

MISSISSIPPI BOARD OF BAR ADMISSIONS
JULY 2022 BAR EXAMINATION

EVIDENCE
100 POINTS

QUESTION 1.1 (50 POINTS)

You are retained in a personal injury action. Allegedly, the Plaintiff slipped and fell while descending a staircase at the Fallen Oaks Restaurant, sustaining painful and disabling injuries. Plaintiff states that she stepped on a stair covered in water leaking from a busted pipe inside the adjoining wall. Suit is filed against the owner of the building housing the restaurant, alleging negligent maintenance of the premises. The property owner denies responsibility on the basis that the manager of the restaurant, who has leased the property from the owner under the same oral agreement for ten years, allegedly has control of the premises and responsibility for maintenance of the premises. However, the owner of the building previously hired a plumber to repair the busted pipe and did so again the day after the most recent incident.

Discovery reveals that individuals have fallen in the same dimly lit stairwell within the past year, and the building owner and leasee paid the medical expenses incurred in at least one of these previous incidents. The owner is refusing to pay expenses associated with the current incident.

- 1.1.1. What general duty does the property owner/leasee owe to the patron? (15 Points)
- 1.1.2. Discuss the relevancy and admissibility at trial of the previous slip-and-fall incidents and the property owner's payment of medical expenses. (20 Points)
- 1.1.3. Discuss the relevancy and admissibility at trial of the fact that Defendant repaired the busted pipe? (15 Points)

QUESTION 1.2 (50 POINTS)

A recurring courtroom evidentiary issue is the admissibility of photographs in a civil or a criminal trial. Assume you are in trial and your opponent seeks to introduce photographs purportedly depicting the other side's version of events. The case arises from a motor vehicles accident and your opponent seeks to offer photographs that include: a) deceased bodies at the scene; and, b) the autopsy findings. The photographs are graphic, so as a minimally competent attorney, you timely object to the photographs.

In analyzing admissibility below, it is immaterial whether the trial is civil or criminal. In support of your objection, please answer the following questions:

- 1.2.1** What is the trial court procedural admissibility standard? (10 Points)
- 1.2.2** What factors should the trial court weigh in determining whether to admit the photographs? (20 Points)
- 1.2.3** Photographs are deemed to have evidentiary value when they meet one of three criteria; name two criteria. (5 Points each, 10 Points total)
- 1.2.4** Upon appellate review, what is the appellate procedural standard of review of the trial court's admissibility decision? (10 Points)

**MISSISSIPPI BOARD OF BAR ADMISSIONS
JULY 2022 BAR EXAMINATION**

**EVIDENCE
100 POINTS**

MODEL ANSWER

QUESTION 1.1 (50 POINTS)

You are retained in a personal injury action. Allegedly, the Plaintiff slipped and fell while descending a staircase at the Fallen Oaks Restaurant, sustaining painful and disabling injuries. Plaintiff states that she stepped on a stair covered in water leaking from a busted pipe inside the adjoining wall. Suit is filed against the owner of the building housing the restaurant, alleging negligent maintenance of the premises. The property owner denies responsibility on the basis that the manager of the restaurant, who has leased the property from the owner under the same oral agreement for ten years, allegedly has control of the premises and responsibility for maintenance of the premises. However, the owner of the building previously hired a plumber to repair the busted pipe and did so again the day after the most recent incident.

Discovery reveals that individuals have fallen in the same dimly lit stairwell within the past year, and the building owner and leasee paid the medical expenses incurred in at least one of these previous incidents. The owner is refusing to pay expenses associated with the current incident.

