



**FEBRUARY 2013**

**EXAMINATION QUESTIONS  
AND  
MODEL ANSWERS**

**APPLICANT'S ANSWERS TO QUESTIONS  
NEVADA BOARD OF BAR EXAMINERS**



# **FEBRUARY 2013 EXAMINATION QUESTIONS**

**APPLICANT'S ANSWERS TO QUESTIONS  
NEVADA BOARD OF BAR EXAMINERS**

**- EXAM 1, QUESTION 1 -**

**FEBRUARY 2013**

**EXAMINATION NO. 1;**

**QUESTION NO. 1: ANSWER IN LIGHT BLUE BOOKLET**

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Bob and Larry are neighbors. Bob is upset that Larry's dog barks nonstop each morning from 4:00 a.m. to 8:00 a.m. Bob has asked Larry to stop his dog from barking during the early morning hours, but Larry refuses to keep the dog quiet. Larry's dog is a prize-winning hunting dog. Larry has repeatedly boasted to Bob that he charges high stud fees for breeding the dog due to the dog's hunting abilities.

Early one morning, Bob walked into Larry's yard and shot the dog with a pellet gun. Alarmed to hear his dog yelping, Larry ran outside to see Bob brandishing a gun over his dog. When Bob saw Larry, Bob menacingly pointed the gun in Larry's direction. Larry, fearing the pellet gun was a deadly weapon, dropped to his knees and begged Bob not to shoot him. Bob lowered the gun and went back to his house to get some sleep.

Larry's dog survived being shot, but the dog became fearful of guns and never hunted again. As a consequence, Larry was no longer able to charge high stud fees for breeding the dog. Larry lost approximately \$20,000 in stud fees in the months following the shooting.

After the gun incident, Larry became very upset and withdrawn. Larry suffered disabling migraines and was unable to leave his home for extended periods of time due to his paralyzing fear of guns. Larry sought medical and psychiatric treatment to alleviate his migraines and anxiety.

**Fully discuss all civil claims and defenses existing between Bob and Larry.**

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1)

**===== Start of Answer #1 (724 words) =====**

The following are the civil claims between Bob (B) and Larry (L), as well as any defenses.

Private Nuisance - This is when a reasonable person loses the quiet enjoyment of his property.

The court will look to factors such as coming to the nuisance, can the nuisance be abated without undue burden, is the nuisance the kind that would affect a reasonable person.

Here, L's dog barks from 4 a.m. till 8 a.m., it barks nonstop. Most people sleep between those times. The reasonable person might be able to sleep through some sparse barking during those hours; however, the barking is nonstop. B asked L to stop his dog from barking but L has refused to do anything. Here, it wouldn't take much to stop the barking, L could let his dog sleep inside his house at night. This would be an easy fix and wouldn't burden him too much. B would have a strong case of nuisance against L.

Hypersensitive - a defense to nuisance could be that the claimant is not a reasonable person and that he is hypersensitive. However, as aforementioned, B meets the reasonable standard and he cannot enjoy his land with the barking dog.

Trespass - this is an intentional act that breaks the barrier of someone else's property. Here, B walked into L's yard without invitation or any other legal right. He would be guilty of trespass. He has no valid defense.

Battery - this is the intentional offensive touching of another. Here, L will claim that when B shot his dog it constituted battery on the dog. However, a battery can only be had to a human person and not an animal.

Intentional infliction of emotional distress (IIED) - this requires extreme and outrageous conduct & an emotional manifestation. Here, B shooting L's dog with a pellet gun would count as extreme and outrageous conduct because it is something that is above and beyond reasonable action.

Also, when B menacingly pointed the pellet gun at L's direction, L reasonably thought that the gun was real, L dropped to his knees and begged B not to shoot him. Again his belief that the gun was real could be reasonable.

In addition, IIED requires that there is a physical manifestation of damages. Here, L has become very withdrawn, he has disabling migraines, has a paralyzing fear of guns and has sought medical and psychiatric treatment to alleviate his migraines and anxiety. The migraines and anxiety satisfy the physical manifestation prong of IIED.

Defense - will argue that his conduct of pointing a pellet gun in L's direction doesn't constitute extreme and outrageous conduct. B will claim that the reasonable person would know that the gun was not a deadly weapon because it doesn't sound like a real gun when fired and the barrel exit hole is much smaller than that of a real gun. B will also claim that he didn't point the pellet gun at L but was just pointing it in L's direction, so L couldn't reasonably believe that B would possibly shoot L. This argument will fail because a reasonable person hearing a yelp like L did, seeing his dog down, the seeing B menacingly pointing a gun in his direction could reasonably

believe the gun is real.

Assault - this is the reasonable apprehension that one is about to inflict immediate battery on another. This is satisfied when L was alarmed hearing his dog yelp, then seeing B brandishing the pellet gun toward his direction, which made him drop to his knees and beg for his life. As discussed earlier, his apprehension was reasonable and L could claim Assault.

Intentional contractual interference - This is when a person deliberately causes another person from entering into future business.

Here, L repeatedly boasted to B about his dog. He told him the dog is a prize-winning hunting dog and that B charges high stud breeding fees. After the shooting L's dog has been fearful of guns and has never hunted again & as a consequence L has not been able to charge the high breeding fees he used to. L has lost \$20,000 in stud fees in the months following the shooting.

B will claim that there was no contract in place where his action interfered with. B will claim that such fees are speculative at best.

===== End of Answer #1 =====



# **FEBRUARY 2013 EXAMINATION QUESTIONS**

**APPLICANT'S ANSWERS TO QUESTIONS  
NEVADA BOARD OF BAR EXAMINERS**

**- EXAM 1, QUESTION 2 -**



**FEBRUARY 2013**

**EXAMINATION NO. 1;**

**QUESTION NO. 2: ANSWER IN RED BOOKLET**

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Dan and Cody lived across the street from Melissa, an attractive college student. Melissa lived alone in a two-bedroom house with a basement. Melissa usually left for her classes at 9:30 a.m. and would return home around 1:00 p.m. Cody noted this and suggested to Dan that they should try to get into her house while she was away and take anything of value. Dan agreed. The next morning Dan watched Melissa leave, crossed the street, and entered Melissa's house through an unlocked basement window.

Melissa went home after her classes. When she opened the door to her bedroom closet to hang her coat, Dan jumped out and pushed her back onto the bed. He had a knife and a rope in his right hand. Melissa immediately recognized the rope as the one she used to tie her yoga mat. She also recognized the knife as one from her kitchen. Melissa and Dan struggled with each other on the bed. Dan got on top of Melissa who kept her eyes closed and screamed for him to leave. Dan grabbed Melissa and threw her onto the bedroom floor. He slammed the bedroom door and ran out of the house leaving the rope and knife behind.

Melissa called the police. While she waited, Melissa noticed the top of her dress had been cut, leaving her partially exposed. In her bedroom closet she found Dan's hat and a roll of duct tape on the floor. Melissa also discovered that her laptop computer had been used that morning to visit several pornography websites. Finally, Melissa determined that an heirloom diamond bracelet given to her by her grandmother was missing.

Dan told Cody what happened at Melissa's house and gave him the bracelet. A few weeks later Cody pawned the bracelet. After the pawnshop owner informed the police of this transaction, Cody was arrested for possession of stolen property. Cody voluntarily told the police that Dan had given him the bracelet. He also told them what Dan said had occurred in Melissa's house. Cody also mentioned the conversation he and Dan had about going into Melissa's house. Cody later wrote a signed statement containing the same information. Based on Melissa's report to the police and Cody's statements, Dan was arrested.

At Dan's trial, Melissa could not positively identify Dan as the man who had attacked her. However, the prosecutor established Dan's identity by: (1) Cody's written statement to the police; and (2) DNA evidence collected from both the hat and the knife. As to the DNA evidence, the prosecutor used audiovisual equipment in court to present the live testimony of a forensic analyst. This allowed the analyst to testify from her lab across town instead of coming into court. The analyst testified as an expert witness about the contents of a report that had been prepared by her colleague who was on leave.

**1. Did the trial court commit constitutional error by admitting Cody's statement and the prosecution's DNA evidence? Explain your answer fully.**

**2. Based on the foregoing facts, please identify and discuss each of the felony offenses (common law and/or statutory) that you find Dan to have committed.**

**3. Based on the foregoing facts, please identify and discuss each of the felony offenses (common law and/or statutory) that you find Cody to have committed.**

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2)

===== Start of Answer #2 (2509 words) =====

I will discuss each part of the question separately.

### **1. Possible Constitutional Error**

I will first discuss the constitutionality of the trial court's admission of Cody's statement. As is relevant to this question, the trial court admitted into evidence Cody's written statement to the police which included evidence that: (1) Dan gave Cody the diamond bracelet; (2) Dan told Cody about everything that happened in the house, and Cody detailed those actions; and (3) Dan and Cody had discussed going into Melissa's house. First, it should be noted that this is hearsay testimony. Second, this statement is also potentially problematic if it was the uncorroborated testimony of a co-conspirator, which as discussed below, Cody is a co-conspirator of Dan. In this case, however, the testimony is at least mostly corroborated through the testimony of Melissa and the DNA evidence which placed Dan at the scene of the crime. Hearsay might also not be a problem here if Cody is unavailable or there are other sufficient indicia of reliability. The problem, constitutionally, however, comes with the Confrontation Clause, which is not coextensive with the hearsay rules. Dan has a federal constitutional right to confront the witnesses against him in a criminal trial. The confrontation clause applies to statements that are testimonial in nature. Thus, an excited utterance by Cody, which would fall under a hearsay exception, would also likely not create any Confrontation Clause problems because it was provided without an eye toward litigation. In this case, however, Cody's written statement to the

police, and all information that he had previously orally provided to the police was undoubtedly with an eye toward litigation and would be testimonial in nature. This is not a situation where the police were asking questions to determine the state of an emergency, such as finding a presently armed and dangerous gunman. Such statements to police would likely be found to be non-testimonial. Therefore, because Cody's statement was testimonial, he was required to be present in court and subject to cross-examination, since the statement was not previously taken in a setting where he was under oath and subject to cross-examination with fair notice to Dan about the subject that it would be used for. The trial court's admission of Cody's statement, therefore, was a violation of the Confrontation Clause which has been incorporated as against the states through the Due Process Clause of the Fourteenth Amendment, which is applicable to the states.

