

February 2000 Bar Examination

Question 1.

Joe's Stereo, Ltd. (the "Partnership") was properly organized as a limited partnership under the laws of Georgia, with Stereo City, Inc., a duly organized Georgia corporation, as its general partner ("GP") and Tom Smith, an individual ("Smith"), as its limited partner. Fidelity Credit ("Creditor") entered into a security agreement with the Partnership, the terms of which provided for funds to be advanced for the purchase of inventory, which advances Partnership promised to repay within 90 days thereafter. The Partnership executed as collateral a financing statement in favor of the Creditor on the business inventory and proceeds, equipment and accounts of the Partnership.

Following a default by the Partnership under the security agreement, the Creditor made demand on the Partnership for payment of amounts due thereunder and thereafter sued to recover the money due. The terms of the security agreement also required that the Partnership pay the Creditor reasonable attorney fees incurred in the enforcement of its rights and remedies after default, and the Creditor is seeking to collect to enforce each such agreement against Smith. The GP was adjudicated bankrupt and was discharged from liability under the contract in the suit and dismissed as a party defendant. The suit presented to the trial court the question whether Smith's signature to the security agreement constituted an assumption of personal liability by Smith thereunder.

The facts were stipulated as follows:

1. The security agreement was negotiated by the GP and the Creditor; Smith did not participate in the negotiations. Before the Creditor approved the security agreement, however, Smith furnished the Creditor, at Creditor's request, a copy of his own personal financial statement.
2. The security agreement was then duly executed on behalf of the Partnership by the GP and by Smith, as limited partner.
3. Smith never possessed any authority to manage the daily affairs of the Partnership. The limited partnership agreement between GP and Smith acknowledged that "the general management, control and conduct of the Partnership shall be vested in the general partner only," and that "the limited partner shall have no power or authority to bind the Partnership."
4. Smith neither kept the books or records of the Partnership, nor supervised its accountant, nor wrote partnership checks.
5. Prior to the execution of the security agreement, the Creditor was not aware of the limited partnership agreement itself between the GP and Smith, although the Creditor understood that Smith was a "silent partner" in the Partnership.
6. Smith signed the security agreement at the request of the GP, intending his signature only in the capacity of a limited partner in the Partnership and did not intend to be personally liable on the obligations: his intention was not communicated to the Creditor.
7. The Creditor would not have extended credit to the Partnership, had Smith not signed the security agreement. It was known to the Creditor that Smith had in the past signed, as guarantor, guaranties of the Partnership's obligations in favor of certain other creditors.

Questions:

1. Did the signature of Smith to the security agreement “as limited partner” constitute his representation or agreement to be personally bound on the obligations therein? Why or why not?
 2. Assume that Smith is also the CEO of the GP, a closely held corporation, and in such capacity exercises the day-to-day control and management of the GP, but has no ownership interest in the GP. Does this change the result?
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Question 2.

John and Mary Smith were married in January of 1984. A child, John Smith, Jr., was born as the issue of this marriage on January 1, 1985. In 1992, John and Mary were divorced. Mary was awarded custody of the children by the Superior Court. Mary Smith was remarried to Henry Jones in 1994. The child's natural father, John Smith, Sr., relinquished his parental rights. John Smith, Sr.'s parents, James Smith and Helen Smith, are now interested in visitation rights in connection with their grandson, John Smith, Jr. Mary Smith, John Smith, Jr.'s mother, has refused to allow the grandparents to see John Smith, Jr. since the divorce. Mary's new husband now seeks to adopt John Smith, Jr. John, Jr. indicates that he prefers living with his paternal grandparents.

Questions:

- A. What rights do the grandparents have as far as visitation is concerned?
 - B. Can the grandparents object to the adoption of their grandson by his stepfather? Explain your answer.
 - C. Can John, Jr. elect to live with his grandparents? Can he object to the adoption? Why or why not?
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Question 3.

Seller, Inc., a Delaware corporation, manufactured aircraft parts in Marietta, Georgia, where its only place of business was located. Seller, Inc. is the wholly-owned subsidiary of Parent, Inc., a California corporation which is not registered to do business in Georgia and has no office or employees in Georgia. Over the years, officers and management-level employees of Parent, Inc. routinely traveled from California to Marietta to observe and evaluate Seller, Inc.'s operations.

In May of 1999, Seller, Inc. sold substantially all of its assets to Buyer, Inc., a Georgia corporation. The assets included Seller's office and manufacturing facilities in Marietta. Since purchasing the assets, Buyer, Inc. has manufactured aircraft parts in Marietta, where its only place of business is located. Seller, Inc. continues to have a small administrative office in Marietta but is not actively manufacturing any products and does not have any other office or facilities.

