

**MISSISSIPPI BOARD OF BAR ADMISSIONS
JULY 2021 BAR EXAMINATION
EVIDENCE
100 POINTS**

QUESTION 1.1. (50 POINTS)

- 1.1.1.** What is hearsay, and is it admissible? (10 POINTS)
- 1.1.2.** Please state the types of “statements” that are governed by the hearsay definitions. (15 POINTS)
- 1.1.3.** 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)

QUESTION 1.2. (50 POINTS)

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

- 1.2.1.** Name three of the four types of privileges specified in the Rules of Evidence. (5 POINTS EACH)
- 1.2.2.** With respect to claiming privilege, it is important to understand who can claim the privilege. Name three groups who can claim any privilege. (5 POINTS EACH)
- 1.2.3.** There are five exceptions to the lawyer-client privilege. As this privilege applies to many of your actions, it is important to understand when the privilege is limited. Name and define two of the exceptions. (10 POINTS EACH)

MISSISSIPPI BOARD OF BAR ADMISSIONS
JULY 2021 BAR EXAMINATION
EVIDENCE
100 POINTS

ANALYSIS

QUESTION 1.1 (50 POINTS)

1.1.1. What is hearsay, and is it admissible? (10 POINTS)

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. M.R.E. 801 (c). (7.5 POINTS). Hearsay is not admissible except as provided by law. M.R.E. 802 (2.5 POINTS).

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

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). M.R.E. 801(a)

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

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

QUESTION 1.2 (50 POINTS)

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

ANSWER:

- | | |
|------------|-------------------------------------------------|
| 1. MRE 502 | Lawyer-Client Privilege |
| 2. MRE 503 | Physician and Psychotherapist-Patient Privilege |
| 3. MRE 504 | Husband-Wife Privilege |
| 4. MRE 505 | Priest-Penitent Privilege |

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

ANSWER:

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

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

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

ANSWER:

1. *Furtherance of the Crime or Fraud.* If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;
2. *Claimants Through Same Deceased Client.* As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or Intestate succession or by inter vivos transaction;
3. *Breach of Duty by a Lawyer or a Client.* As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer;
4. *Document Attested by a Lawyer.* As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;
5. *Joint Clients.* As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

**MISSISSIPPI BOARD OF BAR ADMISSIONS
JULY 2021 BAR EXAMINATION
CONTRACTS
100 POINTS**

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. (50 POINTS)

Employer is in the computer technology business. On March 1, 2014, it offered employment to Engineer as the lead engineer overseeing the development of its proprietary software. The offer was contingent upon Engineer signing a non-compete agreement that prohibited him from working for any competitor of Employer within a 150-mile radius of Employer's home office for a period of one (1) year after termination of Engineer's employment relationship with Employer. Engineer executed the non-compete agreement and began employment with Employer. On February 15, 2019, Engineer informed Employer that he was resigning from his employment going to work as lead engineer for Competitor, one Employer's direct competitors. On January 30, 2021, Employer sued Engineer for breach of the non-compete agreement, seeking both compensatory and nominal damages. At trial, Employer admitted that despite Engineer's knowledge of Employer's proprietary source code and his work for Competitor, Employer's business had prospered in the years after Engineer went to work for Competitor and Employer had neither suffered nor incurred actual monetary damages it had suffered as a result of Engineer's actions.

At the close of the evidence offered by Employer, Engineer moved for a directed verdict, arguing that Employer had failed to prove it suffered any damages and that, under Mississippi law, monetary damages are an essential element that must be proven in order to recover on a breach of contract claim.

2.1.1. Will the trial judge grant Engineer's motion for directed verdict? **(20 POINTS)**

2.1.2. Explain fully. **(30 POINTS)**

QUESTION 2.2. (30 POINTS)

Assume the same facts for this question as in question 2.1, with the following modifications: After the parties presented their evidence and arguments to the jury, the trial judge directed a verdict on liability for breach of contract, and the jury was instructed to consider awarding Employer compensatory damages, or, in the alternative, nominal damages.