Second, the trial court admitted expert evidence interpreting the results of DNA tests conducted on DNA recovered from both the hat and knife found at the scene of the crime. First, this presents a Confrontation Clause problem as well, but for a different reason than above. Regarding the admission of the expert's DNA testimony, the DNA evidence cannot come in alone, it is only effective with the testimony of an expert. Here, the expert did testify, but did so through a live audiovisual presentation, that is, the expert was not physically present in the courtroom. In Nevada, audiovisual testimony is permitted in certain circumstances, but only with exceptional circumstances shown. Here, there is no problem with the Confrontation Clause's desire for allowing cross-examination, but the right has been read more broadly to allow personal confrontation. This is not, however, a strict rule. In fact, particularly in cases like child sex abuse, a court might find that the only way a child can testify without incurring great physical and

emotional harm is to testify via live, one-way TV. This is not to be lightly presumed, however, and the facts in this case, that the expert merely did not want the inconvenience of traveling across town to testify in-person would definitely not meet the burden of overcoming the Confrontation Clause. Thus, the Confrontation Clause would be violated even though the individual was subject to contemporaneous cross-examination. This is the only constitutional error, though there are other probable errors due to hearsay (the expert did not prepare the opinion), and other rules of evidence. Since those possible errors are not of constitutional magnitude, however, I do not reach those issues in this question.

## **2. Dan's Potential Common Law and Statutory Felony Offenses**

Dan faces a plethora of potential common law and statutory felony offenses. I begin with a list and will subsequently detail my analysis below. Dan may have committed the following felony offenses: (1) conspiracy, (2) attempt, (3) criminal trespass, (4) burglary (statutory, not common law), (5) robbery/attempted robbery, (6) attempted rape, (7) attempted sexual assault (statutory felony in Nevada, closely analogous to common law rape), (8) assault/assault with a deadly weapon, (9) kidnapping, (10) larceny/conversion, (11) grand larceny (Nevada statutory offense), (12) possession of stolen goods, and (13) conspiracy to sell stolen goods. Because conspiracy and attempt may apply to multiple of these felony offenses, I will discuss the conspiracy or attempt for each individual named offense with that named offense.

### **1. Criminal Trespass**

Criminal trespass is a statutory offense in Nevada. Criminal trespass is committed when a person wilfully and feloniously enters a property without consent with the intent to commit a felony therein. Here, Dan possessed the wilfulness and felonious intent when he entered Melissa's house. The act was wilful, because Dan did the act purposefully with a bad intent, that is, the intent to commit a felony therein. It is undisputed that in Dan's conversation with Cody, his intent to enter Melissa's house and commit statutory robbery and larceny was present prior to entering the house. Moreover, this also establishes the requisite felonious intent because Dan intended to commit the above named felonies, and potentially more given his subsequent physical altercation with Melissa that suggests that Dan personally also entered with the intent to rape Melissa. Thus, Dan committed criminal trespass. Because Dan successfully completed the crime, his attempt merged with the completed offense. Conspiracy is, however, a separate offense, and the evidence shows that he conspired with Cody to commit the criminal trespass when they cased Melissa's house and discussed entering while she was gone to steal all of the valuable that could be discovered therein.

## 2. Statutory Burglary

Dan would not be guilty of common law burglary because he did not enter the house at night. That one element would preclude a finding of common law burglary. However, in Nevada, statutory burglary is more encompassing, particularly, the nighttime requirement is missing. In Nevada, burglary requires the felonious entry into a protected structure (of which a house is

definitively a protected structure) with the intent to commit a felony. In this case, felonious entry has already been shown above and Dan clearly committed a breaking into the house with the intent, as shown above, to commit a felony. Thus, Dan committed statutory burglary in Nevada, but not common law burglary. Because Dan successfully completed the crime, his attempt merged with the completed offense. Conspiracy is, however, a separate offense, and the evidence shows that he conspired with Cody to commit the statutory burglary when they cased Melissa's house and discussed entering while she was gone to steal all of the valuable that could be discovered therein.

### 3. Robbery

Dan has committed common law and statutory robbery. Robbery is essentially a larceny that requires the force or threat of force against an individual. In Nevada, statutory robbery is even more broad, because the threat of force can be in the future and can be directed to someone in your group. Here, Dan had the yoga mat rope and knife that Melissa recognized while he was actually applying physical force to her. Dan did not actually end up taking those items, but he already had them when he applied the force (as well as presumptively the diamond bracelet), so he was committed robbery. Dan's attempt merges with the completed offense. Robbery is a foreseeable consequence of burglarizing a home, even though they timed it so Melissa would be gone, so Dan would also be guilty of conspiracy.

### 4. Attempted Rape and Sexual Assault

In Nevada, rape is statutorily prohibited under the name of sexual assault. Here, Dan has not actually committed rape or sexual assault. Both crimes require sexual penetration of another, with an object, against the will of the other person. It is undisputed that Dan has not committed rape or sexual assault. However, Dan has clearly committed an attempt. Dan grabbed Melissa, forced her to the bed where he struggled with her, Dan did so with a rope and knife in his hand, Dan got on top of Melissa, Melissa closed her eyes and screamed for Dan to leave, and Melissa's dress top had been cut leaving her partially exposed. The only thing that was not completed was the sexual penetration. Nevada does not require an overt act, but there is plenty of overt act present here to prove an attempted rape. There would be no conspiracy, however, because this was outside the scope of the conspiracy between Dan and Cody, they had only discussed burglary, not rape and there is no evidence suggesting that Cody should have foreseen this. Conspiracy takes more than one person. Thus, Dan committed attempted rape and sexual assault.

## 5. Assault

Assault involves the use of physical force against another, or the placing that person in fear of imminent bodily injury. Assault with a deadly weapon is similar but requires the use of a deadly weapon and the threat of severe bodily injury or death. Here, Dan pushed Melissa, threw her on the bed and struggled with her, tore her dress, and threw her to the floor. This was physical force applied against Melissa putting her in fear of imminent bodily injury. Moreover, Dan had a knife while he was doing this, which makes him also guilty of assault with a deadly weapon. In



Nevada, both the common law and statutory versions of assault and assault with a deadly weapon would be satisfied. Dan would also likely be guilty of conspiracy to commit assault because assault would be presumed within the scope of the conspiracy since it involved the risk of encountering the person who was possibly in the home or would return.

## 6. Kidnapping

Kidnapping, both common law and statutory, requires that a person be held against their will. The common law also requires that the person be moved. Here, both would be met. Dan's actions in holding Melissa against her will and not allowing her to run away by pushing her to the bed and holding her there when she desired to leave, when she had not been there in the first place, is a kidnapping. The movement need not be large, but is sufficient in this case and does not present a situation where Melissa was just kept where she had willingly gone. Thus, Dan committed common law and statutory kidnapping. Conspiracy would probably not lie here because kidnapping is likely outside the scope of the conspiracy.

## 7. Larceny/Conversion

Larceny at common law, requires asportation. In Nevada, under statute, asportation is not a requirement. However, Dan is guilty of both common law and statutory larceny because he took the diamond bracelet. There might be some question as to whether the use of Melissa's laptop computer to view pornography is larceny, and it is doubtful that it is, because there is no

evidence that Dan took anything of value. Thus, Dan committed common law and statutory larceny. Dan also committed common law conversion, however, by taking the bracelet. This would not be false pretenses, however. Conspiracy to commit these offenses has also been committed.

#### 8. Grand Larceny

In Nevada, grand larceny is a statutory offense where more than \$650 has been taken. Since it is likely that the bracelet stolen, as discussed above, was worth more than \$650 because it was diamond, Dan probably committed grand larceny. Dan is also guilty of conspiracy to commit this offense.

#### 9. Possession of Stolen Goods

Dan is guilty of possession of stolen goods. This is a statutory offense in Nevada that is committed when a person knowingly possesses stolen goods. Dan knew the goods were stolen because he took them and was in possession of them. Dan is also guilty of conspiracy to commit this offense because it was part of the scope of the conspiracy, that is possession of stolen goods was a necessary part of their conspiracy to burglarize Melissa's house.

#### 10. Conspiracy to Sell Stolen Goods

In Nevada, it is a statutory crime to knowingly sell stolen goods. Here, Dan did not actually sell the stolen goods, Cody did. However, there is enough evidence to suggest that through their conspiracy to commit burglary, etc. and Dan's subsequent giving of the bracelet to Cody and Cody selling it, that it was within the scope of the conspiracy that Cody would sell the stolen goods and split the money with Dan. Thus, Dan has conspired to sell stolen goods. However, this case is interesting because Cody only pawned the bracelet. This could make it difficult to establish that Cody actually sold the bracelet. Regardless, the conspiracy is still viable.

### **3. Cody's Potential Common Law and Statutory Felony Offenses**

I will discuss Cody's potential common law and statutory felony offenses separately.

#### **1. Conspiracy**

Cody has conspired to commit: (1) criminal trespass, (2) statutory burglary, (3) robbery, (4) assault/assault with a deadly weapon, (5) and larceny/conversion/grand larceny. As discussed in-depth above, Cody had conspired with Dan to burglarize Melissa's home and take everything of value. Cody has thus conspired to commit all of those specific and FORESEEABLE offenses. For this reason, Cody is also on the hook for such offenses as assault and assault with a deadly weapon. It is understood and foreseeable, that Dan, in the commission of the burglary will commit certain other ancillary offenses, and the law will hold Cody liable for those foreseeable crimes. All of the stated crimes thus fall within the scope of the conspiracy (as discussed more

above) and Cody is guilty of conspiracy to commit them. Cody IS NOT guilty of conspiracy to commit attempted rape/sexual assault or kidnapping. These offenses are outside the scope of the conspiracy, unless Cody knew about Dan's proclivities, and as such he cannot be charged with those crimes.

## 2. Possession of Stolen Goods

Cody is guilty of possession of stolen goods, as discussed above. Dan told him what happened and Cody knew where the bracelet came from. Thus, he knowingly possessed a stolen good and is guilty. He is also guilty of conspiracy to commit this crime because it was within the scope of the conspiracy.

## 3. Sale of Stolen Goods

Cody is probably not guilty of sale of stolen goods because he only pawned the goods. Though, it is likely that the prosecution could establish the equivalent of a sale if information were provided that Cody did not intend to come back to reclaim the bracelet. Thus, in effect he would have sold the bracelet which he knew to be stolen. Moreover, he would probably be guilty of conspiracy to sell stolen goods because this was part of the scope of the conspiracy.

