

**Vermont Law School
Fall 2021**

HEALTH LAW

SYLLABUS

**Spencer R. Knapp
Adjunct Professor**

Class Times: T, Th 9:55-11:10

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Course Description

This course will provide an intensive but high-level introduction to health law – the broad body of laws governing the provision, organization and financing of health care in the United States. We will focus on the subjects most applicable to lawyers representing health care providers and regulators in a challenging and dynamic regulatory environment.

The course will have roughly six parts, following the Furrow casebook described below. First, the course will develop the context for our studies, a basic understanding of the highly fragmented health care “system,” which is not really a coordinated system at all. This section will focus on the four recurring themes that pervade health law and policy: cost, quality, access, and choice. (Furrow, Chapters 1 and 9).

Second, we’ll study the “command and control” approaches to quality control (Furrow, Chapters 2-3), looking closely at regulation and licensure of health care professionals and facilities.

Third, we’ll examine the legal framework of the patient-provider relationship and the basic principles of professional liability claims involving health professionals and institutions. (Furrow, Chapters 4-6).

Fourth, the course will review the financial underpinnings of health care (Furrow, Chapters 6-8) focusing on the laws governing private, commercial health insurance, public health insurance, principally Medicare and Medicaid, and the Affordable Care Act. (Furrow, Chapters 10-11).

Fifth, we will explore the laws governing the corporate structure of health care organizations, particularly those involving: hospital-physician relations, corporate governance, tax, fraud and abuse, and antitrust.(Furrow, Chapters 12-15).

Sixth, we will focus on several current issues: public health questions arising from the pandemic; and reproductive rights issues arising from cases now before the Supreme Court. (Furrow, Chapters 16 and 19).

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The span of our studies will necessarily be wide but not deep, providing a fast-paced survey of the key issues in a health lawyer's practice.

Course Materials

Most required readings are from Furrow, *et al*, HEALTH LAW, CASES MATERIALS AND PROBLEMS (*Abridged*, 8th ed. 2018). We will use the paperback abridged edition because it covers all of the essential materials in the full edition, is less expensive, lighter than a concrete block, and easier to transport. Assume the readings listed are from this casebook unless otherwise noted. The authors cite to many additional sources throughout the text. None of those cited materials are required reading. Additional required or optional readings will be noted in the syllabus.

Format

The course will be generally be taught in person but occasionally may be taught remotely. Advance notice of remote classes will be provided with links.

Class Preparation & Participation

Reading assignments for each class are included in the Syllabus below and any updates will be posted on TWEN and TEAMS (and distributed by email) with an expectation that all assigned materials will be read thoughtfully in advance and that good preparation will be a foundation for lively classroom discussions. Individual students will be asked to lead the class discussion of specific issues and in general will be given an advance heads up.

Problem Exercises/Essays

There will be 4-5 written assignments either in the form of problem exercises or short essays.

Final Exam

There will be a take-home, open-book final exam but no mid-term.

Grading

The final grade will be a combination of grades on the problem exercises/essays (1/3rd), the final exam (1/3rd) and classroom preparation, attendance and participation (1/3rd).

Overall Course Objectives

The objective of the course is to provide an introduction to the broad range of laws that impact lawyers who represent health care providers in the United States or government agencies that regulate providers. The course description outlines the focus of the course studies.

Learning Outcomes

Upon completion of this course, students should be able to identify and analyze on at least a preliminary basis the health law issues to be covered.

This schedule of readings and assignments is subject to changes as the semester proceeds, but students will be given at least one-week advance written notice of the changes.

