

**MISSISSIPPI BOARD OF BAR ADMISSIONS
FEBRUARY 2020 BAR EXAMINATION
EVIDENCE
100 POINTS TOTAL**

QUESTION 1.1 (50 POINTS)

You are retained in a personal injury action. Allegedly, the Plaintiff slipped and fell on a stair case at the Fallen Oaks Restaurant, sustaining severe and disabling injuries. Plaintiff states that they stepped on a step covered in water that leaked from a busted pipe inside the adjoining wall. Suit is filed against the owner of the building housing the restaurant, alleging negligent maintenance of the premises. The owner denies responsibility on the basis that the manager of the restaurant, who has leased the property from the owner under the same oral agreement for ten years, allegedly has control of the premises and responsibility for maintenance of the premises.

Discovery reveals that several other individuals have fallen on the same step within the past six months, and the building owner paid the medical expenses incurred by each. The owner is refusing to pay expenses associated with the current incident. Further, the owner of the building hired a plumber to repair the busted pipe the day after the most recent incident.

1.1.1. Discuss the relevancy and admissibility at trial of the previous slip-and-fall incidents and the owner's payment of medical expenses (25 POINTS)

1.1.2. Discuss the relevancy and admissibility at trial of the fact that defendant repaired the busted pipe (25 POINTS)

QUESTION 1.2 (50 POINTS)

The Rules of Evidence 500 Series addresses the concept of privilege as it may pertain to witnesses. These questions seek to test your minimal competency and understanding of invoking a privilege to preclude certain testimony.

1.2.1. Name three of the four types of privileges specified in the Rules of Evidence. (5 POINTS EACH)

1.2.2. With respect to claiming privilege, it is important to understand who can claim the privilege. Names three groups who can claim any privilege. (5 POINTS EACH)

1.2.3. There are five exceptions to the lawyer-client privilege. As this privilege applies to many of your actions, it is important to understand when the privilege is limited. Name and define two of the exceptions. (10 POINTS EACH)

MISSISSIPPI BOARD OF BAR ADMISSIONS
FEBRUARY 2020 EXAMINATION
EVIDENCE

ANALYSIS

QUESTION 1.1 (50 POINTS TOTAL)

1.1.1. Both the Federal and State Rule of Evidence, 404(b), provide:

Evidence of other crimes, wrongs or acts is not admissible to show the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation plan, *knowledge*, identity or absence of mistake or accident.

See also, *Carter v. State*, 450 So.2d 67 (Miss. 1984). While the prior accidents are not admissible to show that Defendant acted in conformity therewith (continuing to negligently maintain the premises), it is admissible to show both the restaurant manager and building owner had/should have had knowledge of the condition of the step and busted water pipe.

Rule 409, M.R.E. and F.R.E., provide that evidence of furnishing or offering or promising to pay medical expenses resulting from an injury is not admissible to prove liability for the injury. Here, the owner did not offer or promise to pay for Plaintiff's medical expenses and, therefore, the evidence is not being offered to prove liability for Plaintiff's injury. However, since the oral lease agreement between the owner and the manager has remained the same before and after the previous incidents, evidence that the owner paid the medical expenses of the others would be relevant to show *control*. Likewise, owner's previous payment of medical expenses is relevant and admissible to show that owner had *knowledge* of the dangerous condition. (25 POINTS)

1.1.2. M.R.E. and F.R.E. 407 prohibits the admission of evidence of *subsequent remedial measures*, or "measures which, if taken previously, would have made the event less likely to occur," for the purpose of proving negligence or culpable conduct in connection with the subject event. However, the evidence is admissible to show ownership and/or control of the premises, or feasibility of precautionary measures, if controverted, or for impeachment. It is important for the answer to articulate that a court may exclude evidence for one purpose but admit the same evidence for a different purpose, and instruct the jury accordingly. MRE 105. [GRADER'S NOTE: this reference may occur in responding to subsection 1.1.1 or 1.1.2] (25 POINTS)

QUESTION 1.2 (50 POINTS TOTAL)

1.2.1. Name three of the four types of privileges specified in the Rules of Evidence. (5 POINTS EACH)

ANSWER:

- MRE 502 Lawyer-Client Privilege
- MRE 503 Physician and Psychotherapist-Patient Privilege
- MRE 504 Husband-Wife Privilege
- MRE 505 Priest-Penitent Privilege

1.2.2. With respect to claiming privilege, it is important to understand who can claim the privilege. Name three groups who can claim any privilege. (5 POINTS EACH)

ANSWER:

- The Professional (lawyer; physician/therapist; priest);
- The Individual in the relationship (client, patient; spouse; penitent);
- Someone on behalf of the individual (guardian; conservator; personal representative; successor; trustee; or similar corporate representative);

MRE 502(c); MRE 503 (c); MRE 504 (c); MRE 505 (c).

1.2.3. There are five exceptions to the lawyer-client privilege. As this privilege applies to many of your actions, it is important to understand when the privilege is limited. Name and define two of the exceptions. (10 POINTS EACH)

ANSWER:

- (1) *Furtherance of the Crime or Fraud.* If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;
- (2) *Claimants Through Same Deceased Client.* As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

- (3) *Breach of Duty by a Lawyer or a Client.* As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer;
- (4) *Document Attested by a Lawyer.* As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;
- (5) *Joint Clients.* As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

**MISSISSIPPI BOARD OF BAR ADMISSIONS
FEBRUARY 2020 BAR EXAMINATION
CONTRACTS
100 Points Total**

IMPORTANT Notice to Bar Examinees: All questions are independent of one another and are not related with one another in any manner. They should each be analyzed separately and independently.

