

WESTERN STATE COLLEGE OF LAW
MEDICAL MALPRACTICE COURSE
Spring 2023

Syllabus & Policies

Professor Philip L. Merkel

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Office Hours: To be announced.

Course Materials

Required Text:

Medical Liability and Treatment Relationships (4th edition), Hall et al. (This edition was published in 2018, so you may be able to find a used copy. Be sure to get the fourth edition.)

Cases, statutes, and other materials listed in “Reading Assignments,” below. These materials are available free of charge on Lexis/Nexis and Westlaw. Note: For class discussions we will refer to pagination in the official case reporters (e.g., Cal. and Cal. App.)

You must have the book and other assigned materials with you in class just as you would a casebook.

Course Coverage

Medical malpractice is a three-hour course that provides a comprehensive introduction to topics relating to law and medicine. We will begin by exploring the nature of the patient-physician relationship and how malpractice law has developed over time. We will then discuss major issues relating to law and medicine, including federal laws like HIPPA, confidentiality of patient health data, informed consent, standards of care, expert testimony, and damages. There will be an emphasis on rules California has adopted affecting these issues. In the second half of the course, we will give special attention to legal changes mandated by the state’s Medical Injury Compensation Reform Act (“MICRA”) and judicial treatment of these changes.

Course Objectives

In this course, you will have the opportunity to learn, practice, and be assessed in each of the following learning outcomes:

- 1) **Doctrinal Knowledge** – Students will demonstrate knowledge of the substantive law of medical malpractice by the end of the semester.

- 2) **Legal Analysis** – Students will demonstrate the ability to identify the factual and legal issues raised by a fact pattern and to appropriately use cases and rules to predict how a court would decide the issue. Students will also demonstrate the ability to identify and evaluate the public policies behind legal precedents, statutes, and regulations.
- 3) **Communications** – Students will demonstrate the ability to communicate both orally and in writing in a manner appropriate to a particular task to effectively convey the author’s or speaker’s ideas.
- 4) **Client Sensitivity** – Students will demonstrate an awareness of client needs and goals, including being sensitive to client backgrounds and circumstances.

Examinations and Grading

Medical Malpractice is a graded course. Your grade will be based on the following: midterm examination (30%); class participation and attendance (15%); final examination (55%).

Attendance and Participation

PLEASE READ CAREFULLY

Students must attend class regularly, prepare written case briefs and notes of non-case materials, and participate in discussions. There is no “free pass” policy for this course.

A student can be absent no more than **three** class sessions. If you are unprepared, this counts as an absence. **A student with absences more than the limit will receive a failing grade for the course.** You are responsible for keeping an accurate count of your absences.

Promptness

Classes will begin promptly at the scheduled time. Please be in your seat (logged in for any on-line meetings) for the start of class. Students who arrive late disrupt the learning process for others. If you are unavoidably late, please enter quietly and take the nearest empty seat. Once class begins, please do not leave the room unless there is an emergency or for medical reasons.

Cell Phones

Please disable phones and **store them** before class begins.

Computers

You may use a personal computer **for note taking or accessing assigned course materials only.** You may not browse the Internet, check email, etc. I may prohibit the

use of personal computers if I determine computer use is interfering with the education process.

If you intend to recite from materials on your computer, have the document open when discussion begins so as not to waste time in calling it up.

Seating Chart

I will send around a seating chart early in the semester. Please print your name legibly in the seat of your choosing. This will be your permanent seat. Because I randomly select students to recite, your seat choice will not enhance or reduce the likelihood of your being chosen.

Appointments

Email me if you wish to make an appointment so we can find a convenient meeting time.

Time Requirements for Class Preparation and the Study of Medical Malpractice

ABA Standard 310 (b) (1) requires that students spend at least two hours of outside study time for every course credit hour. **This means you must devote *at least six hours each week to study outside the classroom.*** Your class preparation should include the following:

- Carefully read the assigned readings relating to the subject(s) to be covered in a specific class.
- Produce *detailed written briefs* of every assigned case and accumulate the briefs in a brief notebook. I may require you to provide me with a written copy of your brief notebook.
- Produce *detailed written summaries* of other assigned materials.
- Produce written answers to problems I may assign.
- Take the initiative to delve further into topics by doing outside study, especially on topics that interest you.
- Form study groups with classmates for the purpose of learning from one another.
- Visit the professor to discuss course materials and identify areas with which you are having difficulty.

