

EXAM SPECIFICATIONS FOR HEALTH LAW

PURPOSE OF THE EXAM. The purpose of the certification exam is to require an applicant to demonstrate substantial knowledge of significant legal concepts and corresponding skills in health law.

EXAM FORMAT. The exam consists of a three-hour morning session with three essay questions each worth 100 points and a three-hour afternoon session with 100 multiple choice questions (10 of which involve professional ethics) each worth 2 points. The required passing score is **350**. The essay portion of the exam may be taken by laptop (supplied by the examinee) or by writing. Answers to the multiple choice questions will be documented by the applicant on a scantron answer sheet supplied by TBLS.

EXAM GRADING. All exam materials are confidential and not available for review. Essay answers are graded anonymously and identified only by an assigned examinee number. Multiple choice answers are computer graded. Successful examinees are notified that they passed but are not provided with the specific score. Unsuccessful examinees are notified of the exam score. Exams that score 10 points below the passing grade are automatically regraded. Exam results are final.

ESSAY QUESTIONS. Essay questions consist of a fact pattern followed by a series of questions (usually 4-6) for an applicant to answer. Essays are designed to require an applicant to recognize and analyze issues in the fact pattern and explain how those issues should be resolved. The fact patterns will involve situations you would likely encounter in your practice. Essays typically involve operational issues of health care facilities, health care transactional issues, and regulatory issues in the health care area. Applicants should make sure to provide the specific information each question asks for and to communicate as clearly as possible. An organized, clearly written answer using complete sentences will almost always receive a higher score than a choppy, disorganized one. In order to pass the exam, applicants must be able to clearly express answers in a manner that would be persuasive to the decision-maker in a case.

MULTIPLE CHOICE QUESTIONS. These questions are designed to test a breadth of issues in the specialty area and require an applicant to select the **best** available answer option.

REQUIRED KNOWLEDGE, SKILLS AND ABILITIES. An applicant in health law is expected to understand the laws and regulations pertaining to, and governing the relationships among, patients, health care providers, health care vendors and entities which pay for health care services. The knowledge, skills and abilities required of a health law applicant are set out below.

NOTE: NOT ALL TOPICS LISTED BELOW WILL BE COVERED ON ANY GIVEN EXAM. APPLICANTS WILL BE TESTED ON RULES AND LAWS IN EFFECT AT THE TIME OF THE EXAM UNLESS OTHERWISE SPECIFIED.

- 1. Licensing, Discipline, Credentialing, and Peer Review of Health Care Professionals, including:**
 - a. Physicians and physician assistants
 - b. Nurses, including advanced practice registered nurses
 - c. Multi-disciplinary entities

2. Hospitals and other Health Care Entities

- a. Licensing and certification
- b. Accreditation
- c. Medical staff issues (including peer review processes)
- d. Compliance programs
- e. Operations and patient safety (other than patient care issues)
- f. Accountable Care Organizations

3. Patient Care Issues

- a. Patient rights, including consent to treatment and advance directives
- b. Confidentiality of patient information, including HIPAA and applicable Texas law, and electronic health records
- c. Hospital transfers and emergency services
- d. Mental health
- e. Human subject protections in clinical research
- f. Abuse and neglect reporting requirements
- g. Theories of civil liability for services furnished to patients

4. Financial Aspects of Health Care Services

- a. Managed care contracting, networks, billing, and dispute resolution
- b. Medicare/Medicaid programs
- c. Antitrust issues in IPAs (including clinical integration) and boycotts
- d. Corporate practice of medicine/physician practice structures and contracting
- e. Patient payment for medical services, including when providers opt out of Medicare

5. Health Care Transactional Issues

- a. Federal and Texas anti-kickback laws
- b. Federal and Texas restrictions on physician referrals to entities with which the physician has a financial relationship (including the federal “Stark” law)
- c. Acquisition and sale of health care entities (i.e., physician practices, ownership transactions in ASCs, imaging centers and specialty hospitals)
- d. Joint ventures
- e. Restrictive covenants (i.e., non-compete, non-solicit, non-hire, confidentiality/non-disclosure of proprietary information)
- f. Tax-exempt issues
- g. Federal and Texas laws on charity care and financial assistance

- 6. The Texas Disciplinary Rules of Professional Conduct.** The ethics questions regarding this topic will involve an array of hypothetical fact situations which will cover several different aspects of ethical issues that arise in the practice of law. The questions will not be limited to the practice of any one specialty area, and consequently, an applicant is advised to be familiar with all provisions of the TDRPC.

SKILLS.

