

**MISSISSIPPI BOARD OF BAR ADMISSIONS**  
**July 2012 Bar Examination**  
**PRACTICE AND PROCEDURE OF MISSISSIPPI COURTS**  
**100 total points**

Monica and Thomas were never married, though they lived together for several years. The on-and-off couple considered themselves “common law” married and had two children, Carrie born in 1997 and Thomas, Jr. (Duece) born in 1999. In 2008, Carrie drowned while swimming at Kuntry Kousins waterpark. After Carrie’s accident, Monica had another child, Diedre. Thomas is not the father of Diedre.

Prior to the accident Thomas openly treated Carrie as his child, and in fact signed Carrie’s birth certificate. While never officially paying child support, Thomas gave money on occasion to Monica for Carrie’s benefit. Thomas also has a daughter, Nina, born in 1993, to whom Thomas pays court-ordered child support. After several years of litigation, the insurance company for Kuntry Kousins waterpark has offered a settlement to “the heirs of Carrie”. The settlement offer appears fair, but your client Monica wants to know “how much will I receive?” Before you can answer that, you must determine who is entitled to the settlement proceeds.

Accordingly, please answer the following questions:

- a. At the time of Carrie’s death, had Thomas established paternity of Carrie under Mississippi law? Why? **(20 points)**
- b. What factors should the Court consider in determining whether Thomas has established or can establish paternity of Carrie? Include in your answer the applicable burden of proof and applicable statute of limitations, if any. **(40 points)**
- c. Who are the heirs of Carrie? Why? **(30 points)**
- d. What share will Monica receive? **(10 points)**

**MISSISSIPPI BOARD OF BAR ADMISSIONS  
July 2012 Bar Examination  
PRACTICE AND PROCEDURE OF MISSISSIPPI CHANCERY COURTS**

**100 Total Points**

**ANALYSIS AND MODEL ANSWER**

Monica and Thomas were never married, though they lived together for several years. The on-and-off couple considered themselves “common law” married and had two children, Carrie born in 1997 and Thomas, Jr. (Duece) born in 1999. In 2008, Carrie drowned while swimming at Kuntry Kousins waterpark. After Carrie’s accident, Monica had another child, Diedre. Thomas is not the father of Diedre.

Prior to the accident Thomas openly treated Carrie as his child, and in fact signed Carrie’s birth certificate. While never officially paying child support, Thomas gave money on occasion to Monica for Carrie’s benefit. Thomas also has a daughter, Nina, born in 1993, to whom Thomas pays court-ordered child support. After several years of litigation, the insurance company for Kuntry Kousins waterpark has offered a settlement to “the heirs of Carrie”. The settlement offer appears fair, but your client Monica wants to know “how much will I receive?” Before you can answer that, you must determine who is entitled to the settlement proceeds.

Accordingly, please answer the following questions:

- a. At the time of Carrie’s death, had Thomas established paternity of Carrie under Mississippi law? Why? **(20 points)**
- b. What factors should the Court consider in determining whether Thomas has established or can establish paternity of Carrie? Include in your answer the applicable burden of proof and applicable statute of limitations, if any. **(40 points)**
- c. Who are the heirs of Carrie? Why? **(30 points)**
- d. What share will Monica receive? **(10 points)**

## Analysis

For purposes of descent and distribution to wrongful death beneficiaries (i.e., “the heirs of Carrie”), a father may establish paternity in several ways pursuant to Miss. CODE ANN. §91-1-15(2)(c):

- Marriage of the child's natural parents before the child is born;
- Paternity adjudication by a court of competent jurisdiction prior to the intestate's death (this includes an acknowledgement of paternity);
- Paternity by a court of competent jurisdiction after the intestate's death, within one year of the intestate's death or within 90 days after the first publication of notice to creditors.

MISS. CODE ANN. §91-1-15, Subsection (d) states that a natural father of an illegitimate and his kindred shall not inherit:

- (i) From and through the child, unless the father has openly treated the child as his, and has not refused or neglected to support the child.

Paternity must be established by clear and convincing evidence before one can inherit through an illegitimate. *Estate of Richardson*, 695 So.2d 587 (Miss. 1997).

### ***Model Answer to a.***

- a. Thomas has not established paternity of Carrie by participating in a marriage ceremony with Monica before Carrie's birth, nor did a court of competent jurisdiction adjudicate paternity before Carrie's death. The act of signing the birth certificate, in and of itself, does not establish paternity. Additionally, the reference to “common law” marriage is irrelevant as Mississippi does not recognize “common law” marriage, and no facts are provided which would allow one to assume that the “common law” marriage occurred in another state. Paternity is not determined based on any relationship of the parents other than a legally recognized marriage. Therefore, at the time of Carrie's death, Thomas had not established paternity of Carrie under Mississippi law.

Discussion of an acknowledgement of paternity may warrant some credit, but the factual scenario does not provide that any such acknowledgement was executed prior to Carrie's death. Therefore, Thomas has not established paternity. Failure to discuss an acknowledgement of paternity will not result in any point deduction.

***Model answer to b.***

- b. The Court, in determining whether Thomas can establish paternity of Carrie, should consider the following:
  - (i) Thomas signed Carrie's birth certificate;
  - (ii) Thomas "openly treated" Carrie as his child; and,
  - (iii) Thomas provided support to Monica for Carrie's benefit (no evidence that Thomas refused or neglected to support Carrie).

Another relevant fact is that Thomas and Monica lived together for several years, thus implying that Thomas provided for Carrie during this time. Therefore, assuming the statute of limitations has not expired, Thomas has enough clear and convincing evidence to establish legal paternity of Carrie. *Estate of Patterson*, 798 So.2d 347 (Miss. 2001).

