

QUESTION I - JULY 2008

PLEASE NOTE: QUESTION I was a "Multistate Performance Test" (MPT) and is not reproduced here. For additional information see: <http://www.ncbex.org/>.

QUESTION II - JULY 2008

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QUESTION III - JULY 2008

Hal and Winona married in 1997 and had their first child, Chip, a year later. In 2002, the couple adopted Kate, who was considered a "special needs" baby because she was deaf. That same year the family moved into the Middleburg, Vermont, house that Hal grew up in. Middleburg is in Addington County. Hal's father, Gary, moved to the smaller cottage next door. Gary took care of the kids while Winona worked part-time, but Winona shouldered the bulk of the parenting when she wasn't working. Hal was a devoted parent as well, though he was quite consumed with his new business venture, so he didn't have as much time to spend with the children as he would have liked.

Through the next few years Chip and Kate both enjoyed frequent contact with their many cousins in the area. Winona and Hal both learned sign language, participated in an online community of hearing parents who were likewise raising deaf children, and made every effort to ensure that Kate was able to integrate fully into their community of family and friends.

In 2006, after struggling for years to hold their relationship together, Winona and Hal decided to divorce. Their parting was amicable, and they kept the best interests of the children in the forefront. They agreed to share legal rights and responsibilities for both children. Winona wanted to move to the New Hampshire town where her own parents lived, located about two hours away. Since a premiere school for deaf children was located there, and Kate would be starting school in 2008, Hal and Winona agreed that Winona should be entrusted with physical rights and responsibilities of Kate. With Hal's assent, Winona and Kate moved to New Hampshire in January, 2007.

Since Chip had already started school in Middleburg, they agreed that Hal would stay in the marital residence and would be entrusted with physical rights and responsibilities for Chip. They knew that Hal's father would be able to help Hal juggle his business and parenting, and Winona could likewise rely on her own parents to help her. They hammered out a parent-child contact schedule that ensured that each child got to spend significant chunks of time with the other parent, and with the other sibling. Hal and Kate filed a final stipulation dividing their property and debts, and establishing spousal maintenance and child support, and they received the final divorce order from the Addington Family Court on March 1, 2007.

Later that spring, Winona decided to finish the nursing training that she had stopped when Chip was born. A nursing school in Albany, New York, offered an intensive program, so she and

Kate moved to Albany on June 15, 2007. Winona completed her training by Thanksgiving, and on December 1, 2007, they moved to Massachusetts where Winona had landed a good job. Within months, the hospital that hired her began downsizing. They cut Winona's position, but offered her a job in a sister hospital in Newtown, an upstate New York town located about an hour and a half from Middleburg. Winona accepted, and on May 15, 2008, she and Kate relocated again. Throughout all of these moves, Winona and Hal adhered to the established parent-child contact schedule, occasionally agreeing to departures to accommodate the needs of one parent or the other, or to deal with special issues that came up for the children.

When Winona made this fourth move, Hal became concerned about Kate's well-being. She was slated to start school in the fall, and Winona was no longer living near a specialized school for the deaf. If Kate was going to receive her education in a local public school system with special assistance, Hal thought she might as well be schooled in Middleburg. He also felt Kate had been moved around too much, and would benefit from the stability of living with him. Finally, his business had grown, stabilized and become financially secure, so he had more time to devote as a parent.

Winona disagreed. She was finally ready to put down longer-term roots in upstate New York, and she didn't see any advantage to Kate's attending school in Middleburg as opposed to her new home town. She had not yet cultivated a community in Newtown, but was confident that she would. Finally, Winona felt strongly that a young girl in particular should be with her mother, who could serve as a positive gender role model.

Unable to persuade Winona to change Kate's living arrangements, and unwilling to back down himself, on June 15, 2008 Hal filed a Motion to Modify in the Addington Family Court. He asked the court to award the parents shared physical rights and responsibilities for Kate. In particular, he proposed that Kate live with him in Middleburg during the school year, and that she stay with her mother during school vacations and most weekends. He asked the court to award him sole physical rights and responsibilities for Kate if it refused to order the parents to share.

Winona has filed a Motion to Dismiss. She takes the position that the Vermont Family Court cannot even consider Hal's Motion to Modify because Kate does not live in Middleburg anymore—she now lives in New York. She also objects to Hal's request to share physical rights and responsibilities, and opposes any other changes to the prior order.

1. Analyze Winona's argument that the Court cannot consider Hal's Motion to Modify since Kate now lives in New York.
2. Assuming the Court does consider Hal's motion, analyze that motion.

QUESTION IV - JULY 2008

Patricia Paine has invested in two different businesses run by Aaron Able: "XYZ Corporation" and "Paine and Able Ltd." XYZ Corporation is a corporation formed in compliance with the

Vermont Business Corporation Act. The articles of incorporation contain a number of items including the following:

The corporation is formed for the sole purpose of operating a real estate management firm to purchase and manage a building located at 1 Elm Street in the City of Burlington, State of Vermont.