An applicant must demonstrate the ability to:

- Communicate effectively and persuasively to clients, counsel and courts
- Develop and evaluate strategies for solving a problem or accomplishing an objective
- Analyze and apply legal rules and principles
- Analyze, sort and use facts; plan and direct factual investigations
- Organize and manage a legal task efficiently within time constraints
- Represent a client consistent with applicable ethical standards
- Invoke and utilize the procedures normally required in the specialty area, including pleadings and filings

SUGGESTED STUDY MATERIALS. There are no preparatory courses provided by TBLS. Past exams are not available for review. The following resources are some suggested materials to use for study; however, these resources are not intended to be definitive, but rather provide resources that cover many topics in health care. References to statutes should be understood to include pertinent rules, regulations, and case law.

- Past conference materials from the spring UT and fall THA/SBOT Health Law programs
- “Fundamentals of Health Law” (7th edition- AHLA)
- AHLA conference materials from the Fundamentals in Health Law program (which are not coordinated with the book)
- Licensing of Physicians and Physician Assistants: Texas Medical Practice Act. *See, e.g.*, Tex. Occ. Code §§151-153; 157 (including delegation of prescriptive authority to PAs and APNs); 159; 160; 162; Ch. 204
- Licensing of Nurses: Texas Nursing Practice Act. *See, e.g.*, Tex. Occ. Code §§301.001-.002; 301.151-154; 301.351-352; 301.401-.412; 303.001-.013
- Credentialing and professional peer review. *See, e.g.*, the federal Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101-11152; 45 C.F.R. Part 60, and Chs. A-F of NPDB Guidebook (<http://www.npdb.hrsa.gov/resources/aboutGuidebooks.jsp>); Tex. Health & Safety Code §§241.101- .105; Texas Medical Practice Act, Tex. Occ. Code §§160.001-.015; Texas Nursing Practice Act, Tex. Occ. Code §§301.401-413, §§303.001-.013; and 22 Tex. Admin. Code §§217.16, 217.19-.20; *St. Luke's Episcopal Hospital v. Agbor*, 952 S.W.2d 503 (Tex. 1997); *Poliner v. Texas Health Sys.*, No. Civ.A.3:00-CV-1007-P, 2006 WL 770425 (N.D. Tex. Mar. 27, 2006 and Nov. 17, 2006), *rev'd*, 537 F.3d 368 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 1002, *reh'g denied*, 129 S. Ct. 1663 (2009); *Kadlec Medical Center v. Lakeview Anesthesia Associates*, 527 F.3d 412 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 631 (2008); *Johnson v. Christus Spohn Health System*, 343 Fed.Appx. 673 No. C-06-138 (S.D. Tex. Feb. 8, 2008), *aff'd*, No. 08-40262 (5th Cir. June 23, 2009); *In Re: Memorial Hermann Hospital System*, No. 14-0171, May 22, 2015; *Community Health Systems Professional Services Corp. v. Hansen*, No. 14-1033, June 16, 2017 [**NOTE: NEED FULL CITE FOR LAST TWO CASES**]
- Licensure of hospitals, nursing facilities, ASCs, home and community support services agencies and psychiatric hospitals. *See, e.g.*, Tex. Health & Safety Code, Ch. 142, 241-243, 577.
- Nurse staffing requirements for hospitals and psychiatric hospitals. *See* Tex. Health & Safety Code Ch. 257
- Medicare conditions of participation for providers: 42 C.F.R. Parts 482-484.
- Social Security Act §1865(a)(1); 42 C.F.R. §§488.1-.4: “deemed status” in Medicare program via accreditation by an approved accrediting agency
- Requirements for patient transfers and for providing emergency services including 42 U.S.C. §1395dd; 42 C.F.R. §§489.20, 489.24; Tex. Health & Safety Code §§241.027-241.028 and 311.021-311.024; 25 Tex. Admin. Code §§133.44 and 133.61
- Ostensible Agency. *See, e.g.*, *Baptist Memorial Hosp. System v. Sampson*, 969 S.W.2d 945 (Tex. 1998); *St. Joseph Hospital v. Wolff*, 94 S.W.3d 513 (Tex. 2002); *Rachel Rawlins v. Daughters of Charity Health Services of Austin d/b/a Seton Medical Center*, No. 03-10-00092-CV, (Tex. Civ. App. – Austin 2011, _____).
- Antitrust, including U.S. Department of Justice & Federal Trade Commission, “Statements of Antitrust Enforcement Policy in Health Care” (1996) & “Improving Health Care: A Dose of Competition” (2004); *see also Heartland Surgical Specialty Hospital, LLC v. Midwest Division, Inc. d/b/a/ HCA Midwest Division*, 527 F. Supp. 2d 1257 (D. Kan. 2007); *FTC and State of Illinois v. Advocate Health Care Network, et al* 15 C 11473 (7th Cir. 2016); *St. Alphonsus Med. Ctr. V. St. Luke's Health System Ltd.*, Case No. 14-35173 (9th Cir. 2015).
- Federal and Texas anti-kickback laws and civil monetary penalties laws (including 42 U.S.C. §1320a-7b), the pertinent safe harbor regulations (including 42 CFR §1001.952) and OIG advisory opinions, fraud alerts, bulletins, open letters, and other OIG guidance. *See* www.oig.hhs.gov; *see also* Tex. Occ. Code, Ch. 102 and §165.155; Texas Commercial Bribery law, Penal Code §32.43

