MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2014 BAR Examination
EVIDENCE
100 Points Total

QUESTION 1 (50 points)

You are retained in a personal injury action to represent Priscilla Plaintiff. Allegedly, Priscilla was a patron who slipped and fell on a stair case at the Utopia Nightclub, sustaining severe and disabling injuries. Priscilla states that she stepped on a step covered in water that leaked from a busted pipe inside the adjoining wall. On behalf of Priscilla, you file suit against the owner of Utopia alleging negligent maintenance of the premises. The owner denies responsibility on the basis that the manager of the Utopia Nightclub, who has leased the property from the owner under the same oral agreement for ten years, allegedly has control of the premises and responsibility for maintenance of the premises. Discovery reveals that three other individuals have slipped and fell on the same stairway within the past six months, and the owner paid the medical expenses incurred by each of the three. The owner refused to pay your client's expenses. Further, it was discovered that the owner of Utopia hired a plumber to repair the busted pipe the day after your client fell.

A. Discuss the relevancy and admissibility at trial of the previous slip-and-fall incidents and the owner's payment of medical expenses (25 points)

B. Discuss the relevancy and admissibility at trial of the fact that Defendant repaired the busted pipe? (25 points)

QUESTION 2 (50 points)

Mable Plaintiff files a federal court action against Davey Defendant and her employer, Widgets, Inc. for sexual harassment. The complaint alleges, *inter alia*, that Davy's actions were the proximate cause of Mable's alleged mental anguish and emotional distress. At Mable's deposition, Mable states that her OB/GYN physician, Dr. Luckett, had prescribed medication for a nervous stomach, which Mable testified, in her opinion, was a result of the mental anguish and emotional distress caused by Davey. Mable testified that, otherwise, she sought no medical attention. Thereafter, Davey serves a Subpoena Duces Tecum on Dr. Luckett requiring her to produce "all records in your possession pertaining to your treatment of Mable Plaintiff". Mable and Dr. Luckett move to quash the Subpoena based upon Mable's medical privilege. Contained in Mable's medical records are matters very private in nature which, in no way, reflect on Mable's mental or emotional condition.

Fully discuss the factual and legal basis in support of Mable's claim for medical privilege and Davey's entitlement to the records, if any. Your answer should include what actions the Court could take in response to the motion to quash. Also, discuss the differences, if any, between an analysis under the Mississippi Rules of Evidence and the Federal Rules of Evidence.

END OF QUESTION

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2014 BAR Examination
EVIDENCE
100 Points Total
ANALYSIS

QUESTION 1 (50 points)

You are retained in a personal injury action to represent Plaintiff. Allegedly, the Plaintiff slipped and fell on a stair case at the Utopia Nightclub, sustaining severe and disabling injuries. Plaintiff states that she stepped on a step covered in water that leaked from a busted pipe inside the adjoining wall. You file suit against the owner of Utopia alleging negligent maintenance of the premises. The owner denies responsibility on the basis that the manager of the Nightclub, who has leased the property from the owner under the same oral agreement for ten years, allegedly has control of the premises and responsibility for maintenance of the premises. Discovery reveals that five other individuals have slipped and fell on the same step within the past three months, and the owner paid the medical expenses incurred by each of the five. The owner had previously refused to pay your client's expenses. Further, it was discovered that the owner of Utopia hired a plumber to repair the busted pipe the day after your client fell.

A. Discuss the relevancy and admissibility at trial of the previous slip-and-fall incidents and the owner's payment of medical expenses (25 points)

B. Discuss the relevancy and admissibility at trial of the fact that Defendant repaired the busted pipe? (25 points)

ANALYSIS

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

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

See also, ***Carter v. State***, 450 So.2d 67 (Miss. 1984). While the prior accidents are not admissible to show that Defendant acted in conformity therewith (continuing to negligently maintain the premises), it is admissible to show Defendant's knowledge of the condition of the step and busted water pipe.

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

B. M.R.E. and F.R.E. 407 prohibits the admission of evidence of *subsequent remedial measures*, or "measures which, if taken previously, would have made the event less likely to occur," for the purpose of proving negligence or culpable conduct in connection with the subject event. However, the evidence is admissible to show ownership and/or control of the premises, or feasibility of precautionary measures, if

controverted, or for impeachment. It is important for the answer to articulate that a court may exclude evidence for one purpose but admit the same evidence for a different purpose, and instruct the jury accordingly. MRE 105. [Grader's Note: this reference may occur in responding to subsection A or B].