===== End of Answer #2 =====

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# **FEBRUARY 2013 EXAMINATION QUESTIONS**

**APPLICANT'S ANSWERS TO QUESTIONS  
NEVADA BOARD OF BAR EXAMINERS**

**- EXAM 1, QUESTION 3 -**

**FEBRUARY 2013**

**EXAMINATION NO. 1;**

**QUESTION NO. 3: ANSWER IN DARK GREEN BOOKLET**

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Ann owns Lot A and Brad owns adjacent Lot B to the east of Lot A. Both lots are in Nevada. Ann owns a house on Lot A. Lot B is landlocked. There is a paved road on the west side of Lot A. With Ann's permission, Brad rides his motorcycle over a dirt path across the north edge of Lot A as his only access to the paved road. Ann also uses the dirt path for access to the paved road, but uses other less direct routes as well. Brad, grateful to Ann, writes to Ann saying that she and her family may swim in his pond located on Lot B. Ann writes a letter back to Brad saying that Ann covenants for herself and her successors and assigns to always keep the house on Lot A painted and in good repair.

Ann subdivides and deeds the vacant western half of Lot A to Charlie, as Lot C, for a discounted price. In the deed, Ann reserves a specified right of way across Lot C for future utility lines in favor of remaining Lot A and Lot B. Ann sells all of remaining Lot A to Debra and Debra properly records the deed with Ann's letter to Brad. Debra constructs a power line over the right of way across Lot C, and also digs a ditch in the right of way for an underground water pipeline. Brad conveys a life estate in Lot B to Edward. Subsequently, a highway is built on the east side of Lot B so that it is no longer landlocked.

**Please fully discuss all real property interests of Debra, Edward and Charlie with respect to:**

- 1. The pond on Lot B;**
- 2. The house on Lot A;**
- 3. The dirt path; and**
- 4. The right of way across Lot C.**

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3)

===== Start of Answer #3 (1702 words) =====

### Essay 3

#### 1. The pond on Lot B

Brad granted Ann an easement in gross to Ann and her family allowing them to enter onto his property to swim in his pond. An easement in gross creates a right in another to enter one's property in for a certain purpose. Here the right was given to Ann and the purpose was to allow her to swim. Any transfer in an possessory interest in land that is greater than 1 year in length must be in writing to satisfy the statute of frauds. Here the easement was in writing because Brad wrote this to Ann.

#### Covenant that runs with the Land

In order for this to be a covenant that runs with the land see below.

This is not a covenant because it does not touch and concern the land - like a promise to maintain property, pay rent, etc. (see covenants that run with the land below). This is more likely going to be an easement in gross which is not transferable to anyone other than Ann and her family.

B may have granted A a license to use the pond as well. See below.

## **2. The house of Lot A**

Unlike the easement in gross given to Anne by Brad, the promise Ann makes to Brad concerning the house is not a possessory interest in her property. Rather it potentially is a covenant to keep the house painted and in good repair. If this constitutes a covenant, Ann may be required to maintain this covenant and it would be enforceable against her, her heirs, and assigns by Brad and those who own the property after him. In order for a covenant to be enforceable there must be notice, intent, privity, and the promise made must touch and concern the land. The real issue here, however, is whether Brad will be able to enforce this covenant against D.

### **Intent**

In order for the covenant to run with the land the original promisee and promisor must have intended for it to do so. Ann, as the promisor, stated in her writing to B that the covenant was for herself and her successors. Because she named her successors specifically, she likely had the intent that the covenant would run with the land.

### **Privity**

In order to show privity for a burden to run with the land and burden subsequent purchasers, there must be vertical privity and horizontal privity. Where the initial owners who enter into the promise share something other than mere ownership of adjacent property there is horizontal privity. Here the original owners, A and B, made a promise and thus shared something in common other than the mere land ownership. Anne made a promise to keep the house painted



and maintained, this constitutes an agreement between A and B, linking them together beyond mere property ownership.

Vertical privity is shown when the subsequent purchaser is in the direct chain of title with the original promisee or promisor. Here Ann sold the Lot to Debra and includes her letter in to B in the deed. As such, Debra is in the direct chain of title .

### **Notice**

For a covenant to be enforceable, there must be notice. The notice can be apparent, inquiry, or record notice. Here Brad was given notice because Ann wrote him a letter stating the promise to the notice as to him is apparent. It is not certain whether Brad or Ann recorded this notice so it cannot be shown that anyone who purchases Brad's house will be able to enforce the promise based on record notice, but they might still be able to if they can show apparent or inquiry notice. The issue here is whether D now owes the duty to B. once Debra bought the house, thy burden would be upon her to keep it painted and in good repair. The facts show that Ann properly records the deed with Ann's letter to Brad. As such, whether D has actual or inquiry notice of the covenant, she is deemed to have record notice of the covenant because it was recorded by Ann. As such she fulfills this requirement.

### **Touch and Concern**

A covenant touches and concerns the land if it is not merely a personal promise to do some act

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but it actually involves the land or the realty on it. Here the house is on the land and it is real property. The promise was to maintain the house or real property and to keep it painted. As such, the covenant touches and concerns the property.

B can enforce the burden in equity against D if she fails to maintain and keep the house painted because all the requirements are met for the covenant to run with the land. Charlie is not involved with this because the house is not on his property and the covenant pertains to the property the house is on and the property that receives the benefit of the covenant (Brad's property).

### **3. The dirt path**

#### **Oral License**

Originally A made an oral agreement to allow B to use the northern portion of Lot A to access the paved road. The problem with an oral agreement is that in order to satisfy the statute of frauds, a possessory interest in property that is greater than one year in duration must be in writing in order to be enforceable. As such, an oral license was probably granted to B by A. The problem with a license is it can be revoked unless there has been detrimental reliance or factors of estoppel arise.

#### **Easement by Necessity**

Despite the possible creation of a license in Brad to use the dirt path, Brad can claim that he has an easement by necessity across the dirt road in order to get access to the highway. An easement

by necessity arises when a lot is landlocked and it does not have any possible method of ingress and egress for access. Here the facts state that the eastern lot B is landlocked. As such, Brad would have a right to use some sort of path through A's lot to get access to the paved road. When an easement arises there is a dominant tenement and a servient tenement. The dominant tenement is the lot that receives the benefit of the easement while the servient tenement is burdened by the easement. As a result of this arrangement, the servient tenement can decide a reasonable location for the easement which A did by allowing B access to the dirt road. Additionally, the servient tenement can use the easement along with the dominant tenement. Additionally, the servient T can request contribution for maintenance of the easement from the Dominant T as well. Lastly, the dominant T cannot go beyond the original scope of the easement which in this case was dirt road access for travelling to the highway.

When A transferred away her land, both to C and to D, the question is whether the easement by necessity remained in effect. There are no facts indicating that A or B recorded the easement so there is no record notice. However, as long as the necessity exists, the easement will remain. As such, the easement will transfer with the land to subsequent servient and dominant T's until it is extinguished. The facts state that a highway is built along lot B so that it is no longer landlocked. At that point, the easement by necessity is extinguished. The only way B can enforce an easement over the dirt road after that is if he got an easement in some other fashion (i.e. express or adverse possession). The facts do not state otherwise so once the highway is built B's easement is extinguished.

#### **4. Right away across Lot C**

##### **Easement by reservation**

The facts state that when A sells her property to C, she reserves a specified right of way across Lot C for future utility lines in favor of remaining lot A and lot B. What A did here was attempt to create an easement by reservation for utility lines across the portion of land she sold to C.

Because she recorded in the deed, the easement satisfies the SOF requirements. An easement by reservation occurs when one explicitly reserves one in the deed upon sale. Here C is on notice of the easement because it was explicitly reserved in the deed. As such, there is a right away specified for utility lines that will benefit lots D and B. The question here however is what is the scope of this easement.

##### **Adverse Easement**

The facts state that D not only uses the easement for utility lines but also for a ditch. The stated use of the easement is for utility lines, so that is okay because it is within the stated scope. The issue however is whether the ditch goes beyond the scope expressly reserved in the original easement. If this is the case, C has a right to enjoin the use of ditch and restore the land to its original state (keeping the utility lines because they are allowed however). D could argue that utility lines include pipes and as such she is within the scope originally contemplated. This is likely an argument that will pass muster because water and power are both considered utilities. In the alternative, C could attempt to get an adverse easement for the ditch if she meets the statutory requirements in NV for such an action. Typically this requires open and notorious use,

continuous uses, exclusive of the true owner, the use must be hostile, and for the statutory minimum period. Here the use obviously open and notorious because it is a ditch and C would be able to see it if it is above ground. At the very least if the pipes were laid he would have seen then ditch being dug. Additionally, it is exclusive because she alone is using the pipes (does not technically have to be absolutely exclusive), it is continuous because the pipes are permanently in the ground. The only question remains is whether the use satisfied the statutory minimum period which is either 5 or 10 years.

===== End of Answer #3 =====

**END OF EXAM**



# **FEBRUARY 2013 EXAMINATION QUESTIONS**

**APPLICANT'S ANSWERS TO QUESTIONS  
NEVADA BOARD OF BAR EXAMINERS**

**- EXAM 1, QUESTION 4 -**

**FEBRUARY 2013**  
**EXAMINATION NO. 1;**  
**QUESTION NO. 4: ANSWER IN ORANGE BOOKLET**

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Dirk created “Miner” Internet marketing software. NY Ltd., a New York corporation, (hereafter “NY”) hired Dirk to modify Miner for its business. The parties agreed that Dirk would retain ownership of Miner, and NY would own the modified version. Because “New-Miner” did not meet company expectations, NY fired Dirk in July 2010.

Dirk relocated to Las Vegas and sold copies of Miner while looking for a new job. In August 2010, NY provided a false job reference regarding Dirk. NY wrote that Dirk “is an incompetent programmer who tried to pass off small changes to Miner as ‘major software development.’” In September 2010, Dirk learned about this reference.

In January 2011, NY sued Dirk in federal district court in New York (hereafter “NY lawsuit”). NY believed that Dirk was actually selling New-Miner rather than Miner. Trial evidence focused upon the technological differences between the two programs. The court found Dirk was selling only Miner. In late 2011, the court entered judgment in favor of Dirk. Neither party appealed.