2.2.1. Please explain whether Employer was entitled to recover compensatory damages? **(15 POINTS)**

2.2.2. Please explain whether Employer was entitled to recover nominal damages? **(15 POINTS)**

QUESTION 2.3. (20 POINTS)

2.3.1. What are the elements of a breach of contract claim? **(20 POINTS)**

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JULY 2021 BAR EXAMINATION
CONTRACTS
100 POINTS**

ANALYSIS AND MODEL ANSWER

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QUESTION 2.1.1. (50 POINTS)

Employer is in the computer technology business. On March 1, 2014, it offered employment to Engineer as the lead engineer overseeing the development of its proprietary software. The offer was contingent upon Engineer signing a non-compete agreement that prohibited him from working for any competitor of Employer within a 150-mile radius of Employer's home office for a period of one (1) year after termination of Engineer's employment relationship with Employer. Engineer executed the non-compete agreement and began employment with Employer. On February 15, 2019, Engineer informed Employer that he was resigning from his employment going to work as lead engineer for Competitor, one Employer's direct competitors. On January 30, 2021, Employer sued Engineer for breach of the non-compete agreement, seeking both compensatory and nominal damages. At trial, Employer admitted that despite Engineer's knowledge of Employer's proprietary source code and his work for Competitor, Employer's business had prospered in the years after Engineer went to work for Competitor and Employer had neither suffered nor incurred actual monetary damages it had suffered as a result of Engineer's actions.

At the close of the evidence offered by Employer, Engineer moved for a directed verdict, arguing that Employer had failed to prove it suffered any damages and that, under Mississippi law, monetary damages are an essential element that must be proven in order to recover on a breach of contract claim.

Will the trial judge grant Engineer's motion for directed verdict? **(20 POINTS)**

Explain fully. **(30 POINTS)**

ANSWER:

NO. **(20 POINTS)** "[C]ontracts, as legally binding and enforceable instruments, have intrinsic value to the parties entering into them, and . . . the failure of one party to carry out his side of the bargain necessarily may result in injury to the other party for the simple fact that a promise was broken, even if the damage resulting from that injury is nominal and/or not monetary." *Bus. Commc'ns, Inc. v. Banks*, 90 So. 3d 1221, 1225

(Miss. 2012). **(15 POINTS)** “Monetary damages are a remedy for, not an element of, breach of contract.” *Id.* **(15 POINTS)**

QUESTION 2.2 (30 POINTS)

Assume the same facts for this question as in question 2.1, with the following modifications: After the parties presented their evidence and arguments to the jury, the trial judge directed a verdict on liability for breach of contract, and the jury was instructed to consider awarding Employer compensatory damages, or, in the alternative, nominal damages.

2.2.1 Please explain whether Employer was entitled to recover compensatory damages? **(15 POINTS)**

2.2.2 Please explain whether Employer was entitled to recover nominal damages? **(15 POINTS)**

ANSWER:

Employer was not entitled to recover compensatory damages because Employer admitted that it neither suffered nor incurred actual monetary damages. *Banks*, 90 So. 3d at 1225. **(15 POINTS)** However, Employer was entitled to recover nominal damages. “[W]here a suit is brought for a breach of a contract, and the evidence sustains the claim, the complainant is entitled to recover at least nominal damages for the failure of the defendant to carry out his agreement.” *Id.* (quoting *Callicott v. Gresham*, 249 Miss. 103, 112, 161 So.2d 183, 186 (1964)). **(15 points)**.

QUESTION 2.3 (20 POINTS)

What are the elements of a breach of contract claim?

ANSWER:

A breach of contract case has two elements: (1) the existence of a valid and binding contract, **(10 POINTS)** and (2) a showing that the defendant has broken, or breached it **(10 POINTS)**. *Maness v. K & A Enterprises of Mississippi, LLC*, 250 So. 3d 402, 414 (Miss. 2018).

MISSISSIPPI BOARD OF BAR ADMISSIONS
JULY 2021 BAR EXAMINATION
CONSTITUTIONAL & CRIMINAL LAW & CRIMINAL PROCEDURE
100 POINTS

IMPORTANT Notice to Bar Examinees: 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)

George, who is a convicted felon, was visiting his girlfriend, Shelia, in Rural County, Mississippi. After a while, the couple engaged in a heated argument. Shelia became concerned about her safety and decided to call the police.