QUESTION 2 (50 points)

Mable Plaintiff files a federal court action against Davey Defendant and her employer, Widgets, Inc. for sexual harassment. The complaint alleges, *inter alia*, that Davy's actions were the proximate cause of Mable's alleged mental anguish and emotional distress. At Mable's deposition, Mable states that her OB/GYN physician, Dr. Luckett, had prescribed medication for a nervous stomach, which Mable testified, in her opinion, was a result of the mental anguish and emotional distress caused by Davey. Mable testified that, otherwise, she sought no medical attention. Thereafter, Davey serves a Subpoena Duces Tecum on Dr. Luckett requiring her to produce "all records in your possession pertaining to your treatment of Mable Plaintiff". Mable and Dr. Luckett move to quash the Subpoena based upon Mable's medical privilege. Contained in Mable's medical records are matters very private in nature which, in no way, reflect on Mable's mental or emotional condition.

Fully discuss the factual and legal basis in support of Mable's claim for medical privilege and Davey's entitlement to the records, if any. (50 points) Your answer should include what actions the Court could take in response to the motion to quash.

ANALYSIS

Rule 501, F.R.E., provides that, unless otherwise required by the United States Constitution, Acts of Congress or Supreme Court rules, the privilege of a witness in a civil action shall be governed in accordance with State Law. Rule 503, M.R.E. establishes a Physician and Psychotherapist-Patient Privilege. Rule 503 (f) provides:

> "Any party to an action or proceeding subject to these rules who by his or her pleadings places in issue any aspect of his or her physical, mental or emotional condition thereby and to that extent only waives the privilege otherwise recognized by this rule. This exception does not authorize ex parte contact by the opposing party." (Emphasis Supplied).

The comment to Rule 503 provides, in pertinent part:

> "With respect to any aspect of the party's physical, mental or emotional condition not put in issue of his or her pleadings, the privilege remains in full force and effect."

Mable's claim of privilege is based upon the fact that the subpoena is overbroad and seeks to discover medical records regarding aspects of Mable's physical condition not placed in issue by her pleadings. Therefore, the privilege is not waived as to matters not touching on Mable's mental and emotional condition. Importantly, "the privilege may be claimed by the patient..." or the person who was the physician at the time. Hence, Dr. Luckett can move to quash the subpoena duces tecum as well as Mable.

Davey will argue that a person's physical ailments or illnesses can have an adverse effect on one's mental or emotional condition. Because Mable's pleadings allege that she suffered emotional distress and mental anguish as a result of Davey's actions, Davey is entitled to discover aspects of Mable's physical condition which might have caused or contributed to the alleged mental anguish and emotional distress.

In response to a timely motion to quash, the Court could request production of the records for *in camera* review. Such a review would allow the Court to pre-determine whether the records should be produced in their entirety or with redactions. Hence, Mable's privilege remains in effect, unless the Court otherwise finds specific relevancy of the records to the claims. Alternatively, the Court could order production of the records and then later determine admissibility via motion *in limine* before trial or *ore tenus* evidentiary motion at trial.

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2014 BAR Examination
CONTRACTS
100 Points Total

FACTS: Ken Carnut purchased a two year old used car from Thrifty Automotive Co. (Thrifty). It had 20,000 miles on the odometer at the time of the purchase. The bill of sale Carnut signed included the following:

THIS CAR IS SOLD AS IS. NO EXPRESS OR IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR OF ANY OTHER KIND ARE PROVIDED. NO INCIDENTAL OR CONSEQUENTIAL DAMAGES SHALL BE RECOVERABLE.

As Carnut left the car lot for the first time, he noticed the automatic seat warmers did not work. He immediately returned to the dealership which repaired this problem and returned the car to Carnut the following day. Unfortunately, this was just the beginning for Carnut who discovered numerous issues with the car and had to return it to the dealership multiple times, sometimes having to leave it overnight. While the repairs were made each time, Carnut was presented a bill for the repairs and continuously reminded of the disclaimer on the Bill of Sale.

Carnut has had enough and has approached you asking whether he (Carnut) has any rights against Thrifty.

QUESTION: What, if any, claims for breach of warranty/ies might Carnut have against Thrifty Automotive. Explain the basis for your answer. Your analysis should not discuss any claims related to damages. **(100 points)**

END OF QUESTION

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2014 BAR Examination
CONTRACTS
100 Points Total

ANALYSIS

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Carnut has had enough and has approached you asking whether he (Carnut) has any rights against Thrifty.

QUESTION: What, if any, claims for breach of warranty/ies might Carnut have against Thrifty Automotive. Explain the basis for your answer. Your analysis should not discuss any claims related to damages.

Initial Analysis 50 Points

Under Miss. Code Ann. § 75-2-315.1 (Supp. 1998), the seller of consumer goods which are motor vehicles can exclude the implied warranties of merchantability and fitness for a particular purpose but only if the vehicle is (1) required to be titled under state law; (2) over six model years old or has been driven more than 75,000 miles; (3) if at the time of

sale the seller gives the purchaser notice of the inapplicability of the warranties "on a form prescribed by the State Attorney General"; (4) the exclusion is in writing; (5) mentions merchantability and fitness; (6) is conspicuous; (7) is separately acknowledged by the signature of the buyer.

