HEALTH LAW: TEXAS MEDICAL MALPRACTICE (LAW 5297-23869, FALL 2011)
Syllabus Version (8-18-2011)

Dale Burrus, J.D., LL.M.
Kroger|Burrus
3100 Weslayan, Suite 300
Houston, Texas 77027
(713) 961-7952 (office)
(713) 419 1940 (cell)
Email: burrus@krogerlaw.com

Room: 213 BLB
Class Time: Tuesdays 4:00p-6:00p

Course Description:
This course is a medical malpractice litigation course designed for LL.M. and upper level J.D. students. Through a practical approach, students will examine each step in managing a medical malpractice lawsuit. In addition to exploring the fundamental issues of physician-patient relationship, standard of care, informed consent, institutional and agency liability, and peer review, students will learn about the substantive and procedural aspects of each stage of a malpractice action. The stages will incorporate such issues as determining whether to bring a malpractice action, qualifying or challenging expert and scientific evidence, proving causation and damages, defending malpractice claims, and allocating liability among different providers. Because malpractice is governed by state common and statutory law, most of the cases will be drawn from Texas law. The course will also highlight Texas’ reform statute that many see as a model throughout the nation.

Course Materials:
A list of assigned readings for each class is attached to this syllabus for your convenience. The main text for the course is Texas Medical Malpractice Defense by Kroger|Burrus. From time to time we will also be reading from Health Care and Medical Products Liability 2011, a CLE text from Plaintiff’s Attorney Paula Sweeney. Texas Medical Malpractice Defense will be available through the book store. Health Care and Medical Products Liability 2011 as well as other supplemental materials will be provided in class or via email. In addition, please note that electronic versions of many of the readings are directly linked to the syllabus via hyperlinks. (Also note that Health Care and Medical Products Liability 2011 may be downloaded from the texasbarcle.com online library. As a student of an ABA accredited school you can join the TexasBarCLE for free and receive access to their CLE Online Library.)

Policies and Procedures:

Cell Phones and Computers: As a reminder, during class all electronic devices should be muted and or set to silent.

Class Attendance: Following the Law Center’s policy, you must attend at least 80% of all class meetings. Please try and email me in advance if you know that you will not be attending a class.

Class Preparation and Participation: Preparation and participation are expected and make the class more enjoyable for everyone. Preparation and participation will be taken into account in determining the final grade. Please do not be daunted by the size of the reading assignments at the beginning of this course. Reading assignments for this course will tend to be heavier toward the beginning of the course to prepare you to participate in the practical experiences that will come
later in the semester. To make the reading assignments more manageable, I have broken them into two categories for most days. If a reading falls under the category of “readings for class”, then I expect you to have read the material for that class period. If the material falls under “reading for examination and clarification”, then I will expect you to have read this material sometime prior to the final examination. Most of the material under “read for examination and clarification” is supplemental and meant to aid your understanding. Please read as much as possible before each class period.

Medical Malpractice Practical Experience: Early in the course I will distribute de-identified medical records based upon an actual medical malpractice case. The class will split into plaintiffs and defendants. Each plaintiff will pair up with a defendant. Based upon the medical records supplied, each side will prepare court documents for the case which will be due periodically throughout the course. The due dates for these assignments are noted on the calendar below. On the day your assignment is due please email a copy to burrus@krogerlaw.com and green@krogerlaw.com. In addition please provide a copy for the other party in your pair. You may decide whether you want to exchange paper copies or electronic copies. I will give you more information about these assignments in class.

For a few class periods throughout the course, you will also participate in mock pre-trial and trial experiences in class based upon the de-identified medical records. Please do your best to not be absent on those days. If you must be absent, contact me and we will try and work out some type of agreement. If you are absent on those days and do not contact me, I reserve the right to lower your participation grade.

Final Examination: For this class you will be taking a three hour exam which will consist of a combination of issue-spotting and policy questions. This exam will be open book. During the exam you may use any text or supplemental reading assigned in this course and any notes/outline that you personally prepared or helped to prepare. More details will be discussed as the exam date approaches.

Grading: The course will be graded based on both class participation and the final examination. 70% of your course grade will be based on the final exam and 30% will be based on class participation. Your class participation grade will include your in-class participation throughout the course, your participation during the practical experience days, and your assignments turned in for the medical malpractice experience.

