MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2016 BAR Examination
EVIDENCE
100 Points Total

QUESTION 1.1 (50 Points Total)

Hearsay is a fundamental evidentiary concept. While the application of the hearsay rules, M.R.E. 801/802/803, are sometimes subject to a detailed analysis based on specific facts, this question seeks to test your understanding of the core concepts. Therefore, please answer the following questions and explain your answers fully.

1.1.1. What is hearsay, and is it admissible? (10 Points)

1.1.2. Please state the types of "statements" that are governed by the hearsay definitions. (15 Points)

1.1.3. Some 25 Hearsay exceptions exist. Please list five such exceptions and define them. (Listing of more than five hearsay exceptions will not result in increased points.) (25 points).

QUESTION 1.2 (50 Points Total)

Hilda Plaintiff files a federal court action against her supervisor Harold Defendant and his employer, Widgets, Inc. for sexual harassment and discrimination. The complaint alleges, *inter alia*, that Harold's actions were the proximate cause of Hilda's alleged mental anguish and emotional distress. At Hilda's deposition, Hilda states that her OB/GYN physician, Dr. Luckett, had prescribed medications for a nervous stomach and anxiety, which Hilda testified, in her opinion, were the result of the mental anguish and

emotional distress caused by Harold. Hilda testified that, otherwise, she sought no medical attention.

Thereafter, Harold and Widget, Inc. serve a Subpoena Duces Tecum (SDT) on Dr. Luckett requiring her to produce "Any and all records in your possession pertaining to your treatment of Hilda Plaintiff". Hilda and/or Dr. Luckett intend to move the Court to quash the SDT based upon Hilda's medical privilege. Contained in Hilda's medical records are matters very private in nature which, in no way, reflect on Hilda's mental or emotional condition.

Based upon this scenario and the MRE, which govern privilege in a federal action, please answer the following:

1.2.1. What is the General Rule of Privilege? (10 Points)

1.2.2. May Dr. Luckett claim the Privilege in these circumstances? (10 Points)

1.2.3. Please state whether Harold and Widgets, Inc. are entitled to Dr. Luckett's records. Explain your position. (15 Points)

1.2.4. Please state the best course of action for the Court to take on the motion to quash. (You may assume the motion is properly filed.) (15 Points)

END

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2016 BAR Examination
EVIDENCE
100 Points Total

ANALYSIS AND MODEL ANSWER

QUESTION 1.1 (50 Points Total)

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ANALYSIS FOR QUESTION 1.1 (50 Points Total)

1.1.1. What is hearsay, and is it admissible? (10 Points)

1.1.1.(a) Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. MRE 801 (c). (**7.5 Points**).

1.1.1.(b) Hearsay is not admissible except as provided by law. MRE 802 (**2.5 Points**).

1.1.2. Please state the types of "statements" that are governed by the hearsay definitions. (15 Points)

A "statement" subject to the hearsay analysis may consist of:

(1) Oral assertion (**5 Points**)

(2) Written assertion (**5 Points**)

(3) Non-verbal conduct of a person, if it is intended by the person as an assertion (**5 Points**). MRE 801(a)

1.1.3. Some 25 Hearsay exceptions exist. Please list five such exceptions and define them. (25 points).

Please see MRE 803. The Grader should award 5 points for each correct definition.

QUESTION 1.2 (50 Points Total)

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1.2.4. Please state the best course of action for the Court to take on the motion to quash. (You may assume the motion is properly filed.) (15 Points)

ANALYSIS FOR QUESTION 1.2 (50 Points Total)

1.2.1. What is the General Rule of Privilege? (10 Points)

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.

In Mississippi, the General Rule of Privilege (Rule) states that a patient has a privilege to refuse to disclose and to prevent any other person from disclosing (A) knowledge derived by the physician by virtue of a professional relationship with the patient or (B) confidential communications made for the purpose for diagnosis and treatment. MRE 503(b)

1.2.2. May Dr. Luckett claim the Privilege in these circumstances? (10 Points)

Yes. The person who was the physician at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the patient. MRE 503 (c).

1.2.3. Please state whether Harold and Widgets, Inc. are entitled to Dr. Luckett's records. Explain your position. (15 Points)

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."

Harold will argue that a person's physical ailments or illnesses can have an adverse effect on one's mental or emotional condition. Likewise, any past physical trauma or other experience may have caused emotional distress as opposed to Harold's alleged actions. Because Hilda's pleadings allege that she suffered emotional distress and mental anguish as a result of Harold's actions, Harold is entitled to discover aspects of Hilda's physical condition, medical history or psychological history which might have caused or contributed to the alleged mental anguish and emotional distress placed in issue by Hilda.

1.2.4. Please state the best course of action for the Court to take on the motion to quash. (You may assume the motion is properly filed.) (15 Points)

Whether brought directly by Hilda or by her representative (Dr. Luckett), the claim of privilege is based upon the fact that the subpoena is overbroad and seeks to discover medical records regarding aspects of Hilda's physical and other conditions not placed in issue by her pleadings ("Any and all records..."). The Rule 503 privilege, in turn, limits inquiry "to that extent" that Hilda places a condition in issue. Therefore, the privilege is not waived as "any and all" to matters, and

specifically not waived to matters otherwise not touching on Hilda's mental and emotional condition.

