

**MISSISSIPPI BOARD OF BAR ADMISSIONS
JULY 2017 BAR EXAMINATION
EVIDENCE
100 POINTS TOTAL**

QUESTION 1.1 (50 points total)

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 total)

- 1.2.1 What is hearsay, and is it admissible? (10 Points)**
- 1.2.2. Please state the types of "statements" that are governed by the hearsay definitions. (15 Points)**
- 1.2.3. Some 25 Hearsay exceptions exist. Please list five such exceptions and define them. (Listing of more than five hearsay exceptions will not result in increased Points.) (25 points)**

**MISSISSIPPI BOARD OF BAR ADMISSIONS
JULY 2017 BAR EXAMINATION
EVIDENCE
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ANALYSIS AND MODEL ANSWER

QUESTION 1.1 (50 points total)

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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.

QUESTION 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)

ANALYSIS 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. **(10 Points)**

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. **(10 Points)**

[NOTE: Any response coherently discussing the MRE 401/402/403 balancing test and underlying concepts should receive an additional **5 Points**.]

QUESTION 1.1.2.

Discuss the relevancy and admissibility at trial of the fact that Defendant repaired the busted pipe? (25 points)

ANALYSIS 1.1.2.

M.R.E. and F.R.E. 407 prohibit 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. **(10 Points)** However, the evidence is admissible to show ownership and/or control of the premises, or feasibility of precautionary measures, if controverted, or for impeachment. **(10 Points)**

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. [Note: this reference may occur in responding to subsection A or B] **5 Points.**

QUESTION 1.2 (50 points total)

QUESTION 1.2.1.

What is hearsay, and is it admissible? (10 Points)

ANALYSIS 1.2.1.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. MRE 801 (c). **(7.5 Points)**. Hearsay is not admissible except as provided by law. MRE 802 **(2.5 Points)**.

QUESTION 1.2.2.

Please state the types of “statements” that are governed by the hearsay definitions. (15 Points)

ANALYSIS 1.2.2.

A “statement” subject to the hearsay analysis may consist of:

- (1) Oral assertion **(5 Points)**

- (2) Written assertion (**5 Points**)
- (3) Non-verbal conduct of a person, if it is intended by the person as an assertion (**5 Points**). MRE 801(a)

QUESTION 1.2.3.

Some 25 Hearsay exceptions exist. Please list five such exceptions and define them. (25 points).

ANALYSIS 1.2.3.

Please see MRE 803. The Grader should award 5 points for each correct definition. Identification of an exception without a definition should receive 3 points for each.

**MISSISSIPPI BOARD OF BAR ADMISSIONS
July 2017 BAR Examination
CONTRACTS
100 Points Total**

Smalltown, Mississippi is governed by a three-member city council. Seller has spoken with all three council members, individually, regarding Smalltown purchasing Whiteacre from him for \$10,000. Each council member expressly told Seller that Smalltown would purchase Whiteacre from him for \$10,000. No written contract for the sale of Whiteacre is ever drafted. The next scheduled Council meeting is two weeks away. One day later, Joe Citizen offers Seller \$20,000 to purchase Whiteacre. Seller immediately accepts and sells Whiteacre to Joe Citizen. Assume for purposes of your answer that there is no dispute as to the legal description of Whiteacre, and there are no issues regarding Smalltown's status as a local municipality.

QUESTIONS

2.1 (50 points)

Is there an enforceable contract between Smalltown and Seller?

Explain the basis for your answer fully.

2.2 (25 points)

Assuming there is a valid contract between Smalltown and Seller, what is the statute of limitations related to this matter? Explain.

2.3 (25 points)

Smalltown, Mississippi hired you to file a breach of contract claim against Seller. What special Rule applies to this breach of contract claim, if any? Explain.

**MISSISSIPPI BOARD OF BAR ADMISSIONS
July 2017 Bar Examination
CONTRACTS
100 Points Total
ANALYSIS AND MODEL ANSWER**

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QUESTION 2.1 (50 points)

Is there an enforceable contract between Smalltown and Seller?

Explain the basis for your answer fully.

Analysis 2.1

The issue in this question deals with the statute of frauds. Since the verbal agreements were not reduced to writing, no contract exists. A contract for the sale of land must be in writing.

Pursuant to Mississippi Statute of Frauds, a contract for the sale of land must be in writing. Miss. CODE ANN. §15-3-1(c). Relevant portion of the statute reads as follows:

- §15-3-1. Certain contracts to be in writing

An action shall not be brought whereby to charge a defendant or other party:

- (c) upon any contract for the sale of lands, tenements or hereditaments, or the making of any lease thereof for longer than one year.

unless in each of said cases, the promise or agreement upon which such action may be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or signed by some person by him or her thereunto lawfully authorized in writing.