1.1.1. What general duty does the property owner/leasee owe to the patron? (15 Points)

1.1.2. Discuss the relevancy and admissibility at trial of the previous slip-and-fall incidents and the property owner's payment of medical expenses (20 points)

1.1.3. Discuss the relevancy and admissibility at trial of the fact that Defendant repaired the busted pipe? (15 points)

ANALYSIS

1.1.1 Under Mississippi law, a property owner/leasee is not an insurer of an invitee's (5 Points) safety. Rather, the owner/leasee owes a duty to keep the premises reasonably safe (5 Points), and when not reasonably safe, to warn of hidden danger not in plain sight. (15 Points)

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

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

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

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

1.1.3. M.R.E. and F.R.E. 407 prohibit the admission of evidence of *subsequent remedial measures*, or "measures which, if taken previously, would have made the event less likely to occur," for the purpose of proving negligence or culpable conduct in connection with the subject event. However, the evidence is admissible to show ownership and/or control of the premises, or feasibility of precautionary measures, if controverted, or for impeachment. It is important for the answer to articulate that a court may exclude evidence for one purpose but admit the same evidence for a different purpose, and instruct the jury accordingly. MRE 105.

[GRADER'S NOTE: this reference may occur in responding to subsection B or C, and is worth 5 Points].

QUESTION 1.2 (50 POINTS)

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ANALYSIS

In analyzing admissibility below, it is immaterial whether the trial is civil or criminal. In support of your objection, please answer the following questions:

1.2.1. What is the trial court procedural admissibility standard? (10 Points)

Sound discretion of the trial court (7 Points); and the court is afforded wide latitude (3 Points). *Eckman v. Moore*, 876 So.2d 975 (Miss. 2004) (internal citations omitted).

[GRADER'S NOTE: Identification of any admissibility standard is worth 3 Points]

1.2.2. What factors should the trial court weigh in determining whether to admit the photographs? (20 Points)

First, the trial court must ascertain that the photographs are relevant. If the photographs are relevant, the trial court "must determine if the photographs are so gruesome and inflammatory as to lack any evidentiary purpose. *William v. State*, 222 So.3d 1066, 1073 (Miss. Ct. "App. 2017)

A photograph that is gruesome, grisly, unpleasant or even inflammatory may still be admitted so long as it is probative in value and its introduction serves a meaningful evidentiary purpose. *Mosley v. State*, 307 So.3d 1261, 1268 (¶26) (Miss Ct. App. 2020).

Ultimately, a trial court will determine whether each photograph is more prejudicial than probative. The trial court should also consider cumulative evidence rule to limit the total number of photographs admitted, if any.

[GRADER'S NOTE: Alternatively, meaningful discussion applying M.R.E. 401-403 analysis should receive credit between 5-15 Points.]

1.2.3. Photographs are deemed to have evidentiary value when they meet one of three criteria; name two criteria. (5 Points each, 10 Points Total)

A photograph has evidentiary value where it:

- a) Describes the circumstances of a death;
- b) Describes the location of a body and cause of death; *or*
- c) Serves to supplement or clarify witness testimony.

McIntosh v. State, 917 So.2d 78, 83 (¶ 13) (Miss. 2005).

[GRADER'S NOTE: Alternatively, meaningful discussion applying M.R.E. 401-403 analysis should receive credit between 2-5 Points.]

1.2.4. Upon appellate review, what is the appellate procedural standard of review of the trial court's admissibility decision? **(10 Points)**

Abuse of discretion. *Martin v. State*, 289 So.3d 703, 705 (Miss. 2019)

[GRADER'S NOTE: Identification of any appellate standard of review is worth 3 Points.]

**MISSISSIPPI BOARD OF BAR ADMISSIONS
JULY 2022 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 and 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 did not sustain any actual monetary loss as a result of Engineer's actions.

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.

