MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2012 Bar Examination
UNIFIED CHANCERY COURT PRACTICE
(100 points total)

Questions and Analyses

Attorney Johnson is attempting to have a court probate the will and determine heirs at law of Robert Franklin, Deceased. Mr. Franklin was a lifelong resident of Tallahatchie County, Mississippi. Attorney Johnson has drafted a petition attaching the will and has had all the known heirs of Mr. Franklin join the petition, but there are several alleged heirs who have not joined the petition scattered about the state.

Mississippi Rule Civil Procedure 81 is of particular importance in chancery court practice. Please answer the following questions pertaining to the application of Rule 81 to an heirship matter.

A. Does it matter where Attorney Johnson files the will and heirship petition? (10 points)

Yes. The obvious answer is that Attorney Johnson should file the will and heirship petition in the chancery court of Tallahatchie County. Chancery courts have exclusive jurisdiction over probate matters, and such matters are proper in the county where the deceased has a fixed place of residence. MISS. CODE ANN. § 91-7-1.

The less obvious answer is that Tallahatchie County is one of several Mississippi counties with two judicial districts, and thus, Attorney Johnson should file within the proper judicial district of Tallahatchie County.

B. How much notice is given to a defendant/respondent in a Rule 81 heirship matter? (10 points)

30 days. M.R.C.P. 81(d)(1) [determination of heirship]

C. What is the difference between a M.R.C.P. 81 Summons and a M.R.C.P. 4 Summons? (20 points)

Rule 81 requires summons shall issue for matters listed within the rule commanding the defendant or respondent to appear and defend at a time and place, either in term time or vacation, at which the same shall be heard. Said time and place shall be set by special order, general order or rule of the court. M.R.C.P. 81(d)(5)

Also, unlike a Rule 4 Summons, a Rule 81 Summons does not require the defendant/respondent file an answer. However, any such party may file an answer or other pleading and must file an answer if so directed by the court. A party who fails to file an answer after being required to do so shall not be permitted to present evidence on his/her behalf. M.R.C.P. 81(d)(4)

Finally, Rule 81 summons are used generally (though not exclusively) in chancery court matters while Rule 4 summons are used in other civil matters where a party is given 30 days notice that a responsive pleading is required. Default is possible for failure to answer a Rule 4 summons, but a party cannot take a default in matters governed by a Rule 81 summons.

D. Who are the defendants/respondents in this matter to whom Attorney Johnson must issue process? Discuss in your answer how Attorney Johnson must serve this process. (30 points)

Attorney Johnson (Johnson) must provide notice to all known and unknown heirs of the deceased. This involves several steps. The fact pattern provides two important pieces of information. First, all "known heirs" have joined the heirship petition. Second, though, is that there are several "alleged heirs who have not joined the petition scattered about the state."

Johnson must use reasonable, diligent effort to locate the alleged heirs. If Johnson can locate a possible address on any of the alleged heirs, Johnson must serve the alleged heir(s) with a Rule 81 summons (date and time certain) and a copy of the petition as outlined in Rule 4 (serving the individual personally; leaving the summons at the usual place of domicile with someone over the age of 16 followed by first class mailing; first class mailing with acknowledgement; or, certified mail return receipt requested if the person resides outside Mississippi).

If Johnson cannot obtain the address, he must file a petition stating that the post office address of the defendant/respondent is not known after diligent inquiry. This diligent inquiry and lack of address statement may be made by either the petitioner or someone on his behalf (Johnson), but must be made by affidavit (sworn petition).

As to all unknown heirs, Johnson must request that the Clerk issue in the style of the pending chancery matter a Rule 81 summons (date and time certain) to "the

Heirs at law of Robert Franklin, Deceased". Such summons should also include the name of any alleged heirs that Johnson cannot locate. Once issued, Johnson shall obtain process by publication through one of the following means:

- Publish the summons once a week for three successive weeks in a newspaper of general circulation of the county in which the petition is pending;

- If there is no such newspaper in the county, the notice must be posted at the courthouse door of the county and published as set forth above in a public newspaper in an adjoining county or at the seat of government of the state.

- Johnson must file an "official" proof of publication in the court file.

E. Can Attorney Johnson continue this Rule 81 matter without losing process? If so, how? (15 points)

Yes. If such action or matter is not heard on the day set for hearing, it may by order signed on that day be continued to a later day without additional summons. Rule 81(d)(5). Continuance is allowed for a variety of reasons as long as good cause is shown.

F. Can a defendant/respondent waive process in a Rule 81 matter? If so, how? (15 points)

Yes, assuming the party is competent. In order to effectively waive service of process, the party must sign and date a written waiver. The document must be sworn to or acknowledged by the party, or it must be proven before two subscribing witnesses. However, a waiver must be executed ***after*** the day upon which the action was commences, and the waiver must be filed with the court. M.R.C.P. 4(e).

A defendant/respondent could also waive process by appearing at the scheduled hearing (with or without proper notice) and stating on the record and under oath that the party waives process.

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2012 Bar Examination
LEGAL ETHICS AND PROFESSIONAL CONDUCT
100 Points Total

FACTS

Betty B. Gaines passed the Mississippi Bar Exam and has been licensed to practice law in the State of Mississippi since 1997. After passing the bar, Betty began working for Kirk, Spock and McCoy, a law firm located on the Mississippi Coast comprised of twenty-five (25) attorneys. Betty's primary area of practice is real estate, but from time to time, she has been known to accept a personal injury case, especially when another partner in her firm referred a good case to her. As a result of her hard work and dedication to clients, Betty became a partner at Kirk, Spock and McCoy in 2004.

