

MISSISSIPPI BOARD OF BAR ADMISSIONS
JULY 2018 BAR EXAMINATION
EVIDENCE
100 POINTS TOTAL

QUESTION 1 (50 Points Total)

Evidence is the process by which facts are placed before a court. Evidence may be in the form of writings, oral statements, non-verbal actions or other means, yet all evidence is subject to some fundamental concepts. These questions seek to ensure your understanding of basic evidence concepts/rules.

- 1.1.1. What is "Relevant Evidence"? (10 points)
- 1.1.2. Is Relevant Evidence always admissible? Why? (10 points)
- 1.1.3. Who may impeach a witness? (10 points)
- 1.1.4. What is the scope of cross-examination under the MISSISSIPPI RULES OF EVIDENCE? (10 points)
- 1.1.5. How does the scope of cross-examination under the MISSISSIPPI RULES OF EVIDENCE compare with the scope under the FEDERAL RULES OF EVIDENCE? (10 points)

QUESTION 2 (50 Points Total)

You are trying a matter involving a parcel of property. The government seeks a portion of your client's parcel for a new public infrastructure project. Your client understands she will lose a portion of her property, but is adamant that the government's offer of fair and reasonable compensation is inadequate. In other words, this is a trial about the amount of monetary compensation due to your client.

As part of your proof, you retain an appraiser and intend to offer the appraiser as an expert a trial. The MRE 700 series governs admissibility of experts. You consult the rules to ensure your expert testimony (remember, experts are expensive) is indeed admissible.

- 1.2.1. When is expert testimony admissible? Include in your answer the foundation requirements of expert testimony. (20 Points)

- 1.2.2. Do the MRE require disclosure of the facts and data underlying the expert opinion? (10 Points)

- 1.2.3. During trial your expert offers an opinion as to the fair market value of the condemned property, i.e., the ultimate issue, and the government's counsel objects. Is the government's objection valid? (10 Points)

- 1.2.4. The Court seems skeptical of your expert as well as the government's expert. Can the Court appoint its own "neutral" expert? (10 Points)

MISSISSIPPI BOARD OF BAR ADMISSIONS
July 2018 BAR Examination
EVIDENCE
100 POINTS TOTAL

ANALYSIS AND MODEL ANSWER

QUESTION 1 (50 Points)

Evidence is the process by which facts are placed before a court. Evidence may be in the form of writings, oral statements, non-verbal actions or other means, yet all evidence is subject to some fundamental concepts. These questions seek to ensure your understanding of basic evidence concepts/rules.

Each question is worth a maximum of 10 Points (50 Points Total).

ANALYSIS

1.1.1. What is "Relevant Evidence"?

Answer: M.R.E. 401 states "Relevant Evidence" means evidence having any tendency to make the existence of any fact **(3 Points)** that is of consequence **(3 points)** more probable or less probable than it would be without the evidence. **(4 Points)**

1.1.2. Is Relevant Evidence always admissible? Why?

Answer: M.R.E. 403 states that "although relevant, evidence may be excluded **(3 Points)** if its probative value is substantially outweighed **(3 Points)** by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by a consideration of undue delay, waste of time, or needless presentation of cumulative evidence". **(4 Points)**

1.1.3. Who may impeach a witness?

Answer: M.R.E. 607 states that "the credibility of a witness may be attacked by any party **(5 Points)**, including the party calling [the witness]." **(5 Points)**

1.1.4. What is the scope of cross-examination under the MISSISSIPPI RULES OF EVIDENCE?

Answer: M.R.E. 611(b) permits cross-examination beyond the scope of direct examination (**5 Points**) (“shall not be limited to the subject matter of the direct examination”) and matters affecting the credibility of the witness. (**5 Points**). This is commonly referenced to as “wide open cross”. (**5 Points, alternatively**).

1.1.5. How does the scope of cross-examination under the MISSISSIPPI RULES OF EVIDENCE compare with the scope under the FEDERAL RULES OF EVIDENCE?

Answer: FEDERAL RULES OF EVIDENCE 611(b) limits the scope of cross-examination to matters elicited on direct. (**5 Points**) (“should not go beyond the subject matter of the direct examination”) and matters affecting the witness’ credibility (**5 Points**).

This is commonly referred to as “limited cross”. (**5 Points, alternatively**)

QUESTION 2 (50 Points)

You are trying a matter involving a parcel of property. The government seeks a portion of your client’s parcel for a new public infrastructure project. Your client understands she will lose a portion of her property, but is adamant that the government’s offer of fair and reasonable compensation is inadequate. In other words, this is a trial about the amount of monetary compensation due to your client.

As part of your proof, you retain an appraiser and intend to offer the appraiser as an expert a trial. The MRE 700 series governs admissibility of experts. You consult the rules to ensure your expert testimony (remember, experts are expensive) is indeed admissible.