Question 2.1 (60 points total)

Landlord leased a large tract of farmland to Lessee for a 10 year lease term beginning January 1, 2010 and ending December 31, 2019. The annual rent was \$120,000, payable in semiannual installments. The lease agreement contained the following extension or renewal option:

Lessor hereby gives and grants unto Lessee the right and option to lease said land for one (1) additional ten (10) year term as follows: If not in default under the terms and conditions of this lease, a ten (10) year extension period beginning January 1, 2020, and ending on December 31, 2029, upon the same terms, except that the rental to be paid by Lessee to Lessor shall be re-negotiated and may increase by the amount of increase from January 1, 2010, to January 1, 2019, in land rent customary in the area for similar property. It is specifically understood and agreed that Lessee's option to renew herein granted shall automatically take effect unless Lessee notifies Lessor in writing of his intention not to renew prior to September 1st of the last year of his primary term.

In early 2019, Landlord and Lessee began re-negotiating the lease for the ten-year renewal period. Landlord sought to increase annual rent to \$280,000. Lessee balked at that price and offered to have an arbitrator determine what rent should be. Landlord refused to arbitrate, and no further discussions were had regarding Lessee's option to renew. In January of 2020, Lessee tendered the same semiannual rent payment it had paid during the initial lease term. Landlord rejected the payment and declared the lease terminated.

2.1.1. Did Landlord have the right to terminate the lease? (15 points)

2.1.2. Explain fully. (45 points)

Question 2.2 (18 points total)

List the elements of a valid contract under Mississippi law.

Question 2.3 (22 points total)

Explain how a Court examines a contract under Mississippi law to determine the parties' intent, including the circumstances in which a Court will consider extrinsic evidence.

**MISSISSIPPI BOARD OF BAR ADMISSIONS
FEBRUARY 2020 BAR EXAMINATION
CONTRACTS
100 Points Total**

ANALYSIS AND MODEL ANSWER

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2.1.1. Did Landlord have the right to terminate the lease? (15 points)

Answer to Question 2.1.1:

YES.

2.1.2. Explain fully. (45 points)

Answer to Question 2.1.2:

Because the parties left an essential term of the lease renewal—rent—to future negotiations, without a definite method to determine that amount, the option was rendered unenforceable. **(15 Points)** “To be enforceable, a contract to enter into a future contract must specify all its material and essential terms and leave none to be agreed upon as the result of future negotiations.” *Intrepid, Inc. v. Bennett*, 176 So. 3d 775, 778 (Miss. 2015) (quoting *Etheridge v. Ramzy*, 276 So.2d 451, 454 (Miss.1973)). “If any essential term is left open to future consideration, there is no binding contract, and an agreement to reach an agreement imposes no obligation on the parties thereto.” *Etheridge*, 276 So.2d at 454. **(10 Points)** “[W]hile courts may supply reasonable terms which the parties omitted in the contracting process, such as a time for performance, essential terms such as price cannot be left as open-ended questions in contracts which anticipate some future agreement.” *Duke v. Whatley*, 580 So.2d 1267, 1273–74 (Miss.1991). **(5 Points)**

Rental amount in a lease agreement is akin to the price amount in a sales contract; thus, it is an essential and basic requirement, and “[w]ithout a definite agreement as to the amount of rent, there can be no binding lease agreement.” **(5 Points)** *Id.* The renewal option here contains no definite method to determine the rent upon renewal. By its very terms, the option required that rent “shall be re-negotiated,” and it provided no formula for determining the amount of any increase. For example, the permitted increase is not tethered to a particular index or formula, the geographic area mentioned in the provision is not defined, and there is no provision that would permit the parties to turn to a qualified third party to determine the new rent. See *Intrepid*, 176 So. 3d at 780. **(5 Points)** Lessee will probably argue that there was an automatic renewal because it did not notify Landlord that it would not renew. However, that argument ignores the language in the option that requires negotiation, which renders the option clause an unenforceable agreement to reach an agreement in the future. *Id.* at 779 (“The option clause was merely an agreement to reach an agreement in the future, which is no agreement at all.”) (citing *Etheridge*, 276 So.2d at 454). **(5 Points)**

Question 2.2 (18 points total)

List the elements of a valid contract under Mississippi law.

Answer to Question 2.2:

1. Two or more contracting parties, **(3 Points)**
2. Consideration, **(3 Points)**
3. An agreement that is sufficiently definite, **(3 Points)**
4. Parties with legal capacity to make a contract, **(3 Points)**
5. Mutual assent, and **(3 Points)**

6. No legal prohibition precluding contract formation. (3 Points)

Rotenberry v. Hooker, 864 So.2d 266, 270 (Miss. 2003)

Question 2.3 (22 points total)

Explain how a Court examines a contract under Mississippi law to determine the parties' intent, including the circumstances in which a Court will consider extrinsic evidence.