2.1.1. Was Employer entitled to recover compensatory damages? (15 Points)

2.1.2. Explain fully. (10 Points)

2.1.3. Was Employer entitled to recover nominal damages? (15 Points)

2.1.4. Explain fully. (10 Points)

QUESTION 2.2 (30 POINTS)

2.2.1. What are the elements of a valid contract under Mississippi law? (30 Points)

QUESTION 2.3 (20 POINTS)

2.3.1. What are the elements of a breach of contract claim under Mississippi law? (20 Points)

**MISSISSIPPI BOARD OF BAR ADMISSIONS
JULY 2022 BAR EXAMINATION**

CONTRACTS

100 POINTS

MODEL ANSWER

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2.1.1 Was Employer entitled to recover compensatory damages? **(15 Points)**

2.1.2 Explain fully. **(10 Points)**

2.1.3 Was Employer entitled to recover nominal damages? **(15 Points)**

2.1.4 Explain fully. **(10 Points)**

ANSWER 2.1:

NO, Employer was not entitled to recover compensatory damages. **(15 Points)** “Without proof of actual monetary damages, a plaintiff cannot recover compensatory damages under a breach-of-contract action.” *Bus. Commc'ns, Inc. v. Banks*, 90 So. 3d 1221, 1225 (Miss. 2012). Because Employer admitted that it neither suffered nor incurred actual monetary damages. *Id.* **(10 Points)** However, Employer was entitled to recover nominal damages. **(15 Points)** “[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.* at 1226 (quoting *Callicott v. Gresham*, 249 Miss. 103, 112, 161 So.2d 183, 186 (1964)). **(10 Points)**.

QUESTION 2.2 (30 POINTS)

2.2.1 What are the elements of a valid contract under Mississippi law? (30 Points)

ANSWER 2.2.1.:

1. Two or more contracting parties, **(5 Points)**
2. Consideration, **(5 Points)**
3. An agreement that is sufficiently definite, **(5 Points)**
4. Parties with legal capacity to make a contract, **(5 Points)**
5. Mutual assent, and **(5 Points)**
6. No legal prohibition precluding contract formation. **(5 Points)**

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

QUESTION 2.3 (20 POINTS)

2.3.1 What are the elements of a breach of contract claim under Mississippi law? (20 Points)

ANSWER 2.3.1.:

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 2022 BAR EXAMINATION
CONSTITUTIONAL & CRIMINAL LAW & PROCEDURE
100 POINTS**

QUESTION 3.1 (33 POINTS)

Bob works at Acme Manufacturing. When he pulls up to work one morning, he notices co-worker Dan getting out of his car in the parking lot and placing a firearm into the trunk of Dan's car. Dan locks the trunk and walks in to the plant.

Bob goes to his supervisor and reports that Dan is violating Acme's policy of no firearms on the plan premises. The supervisor goes to Dan and tells him he must leave work.

3.1.1. Is the supervisor allowed to tell Dan to leave the premises?

3.1.2. Would your answer for 3.1.1 be any different if the parking lot was gated and has a security hut for an entrance?

QUESTION 3.2 (34 POINTS)

Sally is hiking on her grandfather's farm. While out several miles, she comes across a small cabin. A man comes out of the cabin and yells at her to get off of his property. She tells him that she is lost and doesn't know how she ended up on his property.

3.2.1. What would the angry man have to show to have Sally convicted of trespassing?

3.2.2. What difference would it make if Sally climbed over a fence to get to the man's land?

3.2.3. What difference would it make if Sally had taken some tomatoes out of the angry man's garden?

QUESTION 3.3 (33 POINTS)

Kevin walks into his local convenience store. While in the store, he puts two candy bars into his pocket and then walks out the front door. He is stopped by the owner in the parking lot.

3.3.1. What would the store owner have to show to have Kevin convicted of shoplifting?

3.3.2. Would it matter if Kevin claimed he “forgot” that the candy bars were in his pocket?

3.3.3. What would change if Kevin instead walked out of the store with a new cell phone in his pocket valued at \$750?

MISSISSIPPI BOARD OF BAR ADMISSIONS
JULY 2022 BAR EXAMINATION
CONSTITUTIONAL & CRIMINAL LAW & PROCEDURE
100 POINTS

MODEL ANSWER

QUESTION 3.1 (33 POINTS)

