MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2015 Bar Examination
EVIDENCE
(100 Points Total)

In the Spring of 2011, Bill, who had not seen his sister, Susan, in many years decided to pay her a visit. The two took a walk to catch up. As they were walking along a road that led away from Susan's house, Susan unexpectedly asked Bill if she was as beautiful as she used to be. Wary of this question, Bill began to respond thoughtfully, "Well..." Susan, enraged by the hesitation, glanced up and saw a large truck that was coming down the road. Before Bill could finish his sentence, Susan pushed him in front of the truck.

Deputy Jones, who was in his front yard nearby, heard the truck skidding to a stop. He ran to the accident scene and saw Bill lying in the road. Deputy Jones asked Bill, "What happened? Who pushed you?" Bill pointed at Susan and died. Deputy Jones looked at Susan, who said, "He called me ugly, so I pushed him in front of that truck. I hope he's dead."

Susan pled guilty to the manslaughter of Bill and served a three year sentence of imprisonment. Upon her release from custody, Susan, who is the primary beneficiary of Bill's life insurance policy, submitted the policy to the insurance company. The insurance company, in turn, notified Bill's daughter, Debbie, who is the contingent beneficiary, that Susan had submitted a claim. Debbie comes to you and asks what her rights are under the insurance policy. She tells you that Susan is now saying that Bill tripped on a rock and fell in front of the truck.

You recall that Mississippi has a "Slayer Statute" applicable to this circumstance. Susan will be prohibited from receiving benefits if Debbie proves that Susan "willfully procured" Bill's death. You ask Debbie what proof she has that Susan did it, and she gives you Deputy Jones' incident report, the final judgment from Susan's criminal case, Bill's death certificate, and an earlier 1999 judgment against Susan for domestic violence.

Question 1.1 (50 points total):

Deputy Jones completed an official incident report, which contains the following excerpts:

> I asked Bill, "Who pushed you?" He pointed at Susan and died. Susan told me, "Bill called me ugly, so I pushed him in front of that truck. I hope he's dead."

Analyze whether the report would be admissible evidence in a civil action against Susan. Include in this analysis the following:

1.1.1 The admissibility of the report itself **(15 points)**;

1.1.2 The admissibility of Deputy Jones' assertion that Bill pointed at Susan in response to his question **(20 points)**; and

1.1.3 The admissibility of Susan's statements to Deputy Jones **(15 points)**

Question 1.2 (10 points):

The guilty plea is an official judgment in a criminal case in the circuit court, stating that Susan was sentenced to three years imprisonment for the manslaughter of Bill. Analyze the admissibility of the criminal judgment in a civil action in which Debbie must prove that Susan killed Bill.

Question 1.3 (20 points):

The death certificate, an official county record signed by the county coroner, lists the cause of death as blunt force trauma to the head due to a collision with an oncoming truck. You want to introduce the death certificate to establish Bill's cause of death instead of calling the coroner to the stand because the coroner is not a medical doctor and has proven very unreliable in the past. Analyze the admissibility of the death certificate, including whether the cause of death is admissible.

Question 1.4 (10 points):

The 1999 judgment for domestic violence states that Susan pled guilty to domestic violence related to a dispute with her then-husband and was sentenced to probation. You want to introduce this judgment to show that Susan is capable of violence. Analyze the admissibility of the 1999 judgment in a civil action against Susan.

Question 1.5 (10 points):

Susan is now legally divorced from her husband. Analyze whether her former husband, who feels horrible about what happened to Bill and wants Debbie to "get the money," can testify that Susan confessed while they were married to willfully killing Bill.

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2015 Bar Examination
EVIDENCE
(100 Points Total)
ANALYSIS AND MODEL ANSWER

Answer to Question 1 (total of 50 points):

1.1.1 An official police incident report is hearsay but is admissible evidence either under Mississippi Rule of Evidence ("MRE") 803(6), as regularly conducted business activity, or under MRE 803(8), as a public record or report. *E.g., Rebelwood Apts. RP, LP v.* English, 48 So. 3d 483, 491 (Miss. 2010); *Rials v. Duckworth*, 822 So. 2d 283, 287 (Miss. 2002). The report itself, however, may contain inadmissible hearsay. Here, the question states that Deputy Jones completed an official incident report, which makes it admissible evidence. The more difficult question is whether the statements themselves are inadmissible hearsay and should therefore be redacted from the incident report. ***(15 points)***

1.1.2 MRE 801(a) states that a "statement" can either be oral or nonverbal conduct intended as an assertion. Here, Bill was pointing in response to Deputy Jones' question, "Who pushed you?" This nonverbal conduct is a "statement." ***(10 points)***

MRE 804(2) establishes a hearsay exception for a statement made under belief of impending death about the cause or circumstances of the death. For the exception to apply, the declarant must be unavailable, the declarant must make the statement under belief of imminent death, and the statement must be used in a prosecution of a homicide or civil action. Here, all three of these conditions are met. Bill is unavailable because he is dead. Although his state of mind cannot be proven, that he died moments after his statement is sufficient to conclude that he believed he was going to die. Finally, the statement would be used in a contest for insurance benefits, which is a civil proceeding. The statement is admissible under MRE 804(2).[1] ***(10 points)***

1.1.3 MRE 801(d) provides that admissions by a party opponent are not hearsay. Here, Susan's statement will qualify as an admission by a party opponent if Debbie files a civil action against Susan to disqualify her from recovering benefits under Mississippi's Slayer Statute. ***(15 points)***

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[1] An argument could be made that the statement is also admissible MRE 803(1), as a present sense impression, or MRE 803(2), an exited utterance. The problem with this argument is that Bill's statement was prompted by Deputy Jones and therefore not spontaneous. Spontaneity is both the hallmark of the present sense impression and the excited utterance because it is proof of its truthfulness. With that said, the statement was very close in time to the accident, Bill was "explaining" an event, and was under stress of excitement caused by the event. Partial credit may be given for this analysis.