Answer to Question 2.3:

When examining a contract, a court should first examine the four corners of the contract to determine how to interpret it. *McKee v. McKee*, 568 So.2d 262, 266 (Miss. 1990). (10 Points) If the language in the contract is clear and unambiguous the intent of the contract must be effectuated. *Pfisterer v. Noble*, 320 So.2d 383, 384 (Miss. 1975). See also *Pursue Energy Corp. v. Perkins*, 558 So.2d 349, 352 (Miss. 1990). (5 Points) Vagueness and ambiguity are more strongly construed against the party drafting the contract. *Lamb Constr. Co. v. Town of Renova*, 573 So.2d 1378, 1383 (Miss. 1990). (2 Points) Only when the intent of the parties is not clear the Court should then resort to extrinsic evidence. *Perkins*, 558 So.2d. at 353. "It is only when the review of a contract reaches this point that prior negotiation, agreements and conversations might be considered in determining the parties' intentions in the construction of the contract." *Facilities, Inc. v. Rogers–Usry Chevrolet, Inc.*, 908 So.2d 107, 111 (Miss.2005). (5 Points)

**MISSISSIPPI BOARD OF BAR ADMISSIONS
FEBRUARY 2020 BAR EXAMINATION
CONSTITUTIONAL & CRIMINAL LAW & CRIMINAL PROCEDURE
100 Points Total**

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Question 3.1 (50 points total)

Ms. Hicks is an elderly lady who lives alone in Small Town, Mississippi. One morning, Ms. Hicks was getting out of her vehicle with an arm full of groceries when an unidentified person hit her in the back of her head with an unknown object. The person took \$20.00 from her purse and fled. Ms. Hicks staggered to her feet to see a person matching Sara's description drop a metal pipe and get into the passenger side of a white sport utility vehicle, which left the scene at a high rate of speed.

Ms. Johnson, a neighbor living across the street, also saw the white sport utility vehicle speeding away, but she did not see anything else. Ms. Hicks called the local police department, reported the crime, and described the vehicle. Shortly afterwards, Sara was stopped by the local police because she was driving a vehicle that matched the description given by Ms. Hicks.

There are at least three crimes with which the district attorney could reasonably charge Sara. Name two likely charges (**10 points per charge**) and define the elements of each named charge (**15 points per explanation of the elements**).

Question 3.2 (50 points total)

Sara has been charged with a crime against Ms. Hicks and has posted bond. She's so nervous and scared after being released from jail, that she stopped at The Best Bar In Town for a drink. On the way home, she began to drive erratically, swerving all over the roadway. This caught the attention of the local police and he activated his blue lights.

Sara was stopped and charged the driving under the influence because her blood alcohol content was .20. Sara was taken back to the same jail that she just bonded out of. While in jail it was discovered that she already has three prior driving under the influence convictions within the past five years. The district attorney has upgraded her DUI charge.

The district attorney will likely upgrade Sara's initial DUI to what offense? **(10 points for identification of the likely upgraded charge; 20 points for identifying the elements of the initial/underlying charge; 20 points for identifying the elements of the upgraded charge).**

**MISSISSIPPI BOARD OF BAR ADMISSIONS
FEBRUARY 2020 BAR EXAMINATION
CONSTITUTIONAL & CRIMINAL LAW & CRIMINAL PROCEDURE
100 Points Total**

ANALYSIS AND MODEL ANSWER

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Question 3.1 (50 points total)

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Ms. Johnson, a neighbor living across the street, also saw the white sport utility vehicle speeding away, but she did not see anything else. Ms. Hicks called the local police department, reported the crime, and described the vehicle. Shortly afterwards, Sara was stopped by the local police because she was driving a vehicle that matched the description given by Ms. Hicks.

There at least three crimes with which the district attorney could reasonably charge Sara. Name two likely charges (**10 points per charge**) and define the elements of each named charge (**15 points per explanation of the elements**).

Answer to Question 3.1:

Sara could possibly be charged with armed robbery (**10 points**). Miss. Code Ann. § 97-3-79 states that "[e]very person who shall feloniously take or attempt to take from the person or from the presence the personal property of another and against his will by violence to this person or by putting such person in fear of immediate injury to this person by the exhibition of a deadly weapon shall be guilty of robbery." *See also, Smith v. State*, 250 So. 3d 421 (Miss. 2018). The factual scenario indicates that Ms. Hicks was struck with an unknown object and twenty dollars was taken from her purse. Given the facts, Sara could be charged with armed robbery. (**15 points**).

Sara could also be charged with aggravated assault **(10 points)**. Miss. Code Ann. § 97-3-79 states that “[a] person is guilty of aggravated assault if he (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly, under circumstances manifesting extreme indifference to the value of human life; or (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm” See also, *Russell v. State*, 924 So. 2d 604 (Miss. App. 2006).

Ms. Hicks stated that she was struck with an unknown object in the head. Although there is no report of a serious bodily injury, Sara could, nonetheless be charged with aggravated assault. **(15 points)**

NOTE TO GRADERS: Examinees may be awarded partial points for identifying conspiracy to commit a crime as one of the possible charges. The facts leave open the possibility that Sara merely drove the vehicle and that another person attacked Ms. Hicks. See Miss. Code Ann. § 97-1-1(1)(a) (“defines conspiracy as two or more people who conspire either to commit a crime.”).

Question 3.2 (50 points total)

Sara has been charged with a crime against Ms. Hicks and has posted bond. She’s so nervous and scared after being released from jail, that she stopped at The Best Bar In Town for a drink. On the way home, she began to drive erratically, swerving all over the roadway. This caught the attention of the local police and he activated his blue lights.

Sara was stopped and charged the driving under the influence because her blood alcohol content was .20. Sara was taken back to the same jail that she just bonded out of. While in jail it was discovered that she already has three prior driving under the influence convictions within the past five years. The district attorney has upgraded her DUI charge.