George decided to leave the premises and absconded to the nearby woods. When officers arrived, Shelia informed them that George ran into the woods. A lengthy search ensued. George was subsequently found lying facing down on a grassy knoll. When George stood up, a small caliber handgun was found on the ground where George had been lying face down.

3.1.1. List the misdemeanor and/or felony crimes with which George may be charged and analyze the likelihood of conviction on the facts presented? **(50 POINTS)**

Question 3.2. (50 POINTS)

Michael loves marijuana. He smokes marijuana cigarettes several times day. After a hard day at work, Michael decides to relax and have a smoke of marijuana. Soon after lighting up and driving away from his work site, a police officer stops Michael for an expired tag.

As the officer approaches the car, it is undisputed that he saw and smelled a burning marijuana joint on the center console. The officer asked Michael to step out of the car and began to search the vehicle where he found a felony amount of marijuana in the glove compartment. Michael is arrested and charged with possession of marijuana in a motor vehicle.

Michael contends that the search of his vehicle was illegal. He has hired you, and asked you to file a motion to suppress.

3.2.1. Please explain why a motion to suppress may not be successful. **(50 POINTS)**

MISSISSIPPI BOARD OF BAR ADMISSIONS
JULY BAR EXAMINATION
CONSTITUTIONAL & CRIMINAL LAW & CRIMINAL PROCEDURE
100 Points Total

ANALYSIS

Question 3.1 (50 POINTS)

George could be charged with a misdemeanor offense of resisting arrest **(10 POINTS)** and felony possession of a firearm by a felon. **(10 POINTS)**

According to the factual scenario, George ran into the wooded area after his girlfriend, Shelia, called the police. There is nothing in the facts to suggest that George sought to avoid an arrest. But, if he ran into the woods to avoid a lawful arrest then he could be guilty of resisting arrest.

Pursuant to Section 97-9-73 MCA, annotated (1972), “[i]t shall be unlawful for any person to obstruct or resist by force, or violence, or threats, or in any other manner, his lawful arrest.” **(10 POINTS)**

It is undisputed that George is a convicted felon. But, when George stood up, a small caliber hand gun was found on the ground where George had been lying face down. In Mississippi, pursuant to Section, 97-37-5, MCA, annotate (1972), “[i]t shall be unlawful for any person who has been convicted of a felony under the laws of this state, any other state, or of the United States, to possess any firearm....” **(10 POINTS)**

But first, the state would have to prove that George was in fact in possession the firearm.

In Mississippi, there are two types of possession, constructive and actual. “Constructive possession is established by evidence showing that the contraband was under the dominion and control of the defendant.” *Roberson v. State*, 595 So.2d 1310, 1319 (Miss. 1992). *Adams v. State*, 228 So.3d 832 (Miss. App., 2017). **(5 POINTS)**

If the State fails to prove that George was in possession and control over the handgun, then George would not be guilty of the crime. *Brent v. State of Mississippi*, 247 So.3d 367 (Miss. Ct. App., 2018) **(5 POINTS)**

Question 3.2 (50 POINTS)

In order to determine if the stop was illegal, the first step is to determine if the officer had the necessary probable cause to stop Michael. According to the facts presented, the officer stopped Michael because of an expired tag. This could constitute probable cause. "As a general rule, the decision to stop an automobile is reasonable where the police have probable cause to believe that the traffic violation has occurred. *Thomas Earl Austin Jr. v. State*, 72 So.3d 565 (Miss. Ct. App. 2011). **(20 POINTS)**

Regarding the discovery of the marijuana in the glove compartment, when the officer approached Michael's car, he saw a burning marijuana cigarette. In *Fultz v. State*, 822 So.2d 994 (Miss.Ct.App. 2002), the Court held that "due to officer Luckey's testimony that he smelled burnt marijuana emanating from the vehicle, we find that his search of the vehicle was also permissible under the plain-smell corollary of the plain-view doctrine." *See also, Wolf v. State*, 260 So.2d 425 (Miss.1972) (holding that warrantless search is permitted "if there be probable cause to believe that the automobile is mobile and contains contraband or other items which offend against the law."). **(30 POINTS)**

**MISSISSIPPI BOARD OF BAR ADMISSIONS
JULY 2021 BAR EXAMINATION
PRACTICE AND PROCEDURE OF MISSISSIPPI COURTS
100 POINTS**

QUESTION 4.1. (100 POINTS)

Ms. H and Ms. A are members of a LLC. Ms. H acts as the Chief Financial Officer overseeing the finances of the company. Ms. A discovers certain irregularities in the books and becomes convinced that Ms. H has been embezzling funds through an elaborate bookkeeping scheme designed to hide her crime. Ms. A ultimately files suit against Ms. H alleging gross negligence, in the alternative, fraud and seeks punitive damages.