Answer to Question 1.2: MRE 803(22) provides that a judgment entered upon a jury conviction or guilty plea for a crime punishable by imprisonment for more than one year is admissible to prove facts essential to that conviction. Here, Susan pled guilty to killing Bill and was imprisoned for three years for this crime. The judgment is admissible under MRE 803(22) in an action against Susan to prove that she killed Bill. ***(10 points)***

Answer to Question 1.3: Death certificates are subject to the vital statistics exception established by MRE 803(9). The difficult question is whether Bill's statement about the cause of death is hearsay within hearsay that is inadmissible. The Mississippi Supreme Court appeared to hold in *Birkhead v. State*, 57 So. 3d 1223 (Miss. 2011), that the entire death certificate was admissible because MRE 803(9) did not include any exceptions for hearsay within hearsay. *See McKeown v. Pitcock*, 79 So. 3d 520, 529 (Miss. Ct. App. 2011) (Maxwell, J., concurring). The Mississippi Court of Appeals, however, later upheld a trial court's decision to redact the cause of death contained in the death certificate, finding that the Confrontation Clause was violated because the criminal defendant did not have the opportunity to challenge the testimonial statement that would have established an element of the crime. *Beecham v. State*, 108 So. 3d 402, 406 (Miss. Ct. App. 2011).

Exam takers are not expected or required to be aware of these particulars in the case law. The important point is to recognize that death certificates are admissible under MRE 803(9) and that Bill's statement as to the cause of death, which is important to Debbie's case, is hearsay within hearsay that may or may not be admitted. Here, the Confrontation Clause is not implicated because the trial is civil. It is likely that the trial court would admit the entire death certificate under the Mississippi Supreme Court's rationale in *Birkhead*. ***(20 points)***

Answer to Question 1.4: MRE 609 allows previous convictions of crimes punishable by death or imprisonment for more than one year to be used as impeachment evidence. The conviction cannot be used for impeachment because Susan was not sentenced to death or imprisonment for her plea. In addition, MRE 609 states that qualifying convictions are not admissible if more than ten years has elapsed since the time of conviction or the completion of the sentence, whichever is later. The judgment was entered in 1999, more than ten years before the incident, so it is not admissible for that reason also, unless the judge makes an exception under the rules. ***(10 points)***

Answer to Question 1.5: Under the husband-wife privilege of MRE 504, a wife can prevent a former husband from testifying to confidential communications made during the marriage. Susan's confession to her former husband that she pushed Bill into the path of the oncoming truck was likely confidential. The testimony will not be admitted if Susan asserts this privilege. ***(10 points)***

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2015 BAR Examination
CONTRACTS
100 Points Total

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

QUESTIONS

2.1 (50 points)

Is there an enforceable contract between Smalltown and Seller?

Explain the basis for your answer fully.

2.2 (25 points)

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

2.3 (25 points)

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

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2015 Bar Examination
CONTRACTS
100 Points Total
ANALYSIS AND MODEL ANSWER

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

QUESTION 2.1 (50 points)

Is there an enforceable contract between Smalltown and Seller?

Explain the basis for your answer fully.

Analysis 2.1

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

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

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

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

  ***

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

***

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

QUESTION 2.2 (25 points)

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

Analysis 2.2

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

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

Either answer is correct.

QUESTION 2.3 (25 points)

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

Analysis 2.3

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

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

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2015 Bar Examination
CONSTITUTIONAL & CRIMINAL LAW & CRIMINAL PROCEDURE
(100 points total)

Notice to BAR Examinees: All questions are independent of one another and are not related with one another in any manner. They should each be analyzed separately and independently.

Question #3.1: (25 points total)

In the small town of Curious, Defendant was suspected of having killed his wife's boyfriend, Victim. When the murder of Victim occurred, all eyes focused upon Defendant. The police narrowed the list of suspects and deduced that Defendant was the only viable target of the investigation. The police brought Defendant in for questioning without any warnings and simultaneously executed search warrants upon his home, farm, and cars. Defendant publicly maintained his innocence and cooperated with the police fully and was not initially arrested at that time. Subsequently, three months later, the county Grand Jury returned a First Degree Murder indictment against Defendant, and he was then arrested for the murder of Victim. Defendant has claimed from the beginning that he is innocent, and Defendant now demands a preliminary hearing "to clear up this misunderstanding before things go too far." Secondly, Defendant wants his case dismissed by the circuit judge for insufficiency of the evidence maintaining there is not enough evidence to need a jury trial.

3.1.1 Will the circuit judge grant or deny the Defendant's MOTION FOR A PRELIMINARY HEARING ? Explain fully. **(12 points)**

3.1.2: Will the circuit judge grant or deny the Defendant's MOTION TO DISMISS for insufficiency of evidence? Explain fully. **(13 points)**

Question 3.2: (25 points)

Defendant is riding as a rear seat passenger in a car through a "gang neighborhood" in the town of TennMemph. A TennMemph officer on patrol sees that the car is being driven without headlights at night, is making turns without using turn signals and has no operational brake lights. Officer stops the car. As Officer approaches the car he notices Defendant moving about nervously inside the car, ducking and reaching down while looking

around quickly. Officer notices Defendant to be wearing a "blue crips" gang bandanna and asks for some form of identification such as a drivers license to which Defendant responds, "I don't have any because I just got out of prison." Officer then hears and sees a portable police scanner radio sticking out of a jacket pocket worn by Defendant. Officer then orders Defendant out of the passenger rear of the car. Officer asks Defendant why he has a police scanner radio to which Defendant replies, "just to keep current. I bought it at an electronics store. It's not illegal." Officer conducts a pat down of Defendant and discovers a pistol. Defendant had been truthful about just getting out of prison and was in fact a convicted felon. Defendant is then arrested and hand cuffed.

3.2.1 Did Officer violate Defendant's rights by ordering him out of the car? Yes or No. Explain fully. **(10 points)**

3.2.2 Did Officer violate Defendant's rights by patting him down once out of the car? Yes or No? Explain fully. **(15 points)**

Question 3.3: (25 points)

Defendant Alpha and Defendant Omega are adventuresome twin eighteen-year-old males. Alpha and Omega live at home with their parents as they always have. They have worked together on a construction site the past few months for Acme Construction Company. Unfortunately, the economy has caused their employer to lay them off during these tough economic times. Alpha and Omega now have past due credit card bills. Alpha and Omega decide together that they need to make some quick cash. Omega believes that it is all their Boss's fault, (hereinafter "Boss"), so what better way to rectify their situation than to steal from Boss. Alpha agrees completely. Alpha and Omega break into Boss's personal dwelling and are caught inside the dwelling by Boss and the police. Omega has $1200.00 cash in his pocket he took from Boss's closet and Alpha has over $10,000.00 worth of jewelry in his pocket he took from Boss's wife's closet. Alpha and Omega confess on the scene and ask for forgiveness receiving none from either Boss or the police despite no criminal history whatsoever by Alpha or Omega.