ANALYSIS

1.2.1. When is expert testimony admissible? Include in your answer the foundation requirements of expert testimony (20 points)

Answer: If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert may testify thereto in the form of an opinion or otherwise. MRE 702 **(10 points)**

To testify as an expert, the witness must meet the following criteria under Rule 702:

- (1) the testimony is based upon sufficient facts or data;
- (2) the testimony is the product of reliable principles and method; and,
- (3) the witness has applied the principles and methods reliably to the facts of the case. **(10 points)**

Alternatively, the applicant may receive 10 points credit if the applicant references the language found in Rule 703 which states that:

- *the facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known at or before the hearing/trial. **(5 Points)***
- *If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. **(5 Points)***

1.2.2. Do the MRE require disclosure of the facts and data underlying the expert opinion?

Answer: No. **(5 Points)** MRE 705 **(1 Point)** allows an expert to testify in terms of opinion or inferences and give reasons therefor without prior disclosure of the underlying facts or data, unless the Court requires otherwise. **(4 points)**

1.2.3. During trial your expert offers an opinion as to the fair market value of the condemned property, i.e., the ultimate issue, and the government's counsel objects. Is the government's objection valid?

Answer: No. **(5 Points)** MRE 704 **(1 Point)** states that testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. **(4 points)**

1.2.4. The Court seems skeptical of your expert as well as the government's expert. Can the Court appoint its own "neutral" expert?

Answer: Yes. **(5 Points)** MRE 706 **(1 Point)** permits the Court, on its own motion or on the motion of any party, to enter an order to show cause why an expert witness should not be appointed, and may request that the parties submit nominations. **(4 points)**

MISSISSIPPI BOARD OF BAR ADMISSIONS
July 2018 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)

In 2001, Tenant began operating a dollar store in Landlord's shopping center pursuant to a fully integrated and enforceable Lease Agreement. The Lease Agreement contains the following Exclusive Use provision:

Landlord agrees that Landlord shall not lease or sell any space in the shopping center to any dollar store or any store substantially similar to Tenant in operation or merchandising. This Exclusive Use provision shall not apply to any existing tenant open for business in the shopping center at the date of this lease. If there is a breach of this Exclusive Use provision by Landlord, Tenant shall have the right at any time thereafter to elect to terminate this lease, and upon such election, this lease shall be terminated and the Tenant shall be released and discharged from all liability hereunder.

In 2006, a competing dollar store opened in Landlord's shopping center immediately adjacent to Tenant's store. The competing dollar store has operated in the shopping center since 2006 with Tenant's knowledge and without Tenant's objection.

Tenant and Landlord's Lease Agreement was amended in 2007, 2010 and 2013, and each amendment reduced the amount of rent owed by Tenant and extend the term of the lease. The 2013 amendment provided that the term of the Lease Agreement would automatically extend from December 31, 2017 to December 31, 2023 unless Tenant gave written notice to Landlord cancelling the Lease Agreement at least 180 days before January 1, 2018. Tenant did not give written notice of cancellation as required by the Lease Agreement; therefore, on January 1, 2018, the term of the Lease Agreement was automatically extended to December 31, 2023.

On March 1, 2018, Tenant sent a letter to Landlord saying that Landlord's leasing of space to the competing dollar store violated the Exclusive Use provision of the Lease Agreement and that, as a result, Tenant was terminating and cancelling the Lease Agreement effective March 31, 2018. In response to Tenant's letter, Landlord sent a letter to Tenant saying that Tenant has waived any right to enforce the Exclusive Use provision and is estopped to cancel the Lease Agreement on the basis that a competing dollar store

is in the shopping center. Tenant thereafter moved its store to a nearby shopping center, and Landlord later learned that Tenant had been planning to do so since at least January 1, 2017.

2.1.1. Did Tenant have the right to enforce the Exclusive Use provision in 2018 based on Landlord's leasing of space to the competing dollar store? (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
July 2018 Bar Examination
CONTRACTS
100 Points Total

ANALYSIS AND MODEL ANSWER

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and is estopped to cancel the Lease Agreement on the basis that a competing dollar store is in the shopping center. Tenant thereafter moved its store to a nearby shopping center, and Landlord later learned that Tenant had been planning to do so since at least January 1, 2017.

2.1.1. Did Tenant have the right to enforce the Exclusive Use provision in 2018 based on Landlord's leasing of space to the competing dollar store? **(15 points)**

2.1.2. Explain fully. **(45 points)**

Answer to Question 2.1:

2.1.1. NO. (15 Points)

2.1.2. "[I]t is simple contract law that a party may waive the protections of any provision of a contract." *Sanderson Farms, Inc. v. Gatlin*, 848 So.2d 828, 837 (¶ 23) (Miss. 2003). "[A] party to a contract may by words or conduct waive a right to which he would otherwise have been entitled." *Scott Addison Constr., Inc. v. Lauderdale County Sch. Sys.*, 789 So.2d 771, 775 (Miss. 2001) (quoting *Canizaro v. Mobile Communications Corp.*, 655 So.2d 25, 29 (Miss. 1995) (citations omitted)); *Brent Towing Co., Inc. v. Scott Petroleum Corp.*, 735 So.2d 355, 359 (Miss. 1999) ("[W]aiver may be inferred from the actions and conduct of the parties." (quoting *Mariana v. Hennington*, 90 So.2d 356, 362 (Miss. 1956))). **(15 Points)**