4.1.1. What type(s) of conduct must the plaintiff allege in her complaint in order to state a claim for punitive damages against Mr. A under Mississippi law? **(20 POINTS)**

4.1.2. What degree of specificity must be pled relative to gross negligence, fraud and punitive damages pursuant to the Mississippi Rules of Procedure? **(20 POINTS)**

4.1.3. What is the plaintiff's burden of proof at trial with respect to her claim for punitive damages? **(25 POINTS)**

4.1.4. Explain how punitive damage awards are handled from a procedural perspective in a trial in Mississippi. Your response should include an explanation of when and to whom the necessary proof is offered and what role(s) the judge and/or jury play in the award of punitive damages. Include in your explanation whether punitive damages may be awarded in Mississippi in the absence of an award of compensatory damages. **(35 POINTS)**

MISSISSIPPI BOARD OF BAR ADMISSIONS
JULY 2021 BAR EXAMINATION
PRACTICE AND PROCEDURE OF MISSISSIPPI COURTS
100 POINTS

ANALYSIS

Question 4.1.1. *What type(s) of conduct must Ms. H allege in her complaint in order to state a claim for punitive damages against Ms. A under Mississippi law?*

In her complaint, in order to adequately assert a claim for punitive damages, a plaintiff must allege that the defendant “acted with actual malice, gross negligence which evidences a willful, wanton, or reckless disregard for the safety of others, or committed actual fraud.” Miss Code Ann § 65-1-11(1)(a). **(20 POINTS)**.

Question 4.1.2. *What degree of specificity must be pled pursuant to the Mississippi Rules of Procedure as to gross negligence, punitive damages and fraud, respectively? (30 POINTS)*

Mississippi is a “notice pleading” state. **(5 POINTS)**. According to Miss Rule Civ P 8, “[a] pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, **(5 POINTS)**. Miss Rule Civ P 8(e) provides: “Pleading to Be Concise and Direct: Consistency. (1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.” These general rules of pleading apply to both gross negligence and punitive damages. **(10 POINTS)**

However, if the plaintiff does allege fraud, it must be pled with specificity and particularity pursuant to Miss Rule Civ. P. 9(b). Matters such as time, place, contents of the false representations, and the identity of the persons involved and what the persons received or obtained as a result must be plead. **(10 POINTS)**.

Question 4.1.3. *What is the plaintiff's burden of proof at trial with respect to her claim for punitive damages? (20 POINTS)*

Clear and convincing evidence. “Punitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant against whom punitive damages are sought.”

Question 4.1.4. *Explain how punitive damage awards are handled from a procedural perspective in a trial in Mississippi. Your response should include an explanation of when and to whom the necessary proof is offered and what role(s) the judge and/or jury play in the punitive damages may be awarded in Mississippi in the absence of an award of compensatory damages. (30 POINTS)*

A punitive damages award is handled in a bifurcated manner at trial. Mississippi Code Section 11-1-65(b) requires that the trier of fact (the jury in a jury trial, the judge in a bench trial) first find that compensatory damages are to be awarded and in what amount. **(10 POINTS)**

If there is no award of compensatory damages, there can be no punitive damage award. **(5 POINTS)**

If the trier of fact awards compensatory damages, an evidentiary hearing is then had before the judge. Miss. Code Ann § 11-1-65(c). Subsequent to this hearing, the judge determines whether the matter warrants being turned back over to the trier of fact for consideration of a punitive damage award. If the judge does turn the matter back over to the trier of fact, it shall determine whether to award punitive damages and in what amount. 11-1-65(d) **(10 POINTS)**.