....

Two classes of stock shall be authorized as follows: 2,000 shares of Common Stock with a par value of \$10 and 100 shares of Preferred Stock with a par value of \$100. Preferred Shares are cumulative and participating shares, and shall have ten votes per share for purposes of voting on changes to the articles of incorporation.

Patricia is neither an officer nor a director of XYZ Corporation. She is solely a passive investor in the company. Patricia owns 250 shares of common stock and 75 shares of preferred stock in XYZ Corporation. Aaron is president of the corporation. However, Aaron does not sit on the board of directors. Aaron owns 750 shares of common stock. The remaining shares of preferred and common stock are owned by a large number of other investors.

At the end of a recent monthly board meeting, the Board of Directors of XYZ Corporation unanimously votes to give Aaron 500 shares of Preferred Stock since the company is doing so well financially. Subsequently, Aaron calls a special meeting of the shareholders, with adequate notice to all, in order to alter the articles of incorporation to delete the preferred shares special voting rights. Patricia, duly notified, votes against the amendment, but Aaron and all of the other shareholders vote in favor of the amendment. Therefore, the amendment passes by a vote of 6,000 to 1,000. Patricia is extremely upset at this amendment of the articles of incorporation.

Following this shareholders' meeting, Aaron announces that he will enter into a contract with Refusnik, Inc., for XYZ Corporation to buy an airplane for the transportation of Darfur refugees to countries willing to receive them. After learning of the contract, Patricia vigorously objects to this contract.

Patricia's other investment, Paine and Able Ltd., is a limited partnership formed pursuant to the Vermont Limited Partnerships Act for the purpose of investing in domestic oil exploration. Patricia is designated as a limited partner of this partnership. Aaron acts as general partner and agent of the limited partnership. Patricia contributed 50% of the initial capital to the limited partnership, and in honor of this investment, Aaron named the partnership after Patricia. Patricia has no role in the limited partnership other than that of a passive investor.

As the agent of Paine and Able Ltd., Aaron enters into a contract for office cleaning services with Cathy's Cleaning Service. Patricia (who does not know Cathy) objects to the cost of the cleaning service, telling Aaron it is unnecessary and excessively expensive. Aaron informs Patricia what an excellent job Cathy has done at other businesses in town, that the cost of the contract is the typical going rate for office cleaning services, and that it is a better use of Aaron's time to work on behalf of the partnership than to waste his time cleaning the office.

Patricia is so upset at all of these actions by Aaron that she wants to dissolve both businesses and get her share of the assets after the liquidation. Aaron refuses to consider any such dissolution of either business.

- 1) Discuss whether Patricia will be successful in a legal challenge reversing the recent amendment to the articles of incorporation of XYZ Corporation.
- 2) Discuss whether Patricia will be successful in a legal challenge preventing XYZ Corporation from being held liable for the contract with Refusnik, Inc.
- 3) Discuss whether Patricia can be held personally liable for the contract with Cathy if neither Aaron nor the limited partnership were to pay Cathy pursuant to the contract.
- 4) Discuss whether Patricia can successfully dissolve XYZ Corporation.
- 5) Discuss whether Patricia can successfully dissolve Paine and Able Ltd.

QUESTION V - JULY 2008

Your client, Power Producer, Inc. (“Power”), owns wood-fired electric power plants throughout New England, including one in Shrewsbury, Vermont. Power purchased dilapidated plants in the 1990s, and installed new energy efficient equipment developed by Independent Developer, LLC (“Developer”) to use clean wood as fuel for the plants. Power had leased the equipment from Developer.

By 2004, Power had increased the power output and profits at all its plants, including Shrewsbury. By 2005, Power’s business had begun to suffer due to a steep climb in the price of clean wood. In 2006, fires broke out at several plants, including Shrewsbury. The fires resulted in half-inch drifts of neon-orange ash in areas surrounding each plant, leading many newspaper reporters to speculate whether clean wood was the only thing being burned at the plants.

You are defending Power in a civil action for negligence brought by a group of neighbors of the Shrewsbury plant. Developer is a co-defendant, but is represented by separate counsel.

Question: Analyze the admissibility of each piece of the following proposed pieces of evidence in the civil action.

A. Testimony by Bunson Burner, PhD, an electrical engineer with one year of experience as a private fire investigator. Burner claims that the fire in the Shrewsbury plant originated from Power’s negligent installation of Developer’s energy-efficiency equipment. In his deposition, Burner admitted that he had not spoken with the Shrewsbury fire chief, nor had he actually investigated Developer’s equipment or other areas of the plant, but had read accounts of the fire and damage from the local newspaper, and had reviewed Developer’s specification sheets for the equipment.