After tort reform passed in 2005, the pace of litigation seemed to slow at Kirk, Spock and McCoy, while on the other hand, real estate transactions, which Betty routinely handled, increased many fold. After a few years of feeling that the transactional side of the firm had been "carrying" the litigation side, Betty felt she could be more productive and her practice more lucrative if she opened her own law practice.

On November 1, 2011, Betty announced to the managing partner at Kirk, Spock and McCoy that she would be leaving the law firm effective December 31, 2011. The following day (January 1, 2012), Betty intended to open her own law practice, called "Betty B. Gaines, Attorney at Law, LLC."

Betty felt confident that in leaving Kirk, Spock and McCoy that most of her clients would stay with her, and they did. Betty obtained commitments signed by all of her clients that she could take their files with her when she opened her new law firm. With the exception of one or two of the litigation partners at Kirk, Spock and McCoy, everyone wished Betty well for the future.

Upon leaving Kirk, Spock and McCoy, Betty took all of her clients' real estate files with her, some of which had not reached closing and/or completion, but some were files very near the point where all that was remaining was to disperse funds to clients. Since certain settlement funds belonged to Betty's clients and related to files Betty would be taking to her new law firm, Kirk, Spock and McCoy agreed to release funds from their client trust account that were applicable to Betty's files and otherwise the property of Betty's clients.

In order to transfer these funds to Betty's new law firm, Kirk, Spock and McCoy wrote a check from their client trust account payable to "Betty B. Gaines, Attorney at Law." The amount of the check was $24,904.94. Betty also received her last paycheck from Kirk, Spock and McCoy at the same time in the amount of $6,820.25. This payroll check was a separate check and indicated that it was drawn on Kirk, Spock and McCoy's payroll account, showed all the applicable deductions for taxes in the description area above the check, and was also on check stock different from that of the firm's client trust account.

Betty received both checks on December 31, endorsed both with her signature, and then deposited both checks into her personal checking account. The reason that she deposited both checks (totaling $31,725.19) in her personal checking account was because "Betty B. Gaines, Attorney at Law, LLC" was not going to "officially" open until 2012 and did not yet have any bank accounts. Betty decided that was something she would take care of "next year."

When January 2nd rolled around, Betty hit the ground running. Betty had the best of intentions to create a separate client trust account for her new law firm, but opportunities to do so were continuously impeded by other responsibilities, deadlines, travel, and the process of changing law firms.

Somewhere around January 16, 2012, Betty completed her first real estate closing in her law firm's brand new conference room. At that time, Betty released a check for settlement proceeds to her client, William White, in the amount $11,876.03. Much like the deposits Betty made into her personal account, the check to Mr. White was written from the same bank account.

Approximately seventeen (17) checks were written from Betty's personal bank account between the time the deposits were made on December 31, 2011, and the time funds were released to William White on January 16, 2012. Most of these checks had been written by Betty in order to get her new law firm up and going, but one or two checks had been written by Betty's husband, Ralph, who was also a signatory on the joint checking account. At the time the check was written to William White, the Gaines' account had a negative /overdrawn balance of -$503.65. Betty figured she was "cutting it close" with operating expenses associated with her new law firm, but was not that concerned if the account overdrafted since she and Ralph maintained overdraft protection.

A few days after William White deposited his check for the proceeds, his bank notified him that the check he presented had been returned for "insufficient funds." Mr. White then tried to call Betty to see what the problem was. After a day or two of not hearing back from Betty, Mr. White called Kirk, Spock and McCoy to see if they could get in touch with Betty. Mr. White told the office manager at Kirk, Spock and McCoy that the settlement check that Betty issued was on her personal checking account and had been returned for insufficient funds. The

office manager replied that Mr. White would need to contact Betty about the check since Betty no longer worked at Kirk, Spock and McCoy.

Three (3) days after Mr. White called Kirk, Spock and McCoy, Betty called Mr. White and delivered another check to White on January 26. This check was honored since Betty had transferred some money from savings to cover her new law firm's cash flow needs and operations. Mr. White also returned the check to Betty that had been dishonored. On the very same day, Betty received a letter from Kirk, Spock and McCoy requesting that she call the lawfirm. On January 27, 2012, Betty called Kirk, Spock and McCoy and explained to her former managing partner that there must have been "a blip" with the funds not being available for Mr. White at the time he deposited his check. Betty then apologetically stated that her personal account that she had been operating out of at the time "had only been overdrawn for a day or two" until she moved some funds around. Because client funds had been placed in Betty's personal checking account, the managing partner at Kirk, Spock and McCoy expressed responsibility to report the matter to the Mississippi Bar. Betty, of course, stated that she would do whatever was necessary in order to correct any misunderstanding as to what happened.

Acting jointly, both Betty and Kirk, Spock and McCoy reported the matter to The Mississippi Bar. Neither Mr. White nor Kirk, Spock and McCoy filed any sort of written complaint against Betty. After the Bar's General Counsel contacted her, Betty prepared an affidavit stating she never intended to keep any of her client's monies for her own use and even volunteered to provide her checking account statements evidencing her clients had been paid in full. Betty concluded by stating that her recent job transition, and her burdened schedule contributed to the delay in getting Mr. White funds; however, Mr. White as well as all her other clients received everything they were owed.

QUESTIONS

(1) Did Betty's actions violate The Mississippi Rules of Professional Conduct? If so, what Rule(s)? (40 points).

(2) What duty or duties does an attorney owe to a client in the handling of a client's property? (50 points).