Dirk contracted with LV Company, a Nevada corporation in Las Vegas, (hereafter “LV”) to install Miner on LV’s computer servers and be paid royalties for its use. In March 2012, NY demanded LV stop using the software, contending that LV was actually running New-Miner. LV in response removed the software from its servers and refused to pay Dirk any royalties.

While still in Las Vegas, FL, a Florida corporation with its principal place of business in Florida, (hereafter “FL-CO”) contacted Dirk regarding an open position. FL-CO negotiated the terms of Dirk’s employment via telephone and email. Dirk signed an employment contract, moved to Florida, and installed Miner for FL-CO.

FL-CO operated a website that provided product descriptions, pricing and contact information. Only email and telephone orders were accepted. Sixty percent of FL-CO’s average annual revenue came from Florida sales. Nevada sales accounted for only three percent.

In April 2012, NY sued Dirk, LV and FL-CO in federal district court in Las Vegas, alleging all defendants improperly used New-Miner. NY properly served a summons and complaint on each defendant in his or its home state.



Dirk timely responded to the complaint by filing and serving the following:

1. An answer that denied the installation and use of New-Miner;
2. A counterclaim against NY for defamation based on the job reference; and
3. A cross-claim against LV for failure to pay royalties.

NY moved to dismiss Dirk's counterclaim, citing the judgment in the NY lawsuit. Dirk's timely opposition asserts that his counterclaim addresses different issues than the New York lawsuit.

LV moved for summary judgment on Dirk's cross-claim. LV supported this motion with an internal memorandum, along with an affidavit from LV's lawyer that establishes Dirk had installed New Miner on LV's system. Dirk's timely opposition consists of a one-paragraph affidavit wherein he requests more time to oppose the motion and states he thinks more time will yield evidence to oppose the motion. Dirk argues that unspecified discovery will "likely reveal facts to support the cross-claim."

FL-CO challenged personal jurisdiction by filing a motion to dismiss. NY's timely opposition argues that personal jurisdiction is proper.

**Please state how the court should rule on each of the following motions and fully explain why it would be the correct ruling:**

- 1. NY's motion to dismiss;**
- 2. LV's motion for summary judgment; and**
- 3. FL-CO's motion to dismiss.**

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1)

===== Start of Answer #1 (1657 words) =====

**1. NY's Motion to Dismiss**

NY moved to dismiss D's countclaim for defamation based on the "false job reference" that stated that Dirk was incompetent as a programmer "who tried to pass off small changes to Miner as 'major software development.'" NY asserts the prior 2011 Judgment in the NY lawsuit as grounds for dismissal.

**Compulsory Counterclaim**

A compulsory counterclaim is one that must be asserted against a party, or else it is deemed waived. A claim is compulsory if it arises out of the same transaction or occurrence as the underlying claim. Whether D will be estopped from raising the defamation claim in the second suit between him and NY depends on whether the defamation claim arose out of the same transaction or occurrence as the 2011 suit.

In 2011, NY sued D for what seems to be misappropriation of a copyright license, or breach of contract for selling "New-Miner" to companies other than NY. The alleged defamation arose before the suit, where NY stated that D was incompetent at his job because he tried to pass "minor changes" off as major software development. NY will argue that the two claims- both unwarranted selling of what it thought was "New Miner," and a claim for defamation arose out of

the same transaction or occurrence of its hiring of D for the purpose of modifying the software for its business. NY's argument is strong, as the defamation claim would not have arisen without the D's work for NY.

However, D may argue that NY's alleged defamation was wholly independent from the underlying hiring and software modification, and rather arose from a separate transaction of a third party employer seeking a job reference. This argument is not exceedingly persuasive, since the initial connection between the two was for D to provide a software modification, which NY ultimately was unsatisfied with, which in turn caused it to make the statement.

Out of an abundance of caution, and since Dirk found about this statement in September, 2010, and since the lawsuit was brought in January, 2011, he should have brought the claim in the earlier proceeding. A compulsory counter claim that is not brought by the defendant will be considered waived. Thus, it is the court would grant NY's motion on these grounds.

### Preclusion

However, NY seems to be requesting to dismiss based on the "judgment" in the NY lawsuit, rather than D's failure to initially bring the claim in the NY lawsuit. Thus, it is likely that it is asserting either Claim preclusion (res judicata), or collateral estoppel (issue preclusion).

### Res Judicata

Claim preclusion, or res judicata, is found where there is a final judgment on the merits, where the parties in the first suit and the second suit are the same, both sides had a full opportunity to litigate, and the claim in both suits are substantially the same. D's counterclaim asserts defamation, which was never litigated in the first lawsuit. As such, claim preclusion is not met.

### Issue Preclusion

Similarly, Issue preclusion requires a final judgment on the merits, requires that the issue in question was actually litigated, and although it does not require identical parties, the parties in question with respect to the counter claim are identical (NY and D). There was no litigation of defamation or any issues contained therein. As such, the counterclaim will not be barred under a theory of issue preclusion.

Ny will not succeed in asserting either res judicata or issue preclusion. However, it may be successful in a motion to dismissed based on waiver.

## **2. LV's Motion for Summary Judgment**

\_\_\_\_\_Dirk properly brought a cross claim against his co-defendant, LV, for failure to pay royalties. LV seeks an order for Summary Judgment.

Summary Judgment is properly granted where there exist no issues of material fact, such that there is nothing for the jury or judge to decide. The court will consider the evidence in the light most favorable to the moving party. Here, D's claim asserts that LV failed to pay royalties. LV, on the other hand, has offered an "internal memorandum," as well as an affidavit from its own lawyer stating that D had installed New Miner, and implicitly stating that it should not have to pay royalties to D.

Even if the evidence that LV asserts is 100% true, it does not affirmatively establish that it should be excused from paying D the royalties that the parties originally agreed to. Even if D installed New Miner, rather than Minor, and the parties had a valid contract establishing such facts, it would not necessarily excuse D's performance. As such, there are triable issues of material fact that would be outcome determinative in this case. As such, the court should Deny LV's motion for summary judgment on D's counter claim.

### **3. FL-Co's Motion to Dismiss- Lack of Personal Jurisdiction**

A Federal Court has personal jurisdiction over a defendant who is domiciled in the state in which the court sits, a defendant who is served with process in the state, or where a substantial part of the claim arose in the state. Here, arguably much of the transaction arose in Nevada, where D negotiated and contracted with FL-Co (Hereafter "FL") via email.

### Long Arm Statute

However, if one of the above is not met, a state will have personal jurisdiction over a defendant to the extent of its long arm statute. Here, Nevada's long arm statute allows for jurisdiction to the constitutional limits.

### International Shoe

The constitution, under International Shoe, allows personal jurisdiction when it "does not offend traditional notions of fair play and substantial justice." Such is shown by establishing that the defendant has sufficient minimum contacts to the forum state, there is sufficient relatedness between the claim and those contacts, as well as a consideration of fairness.

### Minimum Contacts

Minimum contacts refer to the extent to which the defendant purposely availed himself to, or reached out to the forum state. Further, Minimum contacts contemplates whether it was foreseeable that the defendant would be haled to court in the forum state.

### Purposeful availment

Here, FL "reached" out to Nevada when it contacted D, a Nevada resident regarding an

open position. FL further negotiated an employment contract, which caused D, a NV resident, to move to Florida. FL additionally operates a website that gives product descriptions, pricing, and contact information. Further, NV is responsible for 3% of Florida's sales.

Website interactivity: In a landmark Nevada case involving a Tahoe casino, the Court held that a website will be considered to "reach out" to the forum state based on a sliding scale of "interactivity." A website is passive if it does not illicit consumer input, but rather just gives information. An "interactive" website is one that allows customer input, accepts orders, or, as in the landmark hotel case, accepts online reservations. FL will assert that it runs a passive website, based on the fact that no web-based orders are accepted. However, the FL site provides adequate information for NV residents on how to obtain products. NV sales are regularly made, in an amount of at least 3%. The website alone may not be seen as "reaching out" to the forum state, but the other contacts, and arguably the website as well, will be sufficient minimum contacts.

#### Foreseeability

When products are inserted in to the stream of commerce, it is reasonably foreseeable that they will end up in any state in which the company ships. Although FL only ships 3% of its sales to NV, it is still foreseeable that one of its sales could cause injury in NV.

As such, minimum contacts and foreseeability would probably allow NV to assert jurisdiction over FL.

### Relatedness

The degree of relatedness of the Defendant to the forum state is considered when determining jurisdiction. If a Defendant's contacts are so systematic and continuous that the defendant is essentially at home within the forum, the state will have general jurisdiction over the Defendant and he may be brought into court for any claim that happens in the state, even if unrelated to its contacts. A corporation is "essentially at home" where it is incorporated, and where it has its principal place of business. FL is a Florida based company who operates from Florida, and has its employees there, and makes most of its sales there as well. As such, it's not "essentially at home" in Nevada. Thus, in order for NV to have jurisdiction, it must have specific jurisdiction. Specific jurisdiction is met where the claim in question arises from the Defendant's contacts within the state. Here, NY asserts that FL is improperly using "New Miner," which arises from its hiring of an ex-NV resident, as mentioned above. As such, NV federal court will have specific jurisdiction to hear this case.

### Fairness

Under a consideration of fairness, a court will consider the State's interest, the Defendant's interests, and the Plaintiff's interests.

Here, Nevada has an interest in protecting the rights of its residents. However, at the



time, neither FL or the suing party NY are residents of NV. Only LV is currently located in Las Vegas. As such, it does not seem like there is a high state interest. The Defendant, FL, may assert that it will be exceedingly hard for it to travel to LV to meet its litigation and trial obligations. A court will consider this, but the disadvantages to the D must be exceedingly burdensome in order to find that jurisdiction is improper. As such, and since FL does do business with NV residents, even if slight, it is unlikely FL's interests will invalidate personal jurisdiction over it. Lastly, the court gives deference to the Plaintiff when choosing to bring suit. Here, NY chose to sue in Las Vegas, where at least one defendant resides. As such, the court will probably determine that NV is a proper place for jurisdiction over FL.

The court should deny FL's motion to dismiss based on lack of jurisdiction.