The applicable statute of limitations is within one year of Carrie's death, or within in 90 days of the first publication of the notice of creditors, whichever occurs first. The burden of proof is clear and convincing evidence. Bonus points may be awarded if the length of time between the death and the settlement is discussed as a possible statute of limitations bar, but this discussion is not necessary.

Facts that have no bearing on this analysis include: Thomas' court ordered child support to Nina; genetic testing (testing, while often useful, is complicated in this factual

scenario where Carrie dies four years earlier and, more importantly, genetic testing is not required by statute); that Thomas is not the father of Deidre; and, that Thomas is the father of Thomas, Jr.

***Model answer to c.***

- c. The Court must first consider whether Thomas is establishing paternity within one year of Carrie's death or within 90 days after the first publication of notice to creditors. If Thomas has not done so, then the heirs are:

Monica — Mother  
Thomas, Jr. — Whole Brother

Monica's child Diedre would not inherit because the child is an after-born. The class is closed as of the date of Carrie's death, and there is no evidence that Monica was pregnant when Carrie died (though, arguably, it doesn't matter since the child would still be an after-born). It is also important to note that it is irrelevant whether Thomas was Diedre's father. Thomas could not be the father and Diedre could still inherit "but for" the fact that Diedre is an afterborn.

Assuming paternity is determined in a timely manner and Thomas is adjudicated the natural and legal father of Carrie, the heirs are as follows:

Thomas — Father  
Monica — Mother  
Thomas, Jr. — Whole Brother  
Nina — Half Sister

Thomas has supported Nina pursuant to a court order implying that paternity of Nina was adjudicated by a court of competent jurisdiction. The law treats whole and half siblings as equals when it comes to wrongful death beneficiaries or descent and distribution of wrongful death proceeds. (MISS. CODE ANN. §11-7-13 stating in pertinent part "There shall not be, in any case, a distinction between the kindred of whole and

half-blood of equal degree"). Therefore, if Thomas establishes paternity, then Thomas' other child, Nina, also inherits.

Monica's child Diedre still would not inherit because the child is an after-born to a closed class.

***Model answer to d.***

Ultimately "how much will I receive" as asked by Monica will depend on the heirship determination. Monica will receive either a one-half share or a one-quarter share. Partial credit is appropriate for an incorrect answer of one-third based on the presumption that the heirs are Monica, Thomas, Jr., and Thomas, Sr. as such an answer recognizes some of the heirs.

The issue of a "child's share" is not relevant to the answer Monica seeks, and no points are awarded or deducted for discussing the same. Likewise, the issue of a establishing a guardianship account is not relevant to any of the questions posed, and therefore no points are awarded or deducted for discussing the same.

**MISSISSIPPI BOARD OF BAR ADMISSIONS**  
**July 2012 Bar Examination**  
**CONTRACTS**  
**100 total points**

Lora Smith, a resident of Deltatown, Mississippi, has been a successful professional singer in nightclubs and similar venues for a number of years.

Sammie Johnson, a record producer, saw Smith's nightclub act in Clarksdale, Mississippi and offered Smith a job singing on a tour of nightclubs in the northeastern United States over a tour schedule of 12 months. Johnson also told Smith that Johnson, too, was a singer, as well as a show producer. In fact, as Johnson relayed to Smith, Johnson fancied himself a better singer than Smith; Johnson will both produce and perform in appearances with Smith that are scheduled over the 12-month tour. Johnson offered Smith the sum of \$1000 per week to appear in every club where Johnson would put on a show and a bonus of \$2400 at the end of the tour. Johnson also agreed to provide room and board to Smith for the duration of the tour. Smith and Johnson shook hands on the arrangement but never reduced the agreement to writing.

Because of the length of the tour, Smith moved out of her apartment in Deltatown where she had been paying \$500 per month in rent.

As the tour moved from club to club in town after town, it became clear that audiences liked Smith's singing much more than Johnson's. Johnson initially was quite surprised at this development because he had a long-established career as a singer, having sold many recordings of his songs. Eventually, Johnson grew resentful of Smith's popularity and after nine months of the twelve-month tour, Johnson suddenly fired Smith, refusing to pay for any further room and board or wages, leaving Smith stranded in a small town in New Jersey.

In the absence of a nearby airport, Smith rented a car and drove back to Deltatown, Mississippi. Her old apartment was rented but even on such short notice, Smith was able to find another apartment renting at \$750 per month. For the first two months back in Deltatown, Smith stayed mostly in her apartment feeling sorry for herself and getting over her first job termination. However, it took Smith just a few days after the two-month period to land another job as a singer in a local club where she had worked before. Unfortunately, Smith could only get \$750 per week for her club work.

Assume for purposes of the following questions that Mississippi law applies.

**Question 4.1 (40 points):** Discuss the extent, if any, to which Lora Smith can enforce the oral contract of employment with Sammie Johnson. Be sure to include arguments on both sides of the issue.

**Question 4.2 (60 points):** Assume that Smith's oral contract with Johnson is enforceable. Discuss which, if any, damages Smith can recover; include the legal basis or bases for such recovery and any defenses Johnson may have.

**MISSISSIPPI BOARD OF BAR ADMISSIONS  
July 2012 Bar Examination  
CONTRACTS  
100 total points**

**ANALYSIS AND MODEL ANSWER**

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Assume for purposes of the following questions that Mississippi law applies.

**Question 4.1 (40 points):** Discuss the extent, if any, to which Lora Smith can enforce the oral contract of employment with Sammie Johnson. Be sure to include arguments on both sides of the issue.

**MODEL ANSWER 4.1:** Examinees should note that in Mississippi, employment is presumptively terminable at the will of either the employer or the employee absent a contract for a definite term. **(10 points)** The facts reveal offer, acceptance, consideration in the forms of \$1000 per week and a bonus of \$2400, and a definite period of 12 months. **(10 points)** As a result, the answer should include a discussion of whether the contract was enforceable under the Mississippi Statute of Frauds. Since the contract was to be performed in less than 15 months, it does not fall within the Statute of Frauds. **(10 points)** An answer that includes discussion of the Statute of Frauds in the Uniform Commercial Code should have points taken off, since the contract in the question is one for services, not goods; thus, the UCC does not apply, including the \$500 threshold.

