

**July 2012 BAR EXAM
SESSION NO. III**

QUESTION 2

Three year old Garth went to visit his friend Miley for a play date. Miley's mother took Garth and Miley to the backyard to play. The children swam in an inflatable pool, threw balls and rode bicycles. Miley's mother went inside to make a snack. Initially, she could see the children through the window, but the phone rang and she was distracted. The children wandered to the barn in the backyard where Miley's family stored their four wheeler. Miley's father always left the keys to the four wheeler in the ignition, but also always kept the safety brake locked. Garth hopped on the four wheeler and pretended to ride. Suddenly, the four wheeler thrust forward and pinned Miley against the wall. Miley was screaming in pain. Miley's mother heard the impact and ran to see what was happening. She pulled the four wheeler away from the wall and Miley fell to the floor. Miley's mother called an ambulance, which quickly arrived. As the ambulance sped through traffic to the hospital, an elderly woman failed to yield and crashed into the ambulance causing extensive damage to both her vehicle and the ambulance. A second ambulance arrived and transported Miley to the hospital. She suffered extensive internal injuries, including a lacerated kidney and potential permanent damage to her reproductive organs.

Identify all potential defendants and the causes of action Miley may bring against each and any limitation on damages.

QUESTION 3

James owns a cattle farm in Hamblen County, Tennessee. James's cattle farm consists of two fields: the Upper Field, which is grassy and contains his barn, and the Lower Field, which is rocky but is bordered by the Holston River. Each day between August 1, 2004 and August 1, 2005, James opens the gate to the Lower Field to allow his cattle to travel from the Upper Field down the cowpath through the Lower Field to get water from the river.

While touring the countryside from out of state, Wade sees the Lower Field and decides that the Lower Field is most pristine spot he has ever seen, and thinks that one day, he may want to use this location for some purpose. Wade immediately offers \$50,000.00 to James for the purchase of the Lower Field. Tired of maintaining two fields, James agrees to the offer and sells the Lower Field to Wade. On August 1, 2005, James signs and delivers to Wade a deed which states "I, James, in consideration for \$50,000.00, convey the Lower Field to Wade." Wade gives James a promissory note for \$50,000.00, then records the deed in the proper office and drives back to his home out of state. Wade timely fulfills his 2005 promissory note obligation.

Following the sale of the Lower Field, James continues to use the Upper Field for cattle farming. Between August 1, 2005 and August 1, 2010, James opens the gate each day for his cattle to travel down the cowpath through the Lower Field to get water from the river.

James decides to retire from farming, but Michael wishes to continue the cattle operation on the Upper Field. James and Michael agree on a purchase price of \$40,000.00, and on August 1, 2010, James delivers to Michael a deed which states "I, James, in consideration for \$40,000.00, convey the Upper Field to Wade." Michael rolls up the deed, places it in a safe place, and commences his farming operations.

Also on August 1, 2010, Wade drives back into town, having decided that the Lower Field would make the perfect spot for a scenic restaurant. Wade hires Ben the Builder to build the restaurant in the Lower Field for \$100,000.00. On August 2, 2010, Ben builds a security fence around the worksite and moves rock and dirt around the site of the foundation to make a level grade for building.

On August 3, 2010, Michael tries to take his cattle down the cowpath through the Lower Field to get water at the river, but Michael can't get through because of the security fence constructed by Ben across the Lower Field as part of the construction for Wade's restaurant. Michael finds Wade to tell him of the problem. Wade thinks that cows walking near his restaurant is undesirable and is

Question 3 cont.

unwilling to allow Michael's cattle access through the Lower Field.

Wade realizes he may need financial assistance to pay for the construction, so Wade asks James to lend him \$70,000.00. James agrees to do so on the condition that Wade grants a Deed of Trust to James to encumber the Lower Field. On August 4, 2010: (i) Wade signs a Deed of Trust, (ii) James lends Wade the \$70,000.00, and (iii) James records the Deed of Trust in the correct office. On August 10, 2010, Ben lays concrete blocks for the foundation of the restaurant building. By December 15, 2010, Ben has completed the restaurant building and submits to Wade an invoice for the full contract price of \$100,000. Wade is short on cash and is unable to fully pay Ben, so Ben files a notice of lien in the appropriate office, which notice cites August 2nd as the date of attachment of the lien.