In this matter, the Court will likely request production of the records for *in camera* review. Such a review would allow the Court to pre-determine whether Dr. Luckett should produce the records in their entirety or with redactions. Hence, Hilda's privilege remains in effect, unless the Court otherwise finds specific relevancy of the records to the claims (the "in issue" connection). Alternatively, the Court could order production of the entire records, subject to confidentiality, and then later determine admissibility via motion *in limine* before trial or *ore tenus* evidentiary motion at trial.

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2016 BAR Examination
CONTRACTS
100 Points Total

QUESTION 2.1 (50 Points)

Owner has been negotiating with Buyer Smith hoping that Smith will purchase her condominium. Owner thinks Smith will purchase the condominium if he is not pressured and is given a little more time. On July 15, 2015, Owner writes and delivers the following to Buyer Smith:

> I, Owner, hereby offer to sell to Smith my condominium at 123 CondoParks, Ourtown, Mississippi for $150,000. This offer will remain open until July 31, 2015. To accept this offer, Buyer Smith must deliver written acceptance to me no later than July 31, 2015, at 5 p.m.

Smith finally decides on July 30, 2015, to purchase the condominium. He calls Owner on that day and immediately says, "I am very happy to tell you that I have decided to purchase your condominium." Owner replies, "I'm sorry, but I received a better offer from Buyer Johnson just yesterday, and I am selling the condominium to her instead." Undeterred, Buyer Smith follows up the same day with a fax to Owner restating that he accepts the offer, but never hears back from Owner, who proceeds with the sale to Buyer Johnson.

2.1. Is there a contract between Owner and Buyer Smith which Buyer Smith can enforce? Explain all the reasons that support your conclusion.

QUESTION 2.2 (50 Points Total)

Jim Smith, the owner, and K.C. Johnson, the tenant, sign an eight-month lease on a house in an area zoned for neighborhood commercial operations. The lease provides that if Johnson conducts any business operations in the house which involve visits by members of the public not related to Johnson within the third degree of relationship, whether or not permitted by zoning regulations, Johnson's rent will increase by $300 per month. The lease also contains the usual provision that failure to enforce a section of the lease or declare a party in default does not result in a waiver of the right to enforce the section or declare a party in default.

Smith visits Johnson often as they are acquaintances, and Smith has observed people coming and going from the house on many occasions since the inception of the lease, often entering with nothing in their hands, and leaving with brightly wrapped packages tied with silvery ribbons. Smith has never questioned Johnson or the people about whether they are related to Johnson or what is in the packages. Smith has commented on the delicious smells coming from the double ovens in Johnson's kitchen and the many cupcakes and layer cakes on the large stainless steel table in the dining room.

Six months into the lease after Smith suffers some financial losses, he claims to have suddenly learned Johnson is operating a business in the house that, under the lease, entitles Smith to increased rent and makes demand on Johnson for $1,800 in back increased rent, plus the $300 per month in increased rent for the remaining two months on the lease.

2.2.1. What rights, if any, does Smith have against Johnson for the back increased rent of $300 per month for the first six months of the lease? Explain your answer fully, including any issues or defenses Smith may face in attempting to enforce the rights you identify. (40 Points)

2.2.2. Is Smith entitled to demand the increased rent for the remaining two months of the lease? Explain your answer. (10 Points)

END

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2016 BAR Examination
CONTRACTS
100 Points Total

ANALYSIS AND MODEL ANSWER

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ANALYSIS FOR QUESTION 2.1 (50 Points)

Owner's written note is clearly an offer to sell the condominium. The issue here is whether the contract also qualifies as an option contract, requiring Owner to hold the property for Buyer Smith until July 31, 2015. An option contract for the purchase of property must be supported by separate consideration. Nothing in the facts tells us that any consideration was paid by Buyer Smith to keep the option until July 31, 2015, and no consideration is recited in the contract. Therefore, Owner had no obligation to hold the option open.

The second issue is whether Buyer Smith accepted the offer prior to its being revoked by Owner. Although Buyer Smith stated on the telephone that he wanted to purchase the property, the offer clearly states that any acceptance on Buyer Smith's part must be in writing. Buyer Smith attempted to follow up on his oral acceptance with a written acceptance, but by this time, Buyer Smith was already aware that the offer had been revoked by the sale of the property to another. Buyer Smith has no recourse.

QUESTION 2.2 (50 Points Total)

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2.2.1. What rights, if any, does Smith have against Johnson for the back increased rent of $300 per month for the first six months of the lease? Explain your answer fully, including any issues or defenses Smith may face in attempting to enforce the rights you identify. (40 Points)

2.2.2. Is Smith entitled to demand the increased rent for the remaining two months of the lease? Explain your answer. (10 Points)

ANALYSIS FOR QUESTION 2.2 (50 Points Total)

2.2.1. What rights, if any, does Smith have against Johnson for the back increased rent of $300 per month for the first six months of the lease? Explain your answer fully, including any issues or defenses Smith may face in attempting to enforce the rights you identify. (40 Points)

The language of the lease appears to give Smith the right to demand increased rent for every month in which Johnson operated a business open to the public. The facts support that Johnson did so from the beginning of the lease term, so Smith would be entitled to the increased rent for the entire six months, and Johnson has been in breach for not paying the higher rent.