- 3.1.1.** Under Miss. Code 45-9-55(1), an employer cannot establish or enforce a policy or rule that has the effect of prohibiting a person from transporting or storing a firearm in a locked vehicle in any parking lot or other designated parking area. Since Dan put the firearm in his trunk and locked it, Acme could not ask him to leave the premises. **(23 Points)**
- 3.1.2.** If Acme's parking area had a gate around it and access to it was restricted, Miss. Code 45-9-55 (2) would allow a private employer to prohibit an employee from keeping a firearm in the trunk. Under that scenario, Acme could ask Dan to leave the premises. **(10 Points)**

QUESTION 3.2 (34 POINTS)

- 3.2.1.** To be convicted under Miss. Code 97-17-93, the angry man would have to show that Sally "knowingly" entered his land without permission. If she could show that she was lost and did not know that she was off of her grandfather's property, she would have a valid defense. If convicted, and it was Sally's first offense, it would be a misdemeanor with a \$250 fine. **(20 Points)**
- 3.2.2.** Under Miss. Code 97-17-85, if the angry man's property had a fence on it and had posted "no trespassing" or some other warning, Sally could be fined \$50. However, if Sally was a licensed professional surveyor, she may not be liable. **(7 Points)**
- 3.2.3.** If Sally "willfully and wantonly" gathered tomatoes from the angry man's garden, she could be guilty of a misdemeanor and fined \$500. **(7 Points)**

QUESTION 3.3 (33 POINTS)

3.3.1. Under Miss. Code 97-23-93, if the shopkeeper showed that Kevin willfully took possession of the candy without intending to pay the stated price, he could be charged with shoplifting. Since the price of the candy bars would be less than \$500, Kevin could be convicted of a misdemeanor and fined not more than \$1,000 or jailed for not 6 months or both. **(20 Points)**

3.3.2. Since Kevin concealed the candy bars in his pocket when he left the store, that concealment would be prima facie evidence that Kevin had the requisite intention to convert the merchandise. **(7 Points)**

3.3.3. If Kevin shoplifted a cell phone that was worth more than \$500, he could be convicted of a felony and be punished for the crime of grand larceny. **(6 Points)**

**MISSISSIPPI BOARD OF BAR ADMISSIONS
JULY 2022 BAR EXAMINATION
PRACTICE AND PROCEDURE OF MISSISSIPPI COURTS
100 POINTS**

Ms. H was injured in a restaurant when another patron, Mr. A, became intoxicated and assaulted her. She files a complaint against Mr. A. She seeks punitive damages against him.

QUESTION 4.1 (40 POINTS)

4.1.1. What type(s) of conduct must the plaintiff allege in her complaint in order to state a claim for punitive damages? And with what degree of specificity must it be pled pursuant to the Rules of Procedure?

QUESTION 4.2 (25 POINTS)

4.2.1. What is the plaintiff's burden of proof at trial with respect to her claim for punitive damages?

QUESTION 4.3 (35 POINTS)

4.3.1. Explain how punitive damage awards are handled from a procedural perspective in a trial. Your response should include an explanation of when the necessary proof is offered and what role(s) the judge and/or jury play in the award of punitive damages.

**MISSISSIPPI BOARD OF BAR ADMISSIONS
JULY 2022 BAR EXAMINATION
PRACTICE AND PROCEDURE OF MISSISSIPPI COURTS
100 POINTS**

MODEL ANSWER

QUESTION 4.1 (40 POINTS)

4.1.1. What types of conduct must a plaintiff allege in her complaint in order to state a claim for punitive damages? And with what degree of specificity must it be pled pursuant to the Rules of Procedure?

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). **(15 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, **(10 Points)**. Miss Rule Civ P 8€ 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.” **(5 Points)**.

However, punitive damages are “special” damages and according to Miss Rule Civ. P.9(g), must be pled with specificity. Additionally, if the plaintiff does allege fraud, its nine elements must be pled with specificity and particularity pursuant to Miss Rule Civ. P. 9(b). **(5 Points)**.