Health Law – Scheduled Class Readings, Discussion Topics and Assignments

<u>Weeks</u>	<u>Advance Readings</u>	<u>Discussion Topics in Class</u>	<u>Assignments</u>
Late Summer Reading/Listening			
<p>For an entertaining and sobering introduction to the American medico-legal system, listen to the <u>first six episodes</u> of the podcast “Dr. Death” by Wondery, available on any podcast source. Each episode is about 35-45 minutes – ideal for short trips in the car or a quiet moment on the couch. The podcast is engaging entertainment but will introduce many of the topics we’ll explore more seriously later in the course. It shows physicians and lawyers interacting in the health system – often at their very worst and occasionally at their very best. Highly recommended (as the podcast will be a point of reference in the first class and throughout the semester) but not required.</p>			
Week 1			
Tues. Aug 31	Chapter 1, Cost, Quality, Access and Choice (pp. 1-25).	Orientation to the semester, review of the syllabus and introduction to the key themes that pervade health law and policy.	<p>Consider and be prepared to explain in class why you are taking this course and what you hope to learn.</p> <p>Be prepared to address in class the questions raised in the note on p. 11, the question raised by the Commonwealth Fund report (pp. 11-13)(why is the US doing so poorly compared other wealthy countries?), and the questions in the notes on pp.24-25.</p>
Thur. Sept 2	<p>Chapter 9 – Health Care Reform: The Policy Context, Sections I, II.A, and III (pp. 359-362 and 371- 385)</p> <p>Gawande, <i>The Cost Conundrum</i> (The New Yorker, 2009) https://www.newyorker.com/magazine/2009/06/01/the-cost-conundrum</p>	Why is the cost of health care in the US so high, while the quality is comparatively low, and access is so limited to many?	<p>Be prepared to articulate in class the principle drivers of the comparatively high costs, limited access and low quality of health care in the United States.</p> <p>And consider this: What is wrong in McAllen, Texas?</p>
Week 2			
Tues. Sept 7	Chapter 9 – Section IV (pp. 385-405). Also read:		Consider and be prepared to discuss in class what you think is the most critical problem or challenge facing the US health care system. Is it the high cost, the

	<p>Berwick on Triple Aim https://www.healthaffairs.org/doi/full/10.1377/hlthaff.27.3.759</p> <p><i>Mirror, Mirror 2017: International Comparison Reflects Flaws and Opportunities for Better U.S. Health Care</i> https://interactives.commonwealthfund.org/2017/july/mirror-mirror/</p>		<p>poor quality, the low level of access, or something else? Why?</p> <p>And look at other international health systems and be prepared to address what you consider to be a good model for the future direction of the US health system, putting politics aside.</p> <p>Essay No. 1 will be assigned for submission prior to start of Sept 9 class.</p>
<p>Thurs. Sept 9</p>	<p>Read profiles of US, English, Swiss, and Swedish health systems in <i>International Profiles of Health Systems</i>, https://www.commonwealthfund.org/sites/default/files/2020-12/International_Profiles_of_Health_Care_Systems_Dec2020.pdf</p>	<p>Continued discussion of health policy challenges and reform initiatives</p>	<p>Submit Essay No. 1. Be prepared to discuss issues and present papers in class.</p>
Week 3			
<p>Sept 14</p>	<p>Chapter 2, Quality Control Regulation, Licensing of Health Care Professionals, Sections I, II, IV and V (pp. 27-38 and 44-57). Omit Section III.</p> <p>Also review Vermont Rules on Opiate Prescriptions:</p> <p>https://www.sec.state.vt.us/media/818457/rules-governing-the-prescribing-of-opioids-for-pain-chapter-2-alcohol-and-drug-abuse.pdf</p>	<p>Licensing health professionals – is it effective as a means of regulating health quality?</p> <p>Vermont’s approach to opiate prescriptions by physicians – does it make sense to you?</p>	<p>Be prepared to discuss the rationale of the four cases assigned in the materials on Discipline (<i>Williams</i> and <i>Hoover</i>); Unlicensed Practice (<i>Ruebke</i>); and Scope of Practice (<i>Sermchief</i>)</p> <p>Also be prepared to discuss and analyze the problems in the notes to this Chapter.</p>
<p>Sept 16</p>	<p>Chapter 4, The Professional-Patient Relationship, Sections I-</p>	<p>When do providers have legal “duties” to patients? Can they avoid or narrow these duties?</p>	<p>Compare <i>Esquivel</i> (pp/87-91) and <i>White v. Harris</i> (pp. 91-95). Be prepared to discuss the different outcomes.</p>