On the other hand, the facts also make clear that Smith has been to Johnson's house often and has seen not only people coming and going with some frequency with packages, but Smith has seen and smelled baking going on. Smith cannot ignore what he is observing and continue to receive the lower rent without protest.

The concept of waiver may be raised by Johnson. Waiver to part of a contract may be by words or conduct. Here, seeing baking and customers with goods and accepting the lower rent in the face of that may waive a right to which Smith otherwise would be entitled. *E.g.*, Canizaro v. Mobile Communications Corp. of America, 655 So.2d 25, 29 (Miss. 1995).

Further, the general rule is that where a contracting party, with knowledge of a breach by the other party, receives money in the performance of the contract, he will be held to have waived the breach. *E.g.*, Brent Towing, Inc. v. Scott Petroleum Corp., 735 So.2d 355 (Miss. 1999).

2.2.2. Is Smith entitled to demand the increased rent for the remaining two months of the lease? Explain your answer. (10 Points)

Yes. Although Smith is on shaky ground as to the back increased rent, he can give reasonable notice of his intention thereafter to enforce the contract according to its terms. *E.g.*, Tower Underwriters v. Cully, 211 Miss. 788, 789; 53 So.2d 94, 96 (1951)

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2016 Bar Examination
CONSTITUTIONAL & CRIMINAL LAW & CRIMINAL PROCEDURE
100 Points Total

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

Question 3.1 (50 Points Total)

In the small town of Curious, MS, DEFENDANT was suspected of having killed his wife's boyfriend, VICTIM. When the murder of VICTIM occurred, all eyes focused upon DEFENDANT. The police narrowed the list of suspects and deduced that DEFENDANT was the only viable target of the investigation. The police brought DEFENDANT in for questioning without any warnings and executed search warrants upon his home, office, farm, and cars. DEFENDANT publicly maintained his innocence and cooperated with the police fully and was not initially arrested. Subsequently, the county Grand Jury met and returned an indictment against DEFENDANT, and he was then arrested for the murder of VICTIM. As DEFENDANT has publicly pronounced his innocence from the beginning, DEFENDANT now demands an immediate preliminary hearing to clear up this horrible misunderstanding and stop this runaway prosecution. DEFENDANT further maintains there is no need for a jury trial and makes a motion to have his case dismissed for insufficient evidence, which DEFENDANT maintains the preliminary hearing will establish as he has nothing to hide and has publicly pronounced since the beginning.

3.1.1. How should the Circuit Judge rule on DEFENDANT'S Motion for a Preliminary Hearing? Explain fully. (25 points)

3.1.2. How should the Circuit Judge rule on DEFENDANT'S Motion to Dismiss for insufficient evidence? Explain fully. (25 points)

Question 3.2 (50 points)
It's 2016, and you are a criminal defense attorney in Mississippi representing DEFENDANT. The December 2015 Grand Jury has indicted DEFENDANT for Grand Larceny of a $1,500.00 all terrain vehicle committed in 2015, and as a Section 99-19-83 Habitual Offender. The indictment alleges that DEFENDANT was previously convicted of manslaughter in 2000, for an offense committed in 2000, and that he was sentenced to and served five (5) years actually incarcerated in the Mississippi Department of Corrections. The indictment further

alleges that he was previously convicted of felony malicious mischief in 2008, for an offense committed in 2008, and sentenced to and served three (3) years actually incarcerated in the Mississippi Department of Corrections. Authentic discovery documents support DEFENDANT'S alleged criminal history.

The District Attorney has advised you that there will be no plea offers made and that he will pursue DEFENDANT as a Section 99-19-83 Habitual Offender. The District Attorney advises that he will seek the maximum sentence as allowed by law.

Six months later, DEFENDANT is in fact tried before a jury and convicted of felony Grand Larceny. DEFENDANT has exercised his right to remain silent. Post-trial motions have been denied. DEFENDANT now faces sentencing. The official representative of the Mississippi Department of Corrections has testified in a separate sentencing hearing for the State to the accuracy of DEFENDANT'S criminal history, as alleged in the indictment and has been cross-examined by DEFENDANT's counsel. The circuit judge rules that the State has met it's burden of proof to all the allegations of the indictment for sentencing DEFENDANT as a Section 99-19-83 Habitual Offender.

3.2. What is the maximum potential sentence that the circuit judge could impose against DEFENDANT for grand larceny of a $1,500.00 all terrain vehicle as a Section 99-19-83 Habitual Offender? Explain fully.