QUESTION 4.2 (25 POINTS)

4.2.1. What is the plaintiff’s burden of proof at trial with respect to her claim for punitive damages? (25 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 4.3 (35 POINTS)

4.3.1. Explain how punitive damage awards are handled from a procedural perspective in a trial. Your response should include an explanation of when the necessary proof is offered and what role(s) the judge and/or jury play in the award of punitive damages. A punitive damages award is handled in a bifurcated manner at trial. § 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. **(20 Points)**

If compensatory damages are awarded, an evidentiary hearing is had before the judge. § 11-1-65(c). The judge then determines whether the issue is to be turned over to the trier of fact. If it is turned over, the trier of fact shall determine whether to award them 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 2022 BAR EXAMINATION
DOMESTIC RELATIONS
100 POINTS**

QUESTION 5.1 (100 POINTS)

Geno arrives at his attorney's office enraged, holding a letter from his wife in one hand and his two-year-old twin toddlers with the other hand. He explains that his wife, Sue, left him six months earlier without giving any reason. They had been married for eleven years. The letter simply states: "I want a divorce."

Sue works as a personal trainer at the local gym and makes \$40,000 annually. Geno, a self-employed photographer, had similar earnings until the children were born. His earnings and client base declined when he put his work aside and dedicated most of his time to caring for the twins. Geno maintained the household without much help from Sue. She worked long hours and had unexplained absences from the family. Sue helped with the children occasionally, while Geno spent the majority of his time cooking, cleaning and caring for the children. They live in Mississippi in a house that Geno inherited from his parents and his photography office is based there.

In case of divorce, Geno wants to know whether he is entitled to alimony, whether Sue has any rights to the house and whether he will be awarded custody of the children. To assist the attorney in counseling with Geno, answer the following questions.

- 5.1.1.** What factors will the court consider in determining whether to award alimony? (30 Points)
- 5.1.2.** Discuss and distinguish different types of alimony available in Mississippi? (30 Points)
- 5.1.3.** Discuss whether Geno would be entitled to alimony? (10 Points)
- 5.1.4.** Discuss whether Sue would have any rights to the house? (20 Points)
- 5.1.5.** Discuss two (2) factors that favor Geno in the custody determination? (10 Points)

**MISSISSIPPI BOARD OF BAR ADMISSIONS
JULY 2022 BAR EXAMINATION
DOMESTIC RELATIONS
100 POINTS**

MODEL ANSWER

QUESTION 5.1.1. (30 POINTS)

The Chancellor has discretion as to whether alimony should be awarded and the amount thereof. Factors to be considered in determining alimony are:

- A. The income and expenses of the parties;
- B. The health and earning capacities of the parties;
- C. The needs of each party;
- D. Obligations and assets of each party;
- E. Length of the marriage;
- F. The presence or absence of minor children in the home, which may require that one or both of the parties either pay, or personally provide, child care;
- G. Age of the parties;
- H. The standard of living of the parties, both during the marriage and at the time of the support determination;
- I. Tax consequences of the spousal support order;
- J. Fault or misconduct;
- K. Wasteful dissipation of assets by either party; and,
- L. Any other factor deemed by the court to be just and equitable” in connection with the setting of spousal support.

Armstrong v. Armstrong, 618 So.2d 1278, 1280 (Miss 1993)

M.C.A. Section 93-5-23

(2.5 Points for each of the 12 factors)

QUESTION 5.1.2. (30 POINTS)

Alimony in Mississippi may be Permanent or Periodic, Rehabilitative, Lump Sum or Reimbursement:

- A. Permanent or periodic alimony is a monthly payment to the recipient spouse that continues until the death of either spouse or remarriage of the recipient spouse. It is modifiable based on a change in circumstances. Armstrong v. Armstrong, 618 So.2d 1278 (Miss. 1993); Hubbard v. Hubbard, 656 So.2d 124 (Miss. 1995); Sides v. Pittman, 150 So.2d 211 (Miss. 1993). **(10 Points)**