QUESTION 2.2 (25 points)

Assuming there is a valid contract between Smalltown and Seller, what is the statute of limitations related to this matter? Explain.

Analysis 2.2

The Statute of Limitations on a “**written**” contract in Mississippi is 3 years. (See MISS. CODE ANN. § 15-1-49).

The Statute of Limitations on an “**unwritten**” contract in Mississippi is 3 years. (See MISS. CODE ANN. § 15-1-29).

Either answer is correct.

QUESTION 2.3 (25 points)

Smalltown, Mississippi hired you to file a breach of contract claim against Seller. What special Rule applies to this breach of contract claim, if any? Explain.

Analysis 2.3

It is well established in common law and past Mississippi practice that ... in all averments of fraud or mistake, the circumstances constituting fraud or mistake SHALL be stated with particularity. Miss. R. Civ. Pro 9(b);

Answer should include language that pleadings must be made with specificity and/or particularity.

MISSISSIPPI BOARD OF BAR ADMISSIONS
July 2017 Bar Examination
CONSTITUTIONAL & CRIMINAL LAW & CRIMINAL PROCEDURE
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 #3.1: (50 points total)

Without reasonable suspicion or probable cause, police randomly stop an automobile driven by DRIVER and in which DEFENDANT was a passenger along with two other individuals. Prior to the stop the police did not know who was in the vehicle. However, during the course of their investigation into the identity of the occupants inside the car, the police discovered an active sexual battery arrest warrant for DEFENDANT. DEFENDANT was arrested on the sexual battery warrant, taken into custody, and an unrelated bag of methamphetamine was discovered on his person. DEFENDANT is now separately charged with possession of methamphetamine.

In DEFENDANT's methamphetamine possession prosecution case, not the sexual battery case, you file a Motion to Suppress the bag of methamphetamine which was discovered on DEFENDANT's person as described above. The State argues against the Motion to Suppress asserting that DEFENDANT was not the actual driver of the vehicle.

How should the Circuit Judge rule on DEFENDANT's Motion to Suppress? **(25 points)**
Explain fully. (25 points)

Question #3.2: (50 points total)

Officer personally knows Defendant to be a twice convicted felon of violent crimes. One day while Officer is "walking the beat," Officer sees Defendant driving, parking his car along the street at a meter, exiting his car, put change in the meter, and begins walking down the street. Officer approaches Defendant within two car lengths of Defendant's car, speaks with Defendant, Defendant begins getting visibly nervous and fidgety and will not show Officer his hands. Officer sees what he believes to be the outline of a revolver handgun in Defendant's pants pocket. Officer then touches the outer clothing of Defendant without his consent and feels and finds the revolver handgun. Officer arrests Defendant. Officer then finds cocaine in Defendant's other pocket as part of the arrest. Officer then searches Defendant's car without a warrant and finds a fully automatic machine gun, the possession of which is *per se* illegal by anyone other than authorized U.S. military personnel. Defendant, a convicted felon, is then charged with three felony crimes; 1) possession of weapon by a felon (revolver), 2) possession of an illegal weapon (machine gun) and 3) possession of cocaine. Defendant is offered no deals, tried and convicted and sentenced to Life Without Parole under Mississippi law.

Is the search of Defendant and his car constitutionally permissible? **(25 points)**
Explain fully. (25 points)

**MISSISSIPPI BOARD OF BAR ADMISSIONS
July 2017 Bar Examination
CONSTITUTIONAL & CRIMINAL LAW & CRIMINAL PROCEDURE
100 Points Total**

ANALYSIS AND MODEL ANSWER

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In DEFENDANT's methamphetamine possession prosecution case, not the sexual battery case, you file a Motion to Suppress the bag of methamphetamine which was discovered on DEFENDANT's person as described above. The State argues against the Motion to Suppress asserting that DEFENDANT was not the actual driver of the vehicle.

How should the Circuit Judge rule on DEFENDANT's Motion to Suppress? Explain fully.

Model Answer and Grader's Outline to Question #3.1:

A full and complete explanation of the underlying basis for the examinee's answer, either granted or denied, is required for full twenty-five point credit. Partial credit will be awarded as applicable.