END

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2016 Bar Examination
CONSTITUTIONAL & CRIMINAL LAW & CRIMINAL PROCEDURE
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ANALYSIS AND MODEL ANSWER

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3.1.1. How should the Circuit Judge rule on DEFENDANT'S Motion for a Preliminary Hearing? Explain fully. (25 points total)

Model Answer and Grader's Outline to Question 3.1.1:
DEFENDANT'S Motion for a Preliminary Hearing will be **DENIED**. **(15 points)**

Authority and Explanation for question 3.1.1. **(10 points total)**

"A defendant who has been indicted by a grand jury shall not be entitled to a preliminary hearing." **[5 points]**
UNIFORM CIRCUIT AND COUNTY COURT Rule 6.05, WAIVER OF INITIAL APPEARANCE AND PRELIMINARY HEARING.

"Once the indictment occurs, even [if] a preliminary hearing [has] not been provided, that question becomes moot." ***Hogan v. State,*** 730 So.2d 100, 101(¶ 3) (Miss.Ct.App.1998). Since "[t]he purpose of a preliminary hearing is to [determine] whether there is probable cause to believe that the

defendant has committed an offense, [t]he indictment by a grand jury removes the purpose of the hearing and none need thereafter be conducted." *Id.* (citing ***Mayfield v. State***, 612 So.2d 1120, 1129 (Miss.1992)). ***Rogers v. State,*** 881 So.2d 936 (Miss.App.,2004) **[5 points]**

3.1.2. How should the Circuit Judge rule on DEFENDANT'S Motion to Dismiss for insufficient evidence? Explain fully. (25 points total)

Model Answer and Grader's Outline to Question 3.1.2:
DEFENDANT'S Motion to Dismiss will be **DENIED**. **(15 points)**

Authority and Explanation for Question 3.1.2 **(10 points total)**

Candy Peoples v. State, 481 So.2d 1069, 1070 (1986), "Neither a motion to quash nor any other pretrial pleading can be employed to test the sufficiency of evidence." ***State v. Grady***, 281 So.2d 678, 680 (Miss.1973); ***State v. Peek***, 95 Miss. 240, 243, 48 So. 819 (1909). ***See, Callahan v. State,*** 419 So.2d 165, 168 (Miss.1982); ***State v. Bates,*** 187 Miss. 172, 179, 192 So. 832, 834-835 (1940). **(5 points)**

See also ***Parkman v. State***, 106 So.3d 378, 381 (COA 2012), "Unlike civil proceedings, there is no summary-judgment procedure in criminal cases. *Id.* And the United States Supreme Court has cautioned that the establishment of a pretrial mechanism to review evidentiary challenges to "facially valid indictments ... 'would run counter to the whole history of the grand jury institution, and neither justice nor the concept of a fair trial requires it.' " ***United States v. Williams***, 504 U.S. 36, 54–55, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992) (quoting ***Costello,*** 350 U.S. at 364, 76 S.Ct. 406). The Mississippi Supreme Court has similarly recognized that to allow such a procedure would monumentally alter our criminal justice system. ***Peoples,*** 481 So.2d at 1070." **(5 points)**

Question 3.2: (50 points total)
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3.2. What is the maximum potential sentence that the circuit judge could impose against DEFENDANT for grand larceny of a $1,500.00 all terrain vehicle as a Section 99-19-83 Habitual Offender? Explain fully.

Model Answer and Grader's Outline Question 3.2:
LIFE WITHOUT PAROLE is the maximum potential sentence that the circuit judge could impose against Defendant. **(30 points)**

Defendant is subject to life without parole because Defendant meets all of the elements under M.C.A. Section 99-19-83 for Habitual Offenders. The elements are: two or more prior felony convictions **[5] points**, separately brought and arising out of separate incidents at different times **[5] points**, sentenced to and served separate terms of one year or more in a state or federal penal institution **[5] points**, and that one or more of those prior felonies was a crime of violence **[5] points. Explanation of elements (total 20 points)**

Authority and Explanation for Question 3.2:

Title 99. Criminal Procedure
Chapter 19 Judgment, Sentence, and Execution
Sentencing of Habitual Criminals
§ 99-19-83. Habitual criminals: life imprisonment
Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one (1) year or more, whether served concurrently or not, in any state and/or federal penal institution, whether in this state or elsewhere, and where any one (1) of such felonies shall have been a crime of violence, as defined by Section 97-3-2, shall be sentenced to life imprisonment, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole, probation or any other form of early release from actual physical custody within the Department of Corrections.

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2016 Bar Examination
MISSISSIPPI PRACTICE AND PROCEDURE
100 Points Total

FACTS

Home Owner's [HO] home sits approximately 20 yards from the dam of his neighbor's [N's] 8-acre lake. The lake is located on the edge of N's large pig farming operation. N discovers that his lake has become contaminated by pig waste and is making his hogs ill. N must drain his lake in order to prevent damage and loss to his animals.

On Monday, October 10, HO observes a large backhoe and several large trucks on the dam of N's lake. HO speaks to the backhoe operator and is informed that N is preparing to demolish the dam in order to drain the lake quickly and effectively.

First, though, N has instructed the operator to enlarge the small overflow ditch (which is very close to N's property line) into which the pond drains because, instead of draining the lake slowly through the drainage pipes at the bottom of the pond, N wants to remove the whole dam wall in order to ensure that a large amount of the pig waste is carried out with the swiftly exiting water. The operator informs HO that he will dig out the drainage ditch that day and the next and that they will do dam demolition on Wednesday, October 12.