The Mississippi Supreme Court has made it clear that the decision to terminate a contract must be made immediately and promptly and that the failure to do so constitutes a waiver. *Brent Towing Co., Inc.*, 735 So. 2d at 359 (quoting 12 Am.Jur., *Contracts*, § 449, at p. 1031) ("A party to a contract who, after discovery or knowledge of facts which would entitle him to rescind, treats the contract as a subsisting obligation and leads the other party to believe that the contract is still in effect waives his right to rescind."); *Gault v. Branton*, 75 So. 2d 439, 445 (Miss. 1954); see also *Gannaway v. Toler*, 84 So. 129, 131 (Miss. 1920) ("the party with the advantage of power in the contract shall act with promptness in deciding whether he will terminate the contract, and must do so at the earliest reasonable time after the default of the helpless party."). "If, after acquiring knowledge of the deviation from a known right articulated in the contract, a party fails to insist on its contractual rights, or acts inconsistently with such rights, then that party waives the right to require such performance." *Upchurch Plumbing, Inc. v. Greenwood Utilities Comm'n*, 964 So. 2d 1100, 1112 (Miss. 2007) (citing *Brent Towing Co., Inc.*, 735 So.2d at 358); *Sanderson Farms*, 848 So.2d at 837-38); see also 3 MS Prac. Encyclopedia MS Law § 21:60. **(15 Points)**

Not only did Tenant fail to invoke the Exclusive Use provision to terminate the Lease Agreement during the 12 years that the competing dollar store operated next to Tenant's store, but Tenant negotiated multiple amendments during that period of time that reduced the amount of rent and extended the term of the Lease Agreement for many years. Under Mississippi law, Tenant waived or otherwise lost the right to enforce the Exclusive Use provision. **(15 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). **(5 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 at 1383. **(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). **(10 Points)**

MISSISSIPPI BOARD OF BAR ADMISSIONS
July 2018 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 (33 points total)

John and Stacy had been dating for one year before they broke up. Stacy claims that the break up was due in part to John's strange and unusual behavior that developed after they began dating.

After the break up, Stacy's friend encouraged her to look at John's facebook page. Stacy still had John's username and password, so she visited the facebook page and what she saw terrified her. Although John never used Stacy's name, the page had several quotes that Stacy assumed referred to her: "If I can't have you, no one can"; "I can't live without you"; and "this will be our last day together."

Later, while Stacy was at work, she received flowers from an unknown source. Stacy went to the florist and requested a description of the person that purchased the flowers. The clerk described John.

This was the last straw. Stacy went to the local municipal court and filed stalking charges against John. John has hired you, noted defense attorney to represent him.

3.1.1. Is John guilty of stalking? (15 points)

3.1.2. Explain fully. (18 points)

Question #3.2 (34 points total)

On a Saturday night in Small Town, America, the local party club had just closed its doors for the night and the crowd was dispersing. Several young African-American men piled into Dave's sedan and began to drive away.

Officer Tom had been dispatched to help with crowd control. As Dave's car drove past Officer Tom, someone shouted "F-12 the police." Officer Tom gave chase and stopped Dave's car. Dave, who was driving was ticketed for public profanity.

At the trial of this matter, Officer Tom testified that "F-12" is a derogatory and slanderous expression used to describe the police. The trial judge found Dave guilty of public profanity. Dave has hired you to appeal the trial court's decision.

3.2. Please explain fully why the judge's ruling was constitutionally incorrect.

Question #3.3 (33 points total)

Steve and Pamela were living together in Pamela's home. In fact, the home was deeded to Pamela and taxes were paid by her, but they shared typical home expenses. After several months of living together, Pamela began to suspect Steve of being unfaithful. While looking through Steve's cellular phone, Pamela saw the name "Susan." Pamela didn't recognize the name, but being extra cautious, she texted Susan and instructed her to leave Steve alone and never come to her house.

Steve saw the text message and became irate, accusing Pamela of not trusting him. The argument escalated to the point where Pamela decided to leave and let things cool off. The next morning she returned home and, using her key, she entered the home only to find Steve and a young lady (later identified as Susan) asleep in the bedroom.

Pamela exited the room and went to the front porch where she retrieved her son's Louisville Slugger baseball bat. She returned inside the home and began to pommel both Steve and Susan with the bat, causing severe and painful injuries, especially to Susan. When Susan recovered she decided to file charges against Pamela. In turn, Pamela decided to file charges against Susan.

**3.3.1. Explain fully what charges Susan should file against Pamela?
(17 Points)**

**3.3.2. Explain fully what charges Pamela might bring against Susan?
(16 Points)**

MISSISSIPPI BOARD OF BAR ADMISSIONS
July 2018 Bar Examination
CONSTITUTIONAL & CRIMINAL LAW & CRIMINAL PROCEDURE
100 Points Total
ANALYSIS AND MODEL ANSWER

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Question #3.1 (33 points total)

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Later, while Stacy was at work, she received flowers from an unknown source. Stacy went to the florist and requested a description of the person that purchased the flowers. The clerk described John.