(3) Does the fact that there was no clear showing that Betty intended to use or misappropriate client funds for her own use and/or that all of the client's property was eventually returned to the client "take care of" any violation that might have occurred? (10 points).

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2012 Bar Examination
LEGAL ETHICS AND PROFESSIONAL CONDUCT
100 Points Total

ANALYSIS AND MODEL ANSWER

(1) Did any of Betty's actions violate The Mississippi Rules of Professional Conduct? If so, what Rule(s)? (40 points).

MODEL ANSWER:

Yes. "There is probably no easier path for a lawyer to be subjected to professional discipline than in comingling client and lawyer funds or in treating a client's property as if it belongs to the lawyer. **The Mississippi Supreme Court has referred to comingling of lawyer and client funds as a 'cardinal sin' for which a lawyer will be subject to suspension or disbarment regardless of the lawyer's motive in comingling.** In *Gex v. Mississippi Bar*, 656 So.2d 1124 (Miss. 1995), the Supreme Court noted that '[t]here may be worse sins, but the ultimate wrong of a lawyer to his profession is to divert clients' and third parties' funds entrusted to him to an unauthorized use. A lawyer guilty of such conduct exhibits a character trait totally at odds with the purposes, ideals and objectives of our profession.' Such deviance suggests a lack of trustworthiness and inability to observe professional boundaries. Further, when it involves comingling funds, professional deviance is easily detectable as there is usually a readily available banking paper trail demonstrating deposits, disbursements and withdrawals." §23:2 Professional Responsibility for Mississippi Lawyers, Jeffrey Jackson and Donald Campbell, (MLI Press 2010)(emphasis added).

The exact Rules violated in this question are as follows:

Rule 1.15 Safekeeping Property.

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property....

Rule 8.4 Misconduct.

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another...

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice.

Depositing client funds in an attorney's office account is a ***per se* violation** of Rule 1.15(b) regardless of whether the attorney has no intent to personally use the funds, and regardless of whether the client or third party suffers no loss through the lawyer's activity.

There is a Mississippi case that is virtually identical to facts set forth in Part I of this question. In *Mississippi Bar v. Coleman, 849 So.2d 867 (Miss. 2002)* an attorney in the process of changing law firms deposited client monies in his personal checking account intending to transfer those funds to another trust account. While the attorney, who had no previous history of misconduct or disciplinary actions, claimed that he did not intend to use those client funds for his own benefit, he and his wife wrote seventy-seven (77) checks on their personal checking account, which was then overdrawn, thereby demonstrating unlawful conversion of client funds for the attorney's personal use.

Below are some of the salient portions of the Supreme Court's opinion in *Coleman*:

> **Commingling of client funds is the cardinal sin of the legal profession, whether done intentionally or not; it is the ultimate breach of fiduciary trust.** *Haimes v. Miss. Bar*, 601 So.2d 851, 854 (Miss. 1992). *See also Cotton v. Miss. Bar*, 809 So.2d 582, 587 (Miss. 2000); *Miss. Bar v. Gardner*, 730 So.2d 546, 547 (Miss. 1998); *Reid v. Miss. State Bar*, 586 So.2d 786 (Miss. 1991). In many cases, it has been grounds of disbarment or denial of reinstatement. It is indeed the ultimate breach of fiduciary trust.
>
> *Coleman*, 849 So.2d at 874 (emphasis added).
>
> **There can be no legal profession in the absence of scrupulous honesty by attorneys with other people's money. Public confidence here is vital. There may be worse sins, but the ultimate wrong of a lawyer to his profession is to divert clients' and third parties' funds entrusted to him to an unauthorized use. A lawyer guilty of such conduct exhibits a character trait totally at odds with the purposes, ideals and objectives of our profession. There can be no more damaging evidence ... to a lawyer's fitness to practice law than mishandling a trust account.**
>
> *Coleman* at 875, quoting *Reid*, 586 So.2d at 788. (emphasis added).

> **When a lawyer puts a client's money into his personal account, he can always say that any check he wrote for his personal benefit came from his money in the account, not the client's, and there is no way to actually prove otherwise. Because of this, it is an unethical practice of the most serious order for a lawyer to even mix his client's funds in with his own, or conversely, to use a trust account for personal as well as his client's transactions.**
>
> *Coleman* at 879, quoting *Miss. State Bar Ass'n v. Moyo*, 525 So.2d 1289, 1297 (Miss. 1988)(emphasis added).
>
> Indeed, the viability of the legal profession hinges upon the conservation of its character, a primary component of which is trust, an additional component of which is consistent and responsible self-regulation.
>
> *Coleman*, 849 So.2d at 876.

The offending attorney, Joe Price Coleman, was not disbarred, but was suspended from the practice of law in Mississippi for three (3) years. *Id.* at 877. In *Catledge v. Mississippi Bar,* 913 So.2d 179 (Miss. 2005) however, the Supreme Court imposed a far less severe suspension for comingling (a ninety (90) day suspension)where the Court found a lack of egregious conduct compared to other comingling cases where client funds were appropriated for client use. Nonetheless, even though the Supreme Court in *Catledge* and *Coleman* expressed differences in the penalty applied, the Court has consistently ruled that a violation based upon this type of misconduct existed and the offending attorney is subject to punishment.

(2) What duty or duties does an attorney owe to a client in the handling of a client's property? (50 points).