3.1.1 DEFENDANT's Motion to Suppress should be granted by the Circuit Judge. **(25 points)**

3.1.2 Authority and Explanation for Question #1 granting the motion to suppress: **(25 points)**

The motion should be granted despite the fact that he was a mere passenger. **(5 points)** *Brendlin v. California*, 551 U.S. 249 (2007): The Court held that a passenger of an automobile who is stopped by the police is considered "seized" having standing and may challenge the constitutionality of the stop that results in their own detainment. **(5 points)** This is a 4th Amendment violation **(5 points)** as there was no valid basis for the initial stop

of the car **(5 points)**, either reasonable suspicion or probable cause. **(5 points)** See also, *Mosley v. State*, 89 So.3d 41, 45-47 (COA 2011, cert denied 5/24/12). The examinee will be given applicable credit for identifying the broader principles of “fruit of the poisonous tree” with the “exclusionary rule.”

OR

Alternative Model Answer and Grader’s Outline to Question #1:

3.1.1 DEFENDANT’S Motion to Suppress should be denied by the Circuit Judge. **(25 points)**

3.1.2 Authority and Explanation for Question #1 denying the Motion to Suppress: **(25 points)**

If an examinee identifies the threshold issue pertaining to the unconstitutionality of the initial stop, but goes on to argue the methamphetamine may still be admissible under the “attenuation doctrine,” equal credit will be awarded. It may be argued that when applying the facts of this case to the “attenuation doctrine” and while weighing the three factors of *Brown v. Illinois*, 422 U.S. 590 (1975), (1) temporal proximity, (2) presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct, that the evidence (meth) may still be admissible because the unlawful stop was sufficiently attenuated by the pre-existing arrest warrant which broke the causal chain between the unconstitutional stop and the discovery of the evidence (meth) on DEFENDANT. See also *Utah v. Strieff* 136 ScT 2056, 2063 (2016). Application of either the “independent source doctrine” or the “inevitable discovery doctrine” is not supported by the facts of this question.

Question #3.2: (50 points total):

Officer personally knows Defendant to be a twice convicted felon of violent crimes. One day while Officer is “walking the beat,” Officer sees Defendant driving, parking his car along the street at a meter, exiting his car, put change in the meter, and begins walking down the street. Officer approaches Defendant within two car lengths of Defendant’s car, speaks with Defendant, Defendant begins getting visibly nervous and fidgety and will not show Officer his hands. Officer sees what he believes to be the outline of a revolver handgun in Defendant’s pants pocket. Officer then touches the outer clothing of Defendant without his consent and feels and finds the revolver handgun. Officer arrests Defendant. Officer then finds cocaine in Defendant’s other pocket as part of the arrest. Officer then searches Defendant’s car without a warrant and finds a fully automatic machine gun, the possession of which is *per se* illegal by anyone other than authorized U.S. military personnel. Defendant, a convicted felon, is then charged with three felony crimes; 1) possession of weapon by a felon (revolver), 2) possession of an illegal weapon (machine gun) and 3) possession of cocaine. Defendant is offered no deals, tried and convicted and sentenced to Life Without Parole under Mississippi law.

Is the search of Defendant and his car constitutionally permissible? Explain fully.

Model Answer and Grader's Outline to Question #3.2:

A full and complete explanation of the underlying basis for the examinee's answers pertaining to the search of the defendant himself that included two items (revolver and cocaine) and the search of defendant's car, is required for full twenty-five point credit. Partial credit will be awarded as applicable.

3.2.1 The search of Defendant (**17 points (revolver 12.5 pts cocaine 4.5 pts)**) and his car (**8 points**) were constitutionally permissible. (**25 points total**)

3.2.2 Authority and Explanation for Question #2: (**25 points total**)

Neither probable cause nor reasonable suspicion is needed for an officer to approach and talk to a person in a public place as occurred in this question. (**5 points**) The two requirements for a constitutionally permissible *Terry* "Stop and Frisk," (1) investigatory stop is lawful and (2) suspect is reasonably believed to be armed and dangerous, are present in this case and the examinee's answer should highlight such supporting facts as it pertains to the revolver. The examinee should then explain that the cocaine was subsequently constitutionally seized from defendant's other pocket after the initial arrest for the revolver under the search incident to arrest exception to the warrant requirement. (**10 points Total (5 points each)**) The United States Supreme Court held that under *New York v. Belton*, 453 U.S. 454 (1981), an officer may search the passenger compartment of a vehicle which was recently exited by the arrested occupant despite the fact that the arrest is the first contact the officer has had with the occupant (which takes place outside the car), if the officer has made a contemporaneous lawful, custodial arrest. Officer's lawful discovery of the revolver and cocaine generated sufficient probable cause to search the car Officer saw defendant driving and parking moments earlier in the fact pattern.