The district attorney will likely upgrade Sara’s initial DUI to what offense? **(10 points for identification of the likely upgraded charge; 20 points for identifying the elements of the initial/underlying charge; 20 points for identifying the elements of the upgraded charge).**

Answer to Question 3.2:

Sara’s charge would likely be upgraded to Driving Under the Influence 4th offense **(10 points)**. The facts indicate that Sara had a .20 blood alcohol content. In Mississippi, “[i]t is unlawful for a person to drive or otherwise operate a vehicle within this state if the person . . . [h]as an alcohol concentration in the person’s blood . . . of: (i) Eight one-

hundredths percent (.08%) or more for a person who is above the legal age to purchase alcoholic beverages under state law.” Miss. Code Ann. § 63-11-30(1)(d)(i). **(20 points)**.

Moreover, pursuant to Miss. Code Ann. § 63-11-30(2)(d)(i), “[f]or any fourth or subsequent conviction of a violation of subsection (1) of this section, without regard to the time period within which the violations occurred, the person shall be guilty of a felony ...” **(20 points)**

NOTE TO GRADERS: Correct answers should identify DUI 4th offense as the upgraded charge, and such answers are eligible for the total points allocated. However, examinees may be awarded partial points for discussing an upgraded charge of reckless driving. “Any person who drives any vehicle in such a manner as to indicate either a willful or wanton disregard for the safety of persons or property is guilty of reckless driving” Miss. Code Ann. § 63-3-1201. *See also, Lee v. State*, 759 So. 2d 390 (Miss. 2000). The facts indicate that Sara was speeding, so it is possible that she could be charged with the crime of reckless driving.

**MISSISSIPPI BOARD OF BAR ADMISSIONS
FEBRUARY 2020 EXAMINATION
MISSISSIPPI PRACTICE AND PROCEDURE
100 Points**

QUESTION 4.1

- 4.1.1.** Where do the Circuit and Chancery Courts of Mississippi derive their jurisdictional parameters? **(5 points)**
- 4.1.2.** Are either or both the Circuit and/or the Chancery Courts courts of general jurisdiction? Please explain your answer fully. **(15 points)**

QUESTION 4.2

- 4.2.1.** What is the proper remedy for a defendant who successfully demonstrates that jurisdiction of the Circuit or Chancery Court is not proper in the Court in which it was filed? For example, if a plaintiff wrongfully filed a matter in Chancery Court, over which it determined it did not have jurisdiction, what should the Chancery Court do? Conversely, what should a Circuit Court do should a plaintiff file a matter before it that is properly reserved for the Chancery Courts? **(10 points)**
- 4.2.2** When is dismissal of an action proper for failure to file in the correct court (Chancery v. Circuit)? **(5 points)**

QUESTION 4.3

Assume that a plaintiff files suit for damages alleged to have occurred from medical malpractice in county A. Plaintiff lives in County A. Plaintiff's primary care physician resides in County B. Plaintiff contends that her primary physician committed negligence in her treatment of Plaintiff in County A. After initial treatment by the primary physician, Plaintiff was transferred to a large hospital in County B where Plaintiff's primary care physician sent Plaintiff for emergent care.

Plaintiff's initial complaint included only her primary care physician as a defendant. After filing her complaint, Plaintiff amended it prior to the filing of defendant's answer to add the hospital in County B.

4.3.1. Discuss whether venue under this factual scenario is proper in County A, County B or elsewhere. Your answer should include an analysis of which of the facts presented do and do not have bearing on a proper determination of venue. **(20 points)**

4.3.2. If venue is not proper in the original county in which a Complaint is filed, is dismissal of the suit warranted? **(10 points)**

QUESTION 4.4 Enumerate the proper venue or venues for injury allegedly suffered as a result of a defective product. **(15 points)**

QUESTION 4.5 Describe the analysis a Circuit Court should undertake when determining whether venue is proper in a matter claiming damages due to the negligence or intentional acts of a corporate defendant (outside of the medical malpractice/healthcare arena).

4.5.1. Include in your answer all relevant factors the Court should consider in determining appropriate venue. **(10 points)**

4.5.2. When there is more than one proper and equally convenient venue, explain whether the court should defer to either party's preference in its analysis of proper venue. Include in your response how a court's analysis/prioritization of venue is affected, if at all, by several individual defendants residing in different venues. **(10 points)** (As the question specifically forecloses any argument of forum non conveniens, no points should be awarded for discussion of the doctrine).

**MISSISSIPPI BOARD OF BAR ADMISSIONS
FEBRUARY 2020 BAR EXAMINATION
MISSISSIPPI PRACTICE AND PROCEDURE
100 Points Total**

ANALYSIS AND MODEL ANSWER

- 4.1.1** The jurisdictional parameters of the Circuit and Chancery Courts in Mississippi are set forth in the Constitution of the State of Mississippi. **(5 points)**
- 4.1.2** The Circuit Courts are courts of general jurisdiction **(5.5 points)** while the Chancery Courts are courts of special or limited jurisdiction **(5.5 points)** and only have jurisdiction of matters specifically spelled out by the Constitution. **(2 points)** (Sections 159, 160 and 161 enumerate matters properly heard in Chancery Courts.) Section 156 of the Mississippi Constitution of 1890 provides that the Circuit Court has “original jurisdiction in all matters civil and criminal...not vested by this Constitution in some other court....” **(2 points)**
- 4.2.1** In either case, the matter should be transferred to the court with jurisdiction, **(6 points)** not dismissed. Sections 157 (Circuit) **(2 points)** and 162 of the Mississippi Constitution (Chancery) **(2 points)** provide that where an action is wrongfully filed in Circuit or Chancery Court, the action should be transferred to the court with proper jurisdiction.
- 4.2.2** Dismissal is not appropriate under any of these circumstances. The cause should be transferred to the proper Circuit or Chancery Court. **(5 points)**
- 4.3.1** The healthcare industry has a venue provision all its own—the legislature limited proper venue in these cases exclusively to where the complained-of act occurred.
- “(3) Notwithstanding subsection (1) of this section, any action against a licensed physician, osteopath, dentist, nurse, nurse-practitioner, physician assistant, psychologist, pharmacist, podiatrist, optometrist, chiropractor, institution for the aged or infirm, hospital or licensed pharmacy, including any legal entity which may be liable for their acts or omissions, for malpractice, negligence, error, omission, mistake, breach of standard of care or the unauthorized rendering of professional services shall be brought only in the county in which the alleged act or omission occurred.” Miss. Code Ann. § 11-11-3 (3).