Points should be given for discussion of the various provisions of the Statute of Frauds:

- Upon any special promise to answer for the debt or default or miscarriage of another person **(1 point)**;
- Upon any agreement made upon consideration of marriage, mutual promises to marry being excepted **(1 point)**;
- Upon any contract for the sale of lands, tenements, or hereditaments, or the making of any lease thereof for a longer term than one year **(1 point)**;
- Upon any agreement which is not to be performed within the space of 15 months from the making of the agreement (points specified above); or
- Upon any special promise by an executor or administrator to answer any debt out of his own estate. **(1 point)** (Miss. Code Ann. § 15-3-1 (1972)).

Points may also be given for discussion of whether Johnson was bound by the implied covenant of good faith and fair dealing **(4 points)**, and whether Smith's unexpected popularity could be considered "cause" for termination, even with a contract for a definite term **(2 points)**.

**Question 4.2 (60 points):** Assume that Smith's oral contract with Johnson is enforceable. Discuss which, if any, damages Smith can recover; include the legal basis or bases for such recovery and any defenses Johnson may have.

**MODEL ANSWER 4.2:** Contract damages are generally based on the expectations of the non-breaching party. **(2 points)** In other words, the amount of damages awarded should place the non-breaching party in the position she or

he would have occupied had the contract been performed as expected. **(3 points)** This is also referred to as the “benefit of the bargain.” **(2 points)** The primary limitation on expectation damages is that they must have been foreseeable. **(8 points)**

Smith was entitled to \$1000 per week for the remaining three months of the twelve-month run of the contract. **(2 points)** Smith also arguably would be entitled to the \$2400 bonus since there are no facts supporting a conclusion that she would not have completed the tour but for the act of Johnson in firing her. **(3 points)** Smith also was to have been provided with room and board for the entire term of the contract. Although no specific amount was agreed upon for these two items, Smith could point to the amount of the rent she had to pay (\$750 per month) as a way to measure the value of the housing. **(5 points)**

An answer that merely concludes that Smith was entitled to the difference between the \$750 and \$500 per month rent should not get points for that conclusion as the amount is irrelevant. Smith would have had to obtain housing in Deltatown when she returned after the full twelve-month period, and there was no guarantee that she would have been able to find housing at the lower rate; thus such damages are speculative at best. **(up to 5 points)** (Note: An answer that discusses this point and notes the speculative nature of such damages may be given up to 5 points.)

What Smith was entitled to was the benefit of the bargain – if the contract had been fully performed, she would not have had to pay for housing at all for a period of three additional months. **(5 points)**

Smith also is entitled to consequential damages for the cost of the car rental and fuel to travel from New Jersey to Deltatown, Mississippi as it was foreseeable that Smith would have to find some means of transportation to return home after Johnson terminated her. **(up to 10 points)** (Note: An answer which includes a discussion of whether there was less expensive transportation, such as an interstate bus line, and that Smith had a duty to mitigate her damages in a reasonable manner should be given the remainder of the points.)

Examinees should include a discussion of whether punitive damages are available, noting that they are not usually permitted in contract litigation. **(up to 5 points)** (Note: Answers that include a discussion of whether leaving Smith stranded in a small town in New Jersey rises to the level of tortious breach of contract, thus permitting the possible award of punitive damages, should receive the full five points.)

Finally, examinees should discuss that Smith had a duty to mitigate her damages related to wages. The facts state that Smith looked for and found work within two weeks but at only \$750 per week. They also state that she did not begin her job search for two months while she felt sorry for herself. Johnson reasonably could

assert that Smith failed to mitigate for the first two months. If Smith had mitigated, she could have been making at least \$750 per week for the full three months remaining on the twelve-month agreement. As a consequence, Smith's mitigated damages are the \$250-per-week difference between the \$1000 she would have made per week if the contract had not been breached and the \$750 per week she did make when she found a new singing job. **(10 points)**

**MISSISSIPPI BOARD OF BAR ADMISSIONS  
July 2012 Bar Examination  
CONSTITUTIONAL & CRIMINAL LAW & CRIMINAL PROCEDURE  
30 Minutes, 3 questions  
100 total points**

**Notice to BAR Examinees:** All questions in the CONSTITUTIONAL & CRIMINAL LAW & CRIMINAL PROCEDURE are independent of one another and are not interrelated or connected with one another in any manner and should thus be analyzed separately and independently.

**Question 1: (34) thirty four points**

Defendant, a convicted felon, had been in and out of the criminal justice system in the State of Mississippi almost two dozen times. He knew what it was all about. So when the police came and arrested him for indecent exposure in the instant case and the police began to mirandize him, Defendant told the arresting officer, "don't worry dude, I know what my rights are, I've been through this dozens of times, you don't need to say all that stuff!" Therefore, the arresting officer stopped giving the Defendant his Miranda warnings, only having told him, "you have the right . . . ." before stopping and never subsequently giving him any further Miranda warnings. The officer then asked Defendant several questions, including whether he had a gun. Defendant then told him that he had a "lucky gun" that he was in possession of which kept him safe and where that gun was located and it was seized by the police in Defendant's presence hidden in some tall covering grasses nearby. Defendant stated that it was indeed his "lucky gun" he "had hidden" when he saw law enforcement coming because he knew he "wasn't suppose to have a heater (gun)."

At trial for felon in possession of a firearm, Defendant objects to **A.)** the use of his statements to the police and **B.)** the admission of the gun as evidence against him. How should the court rule? Explain fully.