If a punitive damage award is made, but before judgment is entered, the judge shall ascertain that the award is reasonable in its amount and rationally related to the purpose to punish what occurred giving rise to the award and deter repetition by defendant and others. Miss. Code Ann. § 11-1-65 (f)(1) **(5 POINTS)**.

MISSISSIPPI BOARD OF BAR ADMISSIONS
JULY 2021 BAR EXAMINATION
DOMESTIC RELATIONS
100 Points

QUESTION 5.1. (100 POINTS)

Charles and Kalei dated just three months before they married. Charles, a businessman, was 60 years old. He owned a home valued at \$500,000 and several rental apartment buildings valued at \$3,500,000. Kalei, 21 years old, held an Associate's Degree in physical education. She worked as a lifeguard. Her assets had a total value of \$120,000, consisting of a condo and a jeep. Neither of them wanted an elaborate wedding. They invited a few of their closest family and friends to an informal ceremony at Charles' home, where they would reside after the marriage.

Two weeks prior to the ceremony Charles approached Kalei regarding a prenuptial agreement. He disclosed his financial information and told her he did not want to lose what he worked hard to gain in case they divorced. She readily agreed because she knew it would never be used. Charles' lawyer prepared the document with financial statements from each party attached. He presented it to Kalei as she was getting dressed on the day of the ceremony. She quickly signed it and proceeded to the ceremony.

Within a few months they were blessed with a daughter, Cindy. A year later Kalei gave birth to a son, Charles, Jr. Upon Charles' insistence, Kalei quit her lifeguard job and stayed home to rear the children. During the fifth year of their marriage, Charles was shocked to learn that Cindy was not his child. After overhearing a telephone conversation between Kalei and a man she had dated previously, Charles obtained a DNA test on both children. It was confirmed that Cindy was not his child, but Charles, Jr. was his. Charles filed for a divorce. He advised Kalei that according to the prenuptial agreement, "all property owned before the marriage and any appreciation during the marriage remains separate property...husband shall have custody of his children." He told her to get Cindy and her jeep and leave. Kalei now questions whether Charles can divorce her and whether the prenuptial agreement is legal.

5.1.1. Would Charles have grounds for divorce? Explain. (20 POINTS)

5.1.2. List the requirements for a legally enforceable prenuptial agreement in Mississippi? (10 POINTS)

5.1.3. Does Charles and Kalei's prenuptial agreement meet the requirements? Explain. (20 POINTS)

5.1.4. Assuming the prenuptial agreement is valid, discuss its impact on the court's determination of:

- A. property division (**10 POINTS**)
- B. child custody (**20 POINTS**)
- C. alimony (**20 POINTS**)

MISSISSIPPI BOARD OF BAR ADMISSIONS
JULY 2021 BAR EXAMINATION
DOMESTIC RELATIONS
100 POINTS

ANSWER

1. Would Charles have grounds for divorce? Explain. (20 Points)

A fault-based ground for divorce is pregnancy of the wife by another person at the time of the marriage, if the husband did not know of such pregnancy. If Charles can prove that Kalei was pregnant by someone else at the time they married and he had no knowledge of it, he should be successful on this ground. (Miss Code Ann. Section 93-5-1)

2. List the requirements for a legally enforceable prenuptial agreement in Mississippi? (10 Points)

A premarital agreement must be: in writing; signed; accompanied by full disclosure of the parties' assets; procedurally fair; and substantively fair. (Bell on Mississippi Family Law, at 786 (3rd ed. 2020))

3. Does Charles and Kalei's prenuptial agreement meet the requirements? Explain. (20 Points)

The agreement appears to meet the requirements of a signed writing with assets fully disclosed. At issue is procedural fairness and substantive fairness. Mississippi law requires that an agreement be fair in the execution which requires procedural fairness. Timing is a factor. When was it discussed and presented? Other factors affecting procedural fairness include the availability of independent counsel, whether the complaining spouse had adequate time to review the document, the relative education and sophistication of the parties, and whether the terms of the agreement were explained. Because Kalei was presented with the document while dressing for the ceremony, she, obviously, did not have time to read and understand it or consult counsel. However, when initially approached,

she seemed anxious to sign regardless of the contents. Based on Mississippi case law the agreement would likely stand procedurally. An agreement executed on the morning of a small informal wedding but discussed several weeks in advance was held valid. *Sanderson v. Sanderson*, 170 So.3d 430 (Miss. 2014). A premarital agreement executed two days before the wedding, not read, with no counsel was upheld by the court. *Ware v. Ware* 7 So.3d 271 (Miss. Ct. App. 2008). An agreement was valid even though the wife had little education, did not consult a private attorney, and did not review the entire agreement before signing. *McLeod v. McLeod* 145 So.2d 3d (Miss. Ct. App. 2014)