===== End of Answer #1 =====

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**END OF EXAM**



# **FEBRUARY 2013 EXAMINATION QUESTIONS**

**APPLICANT'S ANSWERS TO QUESTIONS  
NEVADA BOARD OF BAR EXAMINERS**

**- EXAM 2, QUESTION 1 -**

**FEBRUARY 2013**

**EXAMINATION NO. 2;**

**QUESTION NO. 1: ANSWER IN PURPLE BOOKLET**

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Paul organized a country western concert in Las Vegas during the time that a major rodeo was in town. He made the following arrangements for the concert:

**AUDITORIUM RENTAL**

Paul contracted with Alice, who owned Cowboy Auditorium, for the concert venue. Paul chose Cowboy Auditorium because it seats 20,000 people. The contract, which was signed by Paul and Alice, required any changes to be in writing and signed by both parties. The rental price was \$400,000.

Paul sold out Cowboy Auditorium for the concert. A month later, and three days before the concert, Alice informed Paul that the roof of Cowboy Auditorium had collapsed during a rainstorm and that it could not be repaired before Paul's concert date. Aware that competing 20,000 seat auditoriums were available, Alice quickly offered to rent Paul another auditorium that she owned, Suburban Auditorium, which has 10,000 seats. Alice told Paul that she would rent Suburban Auditorium to him for one-half the original rental price. Paul demanded that Alice have Cowboy Auditorium repaired before the concert, but Alice said that was impossible. Unaware of the other possible locations for the concert, Paul felt compelled to use Suburban Auditorium to avoid having to cancel the concert. Paul refunded the ticket price to 10,000 seat holders.

**SOUVENIR SALES**

Paul granted Vegas Concert Souvenirs the right to sell souvenirs at Cowboy Auditorium during the concert. All souvenirs sold were required to have the date of the concert and the names of the performing artists on the souvenirs. The written contract with Vegas Concert Souvenirs provided that Paul would receive one-half of the revenue from the souvenir sales. Vegas Concert Souvenirs imprinted the wrong date on the souvenirs. Paul was unaware of the date error on the souvenirs until the concert was in progress.

The day before the concert, Paul sent Vegas Concert Souvenirs an email stating that the concert had been moved to the smaller Suburban Auditorium. Paul apologized for the use of the smaller auditorium but told Vegas Concert Souvenirs that it was Alice's fault. Vegas Concert Souvenirs conducted sales at the smaller concert venue.

Vegas Concert Souvenirs' sales were much less than expected and only one-half of the souvenirs sold. Vegas Concert Souvenirs refused to pay Paul any money since the venue was moved to the smaller auditorium.

**1. Discuss fully all of Paul's claims against Alice and Vegas Concert Souvenirs and the anticipated defenses that would be raised.**

**2. Discuss fully all of Vegas Concert Souvenirs' claims against Paul and Alice and the anticipated defenses that would be raised.**

## EXAM 2, QUESTION 1

To have a contract there must be the following: offer, acceptance and consideration. If all of these are present we look to the terms of the contract to see what is going on. We then look to see if there was breach of these terms. Finally, we look to see if there were any damages incurred and if there are any defenses.

### AUDITORIUM RENTAL

Paul has offered to rent the Cowboy Auditorium from Alice for a sum of \$400,000.00. An offer is a manifested desire to engage in a certain course of conduct. Here we have a valid offer – Paul wishing to rent the auditorium. Alice has accepted the offer. An acceptance of an offer is an agreement to be bound by the terms of the offer. Here Alice has agreed to rent Paul the auditorium. Finally, for a contract, there needs to be consideration. Consideration is any legal bargained for exchange. Here the consideration was \$400,000 for use of the auditorium. The agreement is in writing and is signed by both parties. There is a valid agreement between Paul and Alice.

The terms of the contract indicate price and date. It is further adds that any changes in the contract must be in writing and signed by both parties.

Was there a breach? Yes. 3 days before the concert, the roof collapsed making the auditorium unavailable. Were there any damages due to the breach? Yes.

Paul chose the auditorium because of its seating capacity – 20,000 - which Paul sold out. Paul was forced to use a smaller auditorium for the concert and had to refund 10,000. Paul experienced damages in the amount of the lost profit from the 10,000 tickets and lost profit from the loss of sales of souvenirs to be sold at the concert. Paul may be out the money he expended prior to the concert. It does not look like Paul spent money looking for another venue so he would not get those as damages.

But does Alice have any defenses? Yes she does. Alice had a duty to present the auditorium as it was contracted. Here everything was going smoothly until the rainstorm. The roof collapse was not Alice's fault and she did not act in bad faith in not presenting the auditorium. Further because it collapsed 3 days before the concert Alice could argue impossibility in performance of the contract. Alice could also say that she attempted to mitigate Paul's damages by offering him a different venue at a discounted price, thus covering his losses.

Paul can counter and say you did not tender a perfect item. Further what you are offering is inferior. Additionally, you own this one.

Alice is aware that Paul has sold out the concert of 20,000 and that her venue is only 10,000. She is aware of the unilateral nature of this and the lack of buying power Paul has.

Alice is aware that there are other 20,000 seat auditoriums and that they were available. Paul was not aware of the other options and was forced to use Alice's solution. This contract was duress. Alice can say that it was not her duty to inform Paul of other options and he could mitigate his damages.

### SOUVENIR SALES

Paul granted Vegas Concert Souvenirs the right to sell souvenirs during the concert. Was there an offer? Yes. Vegas Concert Souvenirs accepted this and the consideration was Paul receiving  $\frac{1}{2}$  revenue from sales. The contract was in writing. The terms of the contract provided that all souvenirs were to have the names of the artists and the date of the concert. However Concert Souvenirs printed the wrong date.

By doing the wrong date, Vegas Concert Souvenirs breached the contract and in essence set no conforming items. Paul was unaware of this until the concert was started and could not change then.

Paul had no ability to decline the t-shirts as to mitigate any damages to him ( $\frac{1}{2}$  souvenir sales) by getting them corrected. One  $\frac{1}{2}$  of the souvenirs were sold, decreasing Paul's share by  $\frac{1}{2}$ . Paul will agree that but for the wrong date I would have made more money.

Vegas Concert will say look, you made less money because it was a smaller venue. In fact it was  $\frac{1}{2}$  the size – a direct reflection of the reduction in sales. Therefore, but for your breach you would have gotten more sales and this had nothing to do with us. In fact even with the wrong date we sold shirts.

Paul will argue that Vegas Concert sales breached by not paying him his owed commission, even though less. Vegas will argue that they are entitled to the money due to Paul's breach.

### VEGAS SOUVENIRS CLAIMS AGAINST PAUL AND ALICE

Vegas Concert Souvenirs entered in a valid contract with Paul. (see above) But Paul breached this contract by providing a smaller venue. Vegas Concert Souvenirs will argue that they anticipated being in front of 20,000 people not 10,000 and that Paul failed to perfectly tender what was in the contract. Further by this and the late notice they received they were unable to mitigate any damages that they might receive. They will claim that they are entitled to expectation damages from the breach of the contract. Paul will argue that yes the auditorium is smaller but you have a way of knowing who will buy what, so the risk of loss is on the seller, you. Paul will argue, I only granted you a license to sell, not a contract to buy, therefore you have no damages. In fact, Paul will argue that I too am damaged by this. Paul will argue that this is only a license and Vegas Concert Souvenirs is not entitled to any damages.

Paul will further argue that, not only was there no contract, your own mistake of printing the wrong date is what caused the decrease in sales. Vegas Concert will counter with the fact that other shirts were sold so there is nothing to prove the date played effect.

Paul will also argue against perfect tender. He will argue that he gave Vegas Concerts what was contracted for – a venue to sell.

Vegas Concerts will bring a claim of damages against Alice for failure to provide a 20,000 seat Cowboy Auditorium. They will argue that but for Alice's failure to deliver on the contract with Paul they would have benefitted.

Vegas will also argue that had more advanced notice been given to them by Paul, they could have minimized the production run of their t-shirts and mitigated their loss. They will argue that once Paul became aware, he should have notified them in a timely manner and did not. Paul will counter that he did.

Alice will counter that Vegas Souvenir is not an intended beneficiary of the contract between Paul and Alice. By not being a 3<sup>rd</sup> party beneficiary, Vegas Concerts is not entitled to anything from Alice and she does not have any duty.

Vegas Concert Souvenirs can counter by saying they are an intended beneficiary because all concerts sell t-shirts and they were a foreseeable actor in this.

Further by acting in bad faith, Alice denied them the ability to profit and therefore contributed to the damages suffered by Vegas Concert Souvenirs.





# **FEBRUARY 2013 EXAMINATION QUESTIONS**

**APPLICANT'S ANSWERS TO QUESTIONS  
NEVADA BOARD OF BAR EXAMINERS**

**- EXAM 2, QUESTION 2 -**

**FEBRUARY 2013**

**EXAMINATION NO. 2;**

**QUESTION NO. 2: ANSWER IN YELLOW BOOKLET**

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Shortly after 2:00 a.m., Las Vegas police officers arrived at the residence of Herbert, his wife Wanda, and their seven year-old daughter Darlene, a special needs child, in response to a dispatch call that the front door was wide open. They found Wanda's body at the bottom of a marble staircase in the entryway with her head in a pool of blood from a fatal head wound. Darlene was standing next to her mother's body, very agitated and upset.

Upon seeing the officers, Darlene said, "Daddy sent Mommy to dreamland. She's hurt real bad. I can't wake her up." One officer began to reach for his weapon and asked, "Is Daddy still in the house?" Darlene's eyes widened and she screamed, "Daddy ran away! Daddy ran away!" When a police officer asked, "Did Daddy hit Mommy?" - Darlene began sobbing uncontrollably and became incoherent.

Later, Herbert was seen sitting on a park bench. As soon as he saw police officers approaching, Herbert blurted out, "I didn't kill my wife." Herbert was arrested and later charged with killing Wanda.

The trial judge held a pretrial evidentiary hearing where Darlene was questioned. She could not identify the name of her school, the name of her teacher, or recall whether she went to school yesterday. When Darlene was asked whether it was bad if she told a lie, she said, "Only if you get caught." When Darlene was asked if she knew what a lie is, she responded, "Mommy always says I have to tell what really happened, but when I do, she gets real mean."