On December 28, 2010, James, Michael, and Ben all approach Wade and threaten to take legal action against Wade.

Wade employs your law firm to advise him on his rights with respect to the Lower Field. Based on the facts given, prepare a memorandum that provides the legal basis and analysis for your conclusions to, and advise on the following issues:

1. Explain whether Wade and Michael have rights in their respective land. If not, what is missing?
2. Explain whether or not Wade must allow Michael's cattle to cross the Lower Field to access the Holston River.
3. Explain whether or not Ben has a valid lien claim.
4. Explain whether James's Deed of Trust or Ben's lien is the first-priority encumbrance.

QUESTION 4

Silas is tried for simple assault in a Tennessee Criminal Court. At trial, there is a real question about whether Silas was the assailant. After the State concludes its proof, the defense files a written motion for judgment of acquittal, arguing that the evidence was insufficient to sustain a conviction. The trial court holds a hearing outside the presence of the jury and denies the motion by written order. The defendant puts on his proof and rests his case with the jury present. Defense counsel then asks for a hearing out of the presence of the jury so that he can renew his motion for judgment of acquittal. The trial judge immediately denies the motion, saying, "I already have ruled on your motion regarding the sufficiency of the evidence, I found against you and see no reason to believe the evidence is weaker now. Your position will be noted for the record."

The defendant is convicted and placed on supervised probation. After his conviction is affirmed on direct appeal, it is reported in the newspaper that the trial judge has a financial relationship with the private probation company that is paid to supervise the defendant. The defendant applies to the governor for a pardon, as do many defendants who were convicted in this judge's court. The governor decides to appoint an informal board to advise him on whether to grant the pardons. The governor specifies that all members of this board be members of his church. He pays the board using funds that have been provided by the legislature for a pilot criminal justice program. The governor follows the board's recommendations in every case and in this case grants a pardon to the defendant.

1. On direct appeal, should the defendant have been granted a new trial based on the Tennessee Constitution?
2. Under the Tennessee Constitution, was the pardon valid?
3. With reference to the Tennessee Constitution, please discuss ways that the trial judge could be removed from office for misconduct.

Please explain your answers in detail.

July 2012 BAR EXAM SESSION NO. IV

QUESTION 5

Ruth Williams was driving her Volvo station wagon northbound on a long, relatively straight 2-lane highway in Union County, Tennessee. Accompanying Ruth in the Volvo were her friends Betty and Gertrude. At the same time, a truck being driven by Elmer Kennedy was heading southbound on the same highway. Tragically, Elmer's truck crossed the center line and struck the Volvo head-on. As a result of the collision, Ruth was instantly killed and Betty was severely injured. Neither Gertrude nor Elmer were injured.

Betty timely filed a lawsuit in the Circuit Court for Union County, Tennessee against Elmer Kennedy and the Estate of Ruth Williams. Generally, Betty claimed that Elmer Kennedy was negligent in allowing his truck to cross into the opposite lane of traffic and that Ruth Williams was negligent for failing to avoid the accident.

At the trial of this action, Betty's attorney intends to introduce testimony through Betty that prior to the collision Betty had directed Ruth to "be careful, Ruth, the moron in that truck up the road is all over the road," that Ruth immediately responded "I'm not worried about a wreck, honey, we're in a Volvo," and that the collision occurred approximately 10-15 seconds thereafter.

1. Discuss any objections that should be made by Elmer Kennedy to the proposed testimony of Betty, including any available defenses or exceptions.
2. Discuss any objections that should be made by the Estate of Ruth Williams to the proposed testimony of Betty, including any available defenses or exceptions.