This was the last straw. Stacy went to the local municipal court and filed stalking charges against John. John has hired you, noted defense attorney to represent him.

3.1.1. Is John guilty of stalking? (15 points)

3.1.2. Explain fully. (18 points)

Answer to Question #3.1:

3.1.1. John should be found not guilty of stalking. (15 Points)

3.1.2. John's defense is simple. According to Mississippi Code Annotated, 97-3-107 (as amended 1972), stalking is defined as "willful, malicious and repeated following or harassing or threatening with intent to place in reasonable fear death or bodily injury." None of the required elements of stalking are present. (18 Points)

Question #3.2 (34 points total)

On a Saturday night in Small Town, America, the local party club had just closed its doors for the night and the crowd was dispersing. Several young African-American men piled into Dave's sedan and began to drive away.

Officer Tom had been dispatched to help with crowd control. As Dave's car drove past Officer Tom, someone shouted "F-12 the police." Officer Tom gave chase and stopped Dave's car. Dave, who was driving was ticketed for public profanity.

At the trial of this matter, Officer Tom testified that "F-12" is a derogatory and slanderous expression used to describe the police. The trial judge found Dave guilty of public profanity. Dave has hired you to appeal the trial court's decision.

- 3.2. Please explain fully why the judge's ruling was constitutionally incorrect.**

Answer to Question #3.2:

The First Amendment to the United States Constitution prevents Congress from, "making any law respecting . . . or abridging the freedom of speech." (10 Points) Even assuming that the Mississippi Supreme Court has determined that the "f" word is profane, the judge's ruling is still incorrect. In *Brendle v. City of Houston*, 759 So. 2d 1274 (Miss. Ct. App. 2000), the Mississippi Court of Appeals held that "Mississippi cannot, under the confines of the U.S. Constitution, regulate speech which does not fall into the categories of 'fighting words,' 'obscene words,' or some 'libelous words.'" (10 Points) As in *Brendle*, "in this case we are not, obviously, dealing with libelous words" and "we are not dealing with 'obscene words[,]'" which "are defined as those that appeal to prurient interests and are in some way erotic." *Id.* (6 Points) Neither is the language considered "fighting words." As in *Brendle*, "[e]ven assuming that [Dave] used the 'f' word in his speech, [Dave]'s language while vulgar, indecent, and arguably profane, did not rise to the level of 'fighting words.'" *Id.* (6 Points) As in *Brendle*, there is nothing in this factual scenario that suggest that Dave's language sought to incite others. (2 Points)

Question #3.3 (33 points total)

Steve and Pamela were living together in Pamela's home. In fact, the home was deeded to Pamela and taxes were paid by her, but they shared typical home expenses. After several months of living together, Pamela began to suspect Steve of being unfaithful. While looking through Steve's cellular phone, Pamela saw the name "Susan."

Pamela didn't recognize the name, but being extra cautious, she texted Susan and instructed her to leave Steve alone and never come to her house.

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Pamela exited the room and went to the front porch where she retrieved her son's Louisville Slugger baseball bat. She returned inside the home and began to pommel both Steve and Susan with the bat, causing severe and painful injuries, especially to Susan. When Susan recovered she decided to file charges against Pamela. In turn, Pamela decided to file charges against Susan.

**3.3.1. Explain fully what charges Susan should file against Pamela?
(17 Points)**

**3.3.2. Explain fully what charges Pamela might bring against Susan?
(16 Points)**

Answer to Question #3.3:

3.3.1. Susan should file charges against Pamela for aggravated assault. Mississippi Code Ann. § 97-3-7(2)(a)(i) states that "a person is guilty of aggravated assault if he . . . attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under the circumstances manifesting extreme indifference to the value of human life."
(17 Points)

3.3.2. It is without any doubt that Pamela intentionally, purposely and knowingly caused bodily injury to Susan. But, in Pamela's defense, she had previously warned Susan against coming to her home and according to the factual scenario, she never invited Pamela to her home on this particular occasion. According to Mississippi Code Ann. § 97-17-93(1), "[a]ny person who knowingly enters the lands of another without the permission of or without being accompanied by the landowner or lessee of the land, shall be guilty of a misdemeanor ." (16 Points)

MISSISSIPPI BOARD OF BAR ADMISSIONS
July 2018 Bar Examination
MISSISSIPPI PRACTICE AND PROCEDURE
100 Points Total

Plaintiff, (hereinafter referred to as P), a Mississippi resident, sues Defendant 1 (hereinafter referred to as DL), a Louisiana resident, and Defendant 2 (hereinafter referred to as DM), a Mississippi resident, in the state circuit court of Mississippi for the tort of assault. Both DM and DL are competent adults.