Under these facts, venue would only be appropriate in County A since it is where the injurious actions alleged in the initial complaint took place. **(10 points)** Where the parties live has no bearing on venue in a medical negligence matter. **(3 points)**.

Here, since venue is determined at the time of filing of the initial complaint, Plaintiff's addition of the defendant in County B would not provide for establishment of venue there, even though Plaintiff alleges that part of the negligent acts occurred in County B. **(7 points)**.

4.3.2 No. The proper remedy for filing a cause of action in a jurisdiction where venue is not appropriate is transfer of that action to a venue that is. Dismissal is not warranted or proper. **(10 points)**

4.4 Miss. Code Ann. §11-11-3 provides that the general test for proper venue applies to defective product cases and adds the provision that such cases may also be brought in the venue where the product was obtained. Miss. Code Ann. §11-11-3(i) provides "[c]ivil actions of which the circuit court has original jurisdiction shall be commenced in the county where the defendant resides, or, if a corporation, in the county of its principal place of business, or in the county where a substantial alleged act or omission occurred or where a substantial event that caused the injury occurred.

(ii) Civil actions alleging a defective product may also be commenced in the county where the plaintiff obtained the product." Thus, the action may be properly filed where the defendant resides **(3.5 points)**, in a Company's principal place of business, **(3.5 points)** where a substantial act or omission occurred **(3.5 points)** or where the plaintiff obtained the product in question. **(4.5 points)**

4.5.1 The Plaintiff's venue choice must comport with the general requirements of Miss.Code Ann. §11-11-3(a).

"(i) Civil actions of which the circuit court has original jurisdiction shall be commenced in the county where the defendant resides, or, if a corporation, in the county of its principal place of business, or in the county where a substantial alleged act or omission occurred or where a substantial event that caused the injury occurred...." **(10 points)**.

4.5.2 When there is more than one correct venue, Plaintiffs have historically been afforded deference in their choice of venue. "Of right, the plaintiff selects among the permissible venues, and his choice must be sustained unless in the end there is no credible evidence supporting the factual basis for the claim of venue." *McMillan v. Puckett*, 678 So. 2d 652, 656 (Miss. 1996). "It is the plaintiff's

prerogative to decide where, among permissible venues, to sue the defendant” and, for that reason, “absent weighty reasons,” the plaintiff’s choice of venue should not be disturbed. *Bayer Corp. v. Reed*, 932 So. 2d 786, 788-89 (Miss. 2006). This Court has held that “the court at trial must give the plaintiff the benefit of the reasonable doubt, and we do so on appeal as well.” *McMillan*, 678 So. 2d at 656 (citation omitted). **(5 points)**

Where there is more than one defendant, Mississippi rules allow for the filing of suit in any venue proper as to any one of the several defendants. Rule 82(c) of the Mississippi Rules of Civil Procedure provides that “[w]here several claims or parties have been properly joined, the suit may be brought in any county in which any one of the claims could properly have been brought.” **(5 points)**

**MISSISSIPPI BOARD OF BAR ADMISSIONS
FEBRUARY 2020 BAR
EXAMINATION
DOMESTIC RELATIONS
100 Points Total**

Harry and Wilma were married in June, 1999, days after meeting in Sandi, California at a Technology Exposition. Wilma happened to be there on family vacation to celebrate her graduation from high school the previous month. Sandi was Harry's home. He had earned an engineering degree from the University of Sandi. After graduation Harry began working at an engineering firm earning \$90,000 annually. Harry also wrote articles for Technology Magazine earning \$12,000 annually.

After remaining in Sandi a few months, the couple moved to Village, Mississippi, Wilma's hometown, into a house that Wilma inherited from her grandmother upon her death in 1998. The house was valued at \$100,000, but needed work. Harry managed its renovation which increased the value to \$180,000.

Not only had Wilma inherited the house, she was also the beneficiary of a flower shop located on the property. She had helped her grandmother operate the flower shop since she was a small child. The flower shop was her grandmother's sole proprietorship. The three employees whom her grandmother had hired continued to run the shop. Wilma checked on things occasionally. The shop continued to generate net income of \$30,000 per month. Harry quit his engineering job and stopped writing. The family lived on the flower shop income. Harry helped with flower deliveries on three occasions.

The couple had two daughters and both parties participated in the care of the children, except when Harry was away on one of his frequent trips to Sandi.

During 2010 Wilma discovered airline, hotel and entertainment receipts and learned that Harry had maintained a relationship with his lover in Sandi. He had taken her on a trip abroad as well as trips to New York, and Hawaii. Wilma immediately filed for divorce on the grounds of adultery, asking for custody of their two daughters, the house and flower shop.

Harry denied the adultery claim, and filed a counter- petition requesting custody of the children, and to be awarded the house, the flower shop and alimony.