Because in the facts from this case Defendant was arrested for illegal narcotics and a weapon, it was reasonable to believe that there may be additional evidence of this crime located within the vehicle and to search it incident to arrest was constitutionally permissible. *Thornton v. United States*, 541 U.S. 615, 623-624 (2004). As stated in *Thornton* and as reflected in the facts of this question, "So long as an arrestee is the sort of 'recent occupant' of a vehicle such as petitioner was here, officers may search that vehicle incident to the arrest." *Id.* Credit may also be awarded for a proper explanation of the "automobile exception." (**10 points**)

Alternatively to the 10 points awarded above for identifying the proper contemporaneous search of Defendant's car because Defendant was a 'recent occupant', equal points can also be awarded for an answer explaining "inventory search" of the car if the explanation includes that it will be impounded per departmental policy as it was driven by defendant contemporaneously with the arrest. Inventory can be done roadside or subsequent to being impounded depending upon departmental policy. (**10 points**)

**MISSISSIPPI BOARD OF BAR ADMISSIONS
July 2017 Bar Examination
MISSISSIPPI PRACTICE AND PROCEDURE
100 Points Total**

MP a Mississippi resident decides to sue T, a Tennessee resident, and MD, a Mississippi resident, in the state circuit courts of Mississippi for the tort of assault. T and MD are competent adult resident citizens of their respective states.

MP files his lawsuit in Hinds County, MS, one day before the one-year statute of limitations is to expire.

He does not have the summons issued on this date. Instead, he comes back the next week to have it issued.

MP serves T in Tennessee and MD in Mississippi the week following issuance of the summons.

QUESTIONS

- 4.1** Will MP's lawsuit be precluded by the statute of limitations because he did not have the summons issued until after the statute of limitations ran? **(34 points)**

- 4.2** Discuss the methods one may use in Mississippi to serve an in-state defendant. **(33 points)**

- 4.3** Discuss the methods one may use in Mississippi to serve an out-of-state defendant. **(33 points)**

**MISSISSIPPI BOARD OF BAR ADMISSIONS
July 2017 Bar Examination
MISSISSIPPI PRACTICE AND PROCEDURE
100 Points Total**

ANALYSIS AND MODEL ANSWER

ANALYSIS 4.1: (34 points total)

The statute is tolled when the complaint is filed, regardless of whether the summons was issued. Civil actions are commenced by the filing of a complaint with the court pursuant to Miss Rule Civ Pro 3(a). **(21 points)**

As long as service is made within 120 days from the date of filing, the action will be deemed timely filed. **(10 points)**

Rule 4(h) allows 120 days to obtain service of process on a defendant after the filing of the lawsuit pursuant to Rule 3(a). Specifically, Rule 4(h) provides as follows:

If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

Erby v. Cox, 654 So. 2d 503, 504-05 (Miss. 1995) **(3 points)**

ANALYSIS 4.2: (33 points total)

Service of Process is governed by Miss. Rule Civ. P. 4.

Service on an in-state defendant such as MD may be made as follows:

- (1) By process server or any person not a party not less than 18 years old.

If it cannot be made to him personally or to a duly appointed agent, by leaving a copy of the summons and complaint at the defendant's usual place of abode with the defendant's spouse or some other person in the defendant's family over the age of sixteen who is willing to accept service. The summons and complaint must then be mailed by first class mail, postage prepaid, to the person to be served at the place where the summons and complaint were left. Service is deemed complete on the tenth day after such mailing. (Miss Rule Civ P 4(c) and 4(d)(1)(A) and (B). **(8 points)**).

- (2) By the Sheriff in the county in which the defendant resides or is found by delivering summons to defendant personally or to an agent authorized by appointment or by law to receive service; or

If it cannot be made to him personally or to a duly appointed agent, by leaving a copy of the summons and complaint at the defendant's usual place of abode with the defendant's spouse or some other person in the defendant's family over the age of sixteen who is willing to accept service. The summons and complaint must then be mailed by first class mail, postage prepaid, to the person to be served at the place where the summons and complaint were left. Service is deemed complete on the tenth day after such mailing. (Miss Rule Civ P 4(c) and 4(d)(1)(A) and (B). **(8 points)**)

- (3) By Mail (first class, postage prepaid) to the person to be served, with two copies of a notice and acknowledgement, postage prepaid, addressed to the sender. If no acknowledgement is received within twenty days, another form of approved service can be used. If defendant does not send back the acknowledgment and cannot show good cause for not doing so, the defendant must then pay the costs of personal service. The notice and acknowledgement should be executed under oath or affirmation. **(8 points)**

