

EXAM No. _____

**Legal Malpractice
Professor Simon
Final Exam
Fall 2008**

INSTRUCTIONS

The total time for the exam is 2.5 hours. The exam has one multi-issue essay, a "true/false with explanation" question and one "bigger picture" question. They are each worth differing amount of points. I have divided the time in rough proportion to the points to give you some guidance.

You may bring to the exam the Fortney text and a **hard copy** of an outline that you prepared. No other materials or commercial outlines are permitted.

This exam is worth 50% of the final grade (200 points). The remaining 50% of the grade is based equally on the expert report (100 points) and your class participation and presentation (100 points).

Be sure to answer the questions I ask. Do not waste your time with speculation for which neither the question nor the answer calls. Brevity and precise analysis will be rewarded; rambling answer will not (and will cost you valuable time). Thus, please organize your answers carefully.

Please either 1. Follow the Registrar's instructions for computer use, or 2. Put your written answers in the bluebooks and make sure your exam number is on each. Write only on **one side** of the page and use ink. Although given my own penmanship, I am clearly not the one to ask this, try to write legibly. I can't give credit for that which I am unable to read.

If you find yourself running out of time, you might try, at least, to outline your answer. You may receive some credit for this effort. Good luck and thank you for a semester I enjoyed greatly.

Essay Question 1 (120 points- 1 hour and 20 minutes)

To: Associate
From: Partner
Re: New matter

Albert Loyer, an attorney, was hired by Barclay F. Calvo, a high school janitor, to represent Calvo in a medical malpractice suit against Dr. Xavier Donnelly. Loyer did not have experience in that type of litigation, so he contacted another attorney, Natalie Nomos, who practiced law on her own, and asked her to assist him on the case. Nomos, who had an excellent record as a malpractice litigator, agreed to help.

Loyer and Nomos reached a loose understanding, never reduced to writing, that Loyer would do the pre-trial work (and keep 40% of the attorney's fees) and that Nomos would present the case at trial (and receive 60% of the attorney's fees). If the case settled, the fees were to be split 50-50. Calvo was told by Loyer simply that Nomos would be serving as co-counsel on the case. Calvo voiced no objection. On one occasion, Nomos briefly met Calvo at Loyer's office and said she looked forward to helping him. The contingent fee agreement that Calvo had originally signed with Loyer was never modified to refer to Nomos.

Loyer neglected to file the case before the statute of limitations elapsed. To cover his mistake, Loyer contacted Calvo and told him that after careful review of the evidence and applicable law, there was little chance of winning at trial. Loyer further explained that he still thought the claim might be settled and that Dr. Donnelly might be willing to pay \$10,000 to "get rid" of the matter. Calvo replied that he would happily accept \$10,000 now rather than risk going to trial and recovering nothing.

Loyer withdrew \$10,000 from his personal savings account and wrote a check for that amount to Calvo. Loyer delivered the check in person to Calvo and asked Calvo to sign a release. Calvo thought that the money

was from Dr. Donnelly, and that the release, which he did not read, released Dr. Donnelly from liability. In fact, the text of the release said that Calvo released Loyer from "any and all liability relating to the representation, including negligence." Loyer did not offer to give Calvo a copy of the release and Calvo did not ask for one. Loyer told Calvo that the settlement was "confidential" and that Calvo could not discuss it with anyone. It turns out that Loyer, realizing that such a release would violate the ethics rules, destroyed the document after it was signed and thus has no plan to rely on it.

Loyer then informed Nomos that the case would not be proceeding forward because Calvo had decided to change attorneys. Nomos was surprised and somewhat disappointed because her initial review of the facts had suggested that there was a strong basis for liability and substantial damages. Nomos had expected to share in a large contingent fee.

Three years later, Nomos saw Calvo at a grocery store and remembered him. Nomos said "hello" and asked how the case had turned out after Calvo changed attorneys. Calvo said that he had never changed attorneys and then explained that he had received a \$10,000 check from Loyer for settling the case. Both Nomos and Calvo were baffled by the encounter. Nomos did not suggest to Calvo that he might have an action for malpractice against Loyer.

As you know, our state provides in Laws of the State (LS) § 508:4:

I. Except as otherwise provided by law, all personal actions, except actions for slander or libel, may be brought only within 2 years of the act or omission complained of, except that when the injury and its causal relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission, the action shall be commenced within 2 years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of.

Calvo has come to our firm for assistance. Please: 1. Analyze whether he has any tort causes of action against Loyer. Identify each such claim and

assess any barriers to establishing our prima facie case on each applicable tort theory; 2. Analyze any affirmative defenses that Loyer is likely to raise; 3. Discuss whether you think Calvo's malpractice insurance is likely to cover this claim, since I understand he does not have much in the way of personal resources; and 4. Identify any possible theory we might use to hold Nomos liable (in the event Calvo can't satisfy the judgment).

Question 2 (40 points- 30 minutes)

Lawyer, at the request of his brother-in-law Bill who told Lawyer that he needs a bank loan for his ailing business, prepares a letter stating that machinery owned by Bill's business is unencumbered. Lawyer wrote this letter based on Bill's assurances that he has not previously pledged the equipment. Lawyer, trusting Bill based on his long history with him, did not go to the Secretary of State's Office to search the reporting system. Had he done so, he would have found that most of the property was used as collateral for a prior loan. Bill takes the letter to Acme Bank, which gives him a \$700,000 loan. Bill believes this loan will allow him to ride out a tough business period and get back on sound footing. Unfortunately, shortly after he obtains the loan, the economic crisis hits. Bill's sales go way down and he has to declare bankruptcy. The bank ultimately loses the full amount it loaned Bill.

Acme sues Lawyer for \$700,000. There is no evidence that Lawyer knew of the actual facts surrounding the machinery or was a co-conspirator in this action. L moves to dismiss the bank's action, claiming that absent fraud, plaintiff had not stated a cause of action. Your research shows that our state has rejected the privity requirement that states like New York use in actions of this sort. The court dismisses the action.

Was the court's ruling correct or incorrect? Explain your conclusion in 150 or fewer words.

Question 3 (40 points -40 minutes)

Having now studied the rules governing malpractice and related actions and the techniques for lessening risk, state whether you believe the law in this area has struck the appropriate balance between the

goals of deterring lawyer mistakes and misconduct and compensating injured clients on one hand, and not unduly restricting the practice of law on the other hand. Explain the basis for your conclusion.