	<p>III (pp. 87-110; 117-118).</p> <p>Also, “Vermont Bans Gifts and Expands Disclosure Requirements for Payments to Health Care Providers” (Health Care & Life Sciences Client Alert, EpsteinBeckerGreen, Oct 2009) Available online at https://www.ebglaw.com/news/vermont-bans-gifts-and-expands-disclosure-requirements-for-payments-to-health-care-providers/</p>	<p>What must providers disclose to patients to lawfully obtain their consent to treatment?</p> <p>How do gifts from vendors to physicians impact their treatment decisions?</p>	<p>Consider whether (or not) you agree with the legal standards for “informed consent” in <i>Canterbury</i> (pp101-108).</p> <p>Be prepared to express your opinion as to whether you believe the laws banning or requiring reporting of gifts to physicians are justified and appropriate?</p>
Week 4			
Sept 21	<p>Chapter 4 – The Professional-Patient Relationship, Section IV (p. 131-153).</p> <p>Also read: <i>Lawson v. Halpern-Reiss</i>, 2019 VT38, Available online at https://www.vermontjudiciary.org/sites/default/files/documents/op18-157.pdf</p>	<p>The common law and federal requirements under HIPAA protecting the confidentiality and privacy of provider-patient communications.</p>	<p>Consider the Problems on pp. 126-7 and 153 and be prepared to answer the questions on p. 153.</p> <p>Also consider the implications of <i>Lawson</i> for Vermont hospitals. Does it really change their obligations of patient confidentiality?</p> <p>Essay No. 2 will be assigned for submission prior to start of next class</p>
Sept 23	<p>No additional readings. Review readings assigned for prior class.</p>	<p>Continued discussion of HIPAA and confidentiality.</p>	<p>Submit prior to start of class and be prepared to discuss described below:</p>
Week 5			
Sept 28	<p>Chapter 5 – Liability of Health Care Professionals, Section I (pp. 155- 181)</p> <p>10 VSA Section 1042, available online at: https://law.justia.com/codes/vermont/2012/titl</p>	<p>What are the legal standards of care applicable to physicians and other providers and how are they established in a professional liability case.</p> <p>How do medical malpractice cases actually proceed and what is the role of expert witnesses?</p>	<p>Consider and be prepared to comment on the rationale and outcomes of the two Mississippi court decisions in <i>Hall</i> and <i>Conn.</i></p> <p>Consider the pros and cons of Vermont’s requirement of a Certificate of Merit.</p>

	e12/chapter27/section1042's		Consider and be prepared to answer the questions on the Problem on p. 181 in light of <i>Wickline</i> .
Sept 30	Chapter 5 – Liability of Health Care Professionals, Section II-IV (pp. 181-206) <i>Smith v. Parrott</i> . 175 VT 375 (2003) available online at: https://law.justia.com/cases/vermont/supreme-court/2003/2002-322op.html	What defenses are available to health care providers facing claims of professional liability? What may they do to avoid or mitigate the risks of liability?	Consider and be prepared to comment on the “The Difficult Patient” Problem on p. 197 in light of <i>Ostrowski</i> . Compare the results in <i>Herskowitz</i> (pp.199-204) and <i>Smith v. Parrott</i> in light of the problem “Missing the diagnosis” (p. 206). Will your response depend on what state Jane Rogers was living in?
Week 6			
Oct 5	Chapter 6 – Liability of Health Care Institutions, Sections I-III (pp. 207 – 236. Omit 236 et seq. but consider problem on pp. 243-4)	What are the range of relationships between hospitals and physicians in the US? In what circumstances, may hospitals be liable for physician misconduct that occurs in the hospital?	Review text and cases: Scott (p.210); Burless (p.213); Darling (p.222); Thompson (p. 227); and Carter (p. (232); Consider and be prepared to discuss in class “The Birthing Center” problem on pp. 243-4.
Oct 7	Chapter 7 – Discrimination and Unequal Treatment in Health Care, Section III (pp. 269-282). Omit Sections I and II. “EMTALA and the challenges of treating behavioral health patients in crisis,” <i>Compliance Today</i> , February 2018 (posted in Course Materials) And: https://www.arentfox.com/perspectives/health-care-counsel-blog/south-	What are the specific obligations of hospital ER’s under EMTALA? How does the mental health crisis impact a provider’s EMTALA obligations?	Consider the Miller and Liles problems (pp. 282-3) and be prepared to answer the questions presented. Essay No. 3 will be assigned for submission prior to start of class on October 14