HO is sure if the dam wall is breached allowing the water to exit swiftly, his home will be overtaken by the floodwater, given the slope of the land and the volume of water in the lake. He does not believe that the small over-flow ditch will come close to accommodating the large volume of water that N intends to release all at once.

HO wants to prevent N from breaching his dam in a way that places HO's property in danger now or in the future.

QUESTIONS

4.1. **Is there a legal vehicle or vehicles available to HO that can accomplish this objective immediately and continue to prevent harm into the future? If so, please name all such vehicle or vehicles. (10 points)**

4.2. **Please analyze whether HO might qualify for any relief that could prevent immediate and/or future harm to his property. Your response should include an explanation of what, if anything, HO would have to show to obtain any such relief under these circumstances. Your response should include the elements of proof necessary to obtain immediate and/or permanent relief should there be a legal vehicle(s) available to him. (40 points)**

4.3. **Do Mississippi Courts provide any possible way to obtain relief before Wednesday? If so, please explain how HO should go about obtaining the quickest relief possible, whether a hearing is necessary and explain what right(s) N would have to oppose the granting of relief to HO. (15 points)**

4.4. **If relief is available, which is the more appropriate Mississippi Court in which to file any such action? (10 points)**

4.5. **If there is a way or ways for HO to obtain relief that prevents N from breaching his dam, how is the duration of each and/or any respective type of relief established? (25 points)**

END

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2016 Bar Examination
MISSISSIPPI PRACTICE AND PROCEDURE
100 Points Total

ANALYSIS AND MODEL ANSWER

4.1. Is there a legal vehicle or vehicles available to HO that can accomplish this objective immediately and continue to prevent harm into the future? If so, please name the vehicle or vehicles. (10 points)

Yes, Temporary Restraining Order (TRO), Preliminary Injunction and a Permanent Injunction. **(10 points)** Miss Rule Civ P 65.

(A Temporary Restraining Order (TRO), which will last only ten days (and may be granted w/o notice or hearing), subsequently, a Preliminary Injunction (which occurs after a hearing) and finally, a Permanent Injunction may be granted after a trial on the merits.)

4.2. Please analyze whether HO might qualify for any relief that could prevent immediate and/or future harm to his property. Your response should include an explanation of what, if anything, HO would have to show to obtain any such relief under these circumstances. Your response should include the elements of proof necessary to obtain immediate and/or permanent relief should there be a legal vehicle available to him. (40 points total)

The criteria for issuance of a TRO, Preliminary Injunction and a Permanent Injunction are basically the same. They are as follows:

4.2.1. Substantial likelihood "that immediate and irreparable injury, loss or damage will result to the applicant" if he cannot get his TRO or injunction. HO should be able to meet this criterion in the context of a TRO given the situation. This is the most critical element in evaluating the validity of a petition for a TRO, Preliminary Injunction and/or a Permanent Injunction. **(20 points)**
(An applicant who grasps this concept is entitled to a minimum of half credit for his or her answer of this subpart.)

4.2.2. Minimal or at least a lessor likelihood of irreparable injury to the enjoined party in the event of the granting of the TRO, Preliminary Injunction and/or Permanent Injunction. Here, while N may suffer injury if he is unable to drain the contaminated lake immediately, his loss or damage is less severe as he still has the option of draining the lake slowly and providing an alternate water source to his herd while this is taking place. On balance, the danger of harm to HO if the injunction is not granted would seem to outweigh that to N should the court grant it. **(5 points)**

4.2.3. Substantial likelihood that HO will succeed on the merits. If HO can provide sufficient proof that a dam breach would flood his home, he will likely succeed on the merits. The facts indicate that his home is close to the dam and insinuate that it is downhill and in the path of rapid water release. **(10 points)**

4.2.4. That the granting of the TRO will not disserve the public interest. Here the granting of the TRO, Preliminary Injunction and/or Permanent Injunction would not seem to disserve the public interest, but would more likely serve it given the potential hazards to others in the community in the event of a massive pig-sewage release. **(5 points)**

See Miss Rule Civ P 65

Miss Code Ann §§ 11-13-33 to 11-13-39. Ray v. Snow, 525 So. 2d 394 (Miss. 1988)

Note to grader: The conclusion(s) reached by the applicant is/are not of utmost importance. An understanding of the general nature of the analysis the court will undertake is the most important component of an answer. The more specific an answer is as to all of the elements, the higher the score. Answers that do this and correctly analyze the factors under the specific facts should be among those receiving the highest scores.

4.3. Do Mississippi Courts provide any possible way to obtain relief before Wednesday? If so, please explain how HO would go about obtaining the quickest relief possible, whether a hearing is necessary and explain what right(s) N would have to oppose the granting of relief to HO. (15 points total)

4.3.1. Yes. HO can seek a TRO immediately. **(6 points)** The purpose of a TRO is preserving the status quo until there is a hearing on the merits merits.