QUESTIONS

- 5.1.** Discuss how the house should be classified in a property division between the parties. **(20 Points)**

- 5.2.** Discuss how the flower shop should be classified in a property division between the parties. **(20 Points)**

- 5.3.** Assuming the chancellor grants Wilma a divorce based on adultery and awards the children to her, discuss the factors that should be considered in dividing the marital property. **(30 Points)**

- 5.4.** Discuss whether Harry would be entitled to alimony and three (3) factors that may weigh against him. **(30 Points)**

**MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2020 BAR
Examination DOMESTIC
RELATIONS
100 Points Total**

ANALYSIS

- 5.1.** Gifts and inheritances are classified as separate assets. However, separate assets may become marital property by gift or family use, joint titling or commingling. There is no evidence of gift or joint titling. The house was clearly the separate asset of Wilma because she inherited it from her grandmother. However, Mississippi has a family use doctrine whereby separate property is almost always converted to marital property. The house was used by the family as their residence. The best argument is that it became marital property as a result. In addition, if separate property appreciates during the marriage, the appreciation may become marital property. Mississippi stands with the majority of states that hold that appreciation attributable to active efforts of either spouse is marital property. *Craft v. Craft*, 825 So.2d 605 (Miss. 2002). The appreciation due to renovation became marital property as a result of contribution by Harry (note that contribution could be by either spouse). It can be argued that only the appreciation in the value of the house would be a marital asset, making it a mixed asset. However, as a result of family use and renovation during marriage, the entire value of the house was likely converted to a marital asset. **(20 Points)**
- 5.2.** The flower shop, because it was inherited, is the separate property of Wilma. The family used the proceeds of the shop to live. However, use of the proceeds does not convert separate property to marital property. *Pearson v. Pearson*, 761 So.2d 1S7 (Miss. 2000). There was negligible contribution by the parties. There was no appreciation during the marriage. The shop would likely remain the separate property of Wilma. **(20 Points)**
- 5.3.** The following factors should be considered in determining property settlement pursuant to *Ferguson v. Ferguson*, 639 So.2d 921: **(30 Points Total)**

5.3.a. Substantial contribution to property accumulation, including direct or indirect economic contribution, contribution to marital and family stability, and contribution to the education or training of the wage-earning spouse; Harry directly contributed to the increased valuation of the house by managing the renovation that increased the value by \$80,000. Harry's travel cost was a dissipation of marital assets and detracted from marital and family stability. Neither spouse contributed to the education and training of the other. There should be an equitable division of this marital asset. Harry should be awarded either half the value pursuant to the family use doctrine or at least half the appreciation.

Three flower deliveries over more than ten years would be an insignificant contribution. It does not appear that either spouse made a significant contribution to the flower shop during the marriage. If the flower shop is separate property it should be awarded to Wilma. **(3.75 points)**

5.3.b. Spousal use or disposition of assets and distribution by agreement; Harry spent family money on travel and entertainment with his lover. This would be considered wasteful dissipation of assets. This certainly would not have been by agreement. **(3.75 points)**

5.3.c. The market and emotional value of assets; The house and flower shop were inherited from Wilma's grandmother and she would have great emotional attachment to both. In addition, Wilma's work in the flower shop with her grandmother during childhood likely created even greater sentimental value. If the flower shop is separate property it is not divided. **(3.75 points)**

5.3.d. The value of each spouse's separate estate; Wilma has a house that she inherited that was \$100,000, but increased in value to \$180,000 due to renovation. She also owns a flower shop that generates a significant amount of income. Her assets are significantly more than Harry's. He has no assets. Equitable division would require division of marital assets. The house, because it was inherited, would be Wilma's separate property. However, marital use and appreciation during the marriage would

convert it to marital property and entitle Harry to an equitable distribution. **(3.75 points)**

5.3.e. Tax consequences and legal consequences to third parties; There are no apparent tax or legal consequences because none of the asset are being liquidated. If a sale of marital assets is ordered by the chancellor, the tax burden would require consideration. **(3.75 points)**

5.3.f. The extent to which property division can eliminate the need for alimony; a monetary distribution of the marital property, the house, would provide temporary funds to Harry and likely eliminate the necessity for alimony. **(3.75 points)**

5.3.g. The needs of each spouse; Harry would need a place to live if the house is awarded to Wilma. As the custodian of the two minor children, Wilma would have an immediate housing need greater than Harry's. **(3.75 points)**

5.3.h. Other factors which should be considered in equity. **(3.75 points)**

5.4. Alimony should be considered only after division of marital property. Alimony is equally available to husbands and wives (M.C.A. 93-5-23). The Chancellor has discretion in deciding whether to award alimony and considers twelve factors. *Armstrong v. Armstrong* 618 so.2d 1278. Financial disparity is a frequent reason for awarding alimony. Factors that weigh against Harry in his alimony claim are: **(30 Points Total)**

5.4.a. Earning capacity of the parties; Harry has a degree in engineering and writing ability and therefore his earning capacity is greater than Wilma's. Wilma has only a high school education. Harry quit a job where he was earning \$90,000 annually and abandoned his writing career that generated \$12,000 annually. The flower shop income is the only source of income that Wilma has. **(10 points)**

5.4.b. Fault or misconduct; Harry's misconduct caused the marriage to end. This would be a factor in denying alimony to him. Although this would not prohibit him from receiving alimony. The majority of states completely eliminated fault as a factor in alimony

awards. In states where fault is still considered, it is generally one of a number of factors for consideration rather than a reason in itself to deny alimony. In 1992 the Mississippi Supreme Court abandoned the "innocent spouse" rule, holding that marital fault is merely one factor for consideration in an alimony award (Hammonds v. Hammonds, S97 So.2d 653). **(10 points)**

5.4.c. Wasteful dissipation of assets by either party; Harry spent family money on travel and entertainment with his lover, this would be determined to be wasteful dissipation of assets. The facts state that he made frequent trips to Sandi. He had taken his lover to on a trip abroad as well as to New York and Hawaii. This is an important factor in determining alimony. **(10 points)**

(A total of 30 POINTS may be awarded for the above factors. Other Armstrong factors listed below would not weigh against Harry's alimony claim. Allow minimal credit for any of these factors: d - l)

5.4.d. Income and expenses of the parties;

5.4.e. The needs of each party;

5.4.f. The obligations and assets of each party.