MODEL ANSWER:

Mississippi's Rules of Professional Conduct impose **strict fiduciary standards** on any Mississippi lawyer who holds the property of others. A lawyer under MRPC 1.15 has an obligation to keep property and funds of clients and third parties safe, identified, accounted for and, in the case of funds, deposited separate from the lawyer's own accounts. Recognizing that **when it comes to client or third party property the lawyer is trustee and fiduciary**, Rule 1.15 requires that the lawyer maintain for funds a separate trust account "in the state where the lawyer is situated, or elsewhere with the consent of the client or third party." The lawyer is not required to open a separate bank trust account for each

deposit or client of third party funds, although a separate trust account may be appropriate in some cases, when the lawyer handles estates. Instead a single trust account will generally do for all such funds, as long as the lawyer can account for which funds belong to which client and/or third person.

A lawyer is obligated under Rule 1.15 to keep "[c]omplete records of such trust account funds and other property....[1] These records must be preserved for seven years after termination of the representation[2]." *See* §23:3 Professional Responsibility for Mississippi Lawyers, Jeffrey Jackson and Donald Campbell, (MLI Press 2010).

The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule. *See* Official Comment to Model Rules of Professional Comment 1.15.

The Mississippi Bar has also published a detailed an informational handout for all Mississippi attorneys available in both print and on the Bar's website entitled "*Lawyer Trust Funds Guidelines*."

(3) Does the fact that there was no clear showing that Betty intended to use or misappropriate client funds for her own use and/or that all of the client's property was eventually returned to the client "take care of" any violation that may have occurred? (10 points).

MODEL ANSWER:

No. Repayment of the funds does not rectify the violation, but is a mitigating factor. *See The Mississippi Bar v. Coleman*, 849 So.2d at 876; *Miss. Bar v. Gardner*, 730 So.2d 546, 547 (Miss. 1998) (repayment is a mitigating factor).

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1 MRPC 1.15(a).

2 MRPC 1.15. *See Miss. Bar v. Abioto*, 987 So.2d 913 (Miss. 2007)(Reciprocal discipline for violation of Tennessee's Rule 1.15 for failing to maintain adequate trust accounts, misplacing client property, and failing to return two videotapes).

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2012 Bar Examination
MISSISSIPPI WORKER'S COMPENSATION
(100 points total)

Questions and Analyses

Question 1

A&B Construction ("A&B") is a large company with 50 employees. A&B subcontracts out various aspects of its projects. A&B was contracted to build a raised home. It hired Painters Inc. to take care of the painting of the house. Painters Inc. failed to obtain workers' compensation insurance for its employees.

During construction, Ernie, A&B's president, was walking through the building project. Ernie noticed that Francis, an employee of Painters' Inc., was painting some trim the wrong color. Francis was at the very top of a 35-foot ladder. Ernie screamed at Francis to stop what he was doing immediately and shook the ladder to get his attention. Francis, startled, lost his balance, and fell to his death.

Francis' wife and child intend to bring suit to recover any sums to which they are entitled.

(1) (a) Will Francis' wife and child be entitled to any workers' compensation benefits from either A&B or Painters Inc.? **(5 points)**

(b) Explain why they will or will not be entitled to benefits from either or both A&B or Painters Inc. and explain what is required, generally, for one to qualify for workers' compensation benefits. **(15 points)**

(2) (a) If Francis' wife and child can obtain workers' compensation benefits from either or both A&B and Painters Inc., will Francis' wife and child be able to recover for any negligence on the part of Ernie or from A&B or Painters Inc? **(10 points)**

(b) Could they potentially recover in tort for negligence or intentional acts by any other company or person who may have been at fault? **(10 points)**

(3) Discuss the benefits that would be available to Francis' wife and child if they were entitled to workers' compensation benefits for the wrongful death of Francis. **(10 points)**

Answer to Question 1

(1) (a) Because Francis was an employee of the uninsured subcontractor, there is no worker's compensation coverage available from Painters' Inc. However, under Mississippi workers' compensation law, when a general contractor-subcontractor relationship exists, the general contractor is deemed a statutory employer and the law requires the general contractor to secure workers' compensation payments for the employees of the subcontractor, if the subcontractor has not secured such compensation. In this scenario, even though Painters Inc. does not have worker's compensation insurance, A&B's workers' compensation coverage should cover Francis and pay benefits to his wife and child.

(b) That being said, an employer must have workers compensation insurance only when it has more than 5 employees. In this case we don't know if Painters Inc. has 5 or more employees. A&B does have 5 more employees, so it must carry workers' compensation insurance.

Furthermore, compensation from an employer's workers compensation insurance shall be payable for disability or death of an employee from injury or occupational disease arising out of and in the course of employment without regard to fault as to the cause of the injury or occupational disease. In this case, Francis was painting the house. Francis is an employee of Painters Inc., a painting subcontractor. It is fair to say that Francis indeed died from an injury arising out of and in the course of employment. Thus it is established that the claimants do have a claim for benefits. It is futile for an employer to claim that the fault lies in Ernie because an employer must pay compensation without regard to fault as to the cause of the injury.

In addition, in order for an injury to be compensable under workers compensation acts it is necessary that the injury result from some risk to which the employment of the claimant exposes him. As part of his job as a painter, Painters Inc. exposed Francis to the risk of working at the top of a 35-foot ladder. As such, it appears that the death resulting from injury is compensable.

(2) (a) No. If workers' compensation benefits are available, they are the exclusive remedy against A&B and Painters' Inc. However, if a third party was negligent or intentionally injured Francis, his wife and child could still pursue a negligence or other tort action against this third party. For example, if another subcontractor or a visitor to the site had caused Francis' injuries, he could also pursue tort claims against those persons or entities.

When an employer fails to secure workers compensation insurance when it is required to, the claimants may pursue a common law negligence action

against it or other potentially liable third parties. If the claimant elects to pursue negligence action, the employer may not raise negligence of a fellow servant as a defense. If neither Painters Inc. nor A&B have comp coverage, then the claimants will have the option of pursuing common law causes of action against them or others who might be potentially liable.