Since the facts show that 2, 3, and 7 are not clearly met, Thrifty cannot disclaim the warranty of implied merchantability. Under that claim Carnut has to show that Thrifty Automotive is a merchant with respect to goods of the kind sold which is clearly apparent. Carnut also must show that the car was not fit for ordinary purposes. See Miss. Code Ann. § 75-2-314 (Supp. 1998). The examinee should discuss that the car had to be returned to Thrifty on numerous occasions over the next year and that at least some of those repairs required the car to be kept overnight. The facts do not reflect the number, type or cost of the repairs; therefore, the examinee cannot reach a definite conclusion that a viable claim for breach of the implied warranty of merchantability exists.

25 Points

The examinee also should note that the facts do not support a claim for breach of the implied warranty of fitness for a particular purpose. See Miss. Code Ann. § 75-2-315 (Supp. 1998), under which Carnut must show that Thrifty had reason to know the particular purpose for which the car was purchased and that Carnut was relying on Thrifty's skill or judgment to select or furnish a suitable car for that purpose.

25 Points

Finally, the examinee should note that while Thrifty could have provided an express warranty as provided in Miss. Code Ann. § 75-2-313 (1972), it also could disclaim that warranty as it was not a manufacturer. See Miss Code Ann § 75-2-315.1 (Supp. 1998). The quoted disclaimer was not sufficient to disclaim the implied warranties discussed above in this analysis, but it was sufficient to disclaim any express warranty since no facts reflect that Thrifty was the manufacturer of the car, nor are there facts regarding whether any manufacturer's warranty has or has not expired.

Discussion of cover, rejection of goods, or other concepts relevant to damages should be given no points since the question does not ask about damages.

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2014 Bar Examination
CONSTITUTIONAL LAW, CRIMINAL LAW & CRIMINAL PROCEDURE
30 Minutes, 3 questions, 100 total points

Notice to BAR Examinees: All questions are independent of each other and should be analyzed separately and independently.

Question #1: (33) Thirty-three points

Defendant has been charged with kidnaping. During the entire course of events, the abductor wore a hood upon his head disguising all facial features. However, the abductor was Caucasian wearing a tank top shirt leaving the skin of his arms exposed completely. The victim can not identify her abductor by facial features but is absolutely certain that the abductor was Caucasian with a tattoo on his right forearm of the "Grim Reaper." During the State's case-in-chief and the testimony of Victim, the district attorney asks the Defendant to stand and take off his sportcoat and roll up his long sleeve shirt in the presence of the jury to expose the identical tattoo on his right arm of the "Grim Reaper." The Defendant objects to exposing his forearm. Should the trial judge require the defendant to expose his right forearm revealing the tattoo? Yes or No? Fully explain your answer.

Question 2: (35) Thirty-five points

Roommate A and Roommate B share a mobile home trailer in the State of Mississippi. Each has their own bedroom at opposite ends of the trailer and share a kitchen and common area in between their respective bedrooms. Police on routine patrol ride through the trailer park and see both Roommate A and B outside their trailer washing their cars. The police stop and notice that Roommate B's car has a lot of stickers on it advocating the legalization of marihuana. Therefore, on a hunch, the officers ask both Roommates if it's okay to just look around the inside of their trailer. Roommate A verbally gives the police permission to go inside the trailer. However, Roommate B unequivocally tells the police "I'm sorry but no way, no how, never may you search the inside of our trailer and finally, go away, please." Nevertheless, since Roommate A gave permission, the officers entered the trailer, smelled marihuana and found sitting in the open on the common area table a

smoldering marihuana cigarette, and an open backpack in plain view belonging to Roommate B that showed in plain view marihuana and digital scales. The backpack had Roommate B's name written on it in plain view too. Roommate B is then arrested. Search incident to the arrest, the police find over 30 grams of marihuana in the shorts he was actually wearing at the time of arrest.

Q: Is the search of the trailer and person of Roommate B constitutionally permissible? Yes or No ? Explain fully.

Question 3: (32) Thirty-two points

There are (2) two devices in which someone in Mississippi may be formally charged with a felony crime. Name those (2) two devices. Fully explain each.

END OF QUESTION

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2014 Bar Examination
CONSTITUTIONAL LAW, CRIMINAL LAW & CRIMINAL PROCEDURE
30 Minutes, 3 questions, 100 total points
ANALYSIS

Notice to BAR Examinees: All questions are independent of each other and should be analyzed separately and independently.