B. A draft report prepared following commencement of the civil case for Power's former president C. E. Owe ("CEO") by analyst Ace Chemistry, stating that Ace's chemical analysis indicates a strong possibility that some industrial debris (as opposed to clean wood) was being burned at the plants, but that further tests are needed. You were copied on the "cc" line, as was Developer's president and general counsel.

C. An email from former president CEO to his wife Wendy (who happens to be the Shrewsbury plant manager) with the text, "Ace Chemistry burns me up – we should fire him before he produces a final report. A little industrial debris never hurt anyone. Besides, who do those neighbors think they are?" CEO has not been seen since shortly after the neighbors filed their lawsuit.

D. Testimony by an insurance adjuster that the insurance premiums for Power's Connecticut plant were increased 30% for 2007 based on the evidence of industrial debris being used at the plant, notwithstanding Power's commitment and security measures to prevent use of industrial debris.

E. An electronic version of a business plan prepared by Industrial Debris, Ltd., found via a link on the Connecticut Secretary of State's website. The plan states that Industrial Debris, Ltd. seeks to enter into industrial debris supply contracts with power plants throughout New England.

F. Pencil notes of Penny Purchaser in the purchasing department for Power's Connecticut plant, as follows: "09/17/2005 Meeting with Industrial Debris sales reps. They say industrial debris is just like wood, cheaper, more output, discount 25% if purchase now for '06. Check for compatibility with Developer's equipment." Penny tells you she can't remember this meeting.

QUESTION VI - JULY 2008

You are a new public defender, assigned to represent Harry Hothead, who has been charged with first-degree murder in connection with the shooting death of his neighbor, Nora Needles. Harry's past criminal record consists of a misdemeanor conviction for shoplifting and several driving-related offenses. He has been living in the ground floor apartment of a multi-unit apartment building for several years, holding down a job at a local bakery (requiring him to rise at 4 a.m. and work until 2 p.m.), and staying out of trouble. His after-work routine typically involved going to the gym, preparing and eating dinner, watching the 7 p.m. news and then going to bed around 8 p.m.

Two weeks ago Friday, a new neighbor, Nora Needles, moved in to the apartment directly above Harry. Problems began almost immediately. The first Monday following Nora's arrival, Harry was awaked at midnight by the sound of Nora's motorcycle pulling into the driveway, following by running feet on the stairs and then music from Nora's stereo. After trying to go back to sleep, Harry finally got out of bed, went upstairs and knocked on Nora's door. Nora opened the door and immediately Harry could smell alcohol on her breath. Nora took one look at Harry, laughed,

and before Harry could speak, slammed the door in his face. The stereo was then turned down. Too tired to deal with the situation further, Harry went back to bed.

The next night, and the night after that, the pattern repeated itself – Harry was repeatedly awakened by noise from Nora’s apartment. After three days, Harry was exhausted and his nerves were beginning to fray. On Thursday evening, before going to bed, he left a note on Nora’s door requesting once again that she try to keep the noise down when she returned home. At 2 a.m. on Friday morning, Harry was awakened to the sound of Nora repeatedly revving her motorcycle outside Harry’s bedroom window, the bike’s headlight shining directly into the room.

Harry had had enough. He retrieved a .38 Special from the top shelf of his closet, and went out to confront Nora. As Harry approached her, Nora continued to rev the bike. Harry screamed for her to stop and then raised the gun, firing a single shot toward the motorcycle. The bullet struck Nora in the chest, killing her. Dazed and terrified, Harry turned and retreated into his apartment. Other neighbors, alerted by the noise, called the police.

The police arrived and immediately cordoned off the area and surrounded the building. After speaking with area residents and determining that Harry was the likely shooter, they telephoned his apartment. When Harry picked up the phone, they said, “We heard you had some trouble up there. Is anyone else hurt?” Harry responded, “She was really getting on my nerves. I finally had to shut her up.” He then hung up. After a two-hour standoff, the police talked him out of the building and he was put in handcuffs and into the back of a police cruiser for transportation to the police department.

During the drive, the officers chatted about the weather and sports while Harry remained silent. Finally, as they approached the station, Harry said, “You know, I really didn’t mean to kill her. I just wanted to put a scare in her.” The officers told him to keep quiet about it until they got him inside. Inside the station, Harry was searched, booked, and fingerprinted, then taken into a conference room and given the Miranda warnings. He said, “Well, I already told you some of this anyway, so I might as well talk to you now,” and he then waived his rights, signed the consent form, and gave a complete statement.

Harry is charged with first-degree murder. Now you must defend him. To prepare for trial, please do the following.

1. Evaluate the likelihood of success of a motion to suppress each of Harry’s statements to the police: the statement on the telephone; the statement in the police cruiser; and his complete statement at the police station.
2. Evaluate the likelihood of success of a motion to include lesser-included offense instructions in the charge to the jury.

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