The asset sale was accomplished through an Asset Purchase Agreement (“APA”), which was

signed by Buyer, Seller and Parent at a closing held in Atlanta. The APA provided that neither Seller nor Parent would compete with Buyer in the aircraft component industry for a period of two years.

On February 22, 2000, the President of Buyer, Inc. comes to your office in Atlanta for legal advice. She informs you that Parent has formed a new, wholly-owned subsidiary corporation, Sub, Inc., which has just begun manufacturing aircraft parts in Nashville, Tennessee. According to the President, the parts will compete with those that Buyer manufactures. She also informs you that Sub, Inc. has a contract to sell its parts for \$800,000 to an aircraft manufacturer in Marietta with whom Seller and, subsequently, Buyer have done business for fifteen years. The President believes Sub, Inc. has already begun delivering parts to the manufacturer. The President then asks your advice and counsel on the following questions:

[ASSUME FOR THE PURPOSE OF THIS ESSAY THAT THE NON-COMPETITION AGREEMENT IS VALID AND ENFORCEABLE.]

Questions:

1. From the standpoint of jurisdiction, could Buyer, Inc. file an action against Parent, Inc. in a United States District Court? Explain your answer.
2. From the standpoint of jurisdiction, could Buyer, Inc. file an action against Seller, Inc. in a United States District Court? Explain your answer.
3. Would a United States District Court in Georgia have jurisdiction over the person of Parent, Inc.? Explain your answer.
4. What remedies could Buyer, Inc. pursue in an action against Parent, Inc.? Explain your answer.

Question 4.

Hector Henry could truthfully say as he faced his fortieth birthday, that he had proved the value of industry and diligence. He had gotten off to a bad start. He dropped out of school after the seventh grade, and ended up with felony convictions for marijuana possession and burglary. But Hector learned his lesson. After his release from prison he went to work and worked hard, until he now owned his own lawn service company, and was expanding into residential and commercial landscaping.

Trouble arrived in the person of Ajax Arkwright, special agent of the Georgia Department of Revenue. Arkwright conducted an audit of Hector's business and assessed \$40,000.00 in past due taxes and penalties. Hector panicked. He had no idea he owed back taxes. He didn't have that kind of money. He was bewildered by the bureaucratic system of appeals and reviews. His accountant assured him that he owed no more than \$10,000.00, an amount he could pay, but Arkwright would not budge from his original assessment. The case went through its eleventh month and third level of appeal with no end in sight. Hector retained tax counsel, and was floored by the amount of his retainer and the projected fee.

On a Monday morning Hector received a call from Agent Arkwright, who wanted to meet with him personally to discuss how he might be of help to Hector. Although Hector thought it strange that

the agent contacted him directly, he was too desperate to ask questions. He met Agent Arkwright at the Waffle House that Arkwright suggested.

The conversation went quickly from the general to the specific. Arkwright repeated that Hector owed the State \$40,000.00. Hector was shocked. He said that he did not believe that he owed that much money but that, in any event, he could not pay that amount. The conversation circled, each feeling out the other. Finally, Arkwright said that he could settle the account for \$12,000.00: a cashier's check for \$9,000.00 to Georgia Department of Revenue and \$3,000.00 cash for himself. For this, Arkwright assured Hector, he could "take care of everything." It was noon. Arkwright had to have his answer and the money by 2:00 PM.

Hector went to his office and asked Helen, his bookkeeper, what she would do. "Pay him!" was Helen's reply. His wife said the same.

Hector met Agent Arkwright at the Waffle House as agreed and gave him the check and cash. He told Arkwright about his conversation with Helen, but didn't mention his wife.

Agent Audie O'Leary, sitting in the next booth, taped all conversations at the Waffle House. Hector and Helen are jointly indicted in the Superior Court of Troy County, Georgia for the offense of bribery.

Hector asks you to represent both him and Helen.

Questions:

1. Can you represent both Hector and Helen? Discuss.
2. Advise Hector on the case against him and any possible defenses.
3. Advise Helen on the case against her and any possible defenses.
4. At trial Helen presents no evidence. Hector presents no evidence except his own testimony.
 - a. Can the District Attorney impeach Hector's testimony by proving his prior record?
 - b. Both defendants claim the right to make opening and closing argument. The prosecutor objects and claims the right to open and conclude. What is the trial judge's ruling?