P files her lawsuit in Forrest County, MS, seven days before the one-year statute of limitations is to expire. P returns to the clerk six months later to have the summonses issued.

P herself personally drives to the respective defendants' homes the day after the summonses were issued and hands the summons to each respective Defendant at their residence.

Questions:

- 4.1.** Will P's lawsuit be precluded by the statute of limitations according to these facts? Please explain how the factual scenario presented affects whether this action should be considered initiated within the statute of limitations. **(25 points)**

- 4.2.** Discuss whether P's service of both Defendants complies with service requirements in Mississippi. Please also describe the methods one may use in Mississippi to serve an in-state defendant under these circumstances. **(25 points)**

- 4.3.** Discuss the methods one may use in Mississippi to serve an out-of-state defendant under these circumstances. **(25 points)**

- 4.4.** Discuss whether P could properly serve these Defendants pursuant to Miss Rule Civ. P. 81(d) explaining why this rule would or would not govern service of the summons under these factual circumstances. Your answer should go on to include the procedural distinctions between service pursuant to Rule 81(d) and pursuant to Rule 4 of the Mississippi Rules of Civil Procedure. **(25 points)**

MISSISSIPPI BOARD OF BAR ADMISSIONS
July 2018 Bar Examination
PRACTICE AND PROCEDURE OF MISSISSIPPI COURTS
100 Points Total

ANALYSIS AND MODEL ANSWER

Question 4.1. (25 points total) Will P's lawsuit be precluded by the statute of limitations according to these facts? Please explain how the factual scenario presented affects whether this action should be considered initiated within the statute of limitations.

Answer to 4.1:

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 P 3(a). **(7 points)**

If service is made within 120 days from the date of filing, the action will be deemed timely filed. **(7 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) (Discussion of terms and conditions of dismissal.) **(6 points)**

Since the summonses were not issued within 120 days of the filing of the complaint, the statute, once more, began to run. The additional seven days left on the statute also expired. As a result, the action will be time barred. **(5 points)**

Question 4.2. (25 points total) Discuss whether P's service of both Defendants complies with service requirements in Mississippi. Please also describe the methods one may use in Mississippi to serve an in-state defendant under these circumstances.

Answer to 4.2:

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

Service on an in-state defendant such as DM 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). **(5 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). **(5 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. **(5 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). **(5 points)**

- (5) Because P in this action served the two defendants herself, service is in violation of the Mississippi Rules of Civil Procedure. (Miss Rule Civ P 4(1). **(5 points)**.)

Question 4.3. (25 points total) Discuss the methods one may use in Mississippi to serve an out-of-state defendant under these circumstances.

Answer to 4.3:

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

- (1) By publication as noted in part 2 (4), above; **(7 points)**
- (2) By personal service; **(7 points)**
- (3) By Certified Mail, return receipt requested. **(7 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." **(4 points)**

Question 4.4. (25 points total) Discuss whether P could properly serve these Defendants pursuant to Miss Rule Civ. P. 81(d) explaining why this rule would or would not govern service of the summons under these factual circumstances. Your answer should go on to include the procedural distinctions between service pursuant to Rule 81(d) and pursuant to Rule 4 of the Mississippi Rules of Civil Procedure.

Answer to 4.4:

Plaintiff could not properly serve either DM or DL pursuant to Rule 81.

Rule 81(d) of the Mississippi Rules of Civil Procedure provides special procedural rules applicable primarily to family law cases and matters involving estates. Actions involving paternity, adoption, termination of parental rights, grandparents' visitation, and independent custody and support are likewise subject to the procedures set forth in Rule 81(d).

It also applies to temporary relief in divorce, separate maintenance, custody, and support matters; to actions to modify custody, support or alimony; actions for contempt and petitions to remove minority. **(15 points)**

Rule 81 requires use of a special summons which commands that the defendant appear and defend at a *specific time and place* set by order of the court and informs him or her that no answer is necessary. See MISS. R. CIV. P. 81, cmt. (section (d)(5)) ("recognizes that since no answer is required of a defendant/respondent,

then the summons issued shall inform him of the time and place where he is to appear and defend"). **(6 points)**

Actions involving paternity, adoption, termination of parental rights, grandparents' visitation, and independent custody and support are triable thirty days after service. **(2 points)**

Petitions for temporary relief in divorce, separate maintenance, custody, and support matters; to actions to modify custody, support or alimony; actions for contempt and petitions to remove minority may be tried seven days after service of process under the Rule. **(2 points)**

In contrast, a Rule 4 summons requires a defendant to answer within thirty days, rather than to appear and defend on a certain date. *Powell v. Powell*, 644 So. 2d 269, 274 (Miss. 1994) (modification based on Rule 4 summons reversed); *Saddler v. Saddler*, 556 So. 2d 344, 346 (Miss. 1990).