Can the State prosecute Alpha and Omega for any felony charge as an adult in circuit court or will this case only be prosecuted in Youth Court as juveniles? Explain fully.

Question 3.4: (25 points)

Officer is on routine patrol when he drives by a local bank where he sees Defendant exiting wearing all black, a face mask, carrying a gun and a bank cash drawer. As Officer approaches Defendant to make an arrest the bank drawer liquid die packs explode turning

Defendant "smurf blue". Defendant is arrested at the scene for armed robbery, properly Mirandized by Officer, and to which Defendant states, "you right about that! I ain't saying nothing without a lawyer and I want mine right now!" Officer drives Defendant to the police station. Defendant is then booked and processed without being interrogated. Officer intentionally places Defendant in a cell with "Tattle Boy" who is in jail for stealing candy bars from a local convenience store. Officer has previously promised "Tattle Boy" that if "Tattle Boy" can get information from five persons that are placed in the cell with him, then Officer will drop "Tattle Boy's" shoplifting charges. Defendant is "Tattle Boy's" fifth cell mate, so "Tattle Boy" is excited about being let go if he can get Defendant to talk to him about the bank robbery. As soon as Defendant is in the cell, "Tattle Boy" says to Defendant, "man you look like a smurf all blue and such, whatcha in for? You can tell me, I hate those cops! I don't tell them nothing!" Defendant tells "Tattle Boy" all the details of the armed robbery amounting to a full confession. "TattleBoy" informs Officer about the confession so "TattleBoy" is released immediately promising to never steal candy bars again. Thereafter, Officer and "TattleBoy" confirm to the trial judge their successful undercover operation.

Are the statements made by Defendant to "TattleBoy" going to be admissible against Defendant in the State's case in chief ? Yes or No. Explain fully.

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2015 Bar Examination
CONSTITUTIONAL & CRIMINAL LAW & CRIMINAL PROCEDURE
(100 points total)
ANALYSIS AND MODEL ANSWER

Notice to BAR Examinees: All questions are independent of one another and are not related with one another in any manner. They should each be analyzed separately and independently.

Question #3.1: (25 points total)

In the small town of Curious, Defendant was suspected of having killed his wife's boyfriend, Victim. When the murder of Victim occurred, all eyes focused upon Defendant. The police narrowed the list of suspects and deduced that Defendant was the only viable target of the investigation. The police brought Defendant in for questioning without any warnings and simultaneously executed search warrants upon his home, farm, and cars. Defendant publicly maintained his innocence and cooperated with the police fully and was not initially arrested at that time. Subsequently, three months later, the county Grand Jury returned a First Degree Murder indictment against Defendant, and he was then arrested for the murder of Victim. Defendant has claimed from the beginning that he is innocent, and Defendant now demands a preliminary hearing "to clear up this misunderstanding before things go too far." Secondly, Defendant wants his case dismissed by the circuit judge for insufficiency of the evidence maintaining there is not enough evidence to need a jury trial.

3.1.1 Will the circuit judge grant or deny the Defendant's MOTION FOR A PRELIMINARY HEARING ? Explain fully. **(12 points)**

Grader's Outline and Model Answer to Question 3.1.1:
Defendant's Motion for a Preliminary Hearing will be **DENIED**. **(6 points)**

Explanation & Authority: **(6 points)**
Court Rule:
"A defendant who has been indicted by a grand jury shall not be entitled to a preliminary hearing." URCCC 6.05, WAIVER OF INITIAL APPEARANCE AND PRELIMINARY HEARING. The rationale is that the Grand Jury has itself, as an independent body, made a probable cause determination that probable cause does in fact exist that a crime was committed and that probable cause exist that the defendant more likely than not committed the crime and should be required to face a petit jury trial applying a beyond a reasonable doubt standard.

Case Law:

Rogers v. State, 881 So.2d 936, 940 (Miss.Ct.App. 2004).

> "Once the indictment occurs, even [if] a preliminary hearing [has] not been provided, that question becomes moot." ***Hogan v. State,*** 730 So.2d 100, 101(¶ 3) (Miss.Ct.App.1998). Since "[t]he purpose of a preliminary hearing is to [determine] whether there is probable cause to believe that the defendant has committed an offense, [t]he indictment by a grand jury removes the purpose of the hearing and none need thereafter be conducted." *Id.* (citing ***Mayfield v. State,*** 612 So.2d 1120, 1129 (Miss.1992)).

3.1.2: Will the circuit judge grant or deny the Defendant's MOTION TO DISMISS for insufficiency of evidence? Explain fully. **(13 points)**

Grader's Outline and Model Answer to Question 3.1.2

Defendant's Motion to Dismiss for insufficiency of evidence will be **DENIED**. **(7 points)**

Explanation & Authority: (6 points)

State v. Candy Peoples, 481 So.2d 1069, 1070 (MS 1986). "Neither a motion to quash nor any other pretrial pleading can be employed to test the sufficiency of evidence. ***State v. Grady,*** 281 So.2d 678, 680 (Miss.1973); ***State v. Peek,*** 95 Miss. 240, 243, 48 So. 819 (1909). ***See, Callahan v. State***, 419 So.2d 165, 168 (Miss.1982); ***State v. Bates,*** 187 Miss. 172, 179, 192 So. 832, 834--835 (1940). If the procedure employed by the trial court in this case were permitted, it would have a monumental effect on our criminal justice system. As this Court observed in *Grady,*

> It would result in a pretrial hearing in practically every case to determine whether the state has sufficient evidence to support the indictment. This could only result in confusion and delay in the trial of a criminal case.

281 So.2d at 680.

> The proper time to test the sufficiency of the evidence to support any indictment is when the case is tried on its merits. Then if the evidence on behalf of the state is insufficient to support the charge made in the indictment, on proper motion, the trial court should so hold and direct the jury to find the accused not guilty, otherwise, the case should be submitted to the jury to determine the guilt or innocence of the accused.