(b) Francis' wife and child could potentially recover in tort from a third party, even if there was comp coverage. If a common law negligence action is pursued against a third party, an employer who was obligated to provide workers compensation benefits may intervene against it to seek reimbursement. Any employer who was obligated to provide workers compensation benefits is entitled to repayment of compensation and medical expenses from net proceeds resulting from the negligence action against a liable third party.

(3) In this particular scenario, we are dealing with wrongful death damages. Under Mississippi workers compensation law, when a wrong death occurs, the deceased worker's surviving spouse and children are owed the following damages:

- immediate lump sum payment of $250 to surviving spouse,
- reasonable funeral expenses not exceeding $2000,
- weekly payments of 35% of wages to widow during widowhood, and
- weekly payments of 10% of wages for support of each child with total payments not to exceed the multiple of 450 weeks times 66 2/3% of the average weekly wage for the state.

The claimants will definitely receive the aforementioned benefits from A&B.

Question 2

Magnolia Printing Co. ("Magnolia") is a greeting card printing company owned by Dominic. The company usually has 2 full time employees that work 5 days and 40 hours a week. Dominic also works 5 days and 40 hours a week. During the holiday season, there is an upsurge in demand for greeting cards. For this reason, Magnolia always hires an additional employee during the holiday season. The additional employee works full time, 5 days and 40 hours a week, for 5 weeks. This holiday season's additional employee is Eleanor.

Magnolia's store stays very busy during the holiday season, and they make extra efforts to keep it clean during these 5 weeks. As a result, Magnolia contracts with ACME Cleaning ("ACME") to clean its store every Monday during the holiday season. ACME usually cleans the store early in the morning just before any Magnolia employee arrives.

On one of these Mondays, ACME decided to use a new top-of-the-line floor wax. The wax leaves the floor extra shiny, but it also leaves it extra slippery until it dries. Eleanor walked into the store right as the ACME cleaners were leaving. As she walked across the floor to turn on the cash register, she slipped on the newly applied wet wax and broke her arm.

(a) Is Magnolia required to carry workers' compensation insurance? Please explain your answer. **(15 points)**

(b) If Magnolia is required to carry workers' compensation insurance, would the injury be compensable under the workers' compensation act? **(20 points)**

(c) If Magnolia was not required to carry workers' compensation insurance, will ACME or Magnolia have potential liability to Eleanor sounding in tort? **(15 points)**

Answer to Question 2

(a) Eleanor likely cannot recover under workers' compensation for her injuries because Magnolia does not have to have comp insurance since it does not have more than five employees. An employer is required to carry comp insurance only if the employer "has in service five or more workmen or operatives regularly in the same business or establishment under any contract of hire, express or implied." By this provision, an employer whose operation is small enough to employ fewer than five people is not covered but effectively is exempt.

The coverage test is one of size; it inquires as to the magnitude of the operation. Are five people used regularly to carry it on? If the answer is "yes" there is a requirement that comp be carried. The test is not whether there are five "employees" but whether five people are engaged in the operation. For example, if one proprietor-owner and four employees carry on the operation, the threshold of five for mandatory coverage has been met. Magnolia has a total of 4 full time employees. This includes Eleanor (the additional employee hired for the holiday season), and Dominic (the owner of the company). All 4 employees work 40 hours and 5 days a week. It is thus safe to say that Magnolia is exempt from the "5 or more" rule, and it is not required to have workers compensation insurance.

(b) Compensation from an employer's workers compensation insurance shall be payable for disability or death of an employee from injury or occupational disease arising out of and in the course of employment without regard to fault as to the cause of the injury or occupational disease. Eleanor was injured while in the Magnolia store. The store was open, and she was walking to the cash register. As such, it is probably

safe to assume that the injury occurred out of and in the course of employment.

In addition, in order for an injury to be compensable under workers compensation acts it is necessary that the injury result from some risk to which the employment of the claimant exposes him. In this scenario, Eleanor was exposed to a slippery floor. Magnolia contracted with ACME to clean its store's floors right before its employees arrived. Thus, Magnolia exposed its employees to the risk of walking on slippery floors.

(c) Eleanor may attempt to recover damages from either Magnolia or ACME cleaning in tort if Magnolia does not have comp coverage, but since Magnolia will not be forced to pay for benefits, Magnolia may not intervene in this suit. Eleanor could pursue a third party claim against Magnolia regardless of whether Magnolia had comp insurance or not.

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2012 Bar Examination
REAL PROPERTY
(100 points total)

Shelly, her husband, Dale, and their son, Charles, lived in Tupelo, Mississippi. Dale died intestate on January 2, 1999. Charles continued to live in the family home with his mother, and take care of all family business as his father did. He located the warranty deed to the family home, which showed only his father's name as grantee, and placed it in a safe deposit box along with other important papers. When Charles left home to attend college in August, 2000, Shelly decided she no longer needed such a large house. She decided to move to a smaller one in her home town. She received an appraisal of the house and sold the house to Bill for the appraised value of $120,000. She financed the entire amount herself. She signed a warranty deed of conveyance prepared by Bill. Bill also prepared and signed a note and deed of trust. All three documents were filed in the Lee County Chancery Court records.

Bill lived in the house and made timely payments on the note until June, 2008. He then received a notice from his employer that his engineering job would be transferred to China. To maintain his employment, he decided to move. Since he was close to retiring, he contemplated returning to his home in a few years. After discussing the situation with his best friend, Sam, they agreed that Sam would take over the notes and move into the house while Bill was out of the country. Sam insisted on a quit claim deed to protect his interest. Bill gave his friend a quit claim deed which he had prepared and signed. Bill called Shelly and told her that Sam would be making the payments.