- (4) By Publication. An in-state defendant can be served by publication if it is sworn that after diligent inquiry no address can be obtained. Miss Rule Civ P 4(c)(4)(A). Such publication shall be made once in each week during three consecutive weeks in a public newspaper of the county in which the complaint or petition is pending if there is one. Where there is no such newspaper, the notice shall be posted on the courthouse door and published in an adjoining county or at the seat of the government of the state. Upon completion of publication, proof of publication shall be filed in the papers with the clerk. The defendant has 30 days after the first publication to answer. Civ P 4(c)(4)(B). **(9 points)**

ANALYSIS 4.3: (33 Points total)

Service on an out-of-state defendant such as T may be made under Rule 4 as follows:

- (1) By publication as noted in part 2 (4), above; or **(16 points)**
(2) By Certified Mail, return receipt requested. **(15 points)**. Where the defendant is a natural person, the envelope containing the summons and complaint shall be marked "restricted delivery." Service by this method shall be deemed complete as of the date of delivery as evidenced by the return receipt or by the returned envelope marked "refused." **(2 points)**

**MISSISSIPPI BOARD OF BAR ADMISSIONS
JULY 2017 BAR Examination
DOMESTIC RELATIONS
100 Points Total**

Serena and Cannon were good friends throughout childhood. They began living together when they both enrolled at Career University in September, 2012. Both majored in hospitality management and were gainfully employed at the University Hotel. Serena used Cannon's last name and they represented to their friends that they were married, however, they never obtained a marriage license. After graduation the couple moved into a spacious apartment in New City, Mississippi that Serena leased in her name and maintained at her sole expense. Serena was satisfied with this arrangement because she earned more than Cannon and they planned to purchase a house in Cannon's name when his earnings increased. Because of their similar taste in furniture, they selected beautiful, expensive furnishings for the apartment and charged Cannon's credit card. Cannon paid minimum payments each month.

The relationship deteriorated when Serena heard that Cannon had sold a house that he inherited from his biological father, who died intestate. Cannon told Serena that he was adopted, which prevented any inheritance from his biological father. He further stated that his biological father had a wife who inherited everything.

Serena did not believe Cannon. She was convinced that he inherited the house and secretly disposed of it rather than sharing with her. She changed the locks on the apartment doors and sent a tweet to Cannon that the relationship was over and she would

keep the furniture. Cannon sued her, pro se, in Chancery Court for a divorce and property settlement to get his furniture.

QUESTIONS

- 5.1. Is Cannon correct in his response to Serena regarding adoption and inheritance?
Discuss. **(30 points)**

- 5.2. How should the Chancery court rule on Cannon's petition for divorce and property settlement? Discuss **(40 points)**

- 5.3. On what legal basis can Cannon sue to recover the furniture? Discuss. **(30 points)**

**MISSISSIPPI BOARD OF BAR ADMISSIONS
JULY 2017 BAR Examination
DOMESTIC RELATIONS
100 Points Total**

ANALYSIS AND MODEL ANSWER

Serena and Cannon were good friends throughout childhood. They began living together when they both enrolled at Career University in September, 2012. Both majored in hospitality management and were gainfully employed at the University Hotel. Serena used Cannon's last name and they represented to their friends that they were married, however, they never obtained a marriage license. After graduation the couple moved into a spacious apartment in New City, Mississippi that Serena leased in her name and maintained at her sole expense. Serena was satisfied with this arrangement because she earned more than Cannon and they planned to purchase a house in Cannon's name when his earnings increased. Because of their similar taste in furniture, they selected beautiful, expensive furnishings for the apartment and charged Cannon's credit card. Cannon paid minimum payments each month.

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keep the furniture. Cannon sued her, pro se, in Chancery Court for a divorce and property settlement to get his furniture.

QUESTION 5.1. Is Cannon correct in his response to Serena regarding adoption and inheritance? Discuss. **(30 points total)**

ANALYSIS 5.1.