- B. Rehabilitative alimony is temporary. It is awarded for a period of time to allow the recipient spouse to become self sufficient. Rehabilitative alimony does not automatically terminate upon remarriage of the recipient spouse, but does terminate upon death of either spouse. It may be modified based on change in circumstances. *Hubbard v. Hubbard*, 656 So.2d 124 (Miss. 1995); *Waldron v. Waldron*, 743 So.2d 1064 (Miss. App. 1999). **(10 Points)**
- C. Lump Sum Alimony is a vested sum certain payable at one time or in a series of payments. It is not modifiable and does not terminate upon death of either spouse. It carries over to the estates of the parties. It does not terminate upon remarriage. It is intended as an equity equalizer between the parties. *Wray v. Wray*, 394 So.2d 1341 (Miss. 1981); *Bowe v. Bowe*, 557 So.2d 793 (Miss. 1990); *Holleman v. Holleman*, 527 So.2d 90 (Miss. 1988). **(8 Points)**
- D. Reimbursement alimony is a form of lump sum alimony, awarded to a spouse who supported the other through school and whose contribution cannot be recognized through property division. Reimbursement alimony is vested, not modifiable, and does not terminate upon the parties' deaths or the recipient's remarriage. **(2 Points)**

QUESTION 5.1.3. (20 POINTS)

Credit should be given for a reasonable application of alimony to Geno like the following: Based on the disparity of income, the eleven years of the marriage, his likely custody of the children and possible misconduct of Sue, alimony should be awarded to Geno on a permanent or a temporary basis. If Geno is expected to increase his business income, alimony may be awarded for a period of time and be rehabilitative in nature. If awarded custody of the young children, he may need permanent alimony. The only asset that the couple have is a house, which will likely be awarded to Geno. Therefore, lump sum alimony would not likely be awarded to Geno. **(10 Points)**

QUESTION 5.1.4 (20 POINTS)

Property received by inheritance by a spouse is separate property. However, it may be converted to marital property based on the family use doctrine. **(10 Points)** This doctrine almost always converts a family residence to marital property. Geno's wife and children lived in the home, and it is highly likely marital property. As marital property the Chancellor would consider the property division factors of *Ferguson v. Ferguson*, 639 So.2d 921 (Miss. 1994) in determining whether Sue is entitled to a share of equity of the home. The Ferguson factors **(10 Points)** are:

- A. Substantial contribution to the accumulation of property;
- B. The degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets;

- C. The market value and the emotional value of the assets subject to distribution;
- D. The value of assets not ordinarily, absent equitable factors to the contrary, subject to such distribution, such as property brought to the marriage by the parties and property acquired by inheritance or inter vivos gift by or to an individual spouse;
- E. Tax and other economic consequences, and contractual or legal consequences to third parties, of the proposed distribution;
- F. The extent to which property division may, with equity to both parties, be utilized to eliminate periodic payments and other potential sources of future friction between the parties;
- G. The needs of the parties for financial security with due regard to the combination of assets, income and earning capacity; and
- H. Any other factor which in equity should be considered.

All Ferguson factors are not required to be listed. Credit will be given for a reasonable response to Geno's concern over Sue's rights to the house, such as:

The inherited home will likely be determined to be marital property under the family use doctrine, giving Sue rights to it. However, Ferguson factors considered by a chancellor in determining property division may allow Geno to keep the house. Most relevant factors favor Geno. If awarded custody of the children, Geno's financial need would be greater than Sue's and awarding him the house could reduce or eliminate the need for alimony. A house inherited from his parents would likely have emotional value for him. His home-based business would be another factor favoring Geno.