To the extent there are valid objections to Betty's testimony, is the outcome of any such objections different if the testimony comes from Gertrude rather than Betty? Discuss.

QUESTION 6

The Indonesian Spaniel Club of America ("ISCA") is a Nevada non-profit corporation dedicated to gaining recognition of the breed and creating breeder standards. Its office is in Sacramento, California, where sixty-five percent of its members reside and where its Registered Agent can be found. Its business meetings are held in California, but it sponsors shows in other locations. It has never had a show in Tennessee, but its most recent show was in Birmingham, Alabama. It has an annual conference call in which members are invited to listen to a report by the officers. ISCA has three members in Tennessee, including Babs Woofington ("BW") who lives in Knoxville. One of the ISCA officers lives in Nashville. ISCA has one hundred and sixty-three other members. ISCA requires members to pay annual dues to a P.O. Box in Nevada,

Question 6 Cont.

and it requires members to follow a code of ethics. ISCA produces brochures “to get the word out” that it sends to veterinary colleges and that it mails out on request. ISCA maintains a website that contains only photographs, descriptions, genetic research results, a member list, and links to several other websites. Two links go to blogs containing message boards, both operated by California members and dedicated solely to the Indonesian Spaniel.

BW is one of ISCA’s founding members and has bred the dogs for years. She has hosted social visits by other members at her home. She has read and made postings on the message boards and has listened to the annual conference calls. BW has sold several dogs to other ISCA members at shows. Over time, members have called BW’s breeding practices into question. Recently, she sold a dog at the Birmingham show, but it died the following day. An autopsy at the Auburn University Vet School indicated that the dog had been abused, was malnourished, and was a mixed breed. The Board decided to remove BW as a member. It announced the decision during the next conference call, sent a brief letter to each member, and removed BW’s name from the website. The two linked message boards displayed several strings of messages discussing BW. BW was angry and humiliated. She has sued ISCA in state court in Knox County, Tennessee. She alleged slander, libel, misrepresentation, fraud, and conspiracy, claiming injuries to her reputation and dog-breeding business. BW sends the complaint to ISCA by email (to the president), regular mail to the Nevada P. O. Box, and to the fax number on the website. BW also sends a Knox County subpoena to Auburn to produce the remains of the dog.

ISCA hires you to defend.

1. Does the court have personal jurisdiction over ISCA? Explain fully.
2. Is service of process by BW effective? Explain.
3. Regardless of your answer to #1, ISCA instructs you to file a motion asserting lack of personal jurisdiction. In support, ISCA asks you to file copies of its website material, corporate documents, and an affidavit from its president. Under what rule of civil procedure can you file the motion and what must you file?
4. If the case proceeds, will Auburn be required to produce the remains of the dog? Explain your answer, discussing the applicable rules of civil procedure.

QUESTION 7

While living in California, Robert Green purchased an electric Smart car for his personal use. When Mr. Green moved to Tennessee, Mr. Green decided to sell his electric car due to the scarcity of charging stations. In May, 2010, Mr. Green, consigned his electric car for sale on the lot of Smith Vehicles, LLC, a used car dealer and merchant that was not primarily engaged in the business of selling consigned vehicles. A few months later, an involuntary Chapter 7 bankruptcy petition was filed against Smith Vehicles, LLC. Mr. Green’s electric car was on the premises at the

Question 7 Cont.

time of the filing of the bankruptcy. Other than turning his electric car over to Smith Vehicles, LLC for the purposes of consignment, Mr. Green and Smith Vehicles, LLC had no agreements concerning a designation of the consignment as "sale on approval" or "sale or return." Smith Vehicles, LLC performed the services of a consignee. Mr. Green did not file a UCC-1 financing statement.

1. Discuss whether the consignment of Mr. Green's electric car was a true consignment or a sale, and explain how (or if) the result affects whether title to the electric car transferred.
2. Discuss whether the consignment transaction between Mr. Green and Smith Vehicles, LLC would be governed by Article 9 of the UCC.
3. Discuss whether the consignment transaction between Mr. Green and Smith Vehicles, LLC falls within Article 2 of the UCC.
4. If Mr. Green and Smith Vehicles, LLC had entered into a "sale or return" agreement, would their transaction be governed by either Article 2 or Article 9 of the UCC? Explain.
5. Who has title to the electric car? Discuss.