**Question 2: (33) thirty three points**

Defendant has recently been released from prison on earned release supervision (parole) for his good behavior and is now under the unrestricted supervision of a probation/parole officer. Defendant has been paying his fines and reporting regularly in person to his parole officer and has not been caught using drugs pursuant to his urinalysis screens. However, parole officer is curious about what Defendant is doing with his time during the day. Defendant is found at home sitting on his front porch at 2:00 pm listening to music. Parole officer pulls up in his Crown Victoria and waves to Defendant to come to the curb. Defendant complies and walks up to his parole officer who just for kicks and on a hunch reaches his hand into Defendant's shirt pocket and discovers a packet of crystal meth. Defendant is charged with possession of methamphetamine. Is the search of Defendant legal? Explain fully.

**Question #3: (33) thirty three points**

The State of AtAllCosts is proceeding with the prosecution of Defendant for the crime of child molestation. Prior to trial the police "knew" Defendant was the violator and immediately arrested him for his suspected unconscionable conduct with a minor. In their rush to judgement and in violation of his 6<sup>th</sup> Amendment right to counsel, the police obtained a full confession from Defendant admitting to the lustful acts and having been with the victim at the time alleged. Before trial, the defendant's motion to suppress the confession was granted. During the defendant's case-in-chief, the Defendant testifies on direct that he has never even met the victim and certainly never had any inappropriate sexual conduct with the victim. Is the State prohibited from cross-examining Defendant about the contents of his suppressed statement which was obtained in violation of his 6<sup>th</sup> Amendment right to counsel? Explain fully.

MISSISSIPPI BOARD OF BAR ADMISSIONS  
July 2012 Bar Examination  
CONSTITUTIONAL & CRIMINAL LAW & CRIMINAL PROCEDURE  
30 Minutes, 3 questions  
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ANALYSIS AND MODEL ANSWER

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At trial for felon in possession of a firearm, Defendant objects to **A.)** the use of his statements to the police and **B.)** the admission of the gun as evidence against him. How should the court rule? Explain fully.

**Answer to Question 1: (34) ten points**

**A.)** Defendant's statements should be suppressed. **(17) seventeen points**

**Grader's Outline:** 9 points should be awarded for the correct decision that the defendant's statement's should be suppressed. 8 points should be awarded for a correct explanation of why. See below.

**B.)** The gun should not be suppressed. **(17) seventeen points**

**Grader's Outline:** 9 points should be awarded for the correct decision that the gun should not be suppressed. 8 points should be awarded for a correct explanation of why. See below.

**AUTHORITY: *United States v. Patane*, 542 U.S. 630 (2004):**

The police arrested Patane and began to *Mirandize* him when he interrupted them stating that he knew his rights. The police discontinued giving the *Miranda* warnings and did not subsequently give them to him. The police continued to question him, and the defendant told them where his gun was, which was then seized. He was a convicted felon. The Court held that even though the statements the defendant made about the gun would be inadmissible against him, the “fruits” of the *Miranda* violation, i.e., the gun, would not have to be excluded. “The *Miranda* rule is not a code of police conduct, and police do not violate the Constitution (or even the *Miranda* rule, for that matter) by mere failure to warn. For this reason, the exclusionary rule articulated in cases such as *Wong Sun* does not apply.” *Patane*, at 636. “The Fifth Amendment of course is not concerned with nontestimonial evidence.” (Citations omitted). **See also *Chamberlin v. State***, 989 So.2d 320, 336 (2008).

**Question 2: (33) thirty three points**

Defendant has recently been released from prison on earned release supervision (parole) for his good behavior and is now under the unrestricted supervision of a probation/parole officer. Defendant has been paying his fines and reporting regularly in person to his parole officer and has not been caught using drugs pursuant to his urinalysis screens. However, parole officer is curious about what Defendant is doing with his time during the day. Defendant is found at home sitting on his front porch at 2:00 pm listening to music. Parole officer pulls up in his Crown Victoria and waves to Defendant to come to the curb. Defendant complies and walks up to his parole officer who just for kicks and on a hunch reaches his hand into Defendant’s shirt pocket and discovers a packet of crystal meth. Defendant is charged with possession of methamphetamine. Is the search of Defendant legal? Explain fully.

**Answer to Question 2: (33) thirty three points**

Yes the search is legal. Defendant is a parolee serving parole with terms and conditions that he/she shall be subject to suspicionless searches and does not have an expectation of privacy, and thus no Fourth Amendment protection from such search and seizure is afforded while he/she is a parolee.

**Grader’s Outline:** 17 points should be awarded for the correct decision that the search is legal. 16 points should be awarded for a correct explanation of why it is not a Fourth Amendment violation. See below.

**AUTHORITY: *Samson v. California*, 547 U.S. 843 (2006):**

A parolee, without reasonable suspicion or probable cause, had his shirt pocket searched wherein meth was discovered. The Court held that a parolee serving parole with terms and conditions that he/she shall be subject to suspicionless searches does not have an expectation of privacy, and thus no Fourth Amendment protection from such search and seizure is afforded while he/she is a parolee.

**Question #3: (33) thirty three points**

The State of AtAllCosts is proceeding with the prosecution of Defendant for the crime of child molestation. Prior to trial the police “knew” Defendant was the violator and immediately arrested him for his suspected unconscionable conduct with a minor. In their rush to judgement and in violation of his 6<sup>th</sup> Amendment right to counsel, the police obtained a full confession from Defendant admitting to the lustful acts and having been with the victim at the time alleged. Before trial, the defendant’s motion to suppress the confession was granted. During the defendant’s case-in-chief, the Defendant testifies on direct that he has never even met the victim and certainly never had any inappropriate sexual conduct with the victim. Is the State prohibited from cross-examining Defendant about the contents of his suppressed statement which was obtained in violation of his 6<sup>th</sup> Amendment right to counsel? Explain fully.