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Defendant has been charged with kidnaping. During the entire course of events, the abductor wore a hood upon his head disguising all facial features. However, the abductor was Caucasian wearing a tank top shirt leaving the skin of his arms exposed completely. The victim can not identify her abductor by facial features but is absolutely certain that the abductor was Caucasian with a tattoo on his right forearm of the "Grim Reaper." During the State's case-in-chief and the testimony of Victim, the district attorney asks the Defendant to stand and take off his sportcoat and roll up his long sleeve shirt in the presence of the jury to expose the identical tattoo on his right arm of the "Grim Reaper." The Defendant objects to exposing his forearm. Should the trial judge require the defendant to expose his right forearm revealing the tattoo? Yes or No ? Fully explain your answer.

Model Answer for Question #1: The trial judge will lawfully require the defendant to show his tattoo to the Jury. (17) seventeen points

Model Explanation: The Fifth Amendment privilege against self-incrimination protects an accused from being compelled to testify against himself, that is, to provide evidence of a testimonial or communicative nature, but does not extend to the securing of real or physical evidence. Therefore, forcing a defendant to show his tattoos as part of in-court identification proceedings does not violate his Fifth Amendment right not to incriminate himself. A tattoo is a physical characteristic of the body and is not testimonial or communicative in nature. (16) sixteen points [(8) eight points for identification of the 5th Amendment and (8) eight points for an explanation of testimonial versus non-testimonial]

Authority: ***Strohm v. State***, 845 So.2d 691, 698; (COA 2003); ***Burns v. State,*** 729 So.2d 203, 216 (MScT 1998); ***Gilbert v. California,*** 388 U.S. 263, 266-267 (1967); ***U.S. v. Wade,*** 388 U.S. 218, 222-223 (1967)

Question 2: (35) Thirty-five points

Roommate A and Roommate B share a mobile home trailer in the State of Mississippi. Each has their own bedroom at opposite ends of the trailer and share a kitchen and common area in between their respective bedrooms. Police on routine patrol ride through the trailer park and see both Roommate A and B outside their trailer washing their cars. The police stop and notice that Roommate B's car has a lot of stickers on it advocating the legalization of marihuana. Therefore, on a hunch, the officers ask both Roommates if it's okay to just look around the inside of their trailer. Roommate A verbally gives the police permission to go inside the trailer. However, Roommate B unequivocally tells the police "I'm sorry but no way, no how, never may you search the inside of our trailer and finally, go away, please." Nevertheless, since Roommate A gave permission, the officers entered the trailer, smelled marihuana and found sitting in the open on the common area table a smoldering marihuana cigarette, and an open backpack in plain view belonging to Roommate B that showed in plain view marihuana and digital scales. The backpack had Roommate B's name written on it in plain view too. Roommate B is then arrested. Search incident to the arrest, the police find over 30 grams of marihuana in the shorts he was actually wearing at the time of arrest.

Q: Is the search of the trailer and person of Roommate B constitutionally permissible? Yes or No ? Explain fully.

Model Answer for Question 2: NO. The search of the trailer **and** the person of Roommate B is NOT constitutionally permissible.
Total (16) sixteen points [(8) eight points regarding the trailer and (8) eight points regarding the person of Roommate B]

Model Explanation: The Court would hold this to be a Fourth Amendment violation search of the trailer and of Roommate B's person. A present and objecting co-occupant of a premise can prevent the warrantless entry by police acting only upon consent and without probable cause, obtained from the other present consenting occupant.

Total (19) sixteen points: [(5) five points for identification of the 4th Amendment being implicated; (3) three points for identification of the "present" "objecting" "non-consenting" elements; (3) three points for explaining what is and is not required to obtain a valid consent from someone. i.e. A) knowingly, B) voluntarily and C) intelligently; (8) eight points for explaining that because the search of the trailer was illegal, the arrest and search of the person and seizure of the marihuana in his shorts was also illegal as Fruit of the Poisonous Tree.
Authority: ***Georgia* v. *Randolph,*** 547 U.S. 103, 122-123 (2006).

Question 3: (32) Thirty-two points

There are (2) two devices in which someone in Mississippi may be formally charged with a felony crime. Name those (2) two devices. Fully explain each.

Model Answer:

#1: an INDICTMENT.

#2: a "BILL OF INFORMATION"/"PETITION TO PROCEED ON INFORMATION"/"WAIVER OF GRAND JURY PRESENTMENT"

Note: Any one or a combination of all or any three documents as one will receive the eight points

(16) sixteen points total [(8) eight points for each].

Model Explanation: (16) sixteen points total

First; Under Article 3, Section 27 of the Mississippi Constitution, an indictment returned by a lawfully empaneled grand jury is one way a person can be required to stand trial for a felony. In order for an indictment to be handed down, at least 15 of 20-25 empaneled grand jurors must be present and at least 12 grand jurors must vote that there is probable cause, more likely than not, that a felony crime has occurred and that there is probable cause, more likely than not, that the accused is the one responsible and should be required to stand trial before a petit jury. *See* Uniform Circuit and County Court Rules 7.02 & 7.03. (8) eight points

Second; a "BILL OF INFORMATION"/"PETITION TO PROCEED ON INFORMATION"/"WAIVER OF GRAND JURY PRESENTMENT" may be utilized to allow a person to stand accused and proceed on a felony crime. So long as a defendant is **A)** represented by counsel and the defendant personally comes before the court via a **B)** sworn statement waiving their right to a grand jury presentment indictment and all other applicable constitutional rights both state and federal. Miss. Const. Art. 3, § 27. (8) eight points [(4) four points for **A** and (4) four points for **B**.]