QUESTION 8

Mother and Father married and made their home in Blountville, Tennessee, in June 1996. The couple's daughter was born in 1998, and their son was born in 2000. In 2008, Mother accepted a job in Memphis, Tennessee, at a higher salary than her previous job. Father quit his job and moved with the family to Memphis, a distance of 493 miles.

Mother's new job required frequent travel and long workdays, including weekends. Because Father was unable to find employment in Memphis, he became the primary caretaker for the children. Father's only employment was occasional consulting work for his previous employer. In 2010, the couple began to drift apart. Mother faulted Father for not being aggressive in his job search and for not accepting all of the consulting work offered to him. Father complained of Mother's inattention to matters at home. After Mother became romantically involved with a co-worker, Father filed for divorce in Chancery Court in Memphis.

In September 2011, the court granted the divorce, designating Father primary custodial parent and granting Mother visitation two days every week and alternating holidays. In addition to child support, the court awarded Father transitional spousal support of \$4000 per month for sixty months. After the divorce, Mother moved in with her boyfriend to an apartment twenty miles from the marital residence. On moving day, Mother's boyfriend accidentally backed into Father's car and ran over Father's golf clubs and other sports equipment, causing damage of over \$10,000.00.

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Although the children now want to increase their time with Mother, Father has contacted his former employer in Blountville about coming back to work. Father's parents live in Bristol, Virginia, a few miles from Blountville, and are available to help with the children. Father wants to move not only to work again but also to keep the children from spending too much time with Mother's boyfriend. Father realizes the move will mean the children will spend a considerable amount of time with their grandparents in Virginia as Father adjusts to getting back to work.

In response to Father's notice that he intends to relocate to Blountville with the children, Mother has filed a Petition in Opposition of Relocation and for Modification of Residential Parenting. She also is seeking a reduction in the spousal support. Father has filed a counter-petition alleging it is in the children's best interest for them to move with him. Father also has proposed an alternative parenting plan and has opposed the reduction in spousal support.

Father has come in for consultation with you on the following issues. Discuss each fully.

1. What factors will the court consider regarding the relocation? How will the court likely rule? Why?
2. How will the court likely rule on Mother's petition to reduce the spousal support? Why?
3. Before leaving Memphis, Father wants to file suit against Mother's boyfriend to recover for the damage to his car and sports equipment. What advice would you give Father about which court or court(s) have jurisdiction to hear this claim? Explain.

QUESTION 9

Samuel Jones lost his position as an assistant in his company, Sahara Investments Brokerage, Inc. after it was determined that he had violated several company rules. Jones decided to form his own investment company, Jones Brokerage, Inc., even though Jones did not possess a brokerage license.

Jones told many of his church members and close friends about his opening his new business but did not disclose that he did not possess a brokerage license. Jones asked his church members and friends to invest in his company and promised them great returns on their money.

Two church members, Jim and Sandy Smith, had always wanted to invest their retirement money in a brokerage account that would earn them sufficient money to live comfortably when they retired. The Smiths began to send checks to Jones Brokerage, Inc. for \$1,000 a month for their investment account. Additionally,

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several church members and other friends began to open accounts with Jones Brokerage, Inc., sending Jones money for their accounts.

Jones told the investors he was purchasing stocks and bonds and other investments for their accounts and stated that it would take a long time for them to receive returns on their investments. In actuality, Jones, who did not have a brokerage license, was taking the money from investors and putting it into his personal bank account. Jones was purchasing luxury items such as expensive cars and jewelry for his wife, going on lavish vacations, and purchasing a vacation home at the beach. If, however, there was enough money after his personal expenses, Jones invested some of the money in an attempt to earn enough to pay back his clients.