**Answer to Question #3:** NO; A statement to police taken in violation of the defendant's right to counsel, not admissible in the state's case-in-chief, may be used to impeach defendant's testimony.

**Grader’s Outline:** 17 points should be awarded for the correct decision that the use of the suppressed statement for impeachment only is legal. 16 points should be awarded for a correct explanation of why it is not a sixth amendment violation. See below.

**AUTHORITY:** “The question presented in this case is whether the prosecution may use a statement taken in violation of the *Jackson* prophylactic rule to impeach a defendant's false or inconsistent testimony. We hold that it may do so.” **MICHIGAN v. HARVEY**, 494 U.S. 344, 346; 110 S. Ct. 1176, 1178; 108 L.Ed. 2d 293 (1990);

“We have already decided that although statements taken in violation of only the prophylactic *Miranda* rules may not be used in the prosecution's case in chief, they are admissible to impeach conflicting testimony by the defendant. *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971); *Oregon v. Hass*, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975). The prosecution must not be allowed to build its case against a criminal defendant with evidence acquired in contravention of constitutional guarantees and their corresponding judicially created protections. But use of statements so obtained for impeachment purposes is a different matter. If a defendant exercises his right to testify on his own behalf, he assumes a reciprocal “obligation to speak truthfully and accurately,” *Harris, supra*, 401 U.S., at 225, 91 S.Ct., at 645, and we have consistently rejected arguments that would allow a defendant to “ ‘turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.’ ” *Id.*, at 224, 91 S.Ct., at 645 (quoting *Walder v. United States*, 347 U.S. 62, 65, 74 S.Ct. 354, 356, 98 L.Ed. 503 (1954)). See also *Hass, supra*, 420 U.S., at 722, 95 S.Ct., at 1220–21; *United States v. Havens*, 446 U.S. 620, 626, 100 S.Ct. 1912, 1916, 64 L.Ed.2d 559 (1980).” **MICHIGAN v. HARVEY**, 494 U.S. 344, 351; 110 S. Ct. 1176, 1180; 108 L.Ed. 2d 293 (1990).

**MISSISSIPPI BOARD OF BAR ADMISSIONS**  
**July 2012 Bar Examination**  
**EVIDENCE**  
**100 Points Total**

Sally sued her former employer for sexual harassment and retaliatory termination from employment (for having reported the harassment to her boss). Her employer has taken the position that Sally was fired for sleeping on the job. At trial Sally sought to introduce testimony by a co-worker, John, who heard her boss say one month prior to her termination, and two weeks prior to her report of sexual harassment, that Sally was the best person they had ever had in that position and that they should nominate her for a National Award given by the Company.

Sally's employer objects to the testimony on the basis that it is hearsay.

Sally's boss passed away two months after Sally was fired and was not deposed in the litigation or (physically) present at trial.

**QUESTION A - (35 points total)**

- Please analyze John's proposed testimony pursuant to Rule 801 and explain whether the statement is arguably admissible or not pursuant to this rule.
- Please explain whether it would be admitted as substantive or impeachment evidence under this Rule.
- Please state what effect, if any, declarant availability has on the admissibility of the evidence under this rule.

**QUESTION B - (15 points total)**

- Please analyze John's proposed testimony pursuant to Rule 803 and explain whether the statement is arguably admissible or not pursuant to this rule.
- Please explain whether it would be admitted as substantive or impeachment evidence under this Rule.
- Please state what effect, if any, declarant availability has on the admissibility of the evidence under this rule.

**QUESTION C - (25 points total)**

- Please analyze John's proposed testimony pursuant to Rule 804 and explain whether the statement is arguably admissible or not pursuant to this rule.
- Please explain whether it would be admitted as substantive or impeachment evidence under this Rule.
- Please state what effect, if any, declarant availability has on the admissibility of the evidence under this rule.

**QUESTION D - (25 points total)**

- Please analyze John's proposed testimony pursuant to Rule 613 and explain whether the statement is arguably admissible or not pursuant to this rule.
- Please explain whether it would be admitted as substantive or impeachment evidence under this Rule.
- Please state what effect, if any, declarant availability has on the admissibility of the evidence under this rule.

**MISSISSIPPI BOARD OF BAR ADMISSIONS  
July 2012 Bar Examination  
EVIDENCE  
100 Points Total**

**ANALYSIS AND MODEL ANSWER**

Sally sued her former employer for sexual harassment and retaliatory termination from employment (for having reported the harassment to her boss). Her employer has taken the position that Sally was fired for sleeping on the job. At trial Sally sought to introduce testimony by a co-worker, John, who heard her boss say one month prior to her termination, and two weeks prior to her report of sexual harassment, that Sally was the best person they had ever had in that position and that they should nominate her for a National Award given by the Company.

Sally's employer objects to the testimony on the basis that it is hearsay.

Sally's boss passed away two months after Sally was fired and was not deposed in the litigation or (physically) present at trial.

**QUESTION A - (35 points total):**

- Please analyze John's proposed testimony pursuant to Rule 801 and explain whether the statement is arguably admissible or not pursuant to this rule.
- Please explain whether it would be admitted as substantive or impeachment evidence under this Rule.
- Please state what effect, if any, declarant availability has on the admissibility of the evidence under this rule.

## **ANALYSIS A - (35 points total)**

### **Rule 801**

Hearsay is an out-of-court statement that is offered to prove the truth of the matter asserted therein.

Rule 801(a)(b) and (c) **(7 points)**.

Here, the proposed testimony arguably does not go to prove the truth of the matter asserted and thus, does not meet the definition of hearsay **(5 points)**.

If the trial judge deemed this to be non-hearsay because it was not offered to prove that Sally was the best employee they had ever had in that position and that her boss was going to nominate her for an award, then it could be admitted as it would not be hearsay. The statement is arguably offered—not to prove these things—but to show lack of intent to fire her prior to the report of sexual harassment. (This would also fall under Rule 803 as discussed below if the argument were made that the statement was offered for these purposes.)