4.3.2. The temporary restraining order may be granted *ex parte*. There does not have to be a full hearing. A judge can consider affidavits and attorney statements in granting a TRO. HO must attempt to give N notice of his filing. **(5 points)**

4.3.3. But if HO cannot locate N, HO may still obtain the TRO. A TRO does not necessarily have to be noticed "if (1) it clearly appears from specific acts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or his attorney can be heard in opposition,[7] and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and reason supporting his claim that notice should not be required ...." **(4 points)**

Miss Rule Civ P Rule 65

4.4. If relief is available, which is the more appropriate Mississippi Court in which to file any such action? (10 points total)

4.4.1. The Chancery Court of the County in which the property sits. Chancery Courts are more suited to dealing with matters of equitable relief as is requested here. **(9 points)**.

4.4.2. Matters within the jurisdictional limits of the County Court may also be heard in the County Court in which the property sits. **(1 point)**
Miss Rule Civ P 65
Ms Const Art 6 § 159

4.5. If there is a way or ways for HO to obtain relief that prevents N from breaching his dam, how is the duration of each and/or any respective type of relief established? (25 points total)

4.5.1. If HO seeks and obtains a TRO, it will be limited to 10 days unless extended for a like period or unless N agrees to an extension. After a TRO is granted, HO must press for a Preliminary Injunction in order to prevent the court from dismissing his TRO and/or its automatic dissolution. **(8 points)**

4.5.2. After a hearing where there has been notice to N, the court may grant a Preliminary Injunction that can remain in effect until there is a trial on the merits. (A trial on the merits may be, and often is, combined with the hearing for a Preliminary Injunction if the court so desires.) **(8 points)**

4.5.3. After a trial on the merits, a court may grant a permanent injunction—which is, as the name indicates, permanent. **(9 points)**
Miss Rule Civ P Rule 65

For ease of reference, the body and comments to Miss Rule Civ P 65 are reproduced here.

M.R.C.P. Rule 65
Rule 65. Injunctions
Currentness
(a) Preliminary Injunction.
(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.
(2) *Consolidation of Hearing With Trial on Merits.* Before or after the commencement of the hearing on application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon a trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.
(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted, without notice to the adverse party or his attorney if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed ten days, as the court fixes (except in domestic relations cases, when the ten-day limitation shall not apply), unless within the time so fixed the order for good cause shown is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be stated in the order.
In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time

and take precedence over all matters except older matters of the same character. When the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order.
On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.
(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs, damages, and reasonable attorney's fees as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained; provided, however, no such security shall be required of the State of Mississippi or of an officer or agency thereof, and provided further, in the discretion of the court, security may not be required in domestic relations actions. The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.
(d) Form and Scope of Injunction or Restraining Order.
(1) Every order granting a restraining order shall describe in reasonable detail and not by reference to the complaint or other document the act or acts sought to be restrained; it is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.
(2) Every order granting an injunction shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.
(e) Jurisdiction Unaffected. Injunctive powers heretofore vested in the circuit and chancery courts remain unchanged by this rule.

Editors' Notes

ADVISORY COMMITTEE NOTE
Rule 65 authorizes parties to seek temporary restraining orders (TROs) and preliminary injunctions in civil cases in which permanent injunctive relief or other relief is being sought. A party may move for, and in appropriate circumstances,

obtain a TRO and/or a preliminary injunction before the merits of the case are resolved.

Generally, the purpose of a TRO is to provide temporary short term relief until further action can be taken in the case. To obtain a TRO without notice to the adverse party, the party seeking relief must show, by affidavit or verified complaint, that it will suffer immediate and irreparable injury before the adverse party can be heard in opposition. In addition, the attorney for the party seeking the TRO must certify to the court in writing the efforts made to give the adverse party notice and the reasons why the notice to the adverse party should not be required. If a TRO is granted without notice, it must contain the information required by Rule 65(b) and it must expire by its terms, not more than 10 days after its entry, except in domestic relations cases. Before its expiration, a TRO may be extended by the court for a like period if the restrained party consents or the court extends the TRO for good cause shown.

The purpose of a preliminary injunction is to provide injunctive relief until the merits of the case are resolved. Preliminary injunctions cannot be granted without notice. A party moving for preliminary injunctive relief pursuant to Rule 65(a) must demonstrate that "(i) there exists a substantial likelihood that the [movant] will prevail on the merits; (ii) the injunction is necessary to prevent irreparable harm; (iii) the threatened injury to the [movant] outweighs the harm an injunction might do to the [opposing party]; and (iv) granting a preliminary injunction is consistent with the public interest." See Littleton v. McAdams, *60 So. 3d 169, 171 (Miss. 2011). Motions for preliminary injunctions are within the trial court's discretion.* See City of Durant v. Humphreys County Mem'l Hosp., *587 So. 2d 244, 250 (Miss. 1991).*