Jones' clients, including the Smiths, would ask Jones every week how their investments were doing. Jones would tell them that sometimes the market was doing well and other times the market was not doing well. One day, Jim Smith cornered Jones and asked him exactly what stocks and bonds he had purchased for their account. When Jones couldn't remember any of the investments, Smith demanded return of all of his money. Jones confessed that he did not have any money to return to them.

The Smiths have come to you, their attorney, to ask your advice on what to do. Please respond to the following with explanation:

1. What, if any, criminal violations has Jones committed?
2. If Jones has committed any crimes under Tennessee law, what are the elements that the prosecutor would have to prove?
3. What civil remedies would the Smiths have for the loss of their personal property?

QUESTION 10

Janco, Inc. ("Janco") is in the business of providing janitorial services. Janco is incorporated under the laws of, and has its principal place of business in, the state of Euphoria. ABC, Inc. ("ABC"), a Tennessee corporation headquartered in Tennessee, owns and operates 20 nursing homes – 13 in Tennessee and seven in Euphoria (including its three largest facilities).

On May 1, 2005, Janco delivered to ABC a proposed services agreement (the "Agreement") under which Janco would provide janitorial services at ABC's nursing facilities in Tennessee and Euphoria for a period of five years. The Agreement allowed ABC the right to extend the contract for an additional three years. ABC's president signed the Agreement and returned it to Janco, and Janco's CEO executed the contract at Janco's company headquarters. The Agreement was a one-page form that had no choice-of-law clause indicating which state's law would govern in the

Question 10 Cont.

event of a dispute. Nor did the Agreement provide for the award of attorneys' fees to the prevailing party in the event of a lawsuit between Janco and ABC.

On August 1, 2008, Scrub Company ("Scrub"), an up and coming janitorial-services provider based in Tennessee and organized under the laws of Tennessee, approached ABC about providing its janitorial services at a cost significantly lower than Janco's. Determined to reduce costs, ABC's president sent a letter to Janco's CEO terminating Janco's Agreement, effective immediately. ABC then entered into a new services contract with Scrub.

1. Janco sued ABC for breach of contract in Federal District Court in Tennessee based on diversity of citizenship (assume that jurisdiction and venue are properly established). In addition to seeking damages from ABC for breach of contract, Janco sought to recover its attorneys' fees incurred in prosecuting the lawsuit. Under the laws of Euphoria, a party may recover attorneys' fees for breach of contract where it is shown that the breach was willful and in bad faith, but Tennessee does not have such a law. Additionally, Euphoria has adopted the Restatement (Second) of Conflict of Laws pertaining to contracts. ABC filed a motion to dismiss Janco's claim for attorneys' fees on the grounds that the Agreement lacked an attorneys' fee provision and, further, that Tennessee does not allow recovery of attorneys' fees under these circumstances. Janco opposed the motion to dismiss, asserting that the laws of Euphoria are controlling. How should the court rule on ABC's motion to dismiss the claim for attorneys' fees? Explain your answer.
2. On July 5, 2012, Janco sued Scrub in Federal District Court in Tennessee (based on diversity of citizenship) for inducement to breach a contract and interference with prospective economic advantage (assume that jurisdiction and venue are properly established). Euphoria law allows a cause of action for interference with prospective economic advantage, whereas Tennessee law does not. Additionally, under the laws of Euphoria, a litigant has four years to bring such claims, whereas in Tennessee a litigant has three years to assert a claim for inducement to breach a contract.
 - a. Scrub moved to dismiss Janco's lawsuit on the grounds that the action is barred by Tennessee's three-year statute of limitations. Janco opposed the motion, asserting Euphoria's four-year statute should apply. How should the court rule? Explain your answer.
 - b. Assume that Janco's lawsuit is timely filed and that Scrub moved to dismiss the claim for interference with prospective economic advantage on the grounds that Tennessee does not allow such a claim. Janco opposed the motion on the grounds that Euphoria law applies. How should the court rule? Explain your answer.