At the prosecution's request, Dr. Carol Parker, a consultant frequently used by Nevada lawyers, was present throughout the hearing. Dr. Parker has a graduate degree in child psychology, but is not licensed in Nevada. During her 35-year career consulting for various law enforcement agencies, Dr. Parker has evaluated over 200 child witnesses. Dr. Parker developed a technique for interpreting a special needs child's non-verbal responses to a question using the child's facial expressions and body language. Dr. Parker has authored a widely used textbook on the subject, which has been reviewed by other child psychologists. While most reviews support widespread use of the technique in criminal cases, a few reviewers question its use where the child has been under significant stress. No widespread testing of Dr. Parker's technique has occurred.

At a pretrial forensic interview, when Dr. Parker asked Darlene about dreamland, Darlene first said, "That's where we go when we sleep." Later, Darlene said, "It's like heaven - sunshine, blue skies, fresh air and brightly-colored flowers everywhere." When Dr. Parker asked Darlene what happened when Mommy got hurt, Darlene again began sobbing uncontrollably and became incoherent.

After the hearing and the forensic interview, Dr. Parker prepared a report in which she expressed her opinion that Darlene's statements and demeanor are not inconsistent with those of a seven year-old special needs child who saw her father kill her mother. Dr. Parker said that she based her opinion on (1) her academic training; (2) 35 years of experience in evaluating child witnesses; (3) her particular interview technique; (4) Darlene's statements and demeanor at the house on the night Wanda died; and (5) Darlene's testimony that she observed at the pretrial hearing.

**Please fully explain your answers to the following questions. Address only evidentiary issues, and assume that all appropriate objections are timely made at trial.**

**1. Is Herbert's statement to the police officer's question admissible:**

**(a) If Herbert testifies? If so, by which party?**

**(b) If Herbert does not testify? If so, by which party?**

**2. Should Darlene be permitted to testify at trial?**

**3. Should the police officers be permitted to testify regarding Darlene's statements in the entryway of the house on the night Wanda died?**

**4. Should Dr. Parker be permitted to testify as an expert witness regarding her opinion that Darlene's statements and demeanor are not inconsistent with those of a seven year-old special needs child who saw her father kill her mother?**

**5. Assuming Dr. Parker is allowed to testify, can she offer the following testimony as foundation for her opinion:**

**(a) Darlene's statements and demeanor on the night Wanda died, as reported by the police officers?**

**(b) Darlene's statements and demeanor during her forensic interview?**

**6. Assuming Dr. Parker is permitted to testify as to her opinions, is the textbook she has written admissible?**

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2)

===== Start of Answer #2 (2180 words) =====

1a. Is Herbert's statements to police admissible if he testifies (& by which party)?

Relevance

Relevance is the tendency of a fact of consequence to the matter to be more or less probable. Here, Herbert's blurting "I did not kill my wife" when police approached him could show either that he did not kill his wife or that he was anticipating cops coming to get him and trying to not incriminate himself as much as possible. Therefore, this is relevant.

Hearsay

Hearsay is an out of court statement that is offered for the truth of the matter. It is not admissible evidence unless an exception applies. However, the court has defined certain things as not being hearsay because they are reliable. The statement was made out of court (at a park bench) and would be offered to show he didn't kill his wife.

Admission

An admission is an exemption from hearsay (not hearsay). It is a statement by a party that is offered against the party. Here, the statement can be offered against Herbert by the Prosecution

because it was made by him.

**1b. Is Herbert's statements to police admissible if he doesn't testify (& by which party)?**

Relevance & Hearsay

See above.

Admission

An admission is an exemption from hearsay (not hearsay). It is a statement by a party that is offered against the party. Here, the statement can be offered against Herbert by the Prosecution because it was made by him.

Declaration against interest

A declaration against interests is a statement by an unavailable party that is against his penal or pecuniary interests (and in Nevada social interests). Here, if Herbert doesn't testify, he could be considered to be unavailable. The statement could be against his interest since he blurted it out as a result of seeing police (something a guilty person would do, not someone without anything to hide). This statement could be brought in by the prosecution.

**2. Should Darlene be permitted to testify?**

Relevance

See Rule above. Darlene's statements are relevant because they tend to show that Herbert killed his wife.

Competence

In order for a witness to testify in court, they must be competent. A witness is competent where they have a recollection of the event, take an oath to tell the truth, able to communicate their recollection to the trier of fact, and their testimony would be helpful to the trier. The standard for competence is very low and the courts have often permitted kids or even drug addicts to testify as the jury can weed out bad testimony by judging the credibility of the witnesses.

Here, Darlene's testimony would be helpful to the trier of fact because it can help them decide if Herbert actually killed Wanda as Darlene seemed to be present during the events in question. She seems to be able to recollect what happened because she told the officers that "Daddy sent Mommy to dreamland. She's hurt real bad. I can't wake her up" and "Daddy ran away! Daddy ran away!" However, when asked by Dr. Parker about what happened to her Mommy, she began sobbing uncontrollably and became incoherent. Additionally, she could not even remember what school she went to, the name of her teacher, or even if she went to school yesterday! Lastly, it seems that she has some understanding of how important it is to tell the truth, but she might be

inclined not to as evidenced by her responses of if it was bad to tell a lie: "Only if you get caught" and "Mommy always says I have to tell what really happened, but when I do, she gets real mean." As the threshold for competence is very low, Darlene will probably be able to testify with the defense doing what it can to attack her credibility by bringing up the above mentioned thing such as the fact that she might be reluctant to tell the truth or can't even remember if she went to school yesterday.

**3. Should police be permitted to testify regarding Darlene's statements in the entryway of the house on the night Wanda died?**

Relevance

See Rule above. Darlene's statements are relevant because they tend to show that Herbert killed Wanda. Therefore, it is relevant.

Hearsay

See Rules above. This statement was made at Herbert's house and are being offered to show that Herbert killed Wanda. Therefore, it is hearsay.

Excited Utterance

An excited utterance is a statement about an startling event made while still under the stress of the event. Here, Darlene was *very* aggravated and upset when found by the police. Darlene's statements, "Daddy sent Mommy to dreamland. She' hurt real bad. I can't wake her up" and "Daddy ran away! Daddy ran away!" are an excited utterance. The statements were about a startling event, her dad hitting her mom. She was also still under the excitement of the event as she yelled out the statements to the police and her eyes widened and she screamed when asked about where her Herbert was. She also sobbed uncontrollably and became incoherent when asked her Herbert hit Wanda. Therefore, this is an excited utterance.

#### Presentence Sense

A presentence sense impression is a statement describing an event as it was taking place or shortly thereafter. Here, we do not know how long the statement was made after the supposed events that took place, but it seems that they were shortly thereafter because Darlene was still in shock (the crying and incoherence) and the facts don't state the police delayed in getting to the house after the dispatch call. Therefore, this is probably also a presentence sense impression.

#### **4. Should Dr. Parker be permitted to testify as expert regarding opinion of Darlene's statements?**

#### Relevance



See Rules Above. Dr. Parker's statements are relevant because it tends to discredit Darlene, who is the key witness in Herbert's trial. Therefore, it is relevant.

### Expert opinion

An expert may give an opinion if it is helpful to the trier of fact, the expert is qualified, the expert believes in the opinion to a reasonable certainty, based on the things that an expert in the same field would rely on, and it is based on reliable principles that are reliably applied. In Nevada, the last element (reliable principles reliably applied) is replaced by principles that are generally accepted in the relevant scientific community.

### Helpful to trier of fact

Dr. Parker's opinion will be helpful to the trier in deciding if Darlene's special condition affects her ability to relay information to them and whether they should believe her despite her condition. A trier of fact would not be able to determine if such a condition would affect her ability to perceive, tell the truth, etc. Therefore, her opinion would be helpful.

### Qualified Expert

A witness may be qualified through their education, experience, skills, etc. Here, Dr. Parker has 35 years of experience in evaluating child witnesses, has worked frequently by Nevada lawyers in

similar cases (including evaluating over 200 child witnesses), has a graduate degree in child psychology, and has even developed a technique for interpreting special needs children's responses to questions. She has the education, experiences and skills to give the type of information that she is testifying about. Therefore, she is a qualified witness.

Belief to reasonable certainty

An expert must believe in their opinion to a reasonable degree of certainty, but does not have to be 100% sure in their opinion. The facts do not state how certain she is, but given she has 35 years experience and worked with Nevada lawyers previously, she is probably certain beyond a reasonable degree.

Based on thing relied upon by expert in field

An expert can base their opinions on many things, including their own personal knowledge (which can be acquired by watching the trial) or even hearsay as long as the things they rely on are the type that would be relied upon by others in their relevant scientific field.

Here, Dr. Parker based her opinion on her academic training, her 35 years of experience in evaluating child witnesses, her particular interview technique, Darlenes' statements/demeanor at the house on the night Wanda died, and her testimony she observed at the pretrial hearing. Although the facts do not state whether a child psychologist would rely on such information, none of the information that she relied on seems to be out of the ordinary expert perhaps her

technique (discussed below). Therefore, most likely she relied on the types of information that an expert in her field would rely on.

Reliable principles/generally accepted in scientific community

The federal rules allow the scientific techniques used by experts as long as they are reliable principles that are reliably applied, which means they have been peer reviewed, have a low error rate, accepted by a good amount of the scientific community, etc. However, in Nevada the scientific technique must be generally accepted in the scientific community for the expert to be able to rely/testify about it.

Here, Dr. Parker authored a book about the technique that has been widely used and reviewed by other child psychologists. Most of these peers support the techniques, but some question the use where the child has been under significant stress. Additionally, there has not been widespread testing of the technique. The federal courts will probably allow the testimony of Dr. Parker's technique as it has been widely used and most of her peers give it a positive review. However, it would be inadmissible under Nevada as it does not seem to be generally accepted in the scientific community (there hasn't been widespread testing and some reviewers question its use where the child is under a lot of stress such as possibly watching a parent get killed). Therefore, the testimony can come in for a federal court, but only to the extent that it is not based on Dr. Parker's special technique in a Nevada court.

5a. Can Dr. Parker offer Darlene's statements/demeanor on night Wanda died (as

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**reported by police) as foundation of her opinion?**

**Relevance**

See Rule above. The evidence is relevant to show how Dr. Parker came to her conclusion.

