 8) • *Fain v. Smith* (Ala. 1984) (TWEN)*
September 27	Introduction to Medical Malpractice • Gawande, *The Malpractice Mess* (TWEN) Medical Mistakes and Quality • Hall 294 – 304, 305 - 308 • Gawande, *The Checklist* (TWEN) Physician Liability: The Custom-Based Standard of Care • Hall 322 – 337
October 4	Physician Liability: Variations in the Standard of Care • Hall 337 – 356 Other Negligence-Based Theories Hall 357 – 371
October 11	Physician Liability: Qualification and Examination of Medical Experts • Hall 372 – 401 • Ala. Code § 6-5-548 (TWEN)* • *Johnson v. Price* (Ala. 1999) (TWEN)* • *Ex parte Waddail* (Ala. 2001) (TWEN)* • *Holcomb v. Carraway* (Ala. 2006) (TWEN)*
October 18	Alternative Theories of Liability • Hall 401 – 428
October 25	Causation and Affirmative Defenses • Hall 428 – 462
November 1	Damages and Settlement • Hall 462 – 473, 475 – 479 • 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.]
November 8	Institutional Liability: Hospitals • Hall 479 – 502
November 15	Institutional Liability: Managed Care • Hall 502 – 526
November 22	Medical Malpractice Reform • Hall 526 – 539 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 Friday, November 19; 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.