Reading Assignments

The following assignments are from the required text and materials available on Lexis/Nexis and Westlaw. **Read the entire week's assignment before class.** You are responsible for the notes as well as the cases. Do not prepare written answers to problems unless I instruct you to do so.

<u>Week</u>	<u>Topics and Assignments</u>
1	Introduction to the course; history of medical malpractice; nature of medical practice and judgment; policy goals. Text: 1-14, 26-51.
2	Is there a duty to treat? Text: 55-67, 69-95.
3	Creation and termination of the relationship; Text: 95-122, Alexander v. Scripps Memorial Hospital La Jolla (2018) 23 Cal. App. 5 th 206, 232 Cal. Rptr. 3 rd 733 (Read the "Overview" section and pp. 235-237 of the case only).
4	Confidentiality and HIPPA; Text: 163-194; Civ. Code §§ 56.10, 56.17, 43.92.
5	Informed consent; Text: 194-239; Cobbs v. Grant (1972) 8 Cal. 3 rd 229, 104 Cal. Rptr. 505.
6	Standards of care; Text: 293-312; 322-349; Health & Safety Code § 104340; 1 CACI 400, 501, 502.
7	Res ipsa loquitur, negligence per se; Text: 337-372; Elcome v. Chin (2003) 110 Cal. App. 4 th 310, 1 Cal. Rptr. 3 rd 63; 1 CACI 518.
8	Midterm examination.
9	Medical expert testimony; Text: 372-387; Code Civ. Proc. § 2034; MICRA: policy and constitutionality, American Bank & Trust v. Community Hospital (1984) 36 Cal. 3 rd 359, 204 Cal. Rptr. 671.
10	MICRA: limiting noneconomic damages, Civ. Code § 3333.2 (original and 2023 versions); Merkel, California's Role in the Mid-Twentieth Century Controversy over Pain and Suffering Damages, 5 California Legal History 287 (2010).

- 11 MICRA: statute of limitations; what is “professional negligence?” Code Civ. Proc. §§ 335.1, 340.5; Flores v. Presbyterian Intercommunity Hospital (2016) 63 Cal. 4th 75, 201 Cal. Rptr. 3d 449; Burchell v. Faculty Physicians & Surgeons (2020) 54 Cal. App. 5th 515, 269 Cal. Rptr. 3rd 44; Barris v. County of Los Angeles (1999) 20 Cal. 4th 101, 83 Cal. Rptr. 2d 145.
- 12 MICRA: what is “professional negligence?” (continued), Lopez v. Ledesma (2022) 12 Cal. 5th 848, who is a “health care provider?” Canister v. Emergency Ambulance Service (2008) 160 Cal. App. 4th 388, 72 Cal. Rptr. 3rd 792; MICRA: what is an “action?” Yates v. Pollock (1987) 194 Cal. App. 3d 195, 239 Cal. Rptr. 383; Atkins v. Strayhorn (1990) 223 Cal. App. 3d 1380, 273 Cal. Rptr. 231. MICRA: collateral source rule and application, Civ. Code § 3333.1; Cuevas v. Contra Costa County (2017) 11 Cal. App. 5th 163, 217 Cal. Rptr. 3rd 519.
- 13 MICRA: presuit notification requirements and pitfalls for practitioners, Code Civ. Proc. §§ 364, 365; Woods v. Young (1991) 53 Cal. 3rd 315, 279 Cal. Rptr. 613; Kumari v. Hospital Committee (2017) 13 Cal. App. 5th 306, 220 Cal. Rptr. 3rd 435. MICRA: arbitration, Code Civ. Proc. 1295; Ruiz v. Podolsky (2010) 50 Cal. 4th 838, 114 Cal. Rptr. 3rd 263; Baker v. Italian Maple Holdings (2017) 13 Cal. App. 5th 1152, 220 Cal. Rptr. 3rd 887.
- 14 MICRA: attorney fees limits, Bus. & Prof. Code § 6146 (2023 version). MICRA: Periodic judgments, Code Civ. Proc. § 667.7, Nguyen v. Los Angeles County Harbor UCLA Medical Center (1995) 40 Cal. App. 4th 1433, 48 Cal. Rptr. 2nd 301.
- 15 Reading week.
- 16 Final examination.

DISABILITY SERVICES STATEMENT:

Western State College of Law provides accommodations to qualified students with disabilities. The Disabilities Services Office assists qualified students with disabilities in acquiring reasonable and appropriate accommodations and in supporting equal access to services, programs, and activities at Western State College of Law.