QUESTION 5.1.5 (10 POINTS)

Determination of custody is based on the child's best interest. The factors used to determine best interest are itemized in *Albright v Albright*, 437 So.2d 1003(Miss. 1983). Two factors that favor Geno are:

- A. Continuing care prior to separation. A parent who has been a child's primary caregiver may have a substantial advantage in a custody action. The facts state, that when the twins were born, Geno put his work aside and dedicated most of his time to caring for the twins while Sue continued to work long hours, have unexplained absences from the family and participated only occasionally in childcare. This factor would favor Geno. **(5 Points)**
- B. Parenting skills, willingness, and capacity to provide childcare. Geno's self-employment gives him greater time and flexibility to spend with the children and the facts indicate that he did so willingly. Sue's participation was infrequent and she worked long hours. Geno cooked, cleaned and cared for the children. This factor also favors Geno. **(5 Points)**

Note: Credit should be given for any of the following Albright factors that are relevant with a logical explanation of how it favors Geno: (1) The age, health and sex of a child; (2) Which parent had continuing care of the child prior to separation; (3) Which parent has the best parenting skills and the willingness and capacity to provide primary care; (4) The employment responsibilities of both parents; (5) The physical and mental health of parents; (6) Emotional ties of the parent and child; (7) The parents' moral fitness; (8) The child's home, school and community record; (9) The preference of a child at the age of twelve; (10) Stability of the home environment and employment of each parent; and (11) Other factors.

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FACTS

Angela Smith has a general practice in Jefferson, Mississippi. One of Angela's existing clients, John Jones, sets a meeting with her to discuss his new business venture - establishing a cannabis growing and processing facility in compliance with the recently enacted Mississippi Medical Cannabis Act.

Before the client meeting, knowing that federal law still makes the growth and sale of cannabis illegal, Angela has her associate Tim do some research on the client's exposure to federal criminal prosecution. Tim prepares a memo for Angela that explains, in part:

- 1) Federal law continues to criminalize the growth and sale of cannabis under the Controlled Substances Act, 21 U.S.C. §§ 801-971. Multiple federal courts have noted that the federal prohibitions exist despite the adoption of local decriminalization statutes;
- 2) Every year since 2014, the United States Congress has enacted the Rohrabacher Amendment to the annual federal budget (Consolidated Appropriations Act, 2019, Pub. L. No. 11607 §537, 133 Stat. 13, 138 (2019)), which provides that no federal funds may be used to prevent any state "from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana."
- 3) Two Federal Circuit Courts have determined that the Rohrabacher Amendment practically precludes federal prosecutions of those who are in compliance with state medical marijuana laws. United States v. Bilodeau, 24 F.4th 705, 713 (1st Cir. 2022); United States v. McIntosh, 833 F.3d 1163,1176-77 (9th Cir. 2016).

When Angela meets with Tim to discuss his memo, Tim asks "can we even represent John at all here? I mean, even if John might not get prosecuted, it's still a crime, right? What do we tell him?"

Tim also has some strong personal opinions of his own about the legalization of marijuana, which he asks Angela to discuss with the client. "There's more involved here than just the law itself, you know," Tim states.

QUESTIONS

- 6.1.1.** What is the relevant Rule or Rules of the Mississippi Rules of Professional Conduct governing the scope of representation of a client who proposes to engage in a course of criminal conduct? (10 points)
- 6.2.1.** What is the relevant Rule or Rules of the Mississippi Rules of Professional Conduct governing an attorney's obligation to communicate with the client? (10 points)
- 6.3.1.** What is the relevant Rule or Rules of the Mississippi Rules of Professional Conduct governing providing advice to clients with reference to matters outside of the law? (10 points)
- 6.4.1.** What is required, and what is permitted, under the relevant Rule or Rules of the Mississippi Rules of Professional Conduct related to the request by Angela's client John Jones for representation related to the Mississippi Medical Cannabis Act? In answering, address the rules responsive to questions 6.1, 6.2 and 6.3. (70 points)

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MODEL ANSWER

6.1.1. What is the relevant Rule or Rules of the Mississippi Rules of Professional Conduct governing the scope of representation of a client who proposes to engage in a course of criminal conduct? (10 Points).

Rule 1.2(d) of the Mississippi Rules of Professional Conduct provides:

RULE 1.2(d) SCOPE OF REPRESENTATION

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that a lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

6.2.1. What is the relevant Rule or Rules of the Mississippi Rules of Professional Conduct governing an attorney's obligation to communicate with the client? (10 Points).