- Federal and Texas restrictions on a physician’s referrals to entities with which the physician has a financial relationship including the federal “Stark” law (section 1877 of the Social Security Act, codified at 42 U.S.C. § 1395nn, and section 1903(s) of the Social Security Act, codified at 42 U.S.C. §1396b) and Stark rules (42 CFR §§411.350-411.389); Self-Referral Disclosure Protocol, www.cms.gov/Medicare/Fraud-and-Abuse/PhysicianSelfReferral/Self_Referral_Disclosure_Protocol.html
- Federal False Claims Acts, Health Care Fraud Acts, and Mail and Wire Fraud Acts: 18 U.S.C. §§669, 1341, 1343, 3729-3733; 31 U.S.C. §§3729-3733 (as amended by Fraud Enforcement and Recovery Act, Pub. Law 111-21, 123 Stat. 1617 (2009)); 42 U.S.C. §§1320a-7-1320a-7f (Social Security Act §§1128- 1128F); Texas False Claims Act, Tex. Hum. Res. Code, Ch. 36; and HB 1 (2011) (pertaining to Medicaid fraud); *Universal Health Services v. United States ex rel. Escobar*, No. 15-7 (U.S. June 16, 2016); *United States ex rel Simoneaux v. E.I. DuPont de Nemours & Co.*, No. 16-30141, (5th Cir. Dec. 13, 2016).
- Basic elements and guidelines of Compliance Programs, including their predicate under the Federal Sentencing Guidelines. See information on OIG website on compliance guidance for various provider types and an overview of corporate integrity agreements: www.oig.hhs.gov/
- Choice of entity relating to the formation of licensed healthcare provider groups and joint ventures including the various partnerships, corporations, and limited liability companies described in the Tex. Bus. Org. Code and qualifications specified in the business formation section of the Secretary of State’s website.
- The certification of Texas non-profit healthcare organizations by the Texas Medical Board. See Tex. Occ. Code §162.001(b) and Tex. Ins. Code, Ch. 844; see also Texas Medical Board website <http://www.tmb.state.tx.us/page/non-profit-health-organizations>
- Covenants Not To Compete. See Tex. Bus. & Com. Code § 15.50 *et seq.*
- General business organization federal income tax issues especially with respect to public charities including inurement, private benefit, Intermediate Sanctions and joint ventures between tax-exempt and for-profit entities. See 26 U.S.C. §4958; 26 U.S.C. §501(c)(3); <https://www.irs.gov/pub/irs-tege/eotopice03.pdf> ; *Redlands Surgical Services v. Comm’r of the Internal Revenue Service*, 113 T.C 47 (1999) *aff’d*, 242 F.3d 904 (9th Cir. 2001); *St. David’s Health Care Sys. v. United States*, 349 F.3d 232 (W.D. Tex. 2003).
- Texas and federal Charity Care laws. See Tex. Health & Safety Code §§311.041-.048; Tex. Tax Code § 11.1801; Section 501(r) of the Internal Revenue and its implementing regulations found at 26 C.F.R §§1-501(r)-1 – 1-501(r)-7.
- Texas Corporate Practice of Medicine doctrine. See, e.g., *Flynn Bros. v. First Medical Associates*, 715 S.W.2d 782 (Tex. App. - Dallas 1986); Tex. Occ. Code, Ch. 162; 22 Tex. Admin. Code § 177.17
- Texas HMO Act. See, e.g., Tex. Ins. Code, Ch. 1301 & 28 Tex. Admin. Code, Ch. 3, Subch. X, §§3.3701 *et seq.*; Texas Preferred Provider Benefit Plan Laws. See, e.g., Tex. Ins. Code, Ch. 1301 and 28 Tex. Admin. Code §§3.3701 *et seq.*; understanding differences between activities conducted under HMO Act and PPO laws, and payor-provider contract requirements under each Act
- Texas Third Party Administrator Act. See Tex. Ins. Code, Ch. 4151 and 28 Tex. Admin. Code, Ch. 7, Subch. P §§7.1601 *et seq.*; Texas Utilization Review Agent and Independent Review Organizations. See, e.g., Tex. Ins. Code, Chs. 4201 and 4202, and Tex. Admin. Code, Ch. 19, Subch. R §§19.1701 *et seq.* and Ch. 12; understanding when licensure or certification to conduct TPA, UR and IRO activities is required
- Texas Prompt Pay Laws. See, e.g., Tex. Ins. Code, Chs. 1301.101-1301.138, 843.336-843.346 and 542.051 and Tex. Admin. Code, Ch. 21, Subch. T §§21.2801-21.2826
- Medicare and Medicaid (understand key differences between the two programs)
 - Coverage: Social Security Act §§1812, 1832, 1852(a) and (b), 1862, 1902 and 1905; 42 U.S.C. §§1395d, 1395k, 1395w-22(a) and (b), 1395y, 1396a and 1396d; 42 C.F.R. §§409.1 *et seq.*, 410.1 *et seq.*, 422.1 *et seq.*, understanding items/services covered under Medicare Parts A, B, C and D, and how Medicare items/services are classified; see, e.g. Medicare Benefit Policy Manual, CMP Pub. 100-02 at www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Internet-Only-Manuals-IOMs.html; Texas Medicaid State Plan

