



# HEALTH LAW SYLLABUS

**Cortez**

**Fall 2013**

## **Intro**

Welcome to Health Law at SMU. This syllabus includes all the important information you'll need this semester, so please read it carefully.

## **Objectives**

This course provides a broad overview of health law and the U.S. health care system. I try to cover most of the major laws, regulations, and common law that applies to health care—things that anyone who has taken Health Law should know. I wish I could cover more. It's impossible to do justice to every important topic in a single-semester, three-credit course. Indeed, mastering even one discrete area of health law can take years of practice.

I want you to learn enough to become dangerous. I don't want you to lose the forest for the trees. Junior attorneys are often asked to master the details. But to really appreciate these details as a junior lawyer, you first need a macro-level understanding of how the parts of our health care system fit together. Thus, this course should serve as a foundation for the rest of your career, should you choose to practice in this field, or if you ever represent a client in the health industry.

With that in mind, I designed this course to equip you to do three things: (1) issue spot as a health care lawyer; (2) counsel clients in a complicated and shifting legal and regulatory environment; (3) know where to locate health law when you need it, and how to make sense of it.

## **Themes**

To help make sense of the sprawling health law discipline, I will focus on three themes. First, I want you to appreciate the uneasy relationship between the public and the private in health care. Health care has much more "public" than other industries. It is one of the most regulated sectors of our economy. At the same time, health care is much more privatized than in our peer countries. Second, I want you to understand that health law is subject to overlapping layers of federal, state, and local jurisdiction. Finally, I want you to appreciate that medical uncertainty is endemic to modern medical practice—something the law sometimes takes for granted.

## **Materials**

There are two required books for this course. The main casebook is FURROW ET AL., *THE LAW OF HEALTH CARE ORGANIZATION AND FINANCE* (6TH ED., WEST 2008). But I'll supplement frequently with HALL ET AL., *HEALTH CARE LAW & ETHICS IN A NUTSHELL* (3RD. ED., WEST 2011). I'll also assign some outside readings occasionally, which I'll disseminate via email.

- Attendance** I expect you to attend every class unless there is a really good reason not to. I realize that there will be times when Health Law will have to give way to other things in your lives. But if I notice that you are missing a lot of classes, or are habitually late, I will reduce your participation grade.
- Participation** Class participation is key for a few reasons. In the short term, it's 10% of your grade. (I assign one point for each in-class answer, or two points for particularly insightful answers, or answers that show a mastery of the readings. I'll begin by asking for volunteers, but will call on people if I have to ask more than once or twice.) In the longer term, you should use your law school classes to become more comfortable speaking in front of colleagues. Even if you don't plan to be a trial attorney, you'll have to sound intelligent speaking to clients, colleagues, and smart people. Our class sessions are an excellent chance work on the craft of public and quasi-public speaking. Speak loudly, clearly, and in complete sentences.
- Laptops** In previous semesters, I banned laptops. But it is difficult for a course like Health Law, which covers so much black letter law, in so much technical detail. Thus, I will allow laptops this semester, but only to take notes. If your laptop use becomes a distraction to me or those around you, I will rethink this policy. Also, you must turn off your wireless in class, like you're on an airplane (that doesn't have WiFi).
- Office hours** Email me at [ncortez@smu.edu](mailto:ncortez@smu.edu) to schedule an appointment. I'm in 245 Storey Hall, on the second floor. For scheduling purposes, I teach Tuesdays and Thursdays from 3:30 to 4:45 p.m. and Wednesdays from 2:00 to 4:00 p.m. I'm also happy to answer questions via email. For longer inquiries and discussions, come see me. I'm happy to talk Health Law, law school, legal practice, or anything else.
- Grading** There will be a six-hour take-home exam on a date to be determined in December, with a word limit. The exam essentially is a three-hour exam, but I give you six hours to complete it (hence the word limit). The final exam is 90% of your grade; class participation is the other 10%.

# READINGS

## I. Introduction

- Class 1                    **A. Introduction to Health Law** (Syllabus & handouts; Henry T. Greely, *Some Thoughts on Academic Health Law*, 391 to bottom of 399)
- B. Introduction to the U.S. health care system** (1-15)
- Class 2                    **C. Problems with the U.S. health care system** (Timothy S. Jost, *Our Broken Health Care System*, 537-55 {555-73 is optional but provides a useful overview of health laws}; Nutshell 1-8; casebook 185-91)