Id. at 681--682.

State v. Parkman, 106 So.3d 378, 381+ (Miss.App. Sep 25, 2012)

> But the appropriate time to test the sufficiency of evidence for an indictment, or any count in *381 an indictment, is *during trial* on the merits after the State has presented its case—not before trial. *State v. Peoples,* 481 So.2d 1069, 1070 (Miss.1986) (citing *State v. Grady,* 281 So.2d 678, 681–82

(Miss.1973)). Unlike civil proceedings, there is no summary-judgment procedure in criminal cases. *Id.* And the United States Supreme Court has cautioned that the establishment of a pretrial mechanism to review evidentiary challenges to "facially valid indictments ... 'would run counter to the whole history of the grand jury institution, and neither justice nor the concept of a fair trial requires it.' " *United States v. Williams,* 504 U.S. 36, 54–55, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992) (quoting *Costello,* 350 U.S. at 364, 76 S.Ct. 406). The Mississippi Supreme Court has similarly recognized that to allow such a procedure would monumentally alter our criminal justice system. *Peoples,* 481 So.2d at 1070.[5] ¶ 8. Of course, our trial judges may entertain a variety of other pretrial challenges to indictments—including failure to charge an offense, lack of jurisdiction, double jeopardy, improper composition of the grand jury, and prejudicial prosecutorial misconduct, among others. But our precedent is clear that a trial judge has no discretion to dismiss an indictment, nor any of its counts, prior to trial, where a defendant's sole claim is a lack of evidentiary support. *Id.; Grady,* 281 So.2d at 680.

Question 3.2: (25 points)

Defendant is riding as a rear seat passenger in a car through a "gang neighborhood" in the town of TennMemph. A TennMemph officer on patrol sees that the car is being driven without headlights at night, is making turns without using turn signals and has no operational brake lights. Officer stops the car. As Officer approaches the car he notices Defendant moving about nervously inside the car, ducking and reaching down while looking around quickly. Officer notices Defendant to be wearing a "blue crips" gang bandanna and asks for some form of identification such as a drivers license to which Defendant responds, "I don't have any because I just got out of prison." Officer then hears and sees a portable police scanner radio sticking out of a jacket pocket worn by Defendant. Officer then orders Defendant out of the passenger rear of the car. Officer asks Defendant why he has a police scanner radio to which Defendant replies, "just to keep current. I bought it at an electronics store. It's not illegal." Officer conducts a pat down of Defendant and discovers a pistol. Defendant had been truthful about just getting out of prison and was in fact a convicted felon. Defendant is then arrested and hand cuffed.

3.2.1 Did Officer violate Defendant's rights by ordering him out of the car? Yes or No. Explain fully. **(10 points)**

Grader's Outline and Model Answer to Question 3.2.1:

NO. Officer did NOT violate Defendant's rights by ordering him out of the car. **(5 points)**

Explanation & Authority: (5 points) The vehicle was lawfully stopped for traffic violations

committed in the officer's presence. This procedure of ordering passengers as well as the driver of a lawfully stopped vehicle is expressly permitted pursuant to ***Maryland v. Wilson***, 519 U.S. 408, 415 (1997).

3.2.2 Did Officer violate Defendant's rights by patting him down once out of the car? Yes or No? Explain fully. **(15 points)**

Grader's Outline and Model Answer to Question 3.2.2:

NO. Officer did NOT violate Defendant's rights in performing a "Terry Patdown." **(5 points)**

Explanation & Authority: **(10 points total)**

Define the requirements for a "Terry Stop and Frisk"; (1) investigatory stop is lawful **(5 points)** and (2) suspect is reasonably believed to be armed and dangerous. **(5 points)** Using the fact pattern, give an explanation as to why Officer has justifiable grounds to reasonably believe defendant may be armed and dangerous such as his furtive movements.

AUTHORITY: ***Arizona v. Johnson*, 129 S. Ct. 781 (2009):**

The defendant was a rear-seat passenger in a lawfully stopped car in a "gang neighborhood." In plain sight, the officer saw the defendant nervously looking back at the approaching officers. The defendant was wearing blue "Crips" bandana and was from a neighboring "Crips" town. He had no form of ID and admitted to being recently released from prison. There was also a police scanner sticking from his jacket pocket. The officer ordered the defendant out of the car, as permitted in ***Maryland v. Wilson*, 519 U.S. 408, 415 (1997)**, and performed a ***Terry*** pat-down. The officer found a pistol on the defendant. The Court reaffirmed the two requirements for a constitutionally permissible ***Terry*** "Stop and Frisk," (1) investigatory stop is lawful and (2) suspect is reasonably believed to be armed and dangerous. The Court held that there was no Fourth Amendment violation. (This case is an ancillary case to ***Brendlin v. California*, 551 U.S. 249 (2007)**).

Question 3.3: (25 points)

Defendant Alpha and Defendant Omega are adventuresome twin eighteen-year-old males. Alpha and Omega live at home with their parents as they always have. They have worked together on a construction site the past few months for Acme Construction Company. Unfortunately, the economy has caused their employer to lay them off during these tough economic times. Alpha and Omega now have past due credit card bills. Alpha and Omega decide together that they need to make some quick cash. Omega believes that it is all their Boss's fault, (hereinafter "Boss"), so what better way to rectify their situation than to steal from Boss. Alpha agrees completely. Alpha and Omega break into

Boss's personal dwelling and are caught inside the dwelling by Boss and the police. Omega has $1200.00 cash in his pocket he took from Boss's closet and Alpha has over $10,000.00 worth of jewelry in his pocket he took from Boss's wife's closet. Alpha and Omega confess on the scene and ask for forgiveness receiving none from either Boss or the police despite no criminal history whatsoever by Alpha or Omega.

Can the State prosecute Alpha and Omega for any felony charge as an adult in circuit court or will this case only be prosecuted in Youth Court as juveniles? Explain fully.

Grader's Outline and Model Answer to Question 3.3:

Alpha and Omega are both 18 years of age and are thus both considered to be adults under Mississippi law subject to original circuit court jurisdiction for any felony offense. Burglary of a dwelling and Grand Larceny are felony offenses. Youth Court does NOT have any jurisdiction. **M.C.A. Section 43-21-151**.