MISSISSIPPI BOARD OF BAR ADMISSIONS
July 2018 BAR Examination
DOMESTIC RELATIONS
100 Points Total

After several years of marriage Harold and Winnie decided to start a family. When their son, Charles, was born, Winnie stopped working to care for him. She enjoyed motherhood and spent her time cooking, cleaning, and attending to Charles. Meanwhile Harold supported the family financially with resources from his engineering job. His gross monthly income was \$7,000. Mandatory monthly federal and state income tax, and social security withholding totaled \$2,000.

While home with Charles, Winnie's fifteen-year-old niece, Amy, came to visit. Winnie learned that Amy had run away from home because her mother had become addicted to drugs and could no longer care for her. Amy's father and mother were never married, and Amy never knew her father. Winnie then remembered the Power-of-Attorney Amy's mother had recently given her designating Winnie as attorney-in-fact to have custody and care of Amy. Winnie discussed the situation with Harold and they decided to adopt Amy.

Two years after the adoption occurred, Harold filed for divorce because all of Winnie's time and attention was directed toward Charles and Amy. He wanted custody of Charles and believed that child support only applied to Charles, regardless of which parent received custody. Winnie insisted that she receive custody of both children and child support for both.

QUESTIONS:

- 5.1. Who would have been the necessary parties to Harold and Winnie's petition for adoption? Explain. (20 points)**

- 5.2. Assuming Amy's adoption is legal, what are its implications? (20 points)**

- 5.3. Discuss four (4) relevant factors to be considered in determining whether Harold or Winnie should be awarded custody of the child(ren). (40 points)**

- 5.4. Discuss how child support would be determined/computed under Mississippi statute, assuming Harold is required to pay. (20 points)**

MISSISSIPPI BOARD OF BAR ADMISSIONS
July 2018 BAR Examination
DOMESTIC RELATIONS
100 Points Total
ANALYSIS AND MODEL ANSWER

5.1. Who would have been the necessary parties to Harold and Winnie's petition for adoption? Explain. (20 points total)

Amy's parents and Amy are necessary parties. According to Miss. Code Ann. 93-17-5, the adoptee's mother and father shall be made parties to the proceeding by consent or by process. **(10 points)** In addition, if the adoptee child is more the fourteen (14) years of age he or she shall be required to join in the petition or be served with process. Because Amy is over 14 years of age she must join in the petition or be served with process. A power-of-attorney for care and custody does not give authority to adopt the child. Miss. Code Ann. 93-31-3(1)(a)(i). **(5 points)** However, it may eliminate the need for a guardian ad litem appointment due to abandonment. **(1 point)**

"Any person who would be a necessary party to an adoption proceeding under this chapter and any person alleged or claiming to be the father of a child born out of wedlock who is proposed for adoption or who has been determined to be such by any administrative or judicial procedure (the "alleged father") may file a petition for determination of rights as a preliminary pleading to a petition for adoption in any court which would have jurisdiction and venue of the adoption proceeding. A petition for determination of rights may be filed at any time after the period ending thirty (30) after the birth of the child...The sole matter for determination under the petition for determination of rights is whether the alleged father is the natural father of the child...If the court determines that the alleged father is the child's natural father and that he objects to the child's adoption, the court shall stay the adoption proceedings to allow the filing of a petition to determine whether the father's parental rights should be terminated pursuant to Section 93-15-119, or other applicable provision of the Mississippi Termination of Parental Rights Law." Miss. Code. Ann. 93-17-6 **(4 points)**

5.2. Assuming Amy's adoption is legal, what are its implications? (20 points)

An adopting parent has the same obligation to an adopted child as to a child born into the family. Therefore, if the adoption is legal, custody and child support must apply to Amy and Charles.

5.3. Discuss four (4) relevant factors to be considered in determining whether Harold or Winnie should be awarded custody of the child(ren). (40 points total)

In Mississippi, the Albright factors are applied to determine the best interest of the child in a custody dispute. *Albright v. Albright*, 437 So.2d 1003 (Miss. 1983) factors are:

- a. Age, health and sex of the child
- b. Continuity of care
- c. Parenting skills of the parties and willingness and capacity to provide primary care
- d. Employment responsibilities
- e. Physical and mental health and age of the parties
- f. Emotional ties with the child
- g. Moral fitness
- h. Home, school and community record
- i. Custody preference of the child
- j. Stability of the home environment and other factors

The most relative factors are b, c, d, f, i and j. Applicants should receive full credit for discussion of these factors and partial credit for others.

5.4. Discuss how child support would be determined/computed under Mississippi statute, assuming Harold is required to pay. (20 points total)

Child support for two children is computed as 20% of adjusted gross income. Adjusted gross income is income from all sources reduced by mandatory withholding, including federal and state income tax, and social security contributions. **(10 points)**

Harold should pay \$1,000 in child support each month. It is calculated as \$5,000 adjusted gross income (\$7,000 gross income - \$2,000 federal and state income tax, and social security contributions) x 20%. **(10 points)**

**MISSISSIPPI BOARD OF BAR ADMISSIONS
JULY 2018 EXAMINATION
LEGAL ETHICS AND PROFESSIONAL CONDUCT
100 POINTS TOTAL
FACTS**

Betty Johnson practices law as a solo practitioner in Jefferson, Mississippi, with a wide variety of clients. In one of her contested estate matters, she represented two brothers, John and Jack Smith. In that case, Betty charged the Smith brothers attorney's fees by the hour at \$200.00 per hour, which is a rate typical of that charged by other attorneys in the area with the same level of experience as Betty. Ultimately, the case was settled and the two brothers received "free and clear" joint title to one hundred and sixty (160) acres of family land in a neighboring Mississippi county and which had a large quantity of mature pine trees planted on it.