## II. Health Insurance

- Class 3                    **A. Private health insurance**
1. Understanding health insurance (254-263, Nutshell 9-15, 17-19; Malcolm Gladwell, *The Moral Hazard Myth*<sup>1</sup>; an optional but useful overview is Kaiser Family Foundation, *How Private Insurance Works: A Primer*<sup>2</sup>)
- Class 4                    2. State regulation of private insurance (303-28; Nutshell 229-35)
- Class 5                    3. State liability of managed care organizations
- a. State contract liability (264-68)
- b. State tort liability (269-79, 291-96, 296-300, 302-03)
- Class 6                    4. Federal regulation of private insurance
- a. ERISA preemption of state insurance regulation (338-54; Nutshell 235-41; NPR, *Maryland Requires Retailers to Boost Health Care*<sup>3</sup>; 354-59)
- Class 7                    b. ERISA fiduciary duties (360-71)
- c. ERISA preemption of state tort claims (371-384)
- Class 8                    d. HIPAA, COBRA, and the ADA (399-416)
- Class 9                    5. Consumer-directed health care (205-10, 332-36; TIMOTHY S. JOST, HEALTH CARE AT RISK, 150-165, optional: 86-108)
- Class 10                    **B. Public health insurance** (417-20)

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<sup>1</sup> [http://www.newyorker.com/archive/2005/08/29/050829fa\\_fact](http://www.newyorker.com/archive/2005/08/29/050829fa_fact)

<sup>2</sup> <http://www.kff.org/insurance/upload/How-Private-Insurance-Works-A-Primer-Report.pdf>

<sup>3</sup> <http://www.npr.org/templates/story/story.php?storyId=5235265>

1. Medicare (420-39; Nutshell 60-67)

Class 11 (cont'd) (441-46, up to Newman article, 450-52, 453-63; optional: Atul Gawande, *The Cost Conundrum*<sup>4</sup>)

Class 12 2. Medicaid (464-71; Nicole Huberfeld, *Federalizing Medicaid* 444-53; casebook 477-79, 487-95)

Class 13 **C. Fraud and Abuse**

1. False Claims Act (672-683, note 8 on 685-86, 697-702; review GlaxoSmithKline settlement documents,<sup>5</sup> particularly complaint<sup>6</sup>)

Class 14 2. Medicare and Medicaid Fraud (702-12; 719-28)

Class 15 3. Stark self-referral law (730-43)

### III. Ensuring Quality

Class 16 **A. Measuring “quality”** (15-19, 21-36)

Class 17 **B. Regulating Professionals**

1. Licensing and discipline (96-112)
2. Complementary and alternative medicine (112-121)

Class 18 3. Unlicensed providers (121-30)  
4. Scope of practice regulation (130-39)

Class 19 **C. Regulating Institutions** (140-41; Nutshell 140-45)

1. New health care service configurations (141-43)
2. Regulatory case study: Nursing homes (144-50)
3. The regulatory process (150-57)

Class 20 (cont'd) (157-172)

4. Private accreditation of facilities (172-75)
5. Certificate of need (Nutshell 145-51)

### IV. Access to Care

Class 21 **A. Common law obligations to provide care** (212-23; Nutshell 75-86, 105-09)

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<sup>4</sup> [http://www.newyorker.com/reporting/2009/06/01/090601fa\\_fact\\_gawande](http://www.newyorker.com/reporting/2009/06/01/090601fa_fact_gawande)

<sup>5</sup> <http://www.justice.gov/opa/gsk-docs.html>

<sup>6</sup> <http://www.justice.gov/opa/documents/gsk/us-complaint.pdf>

## **B. Statutory exceptions**

1. EMTALA (225-29)

Class 22

(cont'd) (229-39; Nutshell 86-94)

2. ADA (239-45; Nutshell 95-96)
3. Title VI (249-53; Nutshell 94-95)

## **V. Privacy, Confidentiality, and Informed Consent**

Class 23

**A. Privacy and Confidentiality** (Nutshell 110-15; Congressional Research Service, *Enforcement of the HIPAA Privacy and Security Rule* 1-8, 11-15<sup>7</sup>; New York Times, *Keeping Patients' Details Private, Even from Kin*<sup>8</sup>)

**B. Informed Consent** (Nutshell 124-36)

## **VI. Tax Exempt Organizations**

Class 24

**A. Modern health care organizations** (559-61, 602-06, 611-14)

**B. Charitable tax exemption** (615-28; Nutshell 242-48)

## **VII. Antitrust**

Class 25

**A. Boycotts** (744-49; Nutshell 187-91, 198-201)

**B. Price Fixing and Monopolization** (775-83; Nutshell 207-17)

**C. Mergers** (Nutshell 217-22)

## **VIII. Health Reform**

Class 26

**A. Past proposals** (196-205)

**B. Foreign models** (191-96)

**C. The Affordable Care Act** (TBD)

Class 27

**D. *NFIB v. Sebelius***, 132 S.Ct. 2566 (2012)

## **IX. Review**

Class 28

**Review Session**

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<sup>7</sup> <https://openncrs.com/document/RL33989/2008-08-11/download/1005/>

<sup>8</sup> <https://www.nytimes.com/2007/07/03/health/policy/03hipaa.html>