Question 3.4: (25 points)

Officer is on routine patrol when he drives by a local bank where he sees Defendant exiting wearing all black, a face mask, carrying a gun and a bank cash drawer. As Officer approaches Defendant to make an arrest the bank drawer liquid die packs explode turning Defendant "smurf blue". Defendant is arrested at the scene for armed robbery, properly Mirandized by Officer, and to which Defendant states, "you right about that! I ain't saying nothing without a lawyer and I want mine right now!" Officer drives Defendant to the police station. Defendant is then booked and processed without being interrogated. Officer intentionally places Defendant in a cell with "Tattle Boy" who is in jail for stealing candy bars from a local convenience store. Officer has previously promised "Tattle Boy" that if "Tattle Boy" can get information from five persons that are placed in the cell with him, then Officer will drop "Tattle Boy's" shoplifting charges. Defendant is "Tattle Boy's" fifth cell mate, so "Tattle Boy" is excited about being let go if he can get Defendant to talk to him about the bank robbery. As soon as Defendant is in the cell, "Tattle Boy" says to Defendant, "man you look like a smurf all blue and such, whatcha in for? You can tell me, I hate those cops! I don't tell them nothing!" Defendant tells "Tattle Boy" all the details of the armed robbery amounting to a full confession. "TattleBoy" informs Officer about the confession so "TattleBoy" is released immediately promising to never steal candy bars again. Thereafter, Officer and "TattleBoy" confirm to the trial judge their successful undercover operation.

Are the statements made by Defendant to "TattleBoy" going to be admissible against Defendant in the State's case in chief ? Yes or No. Explain fully.

Grader's Outline and Model Answer to Question 3.4:

NO. Defendant's statements to "TattleBoy" will NOT be admissible against Defendant in the State's case in chief. **(10 points)**

Explanation & Authority: (15 points total)

NO. Anything Defendant said to "TattleBoy" will be inadmissible in the State's case in chief. Defendant effectively invoked his 5th Amendment right to remain silent when he was originally mirandized and did not exercise any valid legal waiver thereafter. **(5 points)** "TattleBoy" was acting as an agent for Officer. Thus, when "TattleBoy" initiated contact with Defendant and received the incriminating statements from Defendant, this information was obtained in violation of Defendant's 5th Amendment right to remain silent and cannot be used against him. **(10 points)**

AUTHORITY: In general Miranda warnings are not applicable to a situation where damaging statements are made in response to interrogation by a private citizen. However, as the Mississippi Supreme Court has noted, "The Fifth Amendment privilege against self-incrimination ... has never been held to apply where private security personnel have questioned a defendant without any participation from the government." Miss.App.,2002. ***Moore v. State***, 816 So.2d 1022, 1027. However, the general rule is subject to the qualification that the private citizen is not acting as an agent for law enforcement officers. ***Weeks v. State***, 804 So.2d 980, 994 (Miss.,2001) {A statement from defendant to a cell mate was tape recorded and defendant contended the cell mate was a police agent, but only testimony came from Sheriff and the cell mate that cell mate was not an agent of the State no testimony to the contrary was offered by the defense. Motion to suppress was properly denied.; ***See also Deloach v. State***, 722 So.2d 512, 518 (Miss. 1998)

MSE #4

MISSISSIPPI BOARD OF BAR ADMISSIONS

February 2015 Bar Examination

MISSISSIPPI PRACTICE AND PROCEDURE

100 Points Total

Your client (C) wishes to sue an individual (D) who either negligently or intentionally rear-ended her at a stoplight. Both C and D are competent adult resident citizens of Jackson, Hinds County, MS.

C is concerned about filing the action in a timely manner.

Please answer the following questions concerning C's potential claim(s).

4.1 How long does C have to file a negligence and/or intentional tort cause of action against D? **(20 points)**

4.2 What is the time period within which a summons and complaint must be served after the Clerk of Court issues the summons? **(15 points)**

4.3 What is the effect of failure to serve a summons and complaint within the prescribed time period? **(10 points)**

4.4 If you are unable to find D, is there a way to extend the time in which you may serve him with the summons and complaint? If so, what must be shown in order to obtain more time? **(15 points)**

4.5 If the summons is issued ten days prior to the expiration of the applicable statute of limitations, what is the effect upon the statute of limitations if the summons and complaint is served 100 days after the issuance of the summons? **(20 points)**

4.6 If the summons is issued ten days prior to the expiration of the applicable statute of limitations, what is the effect upon the statute of limitations if the summons and complaint is served 160 days from issuance of the summons? **(20 points)**

MISSISSIPPI BOARD OF BAR ADMISSIONS

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MISSISSIPPI PRACTICE AND PROCEDURE

100 Points Total

ANALYSIS AND MODEL ANSWER

4.1 She would have three years to file a negligence claim. Negligence claims are subject to Miss Code Civ P §15-1-49: All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after. **(10 points)**

She would have one year to file an intentional tort claim. §15-1-35. **(10 points)**

See *Slaydon v. Hansford*, 815 So. 2d 471, 472 (Miss. 2002) (statute of limitations for assault and battery and other intentional torts is one year, Miss Code Ann § 15-1-35; statute of limitations for a negligence claim is three years).

4.2 120 days. Mississippi Rule of Civil Procedure Rule 4(h) provides:

(h) Summons: Time Limit for Service. If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. **(15 points)**

4.3 Without a showing of good cause, the action shall be dismissed **(7 points)** without prejudice **(3 points)**. Rule 4(h)

4.4 Yes. An extension to the time for service may be granted upon showing of "good cause." **(15 points)**

4.5 Because the statute of limitations is tolled upon the filing of the complaint and issuance of the summons and remains in effect during the pendency of the 120 days, service under this scenario is timely. **(20 points)** See, Miss. Rule Civ. P. 4(h); *Copiah County School Dist. v. Buckner*, 61 So. 3d 162, 267 Ed. Law Rep. 951 (Miss. 2011) (filing complaint tolls statute of limitations, if service is not made upon the defendant within 120 days limitations period resumes running at the end of the 120 days); *Lincoln Elec. Co. v. McLemore*, 54 So. 3d 833 (Miss. 2010) (same).