Addressing substantive fairness, The Mississippi Supreme Court defines an unconscionable premarital contract as one that no one in their senses “and not under a delusion” would make and that “no honest and fair man would accept.” In the same case the court noted that unconscionability should be tested at the time of the agreement to ensure that the court does not set aside a contract that has become “more onerous than originally expected.” A prenuptial agreement is not invalid just because it continues an existing disparity in incomes. *Sanderson v. Sanderson*, 170 So.3d 430 (Miss. 2014) Although there is a major disparity in assets at the time of the agreement, Charles and Kalei’s prenuptial agreement does not appear to rise to this level of unconscionability.

4. Assuming the prenuptial agreement is valid, discuss its impact on the court’s determination of:

A. property division (10 Points)

Agreements for property division are binding on a court in the absence of fraud, duress, and unconscionability. *Bell on Mississippi Family Law*, at 798 (3rd ed. 2020). Mississippi courts have approved most prenuptial agreement provisions establishing a predetermined division of assets upon divorce. A prenuptial agreement was upheld in a divorce after seventeen years of marriage in which the wife, at her husband’s encouragement, sold her house and did not work outside the home. She left the marriage with \$425,000 in separate assets while he had over \$3.5 million in separate property. She

argued that the agreement was unconscionable because he generated assets during the marriage while she did not. The court emphasized that fairness is tested at the time of the agreement. Sanderson v Sanderson, 245 So.3d 421 (Miss. 2018)

The fact that Charles had assets valued at \$4 million and Kalei \$120,000 does not make the prenuptial agreement fraudulent, the product of duress or unconscionable. Charles was honest in disclosing his finances and goal initially.

Whereas, Kalei may have committed fraud by not disclosing her condition. However, the family use doctrine may have converted the house in which they resided into marital property requiring equitable distribution by the court, if not addressed in the prenuptial agreement.

B. child custody (20 Points)

A chancellor has the authority to set aside an agreement between the parties with respect to matters of custody and make decisions that are in the best interest of the child. Parties cannot agree to deprive the court of this authority. Bell on Mississippi Family Law, at 798 (3rd ed. 2020). The court would apply the

Albright factors to determine custody.

C. alimony (20 Points)

Mississippi courts have treated spousal support similar to child support, in that agreements between the parties were subject to the court's review and modification. Bell on Mississippi Family Law, at 799 (3rd ed. 2020). However, parties may decide the issue of alimony in a prenuptial agreement.

Most recently, in the Sanderson case, the Supreme Court affirmed the chancellor's finding that waiver of spousal support was conscionable. The prenuptial agreement waiving spousal support met the legal requirements and was enforced by the court. Kalei will likely have to accept her contract.

**MISSISSIPPI BOARD OF BAR ADMISSIONS
JULY 2021 BAR EXAMINATION
LEGAL ETHICS AND PROFESSIONAL CONDUCT
100 POINTS**

QUESTION 6.1. (100 POINTS)

Angela Smith has a general practice in Jefferson, Mississippi. Just a few weeks prior, a client named John Jones hired her to represent him in his divorce case which was already pending. In the process of representing John, Angela obtained and reviewed the complete file from John's prior attorney and discovered evidence of a couple of investment accounts owned by John that had not been disclosed on prior Rule 8.05 financial disclosure forms required by the Mississippi Uniform Chancery Court Rules.

Later that week, Angela met with John to review the file and see what additional work may be needed. When Angela asked John about the investment accounts and why they had not been included in the prior financial disclosures, he told Angela that his prior attorney had never asked about those accounts and apparently had not noticed the information Angela did. John continued - "I don't think my wife even knows anything about these accounts. I opened them before we were married with money I inherited from my Father and haven't touched them in years. From what I read on the internet, these accounts are my 'separate' property so my wife can't get them in the divorce. Right?"