	carolina-hospital-settles-oig-over-alleged-ementala		
Week 7			
Oct 12	No class or assigned readings. Fall Recess.		
Oct 14	<p>Review: Chapter 9 pp. 385-404 .</p> <p>Read: Chapter 10 – Regulation of Insurance and Managed Care, Sections I and II (pp. 407-437)</p>	<p>Review of the basic tools available to address the interconnected challenges of cost, access and quality.</p> <p>Understanding the basic structure of the Patient Protection and Affordable Care Act and how it uses the health reform tools discussed in Chapter 9.</p>	<p>Submit Essay No. 3 part to start of class.</p> <p>Be prepared to explain in class the three legs of the ACA stool in terms that a layperson could understand.</p>
Week 8			
Oct 19	<p>Chapter 10 – Regulation of Insurance and Managed Care, Section III (pp. 438-466)</p> <p>Also: <i>California v. Texas</i>, https://www.supremecourt.gov/opinions/20pdf/19-840_6jfm.pdf (posted to Course Materials on TWEN and to Files on Teams)</p>	<p>Challenges to ACA, particularly: those leading to the Supreme Court decision in <i>Sebelius</i> in 2012; repeal of the individual mandate in 2017, effective in 2019; and <i>California v Texas</i> decided earlier this year.</p>	<p>Be prepared to explain the rationale of <i>Seblieus</i> and whether you believe the constitutional analysis is sound and defensible.</p> <p>Consider the decision of SCOTUS in <i>California v. Texas</i> be prepared to explain how you would have voted on the legal issues presented.</p>
Oct 21	<p>Chapter 11 – Public Health Financing Programs, Sections I-II (Medicare)(pp. 481-94; 498-503)</p>	<p>Basics of eligibility, coverage and payment for Medicare Parts A, B and D.</p>	<p>Be prepared to address the policy questions in the three “critical thinking” exercises and to discuss the Problem on IPPS on p. 491.</p> <p>Be prepared to evaluate the merits and success of the Medicare Shared Savings Program for ACO’s (pp. 499-503)</p>
Week 9			
Oct 26	<p>Chapter 11 – Public Health Financing Programs, Sections III (Medicaid)</p> <p>“Where Are States Today? Medicaid and CHIP Eligibility Levels for Children, Pregnant Women, and Adults” Available online at: https://www.kff.org/medi</p>	<p>Overview of eligibility and benefits issues under the joint federal-state Medicaid program, the distinctions between “traditional” Medicaid and the expanded Medicaid under ACA, and the interplay of federal and state power under the Medicaid program.</p>	<p>Be prepared to explain and comment on the excerpted portion of <i>Sebelius</i> and the impact of this decision.</p> <p>Be prepared to explain Medicaid eligibility levels in your home state and compare them to those in Vermont.</p>

	caid/fact-sheet/where-are-states-today-medicaid-and-chip/		<p>Be prepared to respond to the Medicaid Eligibility Problem (p. 727).</p> <p>Consider and be prepared to comment on the implications of denying Medicaid coverage to persons who cannot afford insurance.</p> <p>Compare the 6th Circuit’ analysis in <i>Westside Mothers</i> with the Supreme Court’s analysis in <i>Armstrong</i>.</p>
Oct 28	Chapter 12 – Professional Relationships in Health Care, Section I (pp. 559-577 and first part of Section II (pp. 577-583).	<p>Overview of Hospital-physician relationships, including medical staff membership and physician employment.</p> <p>Internal and judicial review processes for decisions on clinical privileges of physicians.</p> <p>Impact of HCQIA on physician rights to recover damages.</p> <p>Doctrine of “at will’ employment and its limits.</p>	<p>Be prepared to describe the processes for assigning clinical privileges to physician members of a hospital’s medical staff and the internal and judicial review processes for limiting or terminating those privileges in light of the <i>Sokol</i> and <i>Mateo-Woodburn</i> decisions.</p> <p>Be prepared to comment on the “public policy” exception to at will termination as articulated in <i>Turner</i>. Consider whether whistleblower legislation (p. 582) would have assisted Turner’s claim.</p>
Week 10			
Nov 2	<p>Chapter 13 – The Structure of Health Care Enterprises, Section I pp. 591-599.</p> <p>Review following posted in Course Materials:</p> <p>Sample Bylaws of a University Hospital</p> <p>Sample Articles of Incorporation and Bylaws of University Health System Parent</p>	<p>Overview of organizational structures of hospital providers, with a focus on the structure of a non-profit hospital that is a member of a health care system.</p>	<p>Be prepared to describe the governance structure of XYZ Hospital as described in the sample documents.</p> <p>Be prepared to discuss in class Problem Exercise No. 4.</p>