After the case is finally concluded, John and Jack drop by Betty's office. They first tell Betty how happy they've been with her representation, then ask if she would do something else for them.

The Smith brothers are college-educated and each of them has been in their own businesses for years, so they understand that they need to protect their new asset. They ask Betty to form a Mississippi Limited Liability Company (LLC) for them as equal partners, that they will then transfer title of the timberland into. "Now, we know that our retainer ran out some time back and we're behind on paying your bill, but we don't have any money right now to get this done" John continued. "Even so, we plan on doing a select cut of timber after the new company is set up and before the end of the year. We also want to

give you a lien against the timber. That way, when it's sold, you'll be the first to get paid."

Betty says she doesn't see any reason why she can't do as they propose as long as there are certain conditions. She quotes them a reasonable additional flat fee to draft a standard LLC Operating Agreement and undertake any other necessary work to form the LLC, and which also includes payment for work to transfer title to the property into the LLC and secure a lien for both that fee and her prior outstanding attorney's fees. She then proceeds to discuss with them how her role and this representation will be different - that she's only willing to do this if they are both in agreement for everything connected with the LLC, all communications and information about her work for the LLC will be shared with both of them and that she will not get in the middle of any disputes between them about the business. Finally, they have to agree that they have no disputes over the amount of her attorney's fees and that the full amount owed will be paid off through the lien and timber sale.

After their discussion, Betty tells them to think about it and to discuss with each other and anyone else they trust, and in the meantime she'll prepare a new client contract and agreement for them to sign if they want to go forward that way. Betty finishes drafting the new agreement and forwards copies of the new agreement to the Smith brothers the very next morning. The agreement spells out all the necessary details about the Smiths' agreement to give Betty a lien against the timber for her attorney's fees and that the Smiths will make reasonable efforts to have a sufficient amount of timber sold by the end of the year to satisfy the lien.

Two weeks later, the Smith brothers return and sign the new written agreement with Betty.

QUESTIONS:

- 6.1. What do the Mississippi Rule of Professional Conduct provide with respect to engaging in business transactions with a client? (20 points)**

- 6.2. Does the agreement between Betty and the Smith Brothers to take a lien against the Smith's property to pay attorney's fees comply with the relevant rule of the Mississippi Rules of Professional Conduct related to business transactions with a client? (30 points).**

- 6.3. What do the Mississippi Rule of Professional Conduct provide with respect to engaging in joint representation of two existing clients who seek to establish a new legal relationship between themselves? (20 points)**

- 6.4. Does the agreement to jointly represent the Smith Brothers in forming an LLC comply with the relevant rule of the Mississippi Rules of Professional Conduct related to creating a new legal relationship between existing clients? (30 points).**

**MISSISSIPPI BOARD OF BAR ADMISSIONS
July 2018 Bar Examination
LEGAL ETHICS AND PROFESSIONAL CONDUCT
100 Points Total**

ANALYSIS AND MODEL ANSWER

- 6.1. What do the Mississippi Rule of Professional Conduct provide with respect to engaging in business transactions with a client? (20 points)**

Rule 1.8 of the Mississippi Rules of Professional Conduct provides in relevant part:

**RULE 1.8 CONFLICT OF INTEREST:
PROHIBITED TRANSACTIONS**

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interests are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
- (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
- (3) the client consents in writing thereto.

- 6.2. Does the agreement between Betty and the Smith Brothers to take a lien against the Smith's property to pay attorney's fees comply with the relevant rule of the Mississippi Rules of Professional Conduct related to business transactions with a client? (30 points total).**

In this case, the agreement does appear to satisfy the provisions of Rule 1.8:

- (1) The transaction and terms appear to be fair and reasonable in this instance, insofar as it was the Smith's idea to offer her a lien and Betty's lien is limited to reasonable attorney's fees already earned by her. Betty's new written document also "spells out all the necessary details" about the agreement, so it would certainly appear that the terms are fully disclosed to the college-educated Smith brothers. **(10 points);**

- (2) After first discussing the potential of such an agreement with Betty, the Smith brothers had two weeks within which to seek independent counsel to discuss the agreement. Betty did not specifically instruct the clients to seek independent legal advice, but it does appear that the Smith brothers had a reasonable opportunity to do so. While it may be argued that Betty should affirmatively instruct the Smith brothers to seek independent counsel, the Smith brothers being college educated and having prior business experience would favor finding that this element is also satisfied. **(10 points)**.
- (3) The Smith Brothers did consent in writing to the agreement, so this element is satisfied. **(10 points)**.