- Payment: 42 C.F.R. Part 424; understanding key aspects of Conditions for Medicare Payment, including requirements for Establishing and Maintaining Medicare Billing Privileges in Subpart P, and opting out of Medicare www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNMattersArticles/Downloads/SE1311.pdf
- Indigent Care and Treatment Act. See, e.g., Tex. Health & Safety Code, Ch. 61, understanding indigent care obligations of Texas counties, public hospitals and hospital districts
- Advance Directives including Texas Advance Directives Act, Tex. Health & Safety Code, Ch. 166 and Texas Determination of Death Act, Tex. Health & Safety Code §671.001, Subchapter A
- Confidentiality and medical record privacy including the privacy rules of the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA), Health Information Technology for Economic and Clinical Health Act (HITECH Act) (Title XIII of American Recovery and Reinvestment Act of 2009), Pub. L. No. 111-5 (2009) and Texas confidentiality laws. See, e.g., 42 U.S.C. §§290dd-2, 1301 *et seq.*; 45 C.F.R. Parts 160, 162, and 164; www.hhs.gov/ocr/privacy/; 42 C.F.R. Part 2 (substance abuse patient records); Tex. Health & Safety Code, Ch. 181, §§ 241.151-241.156, Ch. 611; Tex. Occ. Code, Ch. 159. See also physician's ability to disclose confidential information to law enforcement in certain circumstances, but absence of duty to warn third parties, e.g., *Thapar v. Zezulka*, 994 S.W.2d 635 (Tex. 1999)
- Consent to treatment. See, e.g., Tex. Civ. Prac. & Rem. Code §§74.101-.107, 25 Tex. Admin. Code, Ch. 601, and Ch. 313. See also Tex. Fam. Code Ch. 32 (consent to treatment of child by nonparent or child); §153.073-.074; 153.132 (consent to treatment by parents and conservators); Tex. Health & Safety Code §§81.105-81.107 (HIV); Tex. Fam. Code, Ch. 33 (abortions), Tex. Health & Safety Code Ch. 171, Subch. B (abortions), and Tex. Occ. Code §164.052(a)(19)-(21) and 22 Tex. Admin. Code §165.6 (consent to abortion on unemancipated minor).
- Patient Rights. See, e.g., 45 C.F.R. §§164.520-164.528, and 42 C.F.R. §482.13; Tex. Health & Safety Code, Ch. 576 (rights of mental health patients), Tex. Health & Safety Code §§242.501-242.505 (rights of nursing home residents), and 25 Tex. Admin. Code § 133.42
- Abuse and neglect. See, e.g., Tex. Fam. Code §§261.001 and 261.101-104 (required reporting children), Tex. Health & Safety Code §§260A.001-260A.004 (residents of nursing homes), Tex. Hum. Res. Code §§48.002 and 48.051-48.054 (elderly or disabled persons), Tex. Health & Safety Code §§161.131-161.137 (patients in healthcare facilities), and Tex. Civ. Prac. & Rem. Code, Ch. 81 (sexual exploitation by a mental health services provider)
- Mental Health. See, e.g., Tex. Health & Safety Code Ch. 572 (Voluntary Inpatient Mental Health Services); §§573.001, .002, .011, .021, .022, and .023 (selected provisions concerning Emergency Detention); §§574.001-.004, 574.009, 574.011, 574.031, 574.042; 574.101-110 (selected provisions concerning court-ordered mental health services); §575.014 (Private Hospital Transfer Law); Ch. 578 and 25 Tex. Admin. Code §601.7 (Electroconvulsive Therapy (ECT));
- Federal protection of human research subjects. See, e.g., 21 C.F.R. Parts 50, 54 and 56; and 45 C.F.R. Part 46
- Federal Patient Safety and Quality Improvement Act of 2005 and regulations. See 42 U.S.C. §§299b-21 to 26; 42 C.F.R. Part 3; understanding patient safety activities; patient safety evaluation system and patient safety work product privilege.