Authority:

The Constitution of the State of Mississippi

Article 3. Bill of Rights Section 27. Proceeding by indictment or information.

No person shall, for any indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or the military when in actual service, or by leave of the court for misdemeanor in office or where a defendant represented by counsel by sworn statement waives indictment; but the legislature, in cases not punishable by death or by imprisonment in the penitentiary, may dispense with the inquest of the grand jury, and may authorize prosecutions before justice court judges, or such other inferior court or courts as may be established, and the proceedings in such cases shall be regulated by law.

MSE #4

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2014 BAR Examination
PRACTICE & PROCEDURE OF MISSISSIPPI COURTS
100 Points Total

Allen Allenby, a Mississippi resident, decides to sue Bill Brown, a Tennessee resident, and Cecil Cook, a Mississippi resident, in the state circuit courts of Mississippi for the tort of assault. Bill Brown and Cecil Cook are competent adults.

Allen Allenby files his lawsuit in Hinds County, MS, one day before the one-year statute of limitations is to expire. While he is filing the Complaint, the clerk asks if he wants to have the summons issued. He says no, he is in a hurry and will come back next week to have it issued.

The next week, Allenby returns and has the summons issued. He serves Bill Brown in Tennessee and Cecil Cook in Mississippi the following week.

Questions:

(1) Will Allen Allenby's lawsuit be precluded by the statute of limitations because he did not have the summons issued until after the statute of limitations ran? **(33 points)**

(2) Discuss the methods one may use in Mississippi to serve an in-state defendant. **(33 points)**

(3) Discuss the methods one may use in Mississippi to serve an out-of-state defendant. **(34 points)**

END OF QUESTION

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2014 BAR Examination
PRACTICE & PROCEDURE OF MISSISSIPPI COURTS
100 Points Total

ANALYSIS

Part 1: 33 points

The statute is tolled when the complaint is filed, regardless of whether the summons was issued. Civil actions are commenced by the filing of a complaint with the court pursuant to Miss Rule Civ Pro 3(a). **(20 points)**

As long as service is made within 120 days from the date of filing, the action will be deemed timely filed. **(10 points)**

Rule 4(h) allows 120 days to obtain service of process on a defendant after the filing of the lawsuit pursuant to Rule 3(a). Specifically, Rule 4(h) provides as follows:
If a 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. *Erby v. Cox*, 654 So. 2d 503, 504-05 (Miss. 1995) **(3 points)**

Part 2: 33 points

Service of Process is governed by Miss. Rule Civ. P. 4.
Service on an in-state defendant such as Cecil Cook may be made as follows:

(1) By process server or any person not a party not less than 18 years old. If it cannot be made to him personally or to a duly appointed agent, by leaving a copy of the summons and complaint at the defendant's usual place of abode with the defendant's spouse or some other person in the defendant's family over the age of sixteen who is willing to accept service. The summons and complaint must then be mailed by first class mail, postage prepaid, to the person to be served at the place where the summons and complaint were left. Service is deemed complete on the tenth day after such mailing. (Miss Rule Civ P 4(c) and 4(d)(1)(A) and (B). **(8 points)**.

(2) By the Sheriff in the county in which the defendant resides or is found by delivering summons to defendant personally or to an agent authorized by appointment or by law to receive service; or

If it cannot be made to him personally or to a duly appointed agent, by leaving a copy of the summons and complaint at the defendant's usual place of abode with the defendant's spouse or some other person in the defendant's family over the age of sixteen who is willing to accept service. The summons and complaint must then be mailed by first class mail, postage prepaid, to the person to be served at the place where the summons and complaint were left. Service is deemed complete on the tenth day after such mailing. (Miss Rule Civ P 4(c) and 4(d)(1)(A) and (B). **(8 points)**

(3) By Mail (first class, postage prepaid) to the person to be served, with two copies of a notice and acknowledgement, postage prepaid, addressed to the sender. If no acknowledgement is received within twenty days, another form of approved service can be used. If defendant does not send back the acknowledgment and cannot show good cause for not doing so, the defendant must then pay the costs of personal service. The notice and acknowledgement should be executed under oath or affirmation. **(8 points)**