It is critical that the examinee analyze this basic definition of hearsay and discuss whether the testimony goes to prove the truth of the matter asserted therein. Whether it does or not is a close question, and courts might go either way.

The important thing is that the examinee recognizes the issue and discusses its effect on the admissibility of the evidence.

If the evidence was not hearsay, it would be admitted as substantive evidence **(3 points)**. And, it is irrelevant whether or not the declarant is available or not for purposes of Rule 801 **(3 points)**.

### **Rule 801(d)(2) Admission by a Party Opponent—non-hearsay**

If the judge decided that the statement was offered to prove the truth of the matter asserted therein, then Sally's lawyer would have to try another method of getting it admitted. Rule 801(d)(2) provides another possible method.

Sally's boss' statement would likely fall into the category defined as an Admission by a Party Opponent in Rule 801(d)(2) and would be admissible. It is arguably an admission **(6 points)**. This would likely qualify as an admission as it undermines the position of Sally's employer that Sally was not considered to be a suitable employee because she slept on the job. There is no information in the question about when Sally allegedly slept on the job, but it is nonetheless contrary to the basic position assumed by the employer and would likely come in as an admission.

Sally's boss would also be an authorized declarant of the employer. "A party's own statement is the classic example of an admission. If he has a

representative capacity and the statement is offered against him in that capacity, no inquiry whether he was acting in the representative capacity in making the statement is required. It is only necessary that it “be relevant to the representative affairs.” Comment to the rule. Here, Sally’s boss’ statement was relevant to the representative affairs.

“The general principle survives that a statement by an agent authorized to speak by a party is tantamount to an admission by a party. The rule covers statements made by the agent to third persons as well as statements made by the agent to the principal. The essence of this is that a party’s own records are admissible against him even where there has been no intent to disclose the information to third persons.” Comment to the rule.

If an agent’s statements “concern[] a matter within the scope of his agency”, that statement is admissible. Comment to the Rule. Here, Sally’s boss was commenting about something within the scope of his agency. Thus, his comments should be admitted as the agent of the employer (**3 points for representative/agency discussion**).

Such admissions are deemed non-hearsay, as opposed to an exception to the hearsay rule. Rule 801(d)(2), comments (rule “classifies admissions as non-hearsay.”) (**2 points**).

This type of admission would be admissible as substantive, not merely impeachment, evidence (**3 points**).

Under Rule 801(d)(2) it is immaterial whether or not the declarant is available to testify. *Wright v. Royal Carpet Services* 29 So. 3d 116 (CA Miss 2010). So, it is irrelevant whether Sally’s boss is available for purposes of Rule 801(d)(2) (**3 points**).

### **Rule 801(d)(2) Admission by a Party Opponent—non-hearsay**

#### **QUESTION B - (15 points total)**

- Please analyze John’s proposed testimony pursuant to Rule 803 and explain whether the statement is arguably admissible or not pursuant to this rule.
- Please explain whether it would be admitted as substantive or impeachment evidence under this Rule.
- Please state what effect, if any, declarant availability has on the admissibility of the evidence under this rule.

## **ANALYSIS B - (15 points)**

### **Rule 803**

Another Rule under which Sally's boss' statement may come in is Rule 803(3), then existing Mental, Emotional, or Physical Condition. "A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health)"...is not excluded by the hearsay rule.

Here, Sally's boss' statement reveals his intent, or lack of intent to fire her very shortly before she was actually fired. Thus, it is very likely that this statement would be admitted to show "intent, plan motive or design" of Sally's boss **(9 points)**.

This rule is an exception to the hearsay rule and should the judge allow the statement in under this rule, it would be admitted as substantive evidence **(3 points)**.

The availability of the declarant is immaterial under Rule 803 **(3 points)**.

## **QUESTION C - (25 points total)**

- Please analyze John's proposed testimony pursuant to Rule 804 and explain whether the statement is arguably admissible or not pursuant to this rule.
- Please explain whether it would be admitted as substantive or impeachment evidence under this Rule.
- Please state what effect, if any, declarant availability has on the admissibility of the evidence under this rule.

## **ANALYSIS C - (25 points)**

### **Rule 804(b)(3) Statement Against Interest-exception to the hearsay rule**

Sally's boss' statement also likely qualifies as a statement against interest. Thus, his statement would be admissible under Rule 804(b)(3). This is defined as "A statement which was at that time of its making [one such as would] render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true." As Sally's employer's position is that Sally was fired for poor job performance, this statement would render this position invalid **(15 points)**.

Here, Sally's boss is unavailable pursuant to Rule 804(a)(4) because he "is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity..." *Boyd v. Magic Golf, Inc.*, 52 So. 3d 455 ¶26 (CA Miss 2011). Being unavailable is a prerequisite to admission under Rule 804 (5 points).

Sally's boss' statements would be admitted as substantive evidence under Rule 804(b)(3) (5 points).

#### **QUESTION D - (25 points total)**

- Please analyze John's proposed testimony pursuant to Rule 613 and explain whether the statement is arguably admissible or not pursuant to this rule.
- Please explain whether it would be admitted as substantive or impeachment evidence under this Rule.
- Please state what effect, if any, declarant availability has on the admissibility of the evidence under this rule.

#### **ANALYSIS D - (25 points)**

##### **Rule 613- Prior inconsistent statement-exception to the hearsay rule**

If the Court deemed the statement to be intended to prove the truth of the matter therein and subject to the hearsay prohibition, it would not be admissible for impeachment purposes as a prior inconsistent statement under Rule 613.