4.6 Service under this scenario is untimely because the statute of limitations would only be tolled for 120 days after issuance of the summons. **(20 points)** After expiration of the 120 days, the limitations period would begin to run again. There would be ten days of the limitations period left within which to file a new complaint. But after 130 days from issuance of the summons, the statute of limitations would expire and the service of the complaint 160 days after issuance of the summons would be 30 days past the applicable limitations period and subject to dismissal.

MSE #5

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2015 Bar Examination
DOMESTIC RELATIONS
100 Points Total

The Biloxi casinos provided a regular venue of entertainment for Jon and his wife, Lisa. They never missed a weekend meeting their friends for dinner, drinks and gambling. In 2013, Lisa gave birth to their first child, a girl. Her attitude and lifestyle changed, completely. She preferred being at home with and caring for the baby, rather than spending time at casinos. However, Jon continued to go to the casinos which caused marital friction. Lisa reminded him that if they divorced, he would have nothing because their prenuptial agreement stated that all marital assets would go to her. Jon was supprised at her statement, but vaguely remembered signing a document while he waited in the church vestiview on their wedding day, June 1, 2006. Lisa's uncle and the preacher had given him a paper and told him to sign it. He was quite nervous and signed, thinking that it was something required by the church. He asked his wife, "is that what I signed on our wedding day?" Lisa said, "Yes, my rich uncle gave me this house and an annuity that pays me $20,000.00 per month for life and he didn't want you to take any of it from me."

Jon was employed as a security guard. His gross earnings averaged $3,750.00 per month. After tax withholdings, he brought home $3,000.00 per month. Realizing that his wife never disclosed her wealth to him, he angrily advised her that he would file for divorce, have the prenuptial agreement set aside, get custody of their child and child support. He went to his attorney to discuss the matter. While there, he confided to his attorney that he never divorced his other wives Olivia and Tina before marrying Lisa. He had married Olivia in 1996 and Tina in 2000. Olivia died in 2005. Tina lives in Biloxi.

QUESTIONS

5.1 Discuss whether the prenuptial agreement would be enforceable? **(25 Points)**

5.2 In light of Jon's other two marriges, is he legally married to Lisa? Explain your answer. **(25 Points)**

5.3 What factors would the Chancellor consider in determining custody of the couple's child? Which party will likely be awarded custody? Explain your answer. **(25 Points)**

5.4 Compute the statutory amount of child support that Jon would be required to pay if custody is awarded to Lisa. Alternatively, discuss how child support would be computed for Lisa if custody is awarded to Jon. **(25 Points)**

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2015 Bar Examination
DOMESTIC RELATIONS
100 Points Total
ANALYSIS AND MODEL ANSWER

5.1 (25 points)

Premarital agreements are enforceable in Mississippi like any other contract. Parties are required to **disclose their assets**, enter into the agreement **voluntarily**, and the agreement must be **fair in its execution**. Smith v. Smith, 656 So.2d 1143, 1147 (Miss. 1995).

The fact that Lisa never disclosed her assets to Jon poses a problem. Jon's signing of the document without reading it or knowing what he was signing presents a problem in execution. Lisa would argue that, as a competent adult, he should have inquired about the document and read it before signing. Lisa could argue that the agreement is fair because the house and annuity is not marital property, but her separate property. Gifts and inheritances received during marriage are separate property. Ferguson v. Ferguson, 639 So.2d 921. (*It is only necessary that the three elements are recognized to get full credit.*)

5.2 (25 points)

The marriage between Jon and Lisa in 2006 is valid, because the marriage to Tina is void and the marriage to Oliva terminated at her death. Marriage to Tina took place in 2000 while Jon was still married to Olivia. Pursuant to Miss. Code Ann. Section 93-7-1(2004), bigamy is illegal and such a marriage is void. Olivia died in 2005, thereby terminating that marriage.

5.3 (25 points)

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

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

i. Custody preference of the child
j. Stability of the home environment and other factors

According to the facts, Lisa should receive custody. She chose to spend time with and care for the child while Jon worked and went to the casinos. Items a, b, c, d, f, I and j appear to favor Lisa. In addition, g would favor Lisa. Jon's bigamy diminishes his moral fitness.

5.4 (25 points)

Child support for one child is 14% of gross income adjusted for taxes and other mandatory deductions. Jon would pay $420.00 (.14 x $3000.00) in monthly child support. If Jon received custody, under the statutory guidelines, Lisa's monthly child support payments would be $2,800.00. However, the statutory guidelines do not apply to payors with yearly adjusted income over $50,000.00. Lisa's yearly income is $240,000.00. Miss. Code Ann. Section 43-19-101(1). In circumstances as this, when the guidelines are not presumed to be correct, there must be specific findings of fact regarding child support awards.

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LEGAL ETHICS AND PROFESSIONAL CONDUCT
100 Points Total

FACTS

John Williams passed the Mississippi Bar in 1979, and since that time, has been a solo practitioner with an office in Southaven, MS. Attorney Williams' practice is primarily personal injury, but he will accept an occasional divorce case, especially if he knew the client beforehand.

One of Williams' friends came to his law office seeking representation for filing divorce from her husband. The client, Mrs. Kristin Stanton, believes that her husband, Dr. Steve Stanton, a prominent physician in the area, is cheating on her with one of his office assistants, who is 20 years younger. Since Dr. Stanton's practice does so well, Mrs. Stanton has not worked in years, and she has no access to funds, other than from her husband. As such, she cannot pay Williams's standard $5,000 retainer, primarily because she fears her husband may quickly discover she has retained an attorney. Moreover, Mrs. Stanton merely suspects that Dr. Stanton is cheating on her and has no "actual proof, at least not yet." In explaining this dilemma to Williams, Mrs. Stanton states that she'll gladly pay Williams a percentage of anything she recovers in alimony and/or via a property settlement from Dr. Stanton once they are divorced. Along these lines, she tells Williams that Dr. Stanton has a net worth of over $8 million dollars that was accumulated during their marriage, and which Williams knows from observing Mrs. Stanton's "lifestyle" that she's probably good for such a fee. Thus, Williams agrees to the fee arrangement as proposed by Mrs. Stanton, but decides not to reduce the fee arrangement to writing, primarily on the basis that he and Mrs. Stanton are friends.