Mississippi laws of intestate succession allow an adopted child to **inherit** from his biological father. *Estate of Jones v. Howell*, 687 So.2d 1171 (Miss. 1996). The rule in *Jones* states: "In the absence of a statute to the contrary, although the child inherits from the adoptive parents, he still inherits from or through his blood relatives, or his natural parents. In view of the tendency of the courts to construe adoption statutes so as to benefit the child...a statute severing the relation between parent and child is in derogation of common law and should for that reason be strictly construed, it has been held that an adoption statute providing that the natural parents shall be divested of all legal rights and obligations with respect to such child should not be construed so as to deprive the child of its right to inherit from or through its natural parents..." Cannon could have inherited his biological father's house. **(20 points)**

A spouse and child would share equally pursuant to Mississippi laws of intestate succession. Cannon, assuming he was the only child, would have received the house as **tenant in common** with the surviving spouse. MCA 91-1-3. **(5 points)**

A surviving **spouse is entitled to homestead rights (5 points)** in the marital residence during his or her lifetime or until he or she remarries. Although Cannon may have inherited his father's house, he would not have been allowed to sell it without the consent of his father's spouse. *Biggs v. Roberts*, 115 So.2d 151 (1950)

QUESTION 5.2. How should the Chancery court rule on Cannon's petition for divorce and property settlement? Discuss **(40 points total)**

ANALYSIS 5.2.

The couple did not obtain a marriage license and the state of **Mississippi does not recognize common law marriage**. Common Law marriage was abolished in 1956. Miss. Code Ann. 93-1-15(1) (1972 **(15 points)**). The couple is not married and generally the law does not extend the **rights** enjoyed by married people to those who cohabit. **(15 points)**. Cannon would not be entitled to a divorce nor property settlement /equitable division of assets pursuant to a marriage dissolution. *Davis v. Davis*, 643 So.2d 931 (Miss1994). In *Davis* one partner wanted a share

of the other's great wealth based on her domestic contribution. The court refused to grant a property settlement.

In a few cases, *infra*, the Mississippi court has allowed property settlement/equitable division of property of unmarried persons who cohabitated as married persons. **(10 points)**

In *Pickens v. Pickens*, 490 so.2d 872 court stated:

"Where parties such as these live together in what at least be ... acknowledged to be a partnership and where, through their joint efforts, real property or personal property, or both, are accumulated, an equitable division of such property will be ordered upon the permanent breakup and separation..."

In *Taylor v Taylor*, 317 So.2d 422 (1975), where the punitive wife lived with her partner for 18 years and was seriously ill at the time of the separation, the court departed from strict application of the law.

Cannon and Serena's situation would not likely rise to the level of a partnership. The court would dismiss Cannon's complaint.

QUESTION 5.3. On what legal basis can Cannon sue to recover the furniture? Discuss. **(30 points)**

ANALYSIS 5.3.

Cannon could sue on the theory of **unjust enrichment** as explained in *Cates v. Swain*, 101 So.3d 1171 (2012):

Unjust enrichment "applies to situations where there is **no legal contract** and 'the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain but should deliver to another.'" *Miss. Dep't of Env'tl. Quality v. Pac. Chlorine, Inc.*, 100 So.3d 432, 442 (Miss. 2012) (quoting *Powell v. Campbell*, 912 So.2d 978, 982 (Miss. 2005)). In these circumstances, **equity** imposes "a duty to refund the money or the use value of the property to the **person to whom in good conscience it ought to belong**." *Estate of Johnson v. Adkins*, 513 So.2d 922, 926 (Miss. 1987). The amount of recovery for unjust enrichment is "that to which the claimant is equitably entitled." *Id.*

The facts state that Cannon **charged** the furniture on his credit card and made the payments, he would be entitled to it under the theory of unjust enrichment.

Credit is given for recognizing that Cannon can make a tort claim such as: Trespass to Chattel or Conversion. Credit is also given for recognizing that Cannon can file a replevin action or for injunctive relief.

**MISSISSIPPI BOARD OF BAR ADMISSIONS
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LEGAL ETHICS AND PROFESSIONAL CONDUCT
100 Points Total**

FACTS

In 2014, computer programmers and entrepreneurs Jennifer Jones and John Smith started a web-based company known as “MyAttorney.com.” MyAttorney offers two products to the public - “MyAttorney’s Advice” and “MyAttorney’s Services,” both of which utilize third party subscribing attorneys to provide legal services. MyAttorney also solicits attorneys to subscribe to their website, which includes making a “profile” for each subscribing attorney that users can review in deciding upon a particular attorney to utilize. MyAttorney also advertises its services and that of its subscribing attorneys offered through the website on television, radio and online, using clever pitches involving animated woodland creatures.