	Review Problem Exercise No. 4 posted on TWEN and TEAMS		
Nov 4	Chapter 13 – The Structure of Health Care Enterprises, Section II (Tax-exempt orgs) These pages only: pp. 601-619; 629-632, 635-641.	Overview of the tax laws and principles applicable to tax exempt hospitals and other health care providers or related organizations, with particular attention to “community benefit” standards and the principles of “private benefit,” “private inurement,” and “excess benefit.”.	Be prepared to describe the legal and functional differences between a tax-exempt hospitals and for profit hospitals. Analyze and be prepared to respond to the problems on Excess Benefit Transactions (pp.640-641)
Week 11			
Nov 9	Chapter 14 – Fraud & Abuse, Section I (False Claims Act)	Overview of Federal False Claims Act, one of the underpinnings of the federal fraud & abuse laws	Review closely the Krizek cases. Consider and be prepared to respond to the questions about the case on pp.671-672.
Nov 11	Chapter 14, Fraud & Abuse, Section II, Anti-Kickback (pp. 686-709)	Overview of the federal Anti-Kickback (AKB) statute, its intent requirements, the legal protections provided by selected AKB “safe harbors,” and the “gainsharing” and “beneficiary inducement” prohibitions of Civil Monetary Penalties law.	Review and be prepared to: explain the elements of a violation under the AKB; and analyze the intent requirement of the AKB statute in light of <i>Greber</i> .
Week 12			
Nov 16	Chapter 14, Fraud and Abuse, Section III and IV (Stark and ACO waivers)	Overview of the Ethics in Patient Referrals Act (“Stark”), its legal prohibitions, the Stark law exceptions, and the fraud and abuse law waivers available to ACO’s.	Review and be prepared to: 1. Explain the policy purposes and prohibitions of the Stark statute and regulations and how these prohibitions differ from the AKB. 2. Explain the legal effect of the Stark exceptions and how they differ from the AKB safe harbors. 3. Analyze <i>Tuomey</i> and its implications for hospital-physician compensation arrangements. 4. Explain the ACO waivers (pp. 738-740 and the policy rationale that underlies them.
Nov 18	Read these documents related to <i>US v. Halifax Hospital</i> : -Stark decision (Nov. 2013)	Continued discussion of Stark, AKS, FCA, and essay	Read materials and be prepared to discuss physician compensation arrangements under AKS and

	-AKB decision (Nov. 26, 2013) -Announcement of Settlement (March 2014 (Available in Files on Teams) Review prior readings on Fraud and Abuse		Stark in light of <i>Tuomey</i> and <i>Halifax</i> . Essay No. 4 will be assigned for submission prior to start of November 23 class.
Week 13			
Nov 23	Chapter 15 – Antitrust, Sections I and II (pp. 741-757)	Antitrust Part I: Overview of antitrust laws and interpretive principles applicable to health care providers and transactions.	Submit Essay No. 4 prior to start of class Read all assigned materials. Be prepared to explain in class: <ol style="list-style-type: none"> 1. The federal statutory anti-trust framework and the defenses The per se and “rule of reason” analytical approaches 2. In re Michigan State Medical Society (p.747) Fast Stop Clinics Problem (p. 756)
Nov 25	No class (Thanksgiving)		
Week 14			
Nov 30	Chapter 15, Antitrust, Section III	Antitrust Part II: Continued overview of antitrust laws and interpretive principles applicable to health care providers and transactions.	Read all assigned materials. Be prepared to explain in class: <ol style="list-style-type: none"> 1. Arizona v. Maricopa County Medical Society (p.757) FTC Statements of Antitrust Enforcement in Health Care (p. 766) 2. Antitrust policies on Medicare ACOs (p.772) 3. St. Luke’s Health System case (p.801)
Dec 2	Chapter 16, Reproduction and Birth, Section I and II (pp. 809-838) Also: Excerpts from Briefs of Appellant and	Review of <i>Roe v. Wade</i> and <i>Casey</i> decisions that set constitutional boundaries of state laws regulating abortion and pending challenge to those decisions in <i>Dobbs</i> .	Be prepared to explain the constitutional rationale of the <i>Roe</i> and <i>Casey</i> decisions, the principal arguments being advance to

	Appellee in <i>Dobbs v. Jackson Women’s Health Organization</i> , now pending before SCOTUS (to be supplied later in semester)		challenge those precedents in <i>Dobbs</i> . Consider how you would decide the key legal issues in <i>Dobbs</i> how you think SCOTUS will decide those issues.
Week 15			
Dec 7	Chapter 19 plus additional recent cases on public health issues to be assigned later in the semester.	Public Health Law and the Pandemic	Read the assigned materials and be prepared to address in class the authority of the federal and state governments to address the public health crisis created by the COVID-19 crisis
Dec 9	No additional readings Review your class notes, class outlines and past reading materials	We will use this class to review the semester, address your questions, and plan for final exams. Time will also be allowed in class to complete your evaluations	
<p>Final Exam: Will be open-book, and take-home, consisting of a set of problem questions distributed with instructions at the start of the exam period. Responses will be due at the end of the exam period.</p>			