A few weeks after the initial consultation, a complaint for divorce was filed in DeSoto County Chancery Court wherein Williams is listed as counsel of record for Mrs. Stanton in a divorce action brought by Mrs. Stanton against Dr. Stanton. Shortly after the complaint is filed, Mrs. Stanton arrives for a consultation in Mr. Williams' office wherein she believes that there are pictures on the Internet with Dr. Stanton and his "sweet young thing." She asks Mr. Williams how they might be able to get these pictures, but without Dr. Stanton or his attorney knowing that they have them. Following additional discussions, they learn that these pictures are not the property of Dr. Stanton, but are those of his "new squeeze"

which she has posted on a social media website, Facebook®, which show her and Dr. Stanton, but do not otherwise show Dr. Stanton's name.

Neither Williams nor Mrs. Stanton have a Facebook® account and are not that knowledgeable about social media websites or their use. However, during an office consultation, Williams' assistant overhears some of Williams and Mrs. Stanton's discussion about Facebook® photos. Williams' assistant is roughly the same age of Dr. Stanton's girlfriend, and is aware through discussions with mutual friends of hers and Dr. Stanton's girlfriend that "she lives on her iPhone® and she posts just about everything she does, eats or likes." Assuming that Dr. Stanton's girlfriend probably has a treasure trove of information on her Facebook® page, Williams' assistant suggests that Williams open a Facebook® account so that he can attempt to "friend" Dr. Stanton's girlfriend in hopes of being able to access her pictures. Williams informs his assistant that he does not like that idea, but has no problem if his assistant creates an identity, or better yet, poses as a friend of Dr. Stanton's girlfriend so that she'll give permission to be able to see her pictures. As such, and with Williams' consent, Williams' assistant creates a Facebook® account for someone that she knows is both a friend of hers and Dr. Stanton's girlfriend, but without that friend's knowledge. As such, a Facebook® account is opened by Williams' assistant using a real person's name and picture who is a known acquaintance of both Dr. Stanton's girlfriend and Williams' assistant, but the e-mail associated with the Facebook® account is Williams' assistant's e-mail address at the law firm.

The plan concocted by Williams and his assistant worked. Dr. Stanton's girlfriend accepted the "phony friend request," and as a result, Williams was able to view and download multiple photos that came from Dr. Stanton's girlfriend's Facebook® page. Some of the pictures showed Dr. Stanton and his girlfriend in affectionate poses, and one picture was taken of them together at a luxurious beach resort on a date when Dr. Stanton told his wife he was out of town at a medical conference in Chicago, IL. With this adulterous proof now in hand, Williams informs Mrs. Stanton that "getting at least half of Dr. Stanton's net worth in a property settlement should not be a problem – we have the goods on him."

As the case progresses, Williams continues to speculate about the sizeable fee he'll receive once the Stanton's divorce is finalized. Moreover, now that he's been able to tap into a gold mine of information available on Facebook®, Williams is considering about being more open to accepting divorce cases. Attorney Williams is also proud of himself about how the information on Facebook® was obtained because very little of the information, with the exception of his assistant's e-mail address, can't be directly traced back to him, especially since the account was deleted off Facebook® after he got the pictures.

QUESTIONS

6.1.1 Was the fee arrangement Attorney Williams and Mrs. Stanton entered into proper for this type of case? Yes or No? (10 points).

6.1.2 Which rule(s) of the Model Rules of Professional Conduct is/are implicated? (30 points).

6.2.1 Was the way in which Attorney Williams and/or Williams' legal assistant gathered information about the case (*e.g.* Facebook® photos of Dr. Stanton and his girlfriend) permissible? Yes or No? (10 points).

6.2.2 Which rule(s) of the Model Rules of Professional Conduct is/are implicated? (30 points).

6.3 Assume that the "phony friend account" that Williams' legal assistant setup on Facebook® is revealed and leads to legal repercussions for his legal assistant. Is Attorney Williams responsible in any way for his legal assistant's conduct? (Please limit discussion according to the Model Rules of Professional Conduct. Do not discuss any employment or agency theories of liability) (20 points).

END

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2015 Bar Examination
LEGAL ETHICS AND PROFESSIONAL CONDUCT
100 Points Total

ANALYSIS AND MODEL ANSWER

6.1.1 Was the fee arrangement between Williams and Mrs. Stanton proper?

Yes or No? (10 points).

MODEL ANSWER TO 6.1.1:

No.

6.1.2 Which rule(s) of the Model Rules of Professional Conduct is are/implicated? (30 points).

MODEL ANSWER TO 6.1.2:

MRPC RULE 1.5 – Fees.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof....

According to Section 22:10 – When contingent fees are prohibited from Jackson & Campbell's *Professional Responsibility for Mississippi Lawyers* (MLI Press 2010), under **Rule 1.5(d)(1), a contingent fee is unethical in a "domestic relations matter" where payment is contingent upon securing a "divorce or upon the amount of alimony or support or property settlement."** The policy behind this traditional prohibition is to prevent lawyers from taking a fee position that might give the lawyer an incentive to oppose reconciliation of the parties. The language of the prohibition refers to "domestic relations matters" rather than only to divorce. As such, that language would prevent a contingent

fee in cases involving separation of persons who cohabitated but were unmarried. Too, the reference to "domestic relations" and to "property settlements" would prohibit a contingent fee in negotiating pre-nuptial or post-nuptial agreements between the parties about to join as a couple, or considering the possibility of separation. The state bar's opinion is that Rule 1.5(d)(1) does not, however, prevent a lawyer from charging a contingent fee for the collection of past due support or alimony. *See* Miss. Bar Ethics Opinion 88, Contingent Legal Fees (1983); Miss. Rules of Prof'l Conduct R. 1.5(c) cmt.

Although this type of fee arrangement is prohibited in domestic relations cases, fee agreements should be established at the outset of representation. Rule 1.5(b) provides that "[w]hen a lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation. While Rule 1.5(b) states a clear preference for written memorials of fee agreements, the rule does not mandate a writing in all cases.

Rule 1.5 (b) and **(c)** states:

> **(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.**
>
> **(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a manner in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recover, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written 0statement stating the outcome of the matter, and, if there is a recovery, showing the remittance to the client and the method of its determination.**

Again, although the fee arrangement between Williams and Mrs. Stanton was not reduced to writing, Rule 1.5 (c) still indicates the matter is one in which a contingent fee is prohibited by Rule 1.5(d).