Payments on the note were made by Sam on July 1, 2008, and on the first of each month thereafter, until his employment was terminated on December 31, 2011. Sam is now experiencing financial hardship, trying to live on unemployment benefits. He is now two months delinquent on the house note and Shelly has sent a letter threatening to foreclose. Shelly, for the first time, told Charles about the transactions. Charles paid his friend, who is in law school, to file a petition in justice court to evict Sam.

Sam does not want to let Bill know about his financial hardship but he also does not want to loose the house. Sam made an appointment with an attorney to see what he could do to keep the house.

1. Discuss the property rights of Dale, Shelly, Charles, Bill and Sam. **(50 points)**

2. What legal advice should be given to Sam to save the house? **(25 points)**

3. What actions would likely be taken by the attorney? **(25 points)**

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2012 Bar Examination
REAL PROPERTY
(100 points total)

ANALYSIS

1. Discuss the property rights of Dale, Shelly, Charles, Bill and Sam? (50 points)

The Tupelo house was originally owned in fee simple by Dale because his name was the only one on the deed. When Dale died, intestate, all his property including the house went to his wife and children equally. Assuming there were no other children, Shelly and Charles inherited the house as tenants in common. To convey the entire interest in the house would require the signature of both Shelly and Charles on the deed. According to the facts, only Shelly signed the deed transferring only her undivided one-half interest, although she intended to transfer the entire interest to Bill. We can assume that this was her intention because she sold the house for the appraised value rather than one-half of the appraised value. Bill and Charles then became tenant in common. When Bill subsequently sold the house to Sam by quit claim deed, he only sold his interest. Therefore, Sam stepped in the shoes of bill and became a tenant in common with Charles.

2. What legal advice should be given to Sam to save the house? (25 points)

Sam could claim the entire interest under adverse possession against Charles by tacking on the holding period that Bill had. Bill moved in the house and treated it as his own from August, 2000 through June, 2008. Sam lived in the house from June 2008 through December 2011. The 10-year period or continuous and uninterrupted use appears to be met. Sam would also have to prove that the possession was 1. under a claim of right; 2. actual or hostile; 3. open, notorious, and visible; 4. Exclusive; and 5. Peaceful. Each element must be met by clear and convincing evidence. (MCA 15-1-13) Proving "hostile" may be difficult.

Because Bill received a warranty deed from Shelly, he could sue her under the warranty of merchantable title.

Sam received a quit claim deed, therefore, his interest would be limited to any interest Bill received or established. This would be the entire house if Bill succeeds on his warranty claim or if Sam establishes adverse possession.

3. What actions would likely be taken by the attorney? (25 points)

Sam's attorney should file a motion in justice court to dismiss the eviction action because the foreclosure process must take place pursuant to the deed of trust. He would have to file a suit to quiet and confirm title.

Sam could file chapter 13 bankruptcy and modify the delinquent payments over a five year period. Although no note or deed of trust was signed by Sam, the one signed by Bill and filed in the county chancery court constitutes a lien and follows the property. The suit to quiet and confirm title could be brought in Bankruptcy Court as an adversary proceeding.

Charles law school friend should be reported to the Mississippi Bar for practicing law without a license pursuant to MCA 73-3-55.

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2012 Bar Examination
CONTRACT
(100 points total)

Questions and Analyses

Ahmad Kane and Karen Abel inherited two acres of land in Mississippi from their mother Marianne in equal shares, but Jacob, a grandson of Marianne, received a first right of refusal to purchase the land by meeting any price Kane or Abel was offered if either Kane or Abel decided to sell his or her interest in the land.

Kane and Abel signed a listing agreement with a local real estate broker to market the land. Subsequently, Octagon entered into a contract of sale and purchase with Kane and Abel under which Octagon offered to purchase the land for $4000, subject to Jacob not exercising Jacob's right of first refusal.

Kane and Abel's attorney wrote a letter to Jacob on February 15, advising Jacob of the existence of the sales contract between Kane/Abel and Octagon and giving Jacob until March 15 to exercise his right of first refusal by meeting Octagon's price and showing documentary evidence of the ability to pay or finance the purchase price.

Jacob's response requested he receive a copy of the sales agreement with Octagon, an appraisal of the land, a copy of a survey of the land, and evidence of Octagon's ability to pay the purchase price and other costs at closing. The latter evidence could be in the form of a mortgage commitment letter to Octagon from a financial institution or Octagon's most recent financial statement evidencing sufficient net worth to pay the purchase price and other costs to be borne by it as buyer at the closing of the sale.

Several days later, Jacob received a letter from Kane and Abel's attorney advising that Octagon had not been required to provide any of the documents requested by Jacob and thus Jacob would not be given any such documents and that a copy of the sales and purchase agreement signed by Kane, Abel and Octagon was enclosed.

Subsequently, Jacob stated to the attorney during a meeting that Jacob was "ready, willing and able" to purchase the land but for an amount less that Octagon's price, the amount representing the real estate commission to be paid under the listing agreement upon sale of the land. Jacob also asked for additional documents regarding the Octagon purchase, including another copy of the sales and purchase agreement and the listing agreement. Kane and Abel's attorney refused to provide the requested documents other than another copy of the sales and purchase agreement. Ultimately, on March 16, Kane and Abel's attorney wrote a letter to Jacob advising that the period of his right of first refusal having expired, the sale and purchase by Octagon would go

forward. The attorney did give Jacob one last opportunity to meet Octagon's price if Jacob did so within one day under the initial terms sent to Jacob in the February 15 letter.