Angela then correctly explained to John that regardless of whether the accounts were his separate property, the existence of the accounts and their current value had to be disclosed to the Judge and to his Wife's attorney. She then told John to get her the most current account statements as soon as possible so she could prepare an updated 8.05 financial disclosure. Once that was prepared and submitted, she could then set a trial date.

A few days later, John had still not gotten Angela the account statements. Angela sent John an email in which she again went over the necessity to disclose the accounts and the need for him to get her the current account statements as soon as possible.

After a couple more weeks, Angela finally gets John on the phone, who tells her "those accounts are mine - they're none of my wife's business and I don't want her to know anything about them," John replied. "I don't see how it makes any difference anyway." Angela then tells him that if he refuses to get her that information so the financial disclosure can be amended, she cannot continue to represent him. "They're none of my wife's business," John replied. "Do not tell anyone about them."

Angela also happens to be a friend of yours since law school, and you have kept in touch since you both passed the bar. Immediately following her last meeting with John, she calls you for advice and discusses the situation with you.

- 6.1.1.** What is the relevant Rule or Rules of the Mississippi Rules of Professional Conduct governing confidentiality of client information? **(20 POINTS)**
- 6.1.2.** What provisions of the relevant Mississippi Rule or Rules of Professional Conduct on confidentiality are implicated by John's instruction to Angela to not disclose his investment accounts? Explain what the rule(s) permit and require of Angela under these facts. **(30 POINTS)**
- 6.1.3.** What is the relevant Rule or Rules of the Mississippi Rules of Professional Conduct governing the termination of representation of a client? **(20 POINTS)**
- 6.1.4.** What provisions of the relevant Mississippi Rule of Professional Conduct on termination of representation of a client are implicated under the facts above? Explain what the Rule(s) permit and require of Angela under these facts. **(30 POINTS)**

MISSISSIPPI BOARD OF BAR ADMISSIONS

JULY 2021 EXAMINATION

LEGAL ETHICS AND PROFESSIONAL CONDUCT

100 POINTS TOTAL

Model Answer:

6.1.1. What is the relevant Rule or Rule(s) of the Mississippi Rules of Professional Conduct governing confidentiality? (20 points).

Mississippi Rule of Professional Conduct 1.6 provides:

RULE 1.6 CONFIDENTIALITY OF INFORMATION

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
 - (1) to prevent reasonably certain death or substantial bodily harm;
 - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interest or property of another and in furtherance of which the client has used or is using the lawyer's services;
 - (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
 - (4) to secure legal advice about the lawyer's compliance with these rules;
 - (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's

representation of the client.

- (6) to comply with other law or a court order.
- (C) A lawyer who participates in an intervention on a lawyer, judge or law student by the Lawyers and Judges Assistance Committee shall not reveal any information learned through the intervention from or relating to the lawyer, judge or law student on whom the intervention is conducted except as may be permitted by the Rules of Discipline of the Mississippi Bar or required by law or court order.
- (d) A lawyer shall reveal information to the Lawyers and Judges Assistance Committee in accordance with approved monitoring procedures of the Lawyers and Judges Assistance Committee relating to the status of compliance of a lawyer, judge or law student with the terms and conditions imposed upon the lawyer, judge or law student by the Lawyers and Judges Assistance Committee.
- (e) A lawyer may reveal such information to the extent required by law or court order. (20 points).

6.1.2. What provisions of the relevant Mississippi Rule or Rules of Professional Conduct on confidentiality are implicated by John's instruction to Angela to not disclose his investment accounts? Explain what the rule(s) permit and require of Angela under these facts. (30 points).

Angela is permitted by the Rules of Professional Conduct to disclose John's financial information, despite the fact that he objects to doing so.

Under Rule 1.6(a), an attorney is prohibited from disclosing information related to the representation of a client unless the client consents, "disclosure is impliedly authorized in order to carry our representation" or disclosure is permitted under any the provisions of Rule 1.6(b).

Here, the client has not authorized disclosure and disclosure is not permitted on that ground. (5 points).