**Foundation of Expert Opinion - Darlene's statements/demeanor with cops**

An expert's opinion can be based on hearsay as long as it is a type relied upon by experts in a similar field. However, the proponent cannot admit hearsay into evidence if it is inadmissible evidence. Only the opposing side has the right to admit evidence, even if it is inadmissible, if the expert relies on such evidence in coming to their opinion.

Here, the statements/demeanor of Darlene would be a type of evidence that Dr. Parker could rely on in coming to her opinions and they can be admitted by either side as they are exceptions to hearsay.

**5b. Can Dr. Parker offer Darlene's statements during her forensic interview as foundation of her opinion?**

**Relevance**

See Rule above. The evidence is relevant to show how Dr. Parker came to her conclusion and it

could also show whether Darlene was referring to when she spoke to the police. Therefore, it is relevant.

#### Foundation of Expert Opinion - Darlene's forensic interview

See Rule above. Here, Darlene's statements such as "That's where we go when we sleep," "It's like heaven - sunshine, blue skies, fresh air and brightly colored flowers everywhere," can be entered into evidence by the prosecution, but not Dr. Parker because it is inadmissible hearsay. These statements were made out of court and offered for the truth of the matter (that this is what Darlene thinks dreamland is). Therefore, this is not admissible.

#### 6. Is Dr. Parker's textbook admissible?

##### Relevance

The textbook Dr. Parker wrote is relevant because it shows how her technique works, which would allow the jury to decide if she is a credible witness. Therefore, it is relevant.

##### Hearsay

Rules given above. As the statements in the book were made out of court and offered for the truth of how the techniques work, this would be hearsay.

### Treatises

An exception to hearsay is a treatise where it is authenticated by an expert as the type that is relied on by experts in the field. In a federal court, the treatise could only be read into evidence, not admitted. However, in Nevada, the treatise may be admitted into evidence.

Here, Dr. Parker could authenticate the treatise or another expert could be brought in to do so.

The facts state that it is a widely used textbook on the subject so it will have no problems coming in. In the federal courts, only the relevant excerpts could be read into evidence. But in Nevada, the entire textbook could be admitted into evidence.

### Authentication

Any documents that are admitted into evidence need to be authenticated. In other words, the proponent needs to show that it is what they purport it to be. Here, as this is a widely used and published textbook, it would not be hard to do so. Dr. Parker, as the author could authenticate it or the court might even be able to take judicial notice as it is widely used. Therefore, there are no authentication problems.

===== End of Answer #2 =====



# **FEBRUARY 2013 EXAMINATION QUESTIONS**

**APPLICANT'S ANSWERS TO QUESTIONS  
NEVADA BOARD OF BAR EXAMINERS**

**- EXAM 2, QUESTION 3 -**

**FEBRUARY 2013**

**EXAMINATION NO. 2;**

**QUESTION NO. 3: ANSWER IN DARK BLUE BOOKLET**

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Abby is a new attorney, licensed only in Nevada. She opened her practice as a sole practitioner in Reno near the university campus, operating under the name “University Law Center.”

Soon after Abby opened her practice, Beth retained Abby to handle the incorporation of Beth’s new gourmet cupcake business named “The Cupcake Shop.” Beth planned to open three stores in northern Nevada. Beth also asked Abby to register a trademark for the business. Abby spent 10 hours preparing the necessary paperwork for the incorporation and trademark registration application. Because Beth’s new business was not generating any revenue yet, Beth offered to give Abby a 5 percent share in her business as Abby’s fee. Abby orally agreed. Several months later, Abby sold her share in the business back to Beth for \$50,000.

Soon after the opening of The Cupcake Shop, Carol opened a gourmet cupcake business in South Lake Tahoe, California named “The Cupcake Shoppe.” Beth asked Abby to file a trademark infringement lawsuit against Carol for using the name “The Cupcake Shoppe.” Despite not having any experience in trademark infringement litigation, Abby agreed to represent Beth for a 45 percent contingency fee. The contingency fee agreement signed by Beth provided Abby with “full power and authority to settle, compromise, or take such action as she might deem proper, and to receive all settlement proceeds on behalf of Beth.” Abby then filed a complaint against Carol in a California state court for trademark infringement, unfair competition and injunctive relief. Abby and Carol’s attorney subsequently made several appearances in that court on various discovery matters.

Several months after filing the lawsuit, Abby participated in a triathlon at Lake Tahoe. After the competition, Abby started chatting with a fellow competitor. The competitor told Abby that she was suffering from stress as a result of the legal problems arising from the name of her business and its similarity to the name of a business in Nevada. Realizing that the competitor was Carol, Abby responded, “That’s not healthy! I’m an attorney and maybe I can assist you in resolving the issue.” Unhappy with her current attorney, Carol said, “I’ll give you a call.”

**Discuss fully all ethical issues raised by Abby’s actions.**



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3)

**===== Start of Answer #3 (1185 words) =====**

As an attorney practicing in Nevada, Abby (A) is subject to the Nevada Rules of Professional Responsibility. A's conduct outside Nevada, in California, would subject her to the laws of California. A's actions in California could be disciplined in Nevada if they violated the laws or professional rules (if she were licensed) in California.

Naming her practice "University Law Center"

An attorney can generally name their practice after anything, so long as the name is not false or misleading. An attorney need not include their name in the name of the business. Here, A may have violated her duty to not create a false or misleading name. A's office was located near the university campus. By including University in the name of her practice, she may have misled the public into believing she was affiliated with the university, when she was in fact a sole practitioner.

A's representation of B in incorporation and trademark

Here, A has agreed to represent B in helping her incorporate and file a trademark. A has a duty to perform competently. Here, as a new attorney, A is likely not an expert at either Nevada corporate law or trademark law. Accordingly, A can only accept the representation if she believes she is and is actually capable of becoming competent in these fields. If the representation was difficult,

A could likely not take it on unless she was an expert in the field. Here, A's duties do not appear to be difficult, and there is no indication that A performed the duties in a substandard manner. A was capable of performing the duties in a reasonable amount of time. Therefore, it does not appear as if A breached her duty of competency.

#### The fee arrangement

Fee agreements are generally preferred to be in writing, but are not required to be in writing. Fee arrangements must also be reasonable. Here, A essentially received \$50,000 for ten hours of work. \$5,000 per hour for any attorney, especially a new attorney, is not a reasonable fee. Accordingly, A has violated the duty to accept only reasonable fees.

Furthermore, by accepting a 5% stake in B's business, A has entered into a business relationship with her client. This is only allowed under certain circumstances, as it risk violating A's duty of loyalty to her client as A's and B's interests in the company may become contentious. Here, to be valid, A would have to receive written and informed consent from the client in order to proceed with the transaction. It appears as if the agreement was oral and A did not warn B about the potential consequences. Accordingly, A has violated the ethical rules. Furthermore, A must advise B to obtain advice from other counsel as to the transaction. A has failed to do so. Furthermore, the transaction must be fair. Here, as discussed above, the transaction is not fair because A obtains \$50,000 in exchange for 10 hours of work. A may argue that the value of the 5% share was speculative. However, for numerous reasons, A has violated her duties by entering into a business transaction with her client.

The trademark case against C

A agreed to represent B in a trademark case despite not having an experience in trademark infringement litigation. This likely violated A's duty of competency. Filing incorporation and trademark documents is one thing, pursuing litigation for trademark infringement is another. Pursuing the litigation would likely require expertise in trademark law, expertise which A does not have and likely does not have time to learn. If A were capable a proceeding with the litigation competently, she would not have violated the duty. This seems difficult under the circumstances, however, and A has likely violated the duty of competency.

The fee arrangement is also likely a violation of the rules of professional conduct. Contingency fee agreements must be in writing and are only allowed in certain circumstances. Here, the agreement was in writing and it is not a criminal or domestic matter, assuming it sets forth who is ultimately responsible for paying fees and costs. Accordingly, the agreement meets the procedural requirements. A 45% fee, however, is likely unreasonable. Generally, a contingency fee will be limited to about 1/3 of the recovery unless the attorney possesses specific skill or knowledge entitling them to a higher fee. Here, A is a new attorney and therefore cannot garner a 45% contingency fee.

The agreements giving of A the ability to settle the case is not improper. Generally, an attorney must communicate all settlement offers to the client and the client is responsible for determining whether or not to settle. Here, however, B can delegate that duty to A as her agent. Furthermore,

A can receive the settlement proceeds on behalf of B, so long as A keeps the proceeds separate from her own money and in a client trust account for B's benefit. B would violate the ethical rules if she commingled the settlement proceeds with her own funds.

#### Filing and Appearing in California Court

By appearing in California court, A not only violated her professional duty to act competently, but may also be subject to criminal sanctions in California for violation of California's law prohibiting the unauthorized practice of law. Nothing in the facts indicates A received pro hac vice status pursuant to the rules of California (in Nevada, she would have to associate with Nevada counsel). By breaking the law in California, A has a duty to self-report the violation to the Nevada bar. Failure to do so would result in a violation of Nevada's rules regulating attorneys.

#### Chatting with C

Once A became aware that the person she was chatting with after the race was C, she breached her ethical duties by continuing the conversation. An attorney who knows an adverse party is represented by counsel cannot communicate directly with the adverse party. Here, based upon A's previous appearances in California, she was aware C was represented by counsel. Accordingly, A violated this rule when she continued to communicate with C after becoming aware that she was an adverse party.

A may also, though unlikely, have violated her ethical duties by directly soliciting employment

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from C. An attorney cannot solicit employment in person if the solicitation's main motive is the pecuniary gain of the attorney. Thus, an attorney cannot go door-to-door offering ones services. Here, however, C and A's communications did not originate with A's intent to obtain C as a client, it merely came up in converasation. Accordingly, A has not likely violated this rule.

Furthremore, if A were to pursue representation of C, A would be in breach of her duty of loyalty to B. An attorney cannot simultaneously represent clients who are adverse in pending litigation under any circumstances. This would not be permitted even with the clients infomed consent and even if A reasonably believed she was capable of representing both parties without breaching her duty of loyalty.

Additionally, A could also potentially violate her duty of confidentiality if she were to use any information learned from A in her representation of A in assisting C.