Jacob then wrote Kane and Abel's attorney that Jacob was going to pursue legal action and enclosed a sales and purchase agreement under which Jacob offered to purchase the land for the purchase price Octagon had agreed to less the real estate commission payable to Kane and Abel's broker under the listing agreement. Kane and Abel's attorney asked for an extension of the deadline in Jacob's letter to allow the attorney to obtain a copy of the listing agreement confirm his understanding that it was a six percent commission payable under the listing agreement.

Conversation continued between Jacob and Abel and Kane's attorney about the listing agreement and the amount due thereunder. Eventually, Jacob received a copy of the listing agreement which confirmed the six percent commission. However, the attorney later informed Jacob that Kane had rejected Jacob's offer. After the rejection, Octagon purchased Kane's half interest in the land for $2000, or half the purchase price Octagon had agreed to in its initial agreement with Kane and Abel.

Abel and Jacob then entered into an agreement under which Abel agreed to sell her half interest in the land to ABC Company for $1000, which was $1000 less than Octagon had agreed to pay Abel for her interest in the land. Jacob was the sole owner of ABC Company.

Octagon then brought a declaratory judgment action against Jacob, seeking a declaration that Jacob had waived his right of first refusal when he did not meet Octagon's purchase price under the sales and purchase contract.

<u>QUESTION 1.</u> Define a right of first refusal, sometimes referred to as a first right of refusal, and discuss it in the context of the factual scenario given in the question. (40 points)

MODEL ANSWER TO QUESTION 1.

The right of first refusal is "a conditional option empowering its holder with a preferential right to purchase property on the same terms offered by or to a bona fide purchaser." 77 Am.Jur.2d *Vendor and Purchaser* § 34 (2007). Of necessity, one who holds the right must offer the "exact price" which the third party offeror did. Absence of such a requirement would permit the holder to impede the marketability of the property. *Id.*, § 35. Unless the holder offers the price the third party did, no binding contract is created between the holder of the first right of refusal and the seller of the property. *Richmond v. EBI, Inc.,* 53 So.3d 859, 864 (Miss. Ct. App. 2011); *Graham v. Anderson,* 397 So.2d 71, 72 (Miss. 1981).

Jacob received the terms of the offer by Octagon, including the purchase price, and the deadline by which he had to meet that offer in order to exercise his right of first refusal. It was incumbent on Jacob to do so, and unless the seller chose to waive any of the terms as to Jacob, the latter's failure to meet the offer did not form a binding contract of sale between Kane/Abel and Jacob. *Id.*

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QUESTION 2. Was Jacob's right of first refusal waived? If so, was it required to be in writing? Explain the basis or bases for your answers. (60 points)

MODEL ANSWER TO QUESTION 2.

Yes. Jacob's right was not necessarily waived when he initially offered the sales price offered by Octagon less the sales commission because he still had time left in the refusal period. The facts do not describe whether the period was absolute or ended when any response was provided by Jacob. In any event, when he presented a contract of sale with the same offer in it and let the extended period expire without revising the purchase price in that contract to be the same as what Octagon had offered, Jacob waived his right of first refusal.

The better answer will include the point that efforts by a holder of the right of first refusal to supply a missing term or to clarify the offer the holder has to meet do not amount to a counteroffer and thus waiver. Nor does acceptance of the price unconditionally, coupled with a request to alter the time and place of closing the purchase. *See* 77 Am.Jur.2d *Vendor and* Purchaser § 43 (2007). Rather, "adamant refusal to meet the offered purchase price and protracted attempts to secure a significantly lower purchase price amount to [the holder's] failure to exercise his rights according to the terms of the right of first refusal." *Richmond,* 53 So.3d at 865-66; *Creely v. Hosemann,* 910 So.2d 512, 521 (Miss. 2005).

The initial offer by Jacob in which he sought a copy of the listing agreement might be argued as an effort to clarify a term, and the examinee who argues this should also point out that the facts do not state anything in the agreement entered into between Kane/Abel and Octagon about the sales price being subject to reduction for the payment by Octagon of any commission.

The examinee may conclude either way as to whether Jacob waived his right of first refusal when he initially offered the sales price less commission as long as the conclusion is supported by an adequate explanation of the law and application of that law to the facts given. On the other hand, the examinee's ultimate conclusion should be that the written offer delivered post-receipt of the listing agreement amounted to a waiver as no longer could it be argued he was seeking clarification of a term of the Octagon purchase. He was making a counteroffer.

The waiver was not required to be in writing under the facts given. Nothing is mentioned about the manner in which Jacob had to exercise his rights. Generally, while modifications have to be in writing to satisfy the Statute of Frauds, waivers do not. *See Canizaro v. Mobile Communications Corp. of America*, 655 So.2d 25, 30 (Miss. 1995), *cited in Richmond,* 53 So.3d at 865.

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2012 Bar Examination
CONSTITUTIONAL & CRIMINAL LAW & CRIMINAL PROCEDURE
(100 points total)

ANALYSIS

Question #1 (34 points)

Three days after a stabbing incident, police investigating the case and attempting to gather evidence conducted separate interviews of the Defendant and his wife at the police department about the stabbing of an unrelated man with whom neither one resided. Each were properly mirandized and gave valid waivers. Each gave recorded statements to the police. Each admitted being present at the crime. Each admitted that the Defendant in fact stabbed the victim. Each gave their explanation, which varied, of the manner in which the victim was stabbed by the Defendant. Self defense developed as the primary issue or defense during the trial on the merits of the case against the Defendant. Because of the marital privilege, the Defendant's wife did not testify in person at trial against the Defendant. Therefore, over Defendant's objection, the State used the wife's tape recorded statement she gave police against her husband to refute the Defendant's claim at trial of self defense. The Defendant was convicted and sentenced to twenty years in prison.