6.3. What do the Mississippi Rule of Professional Conduct provide with respect to engaging in joint representation of two existing clients who seek to establish a new legal relationship between themselves? (20 points)

Rule 2.2 of the Mississippi Rules of Professional Conduct provides:

**RULE 2.2 LAWYER SERVING AS
AN INTERMEDIARY BETWEEN CLIENTS**

- (a) A lawyer represents clients as an intermediary when the lawyer provides impartial legal advice and assistance to two or more clients who are engaged in a candid and non-adversarial effort to accomplish a common objective with respect to the formation, conduct, modification, or termination of a consensual legal relation between them.
- (b) A lawyer shall not represent two or more clients as an intermediary in a matter unless:
 - (1) as between the clients, the lawyer reasonably believes that the matter can be resolved on terms compatible with the best interests of each of the clients, that each client will be able to make adequately informed decisions in the matter, that there is little risk of material prejudice to the interest of any of the clients if the contemplated resolution is unsuccessful, and that the intermediation can be undertaken impartially;
 - (2) the lawyer's representation of each of the clients, or the lawyer's relationship with each, will not be adversely affected by the lawyer's responsibilities to other clients or third persons, or by the lawyer's own interests;

(3) the lawyer consults with each client about:

- (i) the lawyer's responsibilities as an intermediary;
- (ii) the implications of the intermediation (including the advantages and risks involved, the effect of the intermediation on the attorney-client privilege, and the effect of the intermediation on any other obligation of confidentiality the lawyer may have);
- (iii) any circumstances that will materially affect the lawyer's impartiality between the clients; and
- (iv) the lawyer's representation in another matter of a client whose interests are directly adverse to the interests of any one of the clients; and any interests of the lawyer, the lawyer's other clients, or third persons that will materially limit the lawyer's representation of one of the clients; and

(4) each client consents in writing to the lawyer's representation and each client authorizes the lawyer to disclose to each of the other clients being represented in the matter any information relating to the representation to the extent that the lawyer reasonably believes is required to comply with Rule 1.4.

(c) While representing clients as an intermediary, the lawyer shall:

(1) act impartially to assist the clients in accomplishing their common objective;

(2) as between the clients, treat information relating to the intermediation as information protected by Rule 1.6 that the lawyer has been authorized by each client to disclose to the other clients to the extent the lawyer reasonably believes necessary for the lawyer to comply with Rule 1.4; and

(3) consult with each client concerning the decisions to be made with respect to the intermediation and the considerations relevant in making them, so that each client can make adequately informed decisions.

(d) A lawyer shall withdraw from service as an intermediary if:

(1) any of the clients so requests;

(2) any of the clients revokes the lawyer's authority to disclose to the other clients any information that the lawyer would be required by Rule 1.4 to reveal to them; or

(3) any of the other conditions stated in paragraph (b) are no longer satisfied.

(e) If the lawyer's withdrawal is required by paragraph (d)(2) the lawyer shall so advise each client of the withdrawal, but shall do so without any further disclosure of information protected by Rule 1.6.

6.4. Does the agreement to jointly represent the Smith Brothers in forming an LLC comply with the Mississippi Rules of Professional Conduct? (30 points total)

The agreement to jointly represent the Smiths in the creation of an LLC implicates Rule 2.2, as Betty's requested service is as an intermediary between clients seeking in a non-adversarial manner to create a voluntary new legal relationship between them as Members of a Mississippi Limited Liability Company.

(10 points)

From the information given, it appears Betty would be justified in believing that the requirements of Rule 2.2(b)(1) are satisfied. The work is limited in scope and leaves the clients with essentially the same interests they have already (*i.e.*, equal equity ownership in a jointly held asset). Both brothers are educated and have business experience. Should the agreement to form the LLC be unsuccessful, they will remain joint owners of the land, so the risk of material prejudice is lessened. Betty makes a condition that she will be impartial and will not get "in the middle" of disputes between them, warning the brothers about limitations created by conflicts of interest. **(5 points)**

As to the provisions of Rule 2.2(b)(3), there is no clear information about whether Betty has any interests that would materially limit her representation, but she does state that she "sees no reason" why she can't proceed with this joint

representation. She also tells them that all information will have to be shared with both of them and that she will not “get in the middle” of disputes between the brothers. She does consult with them about her responsibilities, although it may be argued that the facts don’t sufficiently identify that she had all the discussions required by Rule 2.2(b)(3). **(5 points)**

Likewise, it appears that the provisions of Rule 2.2 (b)(4) are satisfied, because the clients have consented in writing and have also agreed that all information about the representation will be shared with both of them. **(5 points)**

The provisions of Rule 2.2(c),(d) and (e) are not implicated as Betty has not yet completed the work. As such, the facts as provided do not indicate that she has failed in the requirements of actual service as intermediary (Rule 2.2 (c)) and no condition requiring her withdrawal from representation has occurred (Rules 2.2(d) and (e)). **(5 points)**