(4) By Publication. An in-state defendant can be served by publication if it is sworn that after diligent inquiry no address can be obtained. Miss Rule Civ P 4(c)(4)(A). Such publication shall be made once in each week during three consecutive weeks in a public newspaper of the county in which the complaint or petition is pending if there is one. Where there is no such newspaper, the notice shall be posted on the courthouse door and published in an adjoining county or at the seat of the government of the state. Upon completion of publication, proof of publication shall be filed in the papers with the clerk. The defendant has 30 days after the first publication to answer. Civ P 4(c)(4)(B). **(9 points)**

Part 3: 34 points

Service on an out-of-state defendant such as Bill Brown may be made under Rule 4 as follows:

(1) By publication as noted in part 2 (4), above; or **(16 points)**
(2) By Certified Mail, return receipt requested. **(15 points)**. Where the defendant is a natural person, the envelope containing the summons and complaint shall be marked "restricted delivery." Service by this method shall be deemed complete as of the date of delivery as evidenced by the return receipt or by the returned envelope marked "refused." **(3 points)**

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2014 BAR Examination
DOMESTIC RELATIONS
100 Points Total

The glee club was the most exciting part of high school for Heath and Serena. They both played musical instruments and sang. After high school they married and formed a musical group, "Heat." They traveled weekly to perform at various venues. After several years together Heath and Serena decided to start a family. When their child, Chad, was born a year later, Heath informed Serena that she should quit the group and remain home with their child. She reluctantly complied, but enjoyed motherhood. Thereafter, Heat became very successful because their songs gained commerical notority and climbed the charts.

While home with Chad, Serena's niece, Amy, came to visit. Serena learned that Amy had run away from home because her mother had become addicted to drugs and could no longer care for her. Amy's father and mother were never married and Amy never knew her father. For the prior two years, Amy had been living with her grandparents, but wanted to move in with her aunt Serena. Serena discussed the situation with Heath and they decided to adopt Amy. Amy's grandparents signed the adoption petition and the Chancellor granted the adoption.

Shortly after the adoption occurred, Serena learned that Heath had been unfaithful to her. He was having an affair with one of the group members from the day she left. When confronted, Heath immediately agreed to a divorce, but stated that Serena was not entitled to any of his money, and that he would only pay child support for Chad. He then stated that he would contact Amy's natural father and have him set aside the adoption. Serena insisted that she receive child support for both children, and alimony.

Discuss who would likely succeed on the issues of child support and alimony. Include in your discussion

a. the implications of Amy's adoption **(10 points)**

b. the challenges that Amy's natural father may make to the adoption **(50 points)**

c. factors considered in determining alimony **(40 points)**

END OF QUESTION

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2014 BAR Examination
DOMESTIC RELATIONS
100 Points Total
ANALYSIS

1. An adopting parent has the same obligation to an adopted child as to a child born into thefamily. Therefore, if the adoption is legal, Heath must pay child support for Amy as well as Chad. **(10 Points)**

2. A petition for adoption must include as parties the child's parents, unless the parents' rights have been terminated. Miss. 93-17-7(1)(2004) The facts do not state that the mothers rights were terminated (10 Points) However, because the mother was on drugs and unable to care for Amy, the chancellor could have terminated her parental rigths in the adoption proceedings. To do so, the mother would have to be made a party to the proceedings by service of process or joinder. The facts do not indicate that she was served or made a party to the proceedings. If the mother had been made a party and contested the adoption, the petitioners would have to present clear and convincing proof that the she abandoned or deserted the child or is mentally or morally or otherwise unfit, and that the adoption is in the best interest of the child. Miss. Code Ann. 93-17-7(1)(2004). A guardian ad litem would likely be appointed for the child. **(20 Points)**

Mississippi law states that an unmarried father may not object to adoption unless, within thirty days after the child's birth, he has demonstrated "a full commitment to the responsibilities of parenthood. The facts state that Amy never knew her natural father. This indicates that he never established a relationship with her and therefore would not require notification. Miss. Code Ann. 93-17-5(3)(2004) **(10 Points)**

If Amy was over the age of 14, she should have joined in the petition or been served. If she was under 14 years of age she should have been joined through a next best friend. The facts do not indicate that Amy was joined in the petition. Therefore, the adoption could be challenged on this issue. Miss. Code Ann. 93-17-5(4)(2004) **(10 Points)**

An action to set aside an adoption must be brought within six months of the final decree. After six months it may be challenged only on the grounds of subject matter or personal jurisdiction or failure to proceed under the adoption statute. Miss. Code Ann. 93-17-17 (2004). **(10 Points)**

It appears that the adoption decree may be challenged on jurisdictional grounds because the mother nor the child were joined in the petition. The court did not have personal jurisdiction over them.