5.4.g. The length of the marriage;

5.4.h. The presence or absence of minor children in the home, which in the home, which may require that one or both of the parties either pay, or personally provide, childcare;

5.4.i. Age of the parties

5.4.j. Standard of living of the parties;

5.4.k. The tax consequences of the spousal support order;

5.4.l. Any other factor deemed by the court to be just and equitable in connection with the setting of spousal support.

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LEGAL ETHICS AND PROFESSIONAL CONDUCT
100 POINTS TOTAL**

FACTS

Angela and John were study partners during law school and became fast friends.

Following law school, John opened a solo general litigation practice in North Mississippi while Angela went to work for a large firm on the Mississippi Gulf Coast. Several years into their respective practices, Angela contacts John and offers to refer a lucrative plaintiff's car wreck case to John. "The Plaintiff is a friend of my cousin who lives just thirty minutes away from you," Angela said, "plus, it's a good case, with clear liability. You just have to fight over the amount of damages. I don't know the Judges up there and I'm several hours away. If you want to just take the ball and run with it, I'll only take 25% of any fee you get. Get her signed up, then just let me know when its over and you're ready to disburse the fees." John agrees and then confirms the agreement with Angela in a letter. Angela provides John with the client's contact information.

After contacting the prospective client Theresa Smith and meeting with her alone at her house, John confirms that it is an excellent case with a large anticipated amount of recoverable damages. However, Theresa tells John that she is in dire financial straits because of her medical bills from the accident, telling him she will be evicted "any day now" from her apartment and medical providers are threatening to sue her. Theresa tells John that she won't hire him as her attorney unless he helps her pay some bills now.

John tells Theresa that he normally charges a 33% contingency fee in these kinds of cases, but will agree to advance the funds requested if she agrees to a 40% contingency fee. He further tells her that he will share that fee with Angela, but that won't increase what she has to pay for attorney's fees. Theresa agrees and the two of them shake hands on the deal, with John telling Theresa he will email her a written contingency fee agreement to sign. The following week, John starts paying Theresa's \$800.00 monthly apartment rent and also gives her \$700.00 per month to make payments toward her outstanding medical bills.

John then files a lawsuit on behalf of Theresa and the case proceeds. John spends a substantial amount of time participating in discovery over the next year, including Theresa's deposition. After discovery is complete, the attorneys defending the case file motions to strike a large portion of Theresa's recoverable damages and John believes the motion may be granted. Feeling he can't properly respond to the motions without help, John calls Michael, another local attorney, for assistance. Michael agrees to work with John on the case until conclusion, including helping at trial if needed, in exchange for 25% of the fee. John agrees. Michael spends the next week working on the motion responses, responds to the motions and then argues at the motion hearing later that month. The Judge hearing the case denies the defense motions and soon after, John negotiates a favorable settlement for Theresa, subject to her approval.

John calls Theresa on her cell phone and speaks to her for the first time since her deposition to discuss the settlement and she agrees to the settlement amount. Once the settlement is concluded and proceeds are paid, John issues checks to Angela, Theresa and Michael for the amounts agreed to, along with a brief letter that simply states that their funds from the lawsuit were enclosed.

After receiving her check, Theresa calls John and is angry. "With what I agreed to settle for, this check is way too small," she said. John explained that he deducted the money he had advanced her, as well as other case expenses, and then a 40% contingency attorney's fee. "You told me you normally charged a one-third fee and that's what I agreed to," Theresa yelled. "I know you're sharing your fee with Angela, but that's no reason to overcharge me. I also didn't agree to your other 'expenses,' whatever those are. This is why lawyers have bad reputations - I'm going to call the bar on you." John tries to further explain, but Theresa hangs up on him.

John then pulls his file, but does not find where he ever sent a written contingency fee agreement to Theresa for signature.

QUESTIONS

- 6.1. Does Angela and John's agreement for the referral of a client and attorney's fee sharing comply with the Mississippi Rules of Professional Conduct governing attorney's fees? Explain. **(30 points)**.
- 6.2. Does John and Michael's agreement for sharing the attorney's fee comply with the Mississippi Rules of Professional Conduct governing attorney's fees? Explain. **(20 points)**.
- 6.3. Does John's agreement to advance funds to Theresa comply with the Mississippi Rules of Professional Conduct governing conflicts of interest and transactions with clients? Explain. **(20 points)**.
- 6.4. Does John's contingency fee agreement with Theresa comply with the Mississippi Rules of Professional Conduct governing attorney's fees? Explain. **(30 points)**.

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FEBRUARY 2020 EXAMINATION
LEGAL ETHICS AND PROFESSIONAL CONDUCT
100 POINTS TOTAL**

Analysis and Model Answer:

6.1. Does Angela and John's agreement for the referral of a client comply with the Mississippi Rules of Professional Conduct? Explain. (30 points total)

The Mississippi Rules of Professional Conduct provides:

- (e) A division of fee between lawyers who are not in the same firm may be made only if:
- (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
 - (2) the client is advised of and does not object to the participation of all the lawyers involved; and
 - (3) the total fee is reasonable.