Before a party may impeach a witness with a prior inconsistent statement there must be an actual contradiction in fact between the testimony and the prior statement—counsel opposite must lay a proper foundation before attempting to impeach the witness. *Everett v. State*, 835 So. 2d 118 (Miss. 2003). Here, since Sally's boss was deceased, and had not testified on the stand or by deposition testimony submitted at trial that he had not said these things about Sally's job performance, the statements would not qualify as a "prior inconsistent statement" under Miss Rule Evid 613(b). (Rule 613) (15 points)

For purposes of impeaching a witness under this rule, the statement is inconsistent if under any rational theory its introduction might lead to a conclusion different from the witnesses' testimony. Sally's boss' comments would meet this criterion, since the employer's position had been that Sally was fired for poor job performance (3 points).

In order to use Rule 613 to admit a prior inconsistent statement, the witness to be impeached must have testified contrary to the evidence sought to be admitted and been subject to cross examination during trial. *Everett v. State*, 835 So. 2d 118 (Miss. 2003). Since Rule 613 only applies when a witness is under examination on the stand, thus, the witness must be present or "available" to put Rule 613 to use **(3 points)**.

Any statements admitted under this rule are admitted for impeachment purposes only, not as substantive evidence. Impeachment as to collateral matters is not permitted. Miss. Rule Evid 401, 402, 613. *Flowers v. State*, 773 So. 2d 309 appeal after new trial 842 So. 2d 531, appeal after new trial 947 So. 2d 910 **(4 points)**.

**MISSISSIPPI BOARD OF BAR ADMISSIONS**  
**July 2012 Bar Examination**  
**REAL PROPERTY**  
**100 Points Total**

Frank's parents owned 200 acres of land in Panola County, Mississippi. Desiring to dispose of all their assets prior to death, they began transferring portions of the 200 acre tract to their children. Frank, the eldest son, received 20 acres via quit claim deed dated June 30, 2010. Frank immediately mortgaged it and was unable to make payments on the note. To avoid foreclosure, he contracted with his friend, Brad, to purchase it. Brad purchased the real property and received a quit claim deed, dated July 30, 2010, from Frank.

The next day Brad inspected his new property and found that the 20 acres consisted of woodland. Upon closer inspection he found an old cabin that appeared to have been abandoned for years. Excited about the recreational potential of his property, he hired Spedy Construction Company to renovate the cabin.

In accordance with the renovation plan which called for completion by October 1, 2010, one of the Spedy's employees began repairing the heat and air unit attached to a concrete slab behind the cabin floor. While doing so, he noticed valuable copper pipes inside the unit. He placed his find in his tool box to carry home with him at the end of the day. As he was driving down the narrow road that crossed Frank's parent's remaining 180 acres, he was stopped by Frank's mother. She confronted him, told him he was trespassing and to stay off her property. The employee called his supervisor at Spedy and explained what happened, but said nothing about the copper.

Brad learned from Frank that the narrow road across the 180 acres had been used by the family since they acquired the property more than 70 years ago and it was the only road leading to the cabin. Actually, it was the only way to get to the 20 acre tract. Brad consulted with an attorney regarding the matter.

1. Identify and describe each type of easement Brad's attorney may consider in his efforts to gain access for Brad to his property via the narrow road. **(50 points)**
2. Which easement should Brad's attorney rely on? Why? **(20 points)**

3. Who has the burden of proof in this dispute? **(10 points)**
4. Who is entitled to the copper? Discuss the property rule(s) of law relied on in making your decision. **(20 points)**

**MISSISSIPPI BOARD OF BAR ADMISSIONS**  
**July 2012 Bar Examination**  
**REAL PROPERTY**  
**100 Points Total**  
**ANALYSIS AND MODEL ANSWER**

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**Question 1:** Identify and describe each type of easement Brad's attorney may consider in his efforts to gain access for Brad to his property via the narrow road. **(50 points)**

**Answer 1: (50 points)**

An easement can be created in several ways: 1. By **express agreement**, 2. By **prescription**, 3. By **implication**, or 4. By **necessity**.

Easements by express agreement are those in writing, usually in a valid **deed** signed by the grantor. There are no facts to suggest there was a written easement for the narrow road. However, Brad or his attorney should search the **property records** in **Panola County** for easements on the property.

A prescriptive easement would encompass the elements **of adverse possession**: a **10-year period** of **continuous and uninterrupted use that is hostile, open, and peaceful**. However, use does **not** have to be **exclusive**. To determine whether the 10-year period has been met, the time of adverse possession by prior owners of the dominant tract is **tacked** on to subsequent owner's time of use. Frank's family used the road for more than 70 years. However, their use would not count because the time period does not began until the one seeking adverse possession began trespassing. The first possible trespasser would have been Frank. Frank's use would have been approximately one month. It appears that Spedy's employee was confronted prior to September, 2010, the renovation completion date, therefore only a few months of possible adverse possession would have occurred. Therefore, the 10-year requirement is not met. This is not a prescriptive easement.

**Easement by implication** stems from the idea that one would not sell a portion of his/her land and at the same time cause it to be **landlocked**. Implied easements are required for **quiet enjoyment** of the land. An implied easement usually requires a showing of necessity. **An easement by necessity** arises when land is **partitioned** in such a way that leaves either portion of the property **inaccessible** except by passing over the other protion. The inaccessible portion, or the one benefiting from the easement, is referred to as the **dominant tract**. The portion used for access, or the one burdened by the easement, is the **servient tract**. **The four (4) requirements for easement by necessity** are:

- a. Common ownership and unified title for both tracts prior to the severance;
- b. Severance of title;
- c. Necessity must arise at the time of the severance; and
- d. Necessity for the easement must continue.

In the fact situation, there was common ownership by Frank's parents prior to severance. The deed to Frank was the initial severance and it caused Frank's property to be inaccessible except by crossing over His parent's property. This necessity continued when Brad purchased the property. The easement is a property right that **runs with the land**. Therefore, subsequent owners of the dominant tract, including Brad, can claim it.