Through MyAttorney’s Advice, users may purchase for a flat fee a brief telephone consultation with an attorney to discuss their general legal issues. Through MyAttorney’s Services, a user may also purchase other legal services for a fixed flat fee, such as DUI representation, will preparation or divorce. Once the user pays the fee through the website, MyAttorney then notifies subscribing attorneys in the user’s area and the first subscribing attorney to respond then provides the advice or service. Alternatively, the user may select an attorney from a list of subscribing attorneys in the area.

Subscribing attorneys agree to take sole responsibility for the legal work performed for a client and agree in the Terms of Service that MyAttorney is simply a “marketing

service.” MyAttorney holds all client funds on behalf of the attorney in an FDIC-insured, competitive interest-bearing account until such time as the telephonic consult (or the service) is complete. Once consultation or services are complete, MyAttorney then electronically deposits the flat fee (plus any interest earned) into the subscribing attorney’s bank account but keeps a “marketing fee” of 25% of the combined flat fee and interest. In light of this structure, MyAttorney has been able to generate terrific profits for their business as their revenue is substantially more than the costs of operating the website and their associated advertising.

The amount of all flat fees are set by MyAttorney.com and are provided in a “menu” of services. How the user’s payments are handled and distributed between MyAttorney.com and the attorney is fully disclosed to the user on the MyAttorney.com website and in its “Terms of Service” included on the website.

After many years of working as a staff attorney for the Department of Human Services, attorney Betty Gaines returns home to open a general law practice in her home town of Jefferson, Mississippi as “Gaines Law Office, PLLC.” In opening her new office, Betty subscribes to the MyAttorney website and agrees to accept clients under its terms.

QUESTIONS

- 6.1. Does MyAttorney’s agreement with Betty violate the Mississippi Rules of Professional Conduct? **(60 points)**

- 6.2. Assume that all of the owners of MyAttorney.com are also licensed attorneys. What difference would that make to the analysis of whether the agreement violates the Mississippi Rules of Professional Conduct? **(40 points)**

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100 Points Total

ANALYSIS AND MODEL ANSWER

QUESTION 6.1. Does MyAttorney's agreement with Betty violate the Mississippi Rules of Professional Conduct? (60 points total)

ANALYSIS 6.1.

The agreement with MyAttorney.com implicates Rules 1.15 (Safekeeping Property); 5.4(a) (Professional Independence of a Lawyer) and 7.2(l) (Advertising) of the Mississippi Rules of Professional Conduct.

Rule 5.4(a) of the Mississippi Rules of Professional Conduct provides that an attorney may not share fees with a non-attorney except under particular circumstances:

Rule 5.4. Professional Independence of a Lawyer.

(a) *A lawyer or law firm shall not share legal fees with a non-lawyer, except that:*

- (1) *an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;***
- (2) *a lawyer who purchases the practice of law of a deceased, disabled or disappeared lawyer may pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price ; and***
- (3) *a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.***

(10 points)

The facts indicate that the owners of MyAttorney are “computer programmers and entrepreneurs” and does not indicate that they are attorneys. By giving MyAttorney a percentage of the legal fees earned, Betty is violating Rule 5.4(a)’s prohibition against sharing legal fees with a non-lawyer. Neither exception to this rule is met as this situation does not involve the purchase of a deceased or disabled lawyer’s practice nor does this agreement provide compensation or retirement benefits to employees. **(10 points)**

However, the Mississippi Rules of Professional Conduct do provide that at a lawyer may “pay the reasonable cost of advertising” and “may pay the usual charges of a lawyer referral service.”

The lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or a written or recorded communication permitted by these Rules and may pay the usual charges of a lawyer referral service or to other legal service organization.

Miss. R. Pro. Cond. 7.2(l) (emphasis added).

(10 points)

Here, Betty is not simply paying for advertising and the facts indicate that the percentage fee paid to MyAttorney greatly exceeds their actual costs for promoting Betty on the website, so the first portion of Rule 7.2(l) is not met. However, it may be argued that this percentage is the “usual charges of a referral service” and is therefore permissible under the second portion of Rule 7.2(l). This argument also fails.

It does not matter that MyAttorney refers to the amount paid to them as a “marketing fee” because the label does not control - the content of the agreement does. Betty pays

a percentage of all fees earned to MyAttorney. While the work performed by MyAttorney remains static regardless of the client, the amount of any particular fee fluctuates and varies with the costs of the service provided by the lawyer. Further, the subscribing attorney is paid only after the attorney has completed the work. If Betty were paying a monthly or annual standard fee to MyAttorney which did not change based on the amount of fees Betty earned, then the agreement may very well comply with Rule 7.2(I). See, e.g., Ethics Opinion No. 209 of the Mississippi Bar (May 28, 1993) (Lawyer may not share percentage of contingency fee with referral service); see also New Jersey Advisory Committee on Professional Ethics, ACPE Joint Opinion (June 21, 2017).