Miss. R. Prof'l. Cond.1.5(e). **(15 Points)**

A forty percent (40%) contingency fee may be reasonable as a total fee, although it can be argued that it is not reasonable since damages are expected to be very substantial and liability is admitted. Even so, John appears to have had to perform a substantial amount of work in the case.

Secondly, John did inform the client of the participation of both John and Angela in the case.

However, Angela does not agree to perform any real work on the case, reflected by her comments that John would "take the ball and run with it" and only contact her once it was time to disburse the fee. As such, it does not appear that Angela's portion of the fee (25%) is in proportion to the services she will render in the case and there is no written agreement where Angela agrees to assume joint responsibility for the representation. The fee division here would violate Rule 1.5(e). **(15 points)**

6.2. Does John and Michael's agreement for sharing the fee comply with the Mississippi Rules of Professional Conduct? Explain. (20 points)

With respect to John's agreement with Michael, Rule 1.5(e) is again implicated. Michael appears to engage in substantial and important work in the case and while trial is ultimately not necessary, agrees to help with trial. It may be argued that his participation over one month is not sufficient to justify a full 25% portion of the fee, but his involvement creates a much more substantial issue on this element.

As with the analysis of the agreement with Angela, a total 40% contingency fee may be reasonable, although it may be argued that it is excessive.

Regardless, there is no evidence that Theresa was ever informed or agreed to Michael's involvement. For this reason alone, the agreement does not comply with Rule 1.5(e)(2).

6.3. Does John's agreement to advance funds to Theresa comply with the Mississippi Rules of Professional Conduct? Explain. (20 points total)

Rule 1.8(e) of the Mississippi Rules of Professional Conduct Provides:

- (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, or administrative proceedings, except that:
 - 1. A lawyer may advance court costs and expenses of litigation, including but not limited to reasonable medical expenses necessary to the preparation of the litigation for hearing or trial, the repayment of which may be contingent on the outcome of the matter; and
 - 2. A lawyer representing a client may, in addition to the above, advance the following costs and expenses on behalf of the client, which shall be repaid upon successful conclusion of the matter.
 - a. Reasonable and necessary medical expenses associated with treatment for the injury giving rise to the litigation or administrative proceeding for which the client seeks legal representation; and
 - b. Reasonable and necessary living expenses incurred.

The expenses enumerated in paragraph 2 above can only be advanced to a client under dire and necessitous circumstances, and shall be limited to minimal living expenses of minor sums such as

those necessary to prevent foreclosure or repossession or for necessary medical treatment. There can be no payment of expenses under paragraph 2 until the expiration of 60 days after the client has signed a contract of employment with counsel. Such payments under paragraph 2 cannot include a promise of future payments, and counsel cannot promise any such payments in any type of communication to the public, and such funds may only be advanced after due diligence and inquiry into the circumstances of the client.

Payments under paragraph 2 shall be limited to \$1,500 to any one party by any lawyer or group or succession of lawyers during the continuation of any litigation unless, upon ex parte application, such further payment has been approved by the Standing Committee on Ethics of the Mississippi Bar. An attorney contemplating such payment must exercise due diligence to determine whether such party has received any such payments from another attorney during the continuation of the same litigation, and, if so, the total of such payments, without approval of the Standing Committee on Ethics shall not in the aggregate exceed \$1,500. Upon denial of such application, the decision thereon shall be subject to review by the Mississippi Supreme Court on petition of the attorney seeking leave to make further payments. Payments under paragraph 2 aggregating \$1,500 or less shall be reported by the lawyer making the payment to the Standing Committee on Ethics within seven (7) days following the making of each such payment. Applications for approval by the Standing Committee on Ethics as required hereunder and notices to the Standing Committee on Ethics of payments aggregating \$1,500 or less, shall be confidential.

Miss. R. Prof. Cond.1.8(e). (12 Points)

Here, John's agreement violates Rule 1.8(e). While it may be argued that the funds are "reasonable medical expenses" and "living expenses" within the meaning of the rule and that Theresa's circumstance is a "dire and necessitous" one, John fails to comply with the time limitation of payment (*i.e.*, 60 days after client signs contract for employment of counsel) and exceeds the maximum amount allowable without first obtaining permission from the Standing Committee on Ethics of the Mississippi Bar. Additionally, he does not appear to have performed any "due diligence and inquiry into the circumstances of the client" before making payments, but simply agrees after merely being told by the client of the claimed circumstances. **(8 Points)**

6.4. Does John's contingency fee agreement with Theresa comply with the Mississippi Rules of Professional Conduct? Explain. (30 points total)

Generally, an attorney may enter into a contingency fee agreement as long as the case does not involve a domestic relations matter where payment is contingent upon securing divorce, alimony or support, or where there is a contingent fee for representing a defendant in a criminal case. Miss. R. Prof. Conduct 1.5(d). **(5 Points)**

When a contingent fee is permissible, there are certain requirements:

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

Miss. R. Prof. Cond. 1.5(c). **(15 points)**

Here, while a written agreement was intended, John never obtained a written contingency fee agreement from Theresa that contained the information provided for under Rule 1.5(c). Moreover, since John's only sent with Theresa's check a "brief letter that simply stated that their funds from the lawsuit were enclosed," he further failed to comply with 1.5(c)'s provision that requires a written statement showing the method of determining the client's recovery. **(10 points)**