To seek reasonable accommodations, a student must contact Senior Assistant Dean Donna Espinoza, Student Services Director and Disabilities Services Coordinator, whose office is in the Students Services Suite. Dean Espinoza's phone number and email address are: (714) 459-1117; despinoza@wsulaw.edu. When seeking accommodations, a student should notify Dean Espinoza of her or his specific limitations and, if known, her or his specific requested accommodations. Students who seek accommodations will be asked to supply medical documentation of the need for accommodation. Classroom accommodations are not retroactive, but are effective only upon the student sharing approved accommodations with the instructor or professor. Therefore, students are encouraged to request accommodations as early as feasible with Dean Espinoza to allow for time to gather necessary documentation. If you have a concern or complaint in this regard, please notify Dean Espinoza; or please notify Dean Allen Easley at aeasley@wsulaw.edu or (714) 459-1168. Complaints will be handled in accordance with the College of Law's "Policy against Discrimination and Harassment."

Western State College of Law – Programmatic Learning Outcomes

Western State College of Law's curriculum is designed so that every student achieves a level of competency prior to graduation in each of the eight Programmatic Learning Outcomes listed below:

(1) Doctrinal Knowledge

Students will demonstrate knowledge of substantive and procedural law in the core curriculum subjects, including Contracts, Criminal Law, Criminal Procedure, Torts, Real Property, Business Association, Evidence, Civil Procedures, Constitutional Law, Estates, Community Property, Remedies, and Professional Responsibility.

(2) Practice Skills

Students will demonstrate the development of other law practice skills. Each student's chosen outcomes within this category will be varied based on the student's particular interests, coursework and work experiences. They may include, but are not limited to, the following topics: oral presentation and advocacy; interviewing; counseling; client service and business development; negotiations, mediation, arbitration, or other alternate dispute resolution methods;

advanced legal research and writing (excluding purely academic papers and the first four units earned in introductory first-year legal research and writing class); applied legal writing such as drafting contracts, pleadings, other legal instruments; law practice management or the use of technology in law practice; cultural competency; collaboration or project management; financial analysis, such as accounting, budgeting project management, and valuation; cost benefit analysis in administrative agencies; use of technology, data analyses, or predictive coding; business strategy and behavior; pre-trial preparation, fact investigation, such as discovery, e-discovery, motion practice, assessing evidence, or utilizing experts; trial practice; professional civility and applied ethics; a law clinic that includes a classroom component; or a legal externship that includes a classroom component.

(3) Legal Analysis

Students will demonstrate the ability to identify the factual and legal issues implicated by a fact pattern and to appropriately use cases (including identifying the salient features of an appropriate precedent case, identifying legally significant similarities or differences between the precedent case and a fact pattern and explaining why those are legally significant) and rules (including the ability to connect legally significant facts in a fact pattern to the rule) to predict how a court would decide the issue. Students will also demonstrate the ability to identify and evaluate the public policies of a precedent case or rule, and be able to evaluate how public policy can impact the application of a rule to the legal issue.

(4) Legal Research

Students will demonstrate the ability to locate relevant legal authority using a variety of book and electronic resources, and to properly cite to such legal authority.

(5) Communication

Students will demonstrate the ability to communicate both orally and in writing in a manner appropriate to a particular task to effectively convey the author or speaker's ideas. This includes audience sensitivity in written and oral communication (the ability to adopt a tone, style and level of detail appropriate to the needs, knowledge and expertise of the audience); and written communication basic proficiency (the ability to use the conventions of grammar, spelling, punctuation, diction and usage appropriate to the task and sufficient to convey effectively the author's ideas).

(6) Advocacy of Legal Argument

Students will demonstrate the ability, in both oral and written formats, to evaluate the legal, economic and social strengths and weaknesses of a case and use case and statutory authority as well as public policy to persuade others. Making policy-based arguments includes the ability to identify and evaluate the public policies of a precedent case or rule and their implications, and be able to assert such appropriate arguments to support a particular application or distinction of a

precedent case to a legal controversy or a particular resolution of the application of a rule to the legal controversy.

(7) Client Sensitivity and Cultural Competency

Students will demonstrate an awareness of clients' needs and goals, including a sensitivity to clients' background and circumstances (including, but not limited to, socio-economic, gender, race, ethnicity, educational, disability and/or religious background(s)), the ability to make decisions that reflect an appropriate focus on those needs and goals, and awareness that cultural issues may affect the relevance of facts and application of the law.

(8) Legal Ethics

Students will demonstrate the ability to identify ethical issues in law practice contexts and make appropriate decisions to resolve such issues.