However, it does appear that disclosure is "impliedly authorized" insofar as the

disclosure of accurate and current financial information of a party is required by governing court rules in a divorce matter. (5 points).

Regardless, in light of the obligation to disclose financial information under Court rules, disclosure of client information is permitted “to comply with other law or court order” as set forth in 1.6(b)(6) and similarly, 1.6(e). If she is not permitted to withdraw as his attorney, Angela will be required to submit John’s financial information as part of the case and will have separate ethical obligations of candor to the tribunal under Rule 3.3 and fairness to opposing party and counsel under Rule 3.4 to not present (or permit to be presented) false evidence. (10 points).

Disclosure might also prevent fraud and related financial injury, triggering permissible disclosure under Rule 1.6(b)(2) or (3). (5 points).

Finally, but importantly, Angela’s phone call to seek help on how to handle the situation is itself a permissible disclosure, pursuant to Rule 1.6(b)(4), to the extent the call constitutes an attempt “to secure legal advice” about compliance with the Rules of Professional Conduct. (5 points).

6.1.3. What is the relevant Rule of the Mississippi Rules of Professional Conduct governing the termination of representation of a client? (20 points).

Rule 1.16 of the Mississippi Rules of Professional Conduct provides:

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
 - (1) the representation will result in violation of the rules of professional conduct or other law;

- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
 - (3) the lawyer is discharged.
- (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without materially adverse effect on the interests of the client, or if:
- (1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
 - (2) the client has used the lawyer's services to perpetrate a crime or fraud;
 - (3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
 - (4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
 - (5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
 - (6) other good cause for withdrawal exists.
- (c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
- (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law. (20 points).

6.1.4. What provisions of the relevant Mississippi Rule of Professional Conduct on termination of representation of a client are implicated under the facts above? Explain

what the rule(s) permit and require of Angela under these facts. (30 points).

Rule 1.16(a) provides that an attorney shall withdraw where representation results in violations of the rules of professional conduct or other law, the lawyer's physical or mental condition materially impairs representation or if the lawyer is discharged. Here, there is nothing to indicate that Angela has any physical or mental impairment to require withdrawing. It can be argued that representation would result in a violation of the Rules of Professional Conduct in light of John's insistence to keep certain financial information secret, but as analyzed in the previous question, Angela can nevertheless permissibly disclose that financial information and comply with her ethical obligations. (5 points).

With no trial date set, there does appear to be sufficient time to withdraw from representation "without materially adverse effect on the interests of the client" as referenced in Rule 1.16(b). (3 points).

Under the facts presented, it does not appear that withdrawal is permissible under Rule 1.16(b)(2), when the client has used the lawyer's services to commit a crime or fraud, although he may have done so with his prior attorney when submitting an incomplete financial disclosure form. (3 points).

Angela has already told John that she would withdraw from representing him if he did not provide the updated financial information for disclosure. That notice may constitute "reasonable warning" of withdrawal under Rule 1.16(b)(4) insofar as a trial date has not been set and there do not appear to be any other facts affecting whether notice is reasonable. Regardless, it can be argued that he should be given another

opportunity to agree for the information to be produced. (3 points).

Otherwise, it may be argued that withdrawing from representation is permissible under any of the remaining provisions under Rule 1.16 (b):

- Rule 1.16(b)(1). The client persists in a course of action that the lawyer believes is fraudulent (*i.e.*, concealing relevant financial information);
- Rule 1.16(b)(3). John insists on pursuing an objective (*i.e.*, concealing relevant financial information) that Angela finds repugnant or imprudent; and
- Rule 1.16(b)(5). The representation “has been rendered unreasonably difficult by the client” in light of his refusal to provide required information for use in the proceedings.;

An appropriate answer would discuss the fact that multiple provisions are available to Angela to seek withdrawal of representation. (6 points). Regardless of the other provisions of Rule 1.16, the Judge may deny any motion to withdraw filed by Angela. If that were the case, Angela is then required to continue representation of John as she has been “ordered to do so by a tribunal.” Rule. 1.16(c). This would, as previously discussed, trigger Angela’s obligations of candor to the tribunal under Rule 3.3 and fairness to opposing party and counsel under Rule 3.4 to not present (or permit to be presented) false evidence (10 points).