Rule 65 (c) requires that proper security be given by the movant obtaining a TRO or preliminary injunction so that proper payment for costs, damages and reasonable attorneys' fees may be made to the restrained party in the event it is determined that such party was wrongfully enjoined or restrained. Such security is not required from the State of Mississippi and may be waived in domestic relations cases. Mississippi Code Annotated § 11-13-37 provides an independent statutory basis for awarding damages and attorneys' fees upon dissolution of an injunction. County courts have some authority to issue injunctive relief. Mississippi Code Annotated § 9-9-21 provides that county courts "shall have jurisdiction concurrent with the circuit and chancery courts in all matters of law and equity wherein the amount of value of the things in controversy shall not exceeds ... the sum of ... $200,000.00." Mississippi Code Annotated § 99-9-23 provides that county courts "shall have the power to order the issuances of writs of certiorari, supersedeas, attachments, and other remedial writs in all cases pending in, or within the jurisdiction of, [the county court]." Section 9-9-23, however, further provides that

county courts "shall not have original power to issue writs of injunction, or other remedial writs of equity or in law except in those cases hereinabove specified as being within [the court's] jurisdiction." The statutes have been interpreted as authorizing county courts to issue injunctions in cases falling within the concurrent jurisdiction of the chancery and county court. See, e.g., Lee v. Coahoma Opportunities, Inc., *485 So. 2d 293, 294 (Miss. 1986) (citing Miss. Code Ann. § 9-9-21(1)) ("A claim for specific performance of a contract of employment plus attendant injunctive relief is well within the jurisdiction of the county court on its equity side");* Swan v. Hill, *855 So. 2d 459, 462-63 (Miss. Ct. App. 2003) (holding that the county court had jurisdiction to issue injunctive relief in a case involving property rights).*

[Advisory Committee Note adopted effective July 1, 2014.]

Relevant Notes of Decisions (5)

View all 21

Notes of Decisions listed below contain your search terms.

Due process

Failure to provide mother with notice of the ex parte temporary restraining order (TRO) hearing on father's petition for emergency relief in conjunction with his challenge to termination of his parental rights did not violate due process; the civil procedure rules permitted emergency requests to be heard without notice in accordance with a showing of immediate and irreparable harm, and father asserted in his initial pleadings that irreparable harm or injury would come to the children if the emergency hearing was denied. U.S.C.A. Const.Amend. 14; Rules Civ.Proc., Rule 65(b). C.M. v. R.D.H., Sr., 2007, 947 So.2d 1023. Constitutional Law 4403.5; Infants 2070; Infants 2291

Temporary restraining order

Trial court order granting a temporary restraining order (TRO) on father's petition for emergency relief in conjunction with his challenge to termination of his parental rights was not an abuse of discretion; father presented evidence that mother's husband served the children beer to get them to sleep at night, that husband beat the children if they did not call him "daddy," and that he had no knowledge of the termination of parental rights proceeding, and mother's testimony corroborated father's allegations. Rules Civ.Proc., Rule 65(b). C.M. v. R.D.H., Sr., 2007, 947 So.2d 1023. Infants 2062; Infants 2195

The granting of a temporary restraining order (TRO) is within the discretion of the trial judge, and the Court of Appeals will not disturb the order absent an abuse of discretion. Rules Civ.Proc., Rule 65(b). C.M. v. R.D.H., Sr., 2007, 947 So.2d 1023. Appeal And Error 954(1); Injunction 1126

Trial court proceedings resulting in grant of declaratory and injunctive relief requiring Lieutenant Governor to comply with requests by senators that conference

reports presented to Senate be read in full were irregular and contrary to law; temporary restraining order (TRO) was issued without clear and specific statement of irreparable injury, TRO set complaint for "hearing on the merits" eighteen hours after its issuance, which did not allow for answer to complaint, and judgment was issued interpreting state constitution contrary to ruling of Lieutenant Governor, without issuance of summons by clerk and service of process, and without regard to rule that allows thirty days for service of answer and timely hearing on merits. Rules Civ.Proc., Rules 4, 12, 57, 65(b). Tuck v. Blackmon (Miss. 2001) 798 So.2d 402. Declaratory Judgment ⚭ 387

Review

Mother's claim on appeal of chancellor's decision to appoint son as conservator over his elderly mother's estate and person, that chancellor's pretrial order prohibiting the disposal and transfer of mother's assets was, in effect, a temporary restraining order issued in violation of rules of civil procedure, was rendered moot, where even assuming the chancellor's order might have been properly characterized as a temporary or preliminary injunction, its terms had expired by the end of the trial and were no longer in effect. Rules Civ.Proc., Rule 65(b). In re Conservatorship of Hester, 2008, 989 So.2d 986, rehearing denied. Mental Health ⚭ 148.1

Rules Civ. Proc., Rule 65, MS R RCP Rule 65

Current with amendments received through December 1, 2015

M.R.C.P. 65

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2016 BAR Examination
DOMESTIC RELATIONS
100 Points Total

FACTS

Harry and Sara began dating their freshman year in college and married the day after graduation. Harry found employment in the sales department of Safety Supply Company. He earned $4,500 per month, $4,000 after taxes. Sara delayed employment because she wanted to start a family.

A year after they had been married, Sara gave birth to their son, Charles. Charles was the delight of her life and she spent countless hours caring for him.