**Question 2:** Which easement should Brad's attorney rely on? Why? (20 points)

**Answer 2:** (20 points)

Assuming no express easement is found, easement by **implication** and **necessity** would be the best approach for Brad's attorney. The property appears to be landlocked. All four **(4) elements** of easement by necessity are met. The property was owned by Frank's parents, therefore, there was common ownership and unified title for both tracts prior to the severance. It was severed when deeded to Frank. The use of the road was necessary to access the 20 acre tract, and that necessity continued when the property was sold to Brad. This property right **runs with the land**.

**Question 3:** Who has the burden of proof in this dispute? (10 points)

**Answer 3:** (10 points)

The one claiming the easement has the burden of proof.

**Question 4:** Who is entitled to the copper? Discuss the property rule(s) of law relied on in making your decision. (20 points)

**Answer 4:** (20 points)

A thing affixed **or permanently attached** to real property in such a way that it takes on the characteristics of real property becomes part of that real property. The copper pipes inside the heat and air unit is an intricate part of the unit. The unit is attached to the real property via **concrete** making it a fixture. **A fixture** is part of the real estate, making what **was personal property, real property**. It could be argued that the employee must turn over the copper to his employer, Spedy, under the **agency** principle. Even if it were, the **owner is Brad**. When Brad purchased the real property, he purchased the land, cabin and all fixtures, including the attached heat and air unit and copper pipes inside it.

MISSISSIPPI BOARD OF BAR ADMISSIONS  
July 2012 Bar Examination  
PROFESSIONAL CONDUCT AND LEGAL ETHICS

100 Points Total

FACTS

Attorney Betty Gaines was retained by a client for the purpose of providing financial and estate planning for the client's now deceased husband. At the time Gaines was retained, the client's husband was disabled, mentally incompetent, and otherwise incapable of handling his business and personal affairs.

Upon Gaines' advice, the client established a trust for the protection of the client's husband, to be funded primarily by life insurance that would be paid to the trust in the event of the client's death. Attorney Gaines prepared the trust document and appointed herself as trustee, serving without bond. Among her duties as trustee, Gaines had the duty and authority to pay premiums on the life insurance policy wherein the trust was named beneficiary. As premiums became due on the life insurance policy, the client issued a check made payable to the trust and delivered it to the trustee for payment of the premium in her fiduciary capacity. The reason the trust was created was based upon the motive that the life insurance proceeds would be used to take care of the husband in the event the client predeceased him. Attorney Gaines drafted the trust document in such a way that the client's objectives would be met and the client approved and signed the trust document.

After a life insurance policy was issued insuring the client's life, the client sent Gaines a check for life insurance premiums in the amount of \$1,500.00 dated December 30, 2011. On or about March 1, 2012, the client received a notice from the life insurance company that the policy had lapsed due to non-payment of premiums (*i.e.*, a lapse notice). Unbeknownst to the client, the \$1,500.00 check payable to the trust to be used for payment of life insurance premiums was negotiated by Betty Gaines as trustee, but apparently it was not used to pay life insurance premiums.

When the client called Gaines to discuss the lapse of the policy, Gaines could not find any record of paying the life insurance premium and could not recall what happened to the \$1,500.00. Gaines was of the belief that she likely deposited the check in her law firm operating account, but could not locate her bank statements to determine exactly where the check may have went. When the client pressed Gaines about what had happened, Gaines offered to refund the money to the client; however, it was too late.

At the time of the lapse of the life insurance policy, the face amount of the policy was in excess of \$500,000.00; however, the client's attempts to have the life insurance policy reinstated failed due to a change in the client's health shortly before the policy lapsed. Now that the policy has lapsed, the client finds herself ineligible for life insurance; thus, there will be no life insurance proceeds to fund the trust. Weeks later while checking her bank statements, the client located a copy of the cancelled check indicating the check had been endorsed by "Betty Gaines, Trustee," but had been deposited in Gaines' law firm operating account.

### QUESTIONS

- (1) As it pertains to her duties as trustee and the handling of the monies to be used to pay life insurance premiums, did the attorney'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 the attorney intended to use or misappropriate client funds for the attorney's own use and/or that the attorney offered to refund the \$1,500.00 to the client "take care of" any violation that may have occurred? (10 points).

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

ANALYSIS AND MODEL ANSWER

- (1) As it pertains to her duties as trustee and the handling of the monies used to pay life insurance premiums, did the attorney's actions violate The Mississippi Rules of Professional Conduct? If so, what Rule(s)? (40 points).

MODEL ANSWER TO (1):

Yes. MRPC 1.2(a), 1.15 and 8.4.

First, by not following the client's objectives as to how the monies were to be used to pay life insurance premiums, the attorney violated **Rule 1.2(a)** of the MRCP, which provides that a lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued.

As to the attorney's use of the client's money for what appears to be the attorney's own use and benefit, the attorney violated **MRPC 1.15**, which provides that a lawyer shall hold property of clients that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. "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 1.2 Scope of Representation**

- (a) A lawyer shall abide by a client's decisions concerning the objectives of the representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, a lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

**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 are two Mississippi cases with facts similar to those set forth in this question. First, as set forth on pages 37-38 the July-October 2006 edition of *The Mississippi Lawyer*, former attorney James T. Mallette was **disbarred** on July 13, 2006 by a Complaint Tribunal in Cause Number 2005-B-993 for violations **nearly identical** to those presented in this question. Likewise, 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 TO (2):**

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....<sup>1</sup>** These records must be preserved for seven years after termination of the representation<sup>2</sup>." 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

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<sup>1</sup> MRPC 1.15(a).

<sup>2</sup> 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).

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 the attorney intended to use or misappropriate client funds for the attorney's own use and/or that the attorney offered to refund the \$1,500.00 to the client "take care of" any violation that may have occurred? (10 points).**

**MODEL ANSWER TO (3):**

**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).

**END**