(10 points)

Finally, by allowing MyAttorney.com to keep client funds in an interest bearing account and further keeping a portion of the interest earned, Betty is violating Rule 1.15's obligation to either ensure the client's trust funds earn a return for the client or are placed in Betty's IOLTA interest bearing trust account. Rule 1.15 of the Mississippi Rules of Professional Conduct impose a number of obligations upon attorneys regarding the handling of money belonging to the client, including that they are to maintain a interest bearing account to hold client funds ("IOLTA account").

Mississippi Rule of Professional Conduct 1.15

...

(d) Except as provided in paragraph (f) of this rule, a lawyer or law firm shall create and maintain an interest- or dividend-bearing trust account (IOLTA Account) for all funds which are nominal or short term funds that

cannot earn income for the client or third party in excess of the costs incurred to secure such income (IOLTA eligible Funds), pursuant to the following:

- (1) All trust Funds shall be deposited in a lawyer's or law firm's IOLTA Account unless- in the lawyer's judgment - the funds can earn income for the client or third party in excess of the costs incurred to secure such income.**
- (2) No earnings from such an IOLTA Account shall be made available to a lawyer or law firm.**
- (5) Lawyers or law firms depositing funds in an IOLTA Account established pursuant to this rule shall direct the depository institution:**
 - i. to remit all interest, net of reasonable service charges or fees, if any, on the average monthly balance in the account, or as otherwise computed in accordance with the institution's standard accounting practice, at least quarterly, to the Mississippi Bar Foundation, Inc. For the purposes of this paragraph, reasonable services charges or fees shall not include fees for wire transfers, insufficient funds, bad checks, stop payments, account reconciliation, negative collected balances and check printing;**
 - ii. to transmit with each remittance to the Foundation a report showing the following information for each IOLTA Account: the name of the lawyer or law firm, the amount of interest or dividends earned, the rate and type of interest or dividend applied, the amount of any services charges or fees assessed during the remittance period, the net amount of interest or dividends remitted for the period, the average account balance for the period for which the interest was earned and such other information as is reasonably required by the Foundation;**
 - iii. to transmit to the depositing lawyer or law firm a periodic account statement in accordance with normal procedures for reporting to depositors.**

(10 points)

Pursuant to Rule 1.15(d), all client trust funds are to be placed in such an account unless “the funds can earn income for the client . . . in excess of the costs incurred to secure such income.” Here, Betty did not ensure that client funds were placed in an account to earn interest for the client. Therefore, Betty was required to hold all funds in her IOLTA account, which she did not do.

There are insufficient facts given to determine whether the account used by MyAttorney.com would otherwise comply with all the IOLTA account requirements under the rules - *e.g.*, a bank authorized to do business in Mississippi. Even so, it is clear that the interest earned is divided between MyAttorney.com and Betty. Rule 1.15(d)(2) says none of the interest from an IOLTA account shall be available to the lawyer or law firm and Rule 1.15(d)(5) requires that all income from IOLTA accounts be given to the Mississippi Bar Foundation on at least a quarterly basis. Therefore, the agreement constitutes additional violations of the Rules.

(10 points)

QUESTION 6.2. Assume that all of the owners of MyAttorney.com are also licensed attorneys. What difference would that make to the analysis of whether the agreement violates the Mississippi Rules of Professional Conduct? (40 points).

ANALYSIS 6.2.

If the owners of MyAttorney.com were also attorneys, then the agreement would not violate Rule 5.4's prohibition against sharing fees with a non-lawyer. However, Rule 1.15 and the concerns about the safeguarding of client property would still be applicable.

Additionally, if the owners of MyAttorney.com were also attorneys, then there would be new concerns of whether the agreement complies with the provisions of Mississippi Rule of Professional Conduct 1.5(d), which provides:

Miss. Rule of Professional Conduct 1.5(d)

- 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.**

(20 points)

Based upon the factual scenario as provided, agreement would violate Rule 1.5(d). The facts do indicate that the involvement of both MyAttorney.com and the subscribing lawyer is disclosed to the client and there is no indication that any client objected to the participation of any lawyer involved. It also does not appear that the amount of fees given to MyAttorney is in proportion to the services performed by it, although there may be insufficient facts to make this determination. Nevertheless, the Terms of Service do not provide for joint responsibility for the representation of the client and therefore the agreement violates the rule.

(20 points)