===== End of Answer #3 =====



# **FEBRUARY 2013 EXAMINATION QUESTIONS**

**APPLICANT'S ANSWERS TO QUESTIONS  
NEVADA BOARD OF BAR EXAMINERS**

**- EXAM 2, QUESTION 4 -**

**FEBRUARY 2013**

**EXAMINATION NO. 2;**

**QUESTION NO. 4: ANSWER IN LIGHT GREEN BOOKLET**

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Peak Produce Co. is a Nevada corporation doing business in Reno and Carson City. Peak's stockholders are Abe, Bonnie and Charles. Peak's directors are Xavier, Yvette and Zane. Xavier is also the corporation's President. Peak's bylaws state, in part, as follows: "The President shall have the authority to oversee the day-to-day operations of the corporation and approve purchases in the ordinary course of business."

Peak is in the third year of a five-year contract to lease its delivery truck fleet from Abe. Without consulting the Board, Xavier unilaterally terminated Abe's contract and purchased a new fleet of trucks. When questioned by Yvette and Zane, Xavier explained that by owning its trucks, Peak will save money in the long-run. Xavier further explained that he showed the lease contract to his divorce lawyer, and she said that Peak could exercise a termination clause contained therein. Abe was furious when he heard what had happened, and declared that the termination clause is only triggered in the event that Peak finds a better leasing opportunity.

Zane, knowing that Peak was looking to expand its business, brought before the Board the opportunity to purchase a warehouse in Fallon for less than fair market value. A special meeting of the Board was properly called to vote on the warehouse purchase. Zane did not disclose the fact that the warehouse is an asset of a trust in which his wife is a beneficiary. Zane and Yvette voted in favor of the purchase. Xavier voted against it. After the closing of the transaction, Bonnie discovered on a government website that an unremediated toxic spill occurred at the warehouse in the 1990's and subsequently told Xavier.

- 1. Fully discuss whether Xavier, as President, had the authority to terminate Abe's contract.**
- 2. Fully discuss all claims that rise out of Abe's termination, and who has the right to bring these claims.**
- 3. Fully discuss what claims the shareholders may have arising out of the warehouse purchase and the bases of these claims.**
- 4. Fully discuss what procedural steps the shareholders would have to take in order to initiate an action based on the warehouse purchase.**

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4)

===== Start of Answer #4 (1817 words) =====

Xavier's authority to terminate Abe's contract

As a general matter, a corporation's board of directors is entitled to make decisions about corporate operations. A board is free to delegate authority to its officers as the board sees fit, subject to its duties of care and loyalty.

Actual authority

Actual authority is authority granted to an officer (or other party) through an express grant, such as through corporate bylaws. Xavier will argue that under Peak's bylaws, he had unilateral authority as Peak's president to terminate the lease with Abe. He will claim that the lease termination constituted part of the "day-to-day operations of the corporation," and that the purchase of new trucks was a "purchase in the ordinary course of business." Xavier, however, is incorrect. The lease was a five-year lease that was only in its third year. Such a lengthy lease falls outside the "ordinary course of business" and was therefore outside Xavier's authority to unilaterally terminate. Xavier's status as a director as well as president makes no difference, as a director has no unilateral authority to act on behalf of the board. Rather, the board may act only based on unanimous written agreement or following a vote at a noticed meeting.

Apparent authority

A party has apparent authority to take an action when it is cloaked with authority to take actions of that general type and the other party relies on the exercise of that authority. Xavier lacked



apparent authority to terminate the lease because nobody relied on his purported exercise of his authority to do so. He simply took the action unilaterally.

### Ratification

A corporate board of directors may ratify the conduct of an officer, even if that conduct was beyond the officer's authority. Ratification requires either a vote of the directors at a properly noticed meeting or unanimous consent of the directors. Xavier may argue that Yvette and Zane, the other two directors, ratified his action by accepting his explanation that "by owning its trucks, Peak will save money in the long run." But Xavier will lose this argument because Yvette and Zane never actually did anything to express their assent to Xavier's conduct. They never agreed in writing and they did not vote at a meeting. Thus, Xavier's conduct was not ratified.

### Claims arising out of Abe's termination

#### Abe's claim for breach of contract

#### Abe's standing to bring claim

Abe will claim that Peak unlawfully terminated Abe's lease of the delivery truck fleet. Abe has standing to bring this claim against Peak because he was injured by losing the revenue from the remaining lease term, and because a court would have the ability to redress the injury by awarding money damages. (An injunction is unlikely because there is an adequate remedy at law via money damages, which could be used to provide Abe the same profits that he would receive if the lease continued.)

Typically, shareholders may not sue corporations in their personal capacity for decisions made by the company. But there is an exception when the shareholder-plaintiff has suffered an injury that is distinct from the injury suffered as a result of his status as a shareholder. Here, Abe has satisfied that test. His injury is based on his loss of business from the lease, not the loss in value of his shares.

#### Merits of Abe's contract claim against Peak

To succeed on a breach of contract claim, a plaintiff must show the existence of a contract, failure by the defendant to perform a contract duty, causation, and damages. Here, Abe can show a valid contract between himself and Peak for a five-year lease of the delivery truck fleet. He can also show causation and damages because the termination of that contract cost Abe the business he would have received from Peak.

Abe will also argue that Peak breached the contract by terminating it. Peak will defend on the basis of the termination clause cited by Xavier. But that clause apparently applies only if Peak "finds a better leasing opportunity," which was not the case here. Rather, Xavier simply terminated the lease because he decided it would be more advantageous to own the trucks. Peak will also defend on the basis that Xavier lacked authority for his actions. As discussed above, Xavier did lack authority. Thus, Peak's defense will be successful.

#### Merits of Abe's claim against Xavier

When a director or officer breaches a contract held by a corporation and does so by acting outside the scope of his authority, that director or officer is personally liable. For reasons discussed

above, Xavier -- who is both Peak's president and a director -- caused Peak to breach its contract with Abe and did so outside the scope of his authority as Peak's president. He is therefore personally liable to Abe for Abe's damages (though he may have insurance to cover the damages).

### Claim for breach of duty of care

#### Standing to raise

A corporation may bring a claim for breach of duty of care. It brings this claim against the director personally. The shareholders may also raise such a claim, but they may do so only through the means of a derivative suit. A derivative suit is a suit brought on the corporation's behalf, though actually prosecuted by the shareholders. Here, the claim against Xavier may be brought by the corporation, either directly or derivatively. It may not be brought by Abe personally, who as a shareholder, has no ability to sue an officer or director for breach of a duty of care.

#### Merits of the claim

As an officer and director, Xavier also owed Peak a duty of care. This duty requires a director to act prudently, in good faith, and as a reasonable person would act. Provided that the person does so, he will be shielded from liability for his actions by the business judgment rule. However, the business judgment rule does not protect directors who have committed nonfeasance by failing to undertake any duties at all.

Peak will argue that Xavier breached his duty of care to Peak by consulting only a divorce lawyer for an interpretation of the lease. It will argue that a reasonable and prudent person would have

consulted a corporate lawyer, perhaps, for example, the company's own lawyer. Peak will also argue that it was bad faith on Xavier's part to show the lease to a lawyer who does not work in this area of law, and that he may have simply been looking for cover by showing it to some lawyer. As a result, it will contend that Xavier is not entitled to the protection of the business judgment rule.

Xavier will respond that by consulting a lawyer, he acted prudently and reasonably. While it may have been better to contact a corporate lawyer, he will claim that this is not nonfeasance and that he was thus entitled to the protection of the business judgment rule.

Peak should prevail, however, as a prudent person -- especially one serving as the director and officer of a corporation -- would have checked with a corporate lawyer before terminating a long-term lease. Abe is not entitled to the protection of the business judgment rule.

#### Shareholder claims arising out of warehouse purchase

The claim arising out of the warehouse purchase would likely be a derivative action for violation of both the duty of care and duty of loyalty.

#### Duty of care

The standard for the duty of care is discussed above. The shareholders will argue that the directors violated their duties of care by failing to learn about the toxic spill at the warehouse. They will argue that a reasonable and prudent person would have become suspicious when presented with the opportunity to purchase a warehouse for less than fair market value, and would have performed independent research to determine why the price might be so low. They

will further argue that this research would include, a Google search that would have yielded the information that Bonnie found on the government website about the unremediated toxic spill. Finally, they will argue that failure to conduct this research constituted nonfeasance that does not entitle the directors to protection of the business judgment rule.

The directors will respond that they exercised due care by considering Zane's proposal at a properly noticed board meeting. They will contend that they acted reasonably and in good faith, especially in light of Peak's desire to expand its business and the fact that this warehouse appeared to be a good opportunity for a deal.

On the duty of care claim, the directors will prevail. While it obviously would have been better for them to discover the information about the spill, they did not act unreasonably, imprudently, or in bad faith by not doing so.

#### Duty of loyalty

Directors owe corporations a fiduciary duty of loyalty. This requires them not to engage in self-dealing or to usurp corporate opportunities. A director may, however, propose to the corporation that the corporation engage in a transaction with the director if the director fully discloses his interest in the transaction and a majority of the disinterested directors vote in favor of it. Here, Zane is an interested director because his wife is a beneficiary of the trust that owns the warehouse. It makes no difference that it is Zane's wife rather than Zane himself, as his wife is a close family member (plus the beneficial interest might be community property). Thus, Zane breached his duty of loyalty by failing to disclose the fact of his wife's interest in the trust. Moreover, the transaction was not approved by a majority of Peak's disinterested directors. As an

interested director, Zane's vote does not count. Thus, the transaction could be approved only if both Yvette and Xavier -- a majority of the disinterested directors -- voted in favor. Here, only Yvette voted for it. Thus, the transaction was not approved.

Procedural steps for shareholder claims

As discussed above, the shareholders do not personally hold claims for corporate conduct, at least not arising out of their status as shareholders. They may, however, bring a derivative suit on behalf of the corporation. Nevada requires them to take a series of steps before doing so, however.

First, the shareholders must present the claim to the board so the board could authorize the lawsuit if it so desired. This step is not required where presenting the claim would be futile. Here, it would not be futile to present the claim because two of the directors are disinterested and could approve a lawsuit against Zane.

Also, the shareholders must adequately represent the interests of the corporation. Because this is a close corporation (presumably) with only three shareholders, they will satisfy this requirement easily.

Finally, the shareholders must post a bond on behalf of the corporation. This ensures that they have a sufficient financial stake in the litigation that it is not frivolous or brought for some improper purpose.

===== End of Answer #4 =====

**END OF EXAM**