3. Whether to award alimony and the amount is in the descretion of the Chancellor. The factors that must be considered by the Chancellor in awarding alimony are as follows:

1. The income and expenses of the parties: favors Serena because she has no income and is resposible for the household expenses while Heath has substantial income.
2. The health and earning capacitites of the parties: neutral
3. The needs of each party: Serena would have a greater need because she is not working and has no other source of income
4. Obligations and assets of each party
5. Length of the marriage: favors Serena because they married shortly after graduating high school.
6. The presence or absence of minor children in the home: favors Serena because she has custody of the two children
7. Age of the parties: neutral because that are the same age
8. The standard of living of the parties both during the marriage and at the time of the support determination: high standard of living during marriage. Serena should be allowed to maintain her standard of living with alimony
9. Tax consequences of the spousal support order: Alimony is taxable to Serena and deductible by Heath
10. Fault or misconduct: favors Serena because Heath was unfaithful therefore destroying the marriage
11. Wastful dissipation of assets by eithr party: implication of this by Heath because of his unfaithfulness
12. Any other factor deemed by the court to be just and equitable in connection with the setting of spousal support: Serena may be entitled to a part of the royalties on the songs since she helped start the group and participated in writing songs. If so, she would receive property settlement which may reduce or eliminate alimony. Otherwise, alimony would certainly be appropriate because she certainly provided support and inspiration to her husband, leading to his success.

Armstrong v. Armstrong, 618 So.2d 1278, 1280 (Miss. 1993)
(4 Points each for a maximum of 40 points)

MSE # 6

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2014 Bar Examination
LEGAL ETHICS AND PROFESSIONAL CONDUCT
100 Points Total

FACTS

"I'm about to be dumped by my lawyer and there is a pre-trial hearing scheduled for my case next week," your prospective new client explains. "My lawyer was upset that I did not accept the last settlement offer, so she is going to start billing me by the hour effective immediately. She says she needs $10,000 to prepare for trial, or she's going to withdraw from my case!"

"But you had a contingency fee agreement when you hired her, right?" you ask.

"Well, we agreed to a contingency fee, but nothing in writing. She said we could complete the paperwork once my case concluded. Even though nothing is signed, we agreed on her receiving thirty-three percent (33%) of any recovery, and me also reimbursing any expenses after her contingent fee is calculated. She knows I don't have the cash to pay any of that up front - that was the whole point!"

"Here's what I think," your prospective new client says as she finishes her story. "She thought I'd take that measly settlement offer and she'd make a quick buck. She was wrong. Now she is completely unprepared for trial and needs an excuse to get out."

In evaluating whether or not to accept representation of this prospective new client and/or inform her as to what rules of professional conduct say about attorneys fees and contingency fee agreements, answer the questions below in accordance with the Mississippi Rules of Professional Conduct and/or the ABA Model Rules of Professional Conduct (collectively referenced as the "MRPC").

QUESTIONS

(1) What rule addresses attorney fees under the MRCP? (5 points)

(2) How should attorney fees pursuant to this rule be determined, especially the factors addressing whether or not a fee is reasonable? (40 points)

(3) Assume that the case described above is a personal injury case, wherein the attorney represents the plaintiff. Assuming that the contingency fee is NOT in writing, will the contingency fee be unenforceable? (20 points)

(4) Assume that the case described above is a domestic relations matter (divorce, alimony or support, marital property settlement, etc.) wherein the attorney represents the plaintiff. Is a contingency fee permissible? (15 points)

(5) Assuming that application of a contingency fee is permissible based upon these facts, can the attorney's fee be changed or modified from contingency fee to a "flat rate" [*e.g.,* hourly rate or lump fee payment] while the case is in midstream? If so, what circumstances must be present for any fee change to be permissible pursuant to the MRCP? (20 points)

END OF QUESTION

MSE # 6

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2014 Bar Examination
LEGAL ETHICS AND PROFESSIONAL CONDUCT
100 Points Total

ANALYSIS AND MODEL ANSWER

(1) What applicable rule addresses attorney fees under the MRPC? (5 points)

MODEL ANSWER TO (1):

MRPC 1.5 – Fees.

(2) How should attorney fees pursuant to this rule be determined, especially the factors addressing whether or not a fee is reasonable? (40 points)

MODEL ANSWER TO (2):

Under MRPC 1.5(a), a "lawyer's fee shall be reasonable." The rule lists eight (8) factors to be used in determining reasonableness. These factors are not exclusive, as the rule is drafted to provide that these factors are included when determining reasonableness.

The eight (8) factors listed in MRPC 1.5(a) are:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment of the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(3) Assume that the case described above is a personal injury case, wherein the attorney represents the plaintiff. Assuming that the contingency fee is NOT in writing, will the contingency fee be unenforceable? (20 points)

MODEL ANSWER TO (3):

Although it would be considered unprofessional and unethical for the contingency fee agreement not to be in writing, the answer is NO, assuming that the attorney can prove by clear and convincing evidence that she fully disclosed all of the terms of the agreement to her client, that it was fair and reasonable, and above all it, was made in good faith.