Question #1: Was the State's use of the wife's tape recorded statement proper under the U.S. Constitution? {You are to assume the statements were properly given to the police initially under *Miranda*.} Explain fully.

Answer: NO. Use of the tape-recorded statement violated Defendant's Sixth Amendment constitutional right to confrontation since the statements were testimonial evidence and not subject to cross-examination. Police interrogations are considered testimonial evidence. The Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). *Crawford* has restored the unavailability and the cross-examination requirements for admissible testimonial hearsay evidence and overruled *Ohio v. Roberts*, 448 U.S. 56 (1980). (Citations omitted). For subsequent cases discussing testimonial versus non-testimonial evidence, see *Davis v. Washington*, 547 U.S. 813 (2006); *Whorton v. Bockting*, 549 U.S. 406 (2007); *Danforth v. Minnesota*, 128 S. Ct. 1029 (2008); *Giles v. California*, 128 S. Ct. 2678 (2009).

Question #2 (33 points):

Metropolis is concerned that illegal drugs such as cocaine are being imported into their city by vehicles. The City Police divert and redirect the six inbound roads to Metropolis funneling traffic into two inbound roads to be sure no illegal drugs get through.

Therefore, in the general interest of crime control to combat the illegal narcotics trade, the police set up Narcotics Checkpoint roadblocks on each of the two remaining inbound roads. As drivers arrive at the checkpoint and are stopped by the police, the police officer handling a narcotics detection dog circles the car to smell for the presence of illegal narcotics.

Defendant is driving into Metropolis after visiting friends in a suburb of Metropolis. Defendant is seen committing no traffic violations as he approaches an intersection where police are stopping all traffic to check for narcotics only. Their drug detection dog is circling the car to smell and detect drugs only. The dog alerts to the presence of cocaine. The officers remove the Defendant from the car, seize and inventory the car, and find a kilo of cocaine hidden in the spare tire wheel well within the rear closed trunk of Defendant's car. Defendant is charged, tried and convicted of possession of cocaine despite his timely objections which were overruled by the trial judge. Defendant is sentenced to thirty years in prison.

Question #2: Was the State's use of the cocaine as evidence against Defendant proper under the U.S. Constitution? Explain fully.

Answer : NO. This particular road block is not permissible because the primary purpose of the Metropolis checkpoint program is only for the general interest in crime control. The checkpoints violate the Fourth Amendment.

Indianapolis v. Edmond, 531 U.S. 32, 48 (2000) ["Because the primary purpose of the Indianapolis checkpoint program is ultimately indistinguishable from the general interest in crime control, the checkpoints violate the Fourth Amendment."] (holding that conducting a drug interdiction checkpoint for the sole purpose of stopping cars long enough to pass a drug sniffing dog around the vehicle, and only checking for controlled substances, was a Fourth Amendment violation). See also *Barlow v. State*, 8 So.3d 196, (Miss.App. 2008) discussing *Edmond.*

Question 3: (33 points):

Defendant is charged with capital murder for the rape and murder of an entire family consisting of a 5 year old girl, a 40 year old husband and wife. Defendant has no prior criminal history and was arrested without incident while at work as bank teller. Defendant confessed to the triple rape and homicide stating he "just wanted to know what it was like." Defendant has been silent and docile since his arrest and confession. Defendant is 6'3" 220 pounds and muscular. The State is seeking the death penalty. During the guilt and sentencing phase of the trial, the State has had the Defendant in leg and wrist handcuffs and shackles just in case Defendant tried to escape or harm someone. Each day, over Defendant's objection which the court summarily overruled without explanation, the jury watched as the Defendant was brought into and removed from the courtroom wearing the restraints and plain clothes. Defendant was convicted and sentenced to life without parole. Once sentenced, Defendant exploded and tried to attack the judge but was fortunately unable to do so because of the restraints which were in place. No one was injured other than the Defendant who hurt himself.

Question #3: **Was Defendant denied any U.S. Constitutional right? If so, which and why? Explain fully. If not, why not? Explain fully.**

Answer: YES. Defendant's 5th and 14th Amendment right to Due Process was violated. ". . . (t)he Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial. Such a determination may of course take into account the factors that courts have traditionally relied on in gauging potential security problems and the risk of escape at trial." *Deck v. Missouri*, 544 U.S. 622, 629 (2005). In this case, there was no showing of escape risk or courtroom security problems that would have warranted the initial visible shackling of Defendant. Shackling is not permitted "just in case." The fact that Defendant did end up being violent does not justify the otherwise initial due process violation.

The Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, *unless* that use is "justified by an essential state interest"—such as the interest in courtroom security— specific to the defendant on trial. *Holbrook v. Flynn,* 475 U.S. 560, 568–569, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986); see also *Illinois v. Allen,* 397 U.S. 337, 343–344, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). The State must prove "beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained."*Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). *Deck v. Missouri*, 544 U.S. 622 (2005): A capital murder defendant who was visibly shackled during his sentencing phase, without any record concerning the "essential state interest," was held to be reversible error. *But see Harper v. State*, 887 So. 2d 817 (Miss. 2004) (under some very isolated circumstances, visibly shackling prisoners in their prison garb and conducting their jury trial within a prison has been approved by some state courts).