Rule 1.4(b) of the Mississippi Rules of Professional Conduct provides:

RULE 1.4 COMMUNICATION

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

6.3.1. What is the relevant Rule or Rules of the Mississippi Rules of Professional Conduct governing providing advice to clients beyond matters of law? (10 Points).

Rule 2.1 of the Mississippi Rules of Professional Conduct provides:

RULE 2.1 ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

6.4.1. What is required, and what is permitted, under the relevant Rule or Rules of the Mississippi Rules of Professional Conduct related to the request by Angela’s client John Jones for representation related to the Mississippi Medical Cannabis Act? In answering, address the rules responsive to questions 6.1, 6.2 and 6.3. (70 Points).

The adoption of the Mississippi Medical Cannabis Act has created a tension between state and federal law, similar to that experienced by other states who have adopted of medical or recreational marijuana laws. This tension extends into the Rules of Professional Conduct that guides Mississippi attorneys in the representation of their clients and implicates the scope of permissible representation as well as the scope of permitted communication and advice with a client.

As the Scope section of the Mississippi Rules of Professional Conduct instructs, it is to be remembered that “the Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.” The Rules of Professional Conduct also “propose a larger context shaping the lawyer’s role,” including “court rules and statutes relating to licensure, laws defining specific obligations of lawyers and substantive and procedural law in general.” **(10 Points)**

Rule 1.2(d) states that “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that a lawyer knows is criminal or fraudulent.” With the use of the mandatory word “shall,” a mechanical application of Rule of Professional Conduct 1.2(d) would appear to preclude at least some part of Angela’s representation of John as the growth and manufacture of cannabis would still constitute the commission of a federal crime. The rule does provide that Angela is permitted to discuss the legal consequences of the proposed course of conduct and to counsel the client to make good faith efforts to determine the state of the law.

By adopting the Mississippi Medical Cannabis Act, however, the legislature has established a public policy that supports compliance to a new legal and regulatory framework and which creates a need for competent legal representation to support stated public policy. The Rules of Professional Conduct “propose a larger context shaping the lawyer’s role,” including “court rules and statutes relating to licensure, laws defining specific obligations of lawyers and substantive and procedural law in general.”

As such, the Ethics Committee of Mississippi Bar Association has recently issued Ethics Opinion 265, stating:

The Committee is of the opinion that pursuant to Mississippi Rules of Professional Conduct 1.2(d) and 1.4 a Mississippi attorney may ethically provide legal services, representing, counseling and assisting a client in activities relating to, and in compliance with, the Mississippi Medical Cannabis Act, provided that the lawyer also advises the client of relevant federal law, including but not limited to the federal Controlled Substances Act.

Ethics Opinion 265, Mississippi Bar Association (June 9, 2022).

A correct answer need not include discussion of the recent Ethics Opinion nor it is required to reach the same conclusion of the Ethics Committee, but should rather address application of Rule 1.2, the tension between federal and state law, and the purpose and application of the Rules of Professional Conduct generally. **(20 Points)**

Rules 1.4 (b) requires Angela to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. In this case, this should include the potential for federal prosecution and uncertainty about the future state of the law and of prosecutions. Despite that federal prosecutions might currently be precluded under the current enactment of the Rohrabacher Amendment, there is no guarantee that of continued annual enactment going forward. **(20 Points)**

Finally, Rule 2.1 permits, but does not require, Angela to provide John advice with reference to “moral, economic, social and political factors” relevant to her representation of John. Here, that could include not only the potential societal benefit or harm of medical cannabis to the people of Mississippi, but also the political possibilities that medical cannabis will be modified (*e.g.*, expanded, restricted, or repealed) in the future. A correct answer may refer to any such potential factor and not merely these.

Regardless of what advice Angela gives, Rule 2.1 requires her to exercise independent professional judgment and render candid advice. **(20 Points)**