<table>
<thead>
<tr>
<th>DATE</th>
<th>TOPIC / READINGS</th>
</tr>
</thead>
<tbody>
<tr>
<td>8/23</td>
<td>The Principles of a Medical Malpractice Case</td>
</tr>
<tr>
<td></td>
<td>1. History of medical malpractice – From 4590i to chapter 74</td>
</tr>
<tr>
<td></td>
<td>2. Health Care Liability Claim – Definition and Elements</td>
</tr>
<tr>
<td></td>
<td>3. Health Care Provider – Patient Relationship</td>
</tr>
<tr>
<td></td>
<td>4. Health Care Negligence and Other Liability Theories</td>
</tr>
<tr>
<td></td>
<td>5. Informed Consent Claims</td>
</tr>
<tr>
<td></td>
<td>6. Vicarious Liability</td>
</tr>
<tr>
<td></td>
<td>7. Non-Health Care Negligence Claims</td>
</tr>
</tbody>
</table>
Readings for Class:

**Introductory Materials**
- Civil Practice and Remedies Code - Ch. 74 §§ 74.001-74.107
- Kroger | Burrus Introduction to Section II & Chapters 8 – 12, 16
- Sweeney, p. 1-13

**Physician – Patient Relationship**
- *St. John v. Pope*, 901 S.W.2d 420 (Tex. 1995)
- Sweeney 177-180

Readings for Examination and Clarification:

**Introductory Materials**
- Review Ch. 74 of the Civil Practice and Remedies Code

**Physician – Patient Relationship**
- Review Salas v. Gamboa summary from Kroger | Burrus Ch. 9

**Health Care Liability Claims**
The Texas Supreme Court has recently decided a number of opinions redefining what constitutes a Health Care Liability Claim. Please review these blog posts at the Kroger | Burrus Blog regarding these cases:
- Texas Supreme Court: Spider Bites are Health Care Liability Claims
- Texas Supreme Court Holds Patient’s Slip and Fall is a Health Care Liability Claim

And review these cases:
- Omaha Healthcare Center, LLC v. Johnson, No. 08-0231
- Harris Methodist Fort Worth v. Ollie

**Vicarious Liability**
- For a discussion reviewing vicarious liability claims against a hospital read Sweeney - Pleading and Proving the Hospital Liability Case, p. 217-223

8/30

**Continuation of Theories of Liability, Causation and Damages**
8. Wrongful Death and Survival Actions
9. Gross Negligence
10. Causation
11. Damages Introduction
   a. Medical Expenses
   b. Loss of Earning Capacity
   c. Loss of Household Services
   d. Funeral/Burial Expenses
   e. Non-Economic Damages
   f. Loss of Consortium
g. Exemplary Damages  
h. Prejudgment and Postjudgment Interest  

12. Damages – Limitations on Recovery

Readings for Class:
- Ch. 74 §§ 74.301-74.303
- Kroger | Burrus Chapters 14-15, 17-19
- Sweeney, Damages in Malpractice Cases, p. 257-259; and Limitation on Damages, p.67-79
- Kroger | Burrus Blog Entry - Texas Supreme Court Limits Medical Expense Evidence to Amount Actually Paid or Incurred
- Haygood v. Escabedo

Readings for Examination and Clarification:
- Additional causes of action - Sweeney 181-216.

9/6

Medical Records, Expert Witnesses, and Expert Reports
13. Expert Witnesses
   a. Selecting Plaintiff / Defendant Experts  
   b. Expert Report Requirements  
   c. Expert Report Deadlines

14. Review of Medical Records
   a. Preparing a Medical Chronology  
   b. Preparing a Medical Summary

* Plaintiffs and Defendants – Medical Summary is due.

Readings for Class:
- Review Example Medical Chronology and Medical Summary  
- Review Medical Records for Practical Experience  
- Ch74 §§ 74.351 – 74.403
- Kroger | Burrus Introduction to Section V & Chapters 34-37
- Baize v. Scott & White, Not reported in S.W. 3d, 2007 WL 135956 (Tex. App. – Austin)  
- Tyler Scoresby, M.D. v. Catarinso Santillan. When reviewing this case look for answers to the following questions: What does it take to qualify for an extension to the 120 deadline for filing an expert report? What’s the line between a merely inadequate report and something that’s not a report at all?  
- Read Am. Transition Ctrs. of Tex, Inc. v. Palacios, 46 S.W.3d 873, 879 (Tex.
### Readings for Examination and Clarification:

- Sweeney on Expert Reports and Witnesses, p. 79 – 156

### 9/13

**Overview of Plaintiff’s Case**  
**Guest Speaker – Plaintiff’s Attorney**  
15. Initial Meetings with Plaintiffs  
16. Case Selection as a Plaintiff’s Attorney  
17. Notice of Claim  
18. Medical Authorizations and Obtaining Records  
19. Pre-Suit Depositions  
20. Statutes of Limitations  
21. Court System Structure  
22. Plaintiff’s Petition and Service  
23. Venue  
24. Personal Jurisdiction  

*Plaintiffs - Petition and Notice of Claim are due*

### Readings for Class:

- Ch. 74 § 74.251  
- Kroger | Burrus Introduction to Section I & Chapters 5 – 7, 20-24  
- Sweeney, Pleadings of Plaintiff, p. 174-175  
- Sweeney, Statute of Limitations and Repose, p. 28 - 60  
- Kroger | Burrus Blog [Texas Supreme Court: Chapter 74 Notice Letter and Authorization Form Required to Toll Statute of Limitations](#)  
- Carreras v. Marroquin

### 9/20

**Pre-Suit Actions**  
25. Advance Directives  
26. Adverse Events and Incident Reports  
27. Investigation and Peer Review  
28. Reporting  
29. Pre-Suit Resolutions  

**Third Party Practice, Federal Statutes, & Government Entities**  
30. Responsible Third Parties  
31. Emergency Medical Care and EMTALA  
32. Federal Torts Claims Act  
33. Texas Torts Claims Act  
   a. Sovereign Immunity  
   b. Statutory Waiver of Immunity  
   c. State and County Hospitals  
   d. Notice Under the TTCA  
   e. Limitations and Exclusions under the TTCA
34. CMS Requirements
   a. Reporting Settlements
   b. Medicare Secondary Payor Mandatory Reporting
   c. Subrogation and Liens Including Medicare set aside reporting

* Defendants - Answer is due.

Readings for Class:

Pre-suit Actions
- Kroger | Burrus Chapters 1-4
- Kroger | Burrus Blog *New Categories of Hospital-Acquired Conditions: the Never-Ending Story*

Third Party Practice
- Sweeney p. 67
- Article 5 of *H.B. 274*
- Kroger | Burrus Blog *Texas Passes 2011 Tort Reform*

EMTALA
- Kroger | Burrus Chapter 13
- Sweeney p. 213 – 215
- Ch. 74 §§ 74.151 - 74.154

Texas Torts Claims Act
- TEX. CIV. PRAC. & REM. CODE §§101.001, .003, .021, .023, .026, .028, .057, .061, 101, .106
- TEX. HEALTH & SAFETY CODE § §285.071-.072
- Sweeney – Texas Torts Claims Act, p. 161-172
- *Klien v Hernandez*, 315 S.W.3d 1 (Tex. 2010)

CMS: Subrogation, Liens, and Mandatory Reporting
- CMS Mandatory Reporting Health Law Guide
- Download and read p. 40-60 of *Subrogation and Liens Including Medicare Set Aside Reporting by Judy Kostura* from the texasbarcle.com. The latest version is from February 24, 2011. As a student of an ABA accredited school you can join the TexasBarCLE for free and receive access to their CLE library including Ms. Kostura’s article.

9/27

Overview of Defendant’s Case
35. Misnomer and Misidentification of Defendant
36. Answer – General Denials
37. Affirmative Defenses
<table>
<thead>
<tr>
<th>38. Jury Demand</th>
<th>39. Amending the Petition or Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>40. Special Exceptions</td>
<td>41. Statutes of Limitations</td>
</tr>
<tr>
<td>42. Court System Structure</td>
<td>43. Obtaining Records From Authorizations</td>
</tr>
<tr>
<td>44. Selecting Plaintiff/Defendant Experts</td>
<td>45. Case Evaluation</td>
</tr>
<tr>
<td>46. Objecting to Plaintiff’s Expert Reports</td>
<td>47. Amending a Statutory Expert Report</td>
</tr>
</tbody>
</table>

**Readings for Class:**
- Kroger | Burrus Introduction to Section III, Chapters 20 - 21, 25 – 30, 33-34, Introduction to Section IX, & Chapter 55.
- Sweeney, p. 175-176.