Naturally, the requirements above are easier evidenced if they were in writing. "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. **Other than for contingent fee agreements governed by Rule 1.5(c), there is no general mandate that fee agreements be in writing.**" §22:4 – Types of fee arrangements; fee suitability. Professional Responsibility for Mississippi Lawyers, Jeffrey Jackson and Donald Campbell, (MLI Press 2010)(emphasis added).

MRPC 1.5(c) states:

> A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter 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 recovery, 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 statement stating the outcome of the matter and, if there is recovery, showing the remittance to the client and the method of its determination.

According to Section 22:8 – Rules for contingent fees; basic writing requirement from *Jackson & Campbell's Professional Responsibility for Mississippi Lawyers* (MLI Press 2010),

> Rule 1.5(c) established special procedural rules for contingent fees, which are fees contingent on the outcome of the matter. The rule contains three requirements. First, there must be a writing. Second, the writing must have specific content. Third, the lawyer must provide a written statement of the outcome, and in cases of recovery, an accounting.
>
> **The professionalism requirement for a writing in contingent fee cases has not prevented the enforcement of a contingent fee that is not in writing. *See Lowrey v. Will of Smith*, 543 So.2d 1155 (Miss. 1989). A lawyer's unprofessional failure under the MRPC to supply a writing does not control whether the lawyer is still entitled to a contingent fee under the oral agreement in fact. *Id.* Further, the mere fact an attorney does not produce a writing as required under Rule 1.5(c) does not mean the fee is *per se* unreasonable under Rule 1.5(a). *See Terrell v. Miss. Bar*, 635 So.2d 1377 (Miss. 1994).**
>
> In *Lowrey v. Will of Smith*, the Mississippi Supreme Court allowed an attorney to recover a contingent fee noting to do otherwise would be "unduly harsh" to the lawyer. *Id.* However, the supreme court found that if lawyers seek to recover under contingent fee agreements *without a writing* required by Rule 1.5(c), the lawyer must show "by clear and convincing evidence that he fully disclosed all of the terms of the agreement to his client, that it was fair and reasonable, and above all it was made in good faith." *Id.* While thus enforcing a contract that did not comply with the professionalism rules, the court imposed heightened substantive and procedural burdens on counsel. On the procedural side, the lawyer must meet the heightened evidentiary burden of proving clearly and convincingly that all terms were fully disclosed to the client. On the substantive side, the lawyer must clearly demonstrate the fairness of the transaction. (These substantive requirements of transactional fairness are required under Rule 1.8(a) when a lawyer enters into a business transaction with the client. The *Lowrey* opinion applies those requirements to fee agreements that do not otherwise comply with Rule 1.5(c)).
>
> (emphasis supplied).

(4) Assume that the case described above is a domestic relations matter (divorce, alimony or support, marital property settlement, etc.) wherein the attorney represents the plaintiff. Is a contingency fee permissible? (15 points)

MODEL ANSWER TO (4):

No. A contingency fee here would be prohibited.

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.

MRPC 1.5(d)(1) states:

> 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.

That said, paragraph (d)(1) does not prohibit a contingent fee agreement for the collection of past due alimony or child support. *See MSB Ethics Opinion No. 88.*

(5) Assuming that application of a contingency fee is permissible based upon these facts, can the attorney's fee be changed or modified from a contingency fee to a "flat rate" [*e.g.*, hourly rate or lump fee payment] while the case is in midstream? If so, what circumstances must be present for any fee change to be permitted pursuant to the MRPC? (20 points)

MODEL ANSWER TO (5):

The fee change must be communicated to the client, preferably in writing, and the change must be reasonable under the circumstances at the time of the modification. Posing a fee change on the eve of trial or under threat of withdrawal however, is NOT reasonable.

Whatever the reason, it is not easy for a lawyer to change the fee agreement in midstream, particularly when the proposed change will result in higher compensation to the lawyer.

The MRPC provides little guidance for these situations. MRPC 1.5(b) only requires that any changes in "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." Moreover, "Assuming fee reasonableness,

lawyers and clients are free to agree to fees that combine hourly, flat fee and/or contingent elements." §22:3 – Types of fee arrangements; fee suitability. Professional Responsibility for Mississippi Lawyers, Jeffrey Jackson and Donald Campbell, (MLI Press 2010).

The MRPC does allow modification of any existing fee agreement; however, the change must be "reasonable under the circumstances at the time of the modification." *See American Bar Association Form Advisory Opinion 11-458, Aug. 4, 2011.* Usually there must be a change in circumstances that was not anticipated at the time of the original fee agreement to justify a modification that benefits the lawyer. Thus, it is permissible for an attorney to raise their rates, assuming they have received the client's informed consent to the change in advance. On the other hand, proposing a fee change on the eve of trial or under threat of withdrawal is not reasonable, and disciplinary authorities will look with suspicion upon either practice.

END