

TORTS: PROFESSOR SUGARMAN
WRITTEN ASSIGNMENT #1
EXPRESS AGREEMENTS NOT TO SUE

Since her first month in medical school, Anna Lau knew that she wanted to open an office in a small town in California's central valley and serve as a doctor to working class and poor people. There are currently no doctors practicing in the town she has in mind. People living there have to travel many miles to see a doctor and often make do without professional care.

Now, seven years later, on the brink of opening her office, she comes to you for legal advice. Dr. Lau has just learned that, as a family practice doctor, her medical malpractice insurance premium for her first year will be at least \$35,000. This has put her in what she considers to be a potentially intolerable bind.

In order to cover her malpractice insurance costs and make it financially, she is confident that she would have to charge her patients impossibly high fees. Many of the people in the town who she would hope to serve currently have no health insurance. She strongly believes that if she charged what her patients could afford and what health insurers are willing to pay for those who do have coverage, she could not earn enough income to pay herself a modest salary, cover her basic office costs, and pay \$35,000 a year for malpractice insurance.

Determined to live out her dream, she is thinking instead about practicing without malpractice insurance and having all her patients sign a form which makes very clear to them that they agree not to sue her for malpractice, unless her malpractice is gross or reckless. She is confident that her patients will willingly sign such an agreement once they realize that this is what it takes to get a new, well-trained doctor to come to live in the town and serve people of modest means. Those unwilling to sign can continue to travel elsewhere for care (or treat themselves).

As part of her plan, people who want to be her patients would pay \$5 and become members of a non-profit organization she would call Anna's Community. All those who are members of Anna's Community (and their immediate families) could come to her for medical care provided that they signed the form waiving tort liability for medical negligence. For those without health insurance, fees for Anna's Community members would be on a sliding scale and very modest for low income people.

Dr. Lau comes to you for advice. 1. Will the courts uphold the proposed agreement not to sue if it is later challenged by a patient of hers in a tort suit claiming that she has injured the patient through ordinary malpractice? (Why or why not?) 2. Do you think, as a matter of justice, that an agreement like this is fair under the circumstances and should be upheld? (Why or why not?)

Answer Dr. Lau's questions on a single page of paper, single spaced, using at least 12 point type and at least 1 inch margins, using no more than 600 words in any event. In preparing your answer, do not do outside research. Instead, read and rely only on the materials in the casebook from pages 466-475. Your answer is due Thursday September 3 at class time. Please bring *two copies* to class that day. Please do not spend a lot of time on this problem.