6.2.1 Was the way in which Williams and/or Williams' legal assistant collected information about the case (*e.g.* Facebook® photos of Dr. Stanton and his girlfriend) permissible?

Yes or No? (10 points).

MODEL ANSWER TO 6.2.1:

No.

6.2.2 Which rule(s) of the Model Rules of Professional Conduct is are/implicated? (30 points).

MODEL ANSWER TO 6.2.2:

MRPC 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;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

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

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

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

According to Section 35:5 –Conduct involving dishonesty, fraud, deceit or misrepresentation from Jackson & Campbell's *Professional Responsibility for Mississippi Lawyers* (MLI Press 2010), "Given the relevance to the

characteristics necessary to practice law, whether criminal or tortious, a lawyer's conduct involving dishonesty, fraud, deceit, or misrepresentation is professional misconduct under Rule 8.4(c). In *Rogers v. Mississippi Bar*[1], the Supreme Court defined each of these terms....Deceit was defined as a 'fraudulent and deceptive misrepresentation, artifice or device, used by one to deceive and trick another, who is ignorant of the facts, to the prejudice and damage of the party imposed upon.'" *Id.*

In the context of this question, **deceit** was used in order to gain access to Dr. Stanton's girlfriend's Facebook® page. Had deceptive tactics not been utilized, it is unlikely that the adulterous pictures would not have been disclosed, especially since Facebook® contains settings and controls to keep a user's information private, unless the user "friends" a person and allows them permission to view their page and pictures.

A 2010 poll found 81% of matrimonial lawyers have used evidence from social networks.[2] Regardless of how lawyers feel about social networks, they contain too much valuable information to ignore. However, informally obtaining that information, while generally easy, is fraught with ethical pitfalls.

Social networking websites ("social networks") like Facebook® are massive databases of self-reported information, ranging from pictures of pets to evidence of fraud to the details of criminal conspiracies. These websites are heavily used and still growing. Nearly 70% of all Americans age 12 to 29 have profiles on social networking websites.[3] The majority of these profiles are on Facebook®, which as of February 2011, reported that the average user shared 90 pieces of content, such as photographs, links, or messages a month.[4] Altogether, Facebook® users share more than 30 billion pieces of total content a month. There is substantial growth in the number of online profiles, making social networks invaluable research tools for learning about almost anyone's actions, interests, and thoughts.

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[1] *Rogers v. Mississippi Bar*, 731 So.2d 1158, 1170 (Miss. 1999).

[2] Leanne Italie, Divorce Lawyers: Facebook Tops in Online Evidence in Court, USA TODAY, June 29, 2010.

[3] Amanda Lenhart, Kristen Purcell, Aaron Smith & Kathryn Zickuhr, Social Media & Mobile Internet Use Among Teens and Young Adults, PEW INTERNET & AMERICAN LIFE PROJECT 3,5 (Feb. 3, 2010).

[4] Facebook Timeline, FACEBOOK, http://www.facebook.com/prtess/info.php?timeline; Facebook Statistics, FACEBOOK.

Lawyers should be able to use information that is publicly available (*e.g.*, Google® search results). **Conversely, because lawyers are barred from engaging in deceptive acts, creating a fake profile or utilizing other overtly deceptive means of covertly obtaining information is unethical.**

Using a fake account to collect information covertly would violate the terms of use of most social networking websites. Facebook® explicitly prohibits the use of fake accounts. Facebook® users agree to not "provide any false personal information on Facebook®."[5] Violations of the terms of use could also be a contractual violation. Although unlikely to be repeated often, the government has brought criminal charges for creating a fake account, arguing that accessing a website in violation of its terms of use is unauthorized access to a computer system, which is criminal under the Computer Fraud and Abuse Act.[6] A criminal violation for fraud would certainly violate Rule 8.4.

The fact that Williams knew that his assistant intended to create an imposter Facebook® account, did nothing to prevent such action, and knowingly acquiesced in allowing that act of deceit to occur is also separate violation of Rule 8.4(a). According to Section 35:3 – Rules violations; attempts; misconduct by and through others from Jackson & Campbell's *Professional Responsibility for Mississippi Lawyers* (MLI Press 2010), under MRPC 8.4(a), it is professional misconduct to violate or attempt to violate the Rules of Professional Responsibility. As such, any rules violation is misconduct. It is also misconduct under Rule 8.4(a) for a lawyer to knowingly assist or to induce another to violate the professionalism rules. Further, a lawyer cannot accomplish through another what the lawyer could not accomplish herself.

6.3 Assume that the "phony friend account" that Williams' legal assistant setup is revealed and leads to legal repercussions for his legal assistant. Is Attorney Williams responsible in any way for his legal assistant's conduct? (Please limit discussion according to the Model Rules of Professional Conduct. Do not discuss any employment or agency theories of liability)(20 points).

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[5] Facebook Terms of Use, FACEBOOK, http:www.facebook.com/terms.php?

[6] See *e.g.*, 18 U.S.C. §1030 (2006); *United States v. Drew*, 259 F.R.D. 449, 452 (C.D. Cal. 2009).

MODEL ANSWER TO 6.3:

Yes, Williams is responsible for his legal assistant's conduct, and failed to assure, arguably through his own failure, that his assistant's conduct was compatible with the professional obligations or the lawyer.

According to **MRPC Rule 5.3 – Responsibilities Regarding Non-Lawyer Assistants:**

> With respect to a non-lawyer employed or retained by or associated with a lawyer:
>
> (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law form shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations or the lawyer;
>
> (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;
>
> **(c) the lawyer shall be responsible for conduct of such a person that would be a violation of the rules of professional conduct is engaged in by a lawyer if:**
>
> (1) **the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved**; or
>
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Official Comment to MRPC 5.3

Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in the rendition of the lawyer's professional services. A lawyer must make

reasonable efforts to give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measure employed in supervising non-lawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that non-lawyers in the firm will act in a way compatible with the Rules of Professional Conduct. *See* Comment to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Williams knowingly ratified the misconduct of his assistant, and is thus responsible for her misconduct according to MRPC 5.3(c)(1).

END