<table>
<thead>
<tr>
<th>49. Types of Discovery – Overview</th>
<th>50. Discovery Control Plan</th>
</tr>
</thead>
<tbody>
<tr>
<td>51. Rule 11 Agreements</td>
<td>52. Spoliation of Evidence</td>
</tr>
<tr>
<td>53. Privileges</td>
<td>54. Requests for Disclosure</td>
</tr>
<tr>
<td>55. Requests for Admission</td>
<td>56. Interrogatories</td>
</tr>
<tr>
<td>57. Requests for Production</td>
<td>58. Obtaining Additional Records and Proving Up Records</td>
</tr>
</tbody>
</table>

**Readings for Class:**
- Ch. 74 § 74.352
- Kroger | Burrus Introduction to Section VI & Chapters 38 – 46.
- Sweeney, p. 231 - 244

**10/11**

**Practical Experience Class**

**Guest Presenters**
In this class we will go over the Plaintiff’s and Defendant’s Case using the medical records provided at the beginning of the course. Be prepared to participate. We will review among other things:
1. Initial Meetings
2. Potential Claims
3. Discovery Requests
<table>
<thead>
<tr>
<th>4. Defenses</th>
</tr>
</thead>
<tbody>
<tr>
<td>* Plaintiffs and Defendants – Discovery Requests are due. Discovery Requests – For this class period, each side will prepare: Requests for Disclosures; Requests for Production; and Interrogatories. Thoroughly Review The Hypothetical Medical Records. Review your notes of what we have done in class up to this point.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>10/18 Depositions and Independent Medical Examinations</th>
</tr>
</thead>
<tbody>
<tr>
<td>59. Plaintiff Depositions</td>
</tr>
<tr>
<td>60. Defendant Depositions</td>
</tr>
<tr>
<td>61. Fact Witness Depositions</td>
</tr>
<tr>
<td>62. Independent Medical Examinations</td>
</tr>
<tr>
<td>63. Investigators</td>
</tr>
<tr>
<td>64. Plaintiff Expert Depositions</td>
</tr>
<tr>
<td>65. Defendant Expert Depositions</td>
</tr>
<tr>
<td>66. Objections to Experts (Daubert/Robinson)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>10/18 *Defendants – Expert Report is Due</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Readings for Class:</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Kroger</td>
</tr>
<tr>
<td>• Kroger</td>
</tr>
<tr>
<td>• Review example depositions.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>10/25 Practical Experience Class</th>
</tr>
</thead>
<tbody>
<tr>
<td>Guest Presenters</td>
</tr>
<tr>
<td>Depositions - Preparing and presenting</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>11/1 Pretrial Resolution</th>
</tr>
</thead>
<tbody>
<tr>
<td>67. Motions for Summary Judgment</td>
</tr>
<tr>
<td>68. Settlement Demands, Stowers and Response</td>
</tr>
</tbody>
</table>
| 69. Mediation  
70. Ancillary Settlement Issues  
71. Lien Issues  
72. Reporting Issues  
73. Guardians Ad Litem |

* Plaintiffs and Defendants – Prepare a short (one paragraph to one page) evaluation of the case in preparation for mediation and settlement.

**Readings for Class:**
- Kroger | Burrus Introduction to Section X & Chapters 56 – 61
- Sweeney – Summary Judgment Practice, p. 244-253

| 11/8 | **Trial**  
74. Trial Preparation  
75. Trial in General  
76. Pretrial Matters and Motions  
77. Voir Dire  
78. Plaintiff’s Case  
79. Defendant's Case  
80. Jury Charge  
81. Verdict |

* Plaintiffs and Defendants – Expert Deposition Questions are due - 20 questions

**Readings for Class:**
- Kroger | Burrus Introduction to Section XI & Chapters 62-69

| 11/15 | **Practical Experience Class**  
**Guest Presenters**  
Mock Trial |

| 11/22 | **No Class: Thanksgiving Holiday** |

| 11/29 | **Post-Trial**  
82. Judgment  
83. Post-Trial Motions  
84. Appeals |

**Review for Final**

**Readings:**
- Kroger | Burrus Introduction to Section XII & Chapters 70-72
- Prepare your outlines and questions for the review.

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>12/6</td>
<td>Possible Makeup Class: If class is canceled during the semester for weather related reasons or other reasons we may move the review for the final to this day.</td>
</tr>
<tr>
<td>12/13</td>
<td>Final Exam</td>
</tr>
<tr>
<td>6-8 p.m.</td>
<td></td>
</tr>
</tbody>
</table>