While home with Charles, Sara received an unexpected visit from her 15 year old niece, Nan. Sara learned that Nan had run away from home because her parents had become addicted to drugs and could no longer care for her. Sara discussed the situation with Harry and together they adopted Nan.

Shortly after the adoption occurred, Sara received a call from a family friend who told her that Harry had been unfaithful to her. She was told that Harry was having an affair with one of the employees at Safety Supply Company. Furious, Sara stormed into Harry's office, while a meeting was in progress with his peers, and began yelling at him about his unfaithfullness. Harry was so embarrassed that he immediately filed for divorce on the ground of habitual cruel and inhuman treatment. In his petition he requested custody of Charles but did not mention Nan in his petition. Sara filed a counter-petition for divorce seeking custody of Charles and for child support.

QUESTIONS

5.1. What would a plaintiff have to prove to be granted a divorce on the grounds of cruel and inhuman treatment in Mississippi? **(20 points)**

5.2. Discuss whether Sara's action would constitute cruel and inhuman treatment. **(20 points)**

5.3. Albright v. Albright, 437 So.2d 1003 (Miss. 1983), sets out factors for determining custody in Mississippi. Discuss at least two factors in Albright that should be considered in determining which parent should be awarded custody of Charles? **(20 points)**

5.4. Based on the Albright factors, discuss at least two factors that should be considered in determining which parent should be awarded custody of Nan? Include in your discussion, the impact of the adoption. **(20 points)**

5.5. Assuming Sara receives custody of Charles and Nan, compute the amount of monthly child support Harry would be required to pay. **(20 points)**

END

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2016 BAR Examination
DOMESTIC RELATIONS
100 Points Total

ANALYSIS AND MODEL ANSWER

5.1. What would a plaintiff have to prove to be granted a divorce on the grounds of cruel and inhuman treatment in Mississippi? (20 points)

Divorce on the ground of cruel and inhuman treatment requires a dual focus. The conduct of the offending spouse and the impact of the conduct on the other spouse must be considered. It must be shown that the conduct meets the stringent test to be cruel and inhuman. There must be a causal connection between the conduct and the other party's physical or mental health. There must be independent corroborating evidence of the conduct.

The court applies the Russell v. Russell test: "conduct only as endangers life, limb, or health, or creates a reasonable apprehension of danger thereto, thereby rendering the continuance of the marital relation unsafe for the unoffending spouse, or such unnatural and infamous conduct as would make the marital relation revolting to the unaffending spouse and render it impossible for him or her, as the case may be, to discharge the duties thereof." Russell v. Russell, 128 So. 270, 272 (Miss.1930)

Habitual accusations of infidelity may constitute habitual, cruel, and inhuman treatment even in the absence of other conduct, if the accusations are clearly unfounded. Thames v. Thames, 100 So.2d 868, 870 (Miss.1958). A divorce was justified by a wife's daily, unfounded accusations of adultery over many years, affecting the husband's physical health. (Hibner v. Hibner,64 So.2d 756, 756, 758 (Miss. 1953).

Accusations made in good faith, although ultimately disproved, do not constitute habitual, cruel, & inhuman treatment. Gregory v. Gregory, 881 So.2d 840 (Miss. Ct. App. 2003)

5.2. Discuss whether Sara's action would constitute cruel and inhuman treatment. (20 points)

Based on the facts, Sara's accusation occurred only once. A one time cruel act can constitute ground for divorce. We must consider the act. It was verbal and not physical. Sara has a basis for her accusation in that she was told by a family

friend that infidelity had occurred. However, we do not know whether it was unfounded. However, this one time accusation would likely not rise to the level of "conduct only as endangers life, limb, or health, or creates a reasonable apprehension of danger thereto." Then we must consider the impact on Harry. He was embarrassed. Embarrassment would likely not rise to the level of "rendering the continuance of the marital relation unsafe for the unoffending spouse, or such unnatural and infamous conduct as would make the marital relation revolting to the unaffending spouse and render it impossible for him or her, as the case may be, to discharge the duties thereof."

5.3. Albright v. Albright, 437 So.2d 1003 (Miss. 1983) sets out factors for determining custody in Mississippi. Discuss at least two factors in Albright that should be considered in determining which parent should be awarded custody of Charles? (20 points)

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

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

According to the facts, Sara would likely be awarded custody of Charles because Sara is not employed and is spending more time with and caring for the child, while Harry works. It is likely that she has greater emotional ties to the child. A logical discussion of any of the Albright factors deserve credit.

5.4. Based on the Albright factors, discuss at least two factors that should be considered in determining which parent should be awarded custody of Nan? Include in your discussion, the impact of the adoption. (20 points)

When Harry and Sara adopted Nan the rights of her natural parents were cut off and Harry and Sara became the parents with the same obligations as a child born to them naturally. Therefore, the issue of her custody would be determined in the

same manner as for Charles. Because Nan is 15 years old, she can voice a preference as to who she wants to have custody of her. In addition, her "home, school and community record" would be considered. A logical discussion of any of the Albright factors deserve credit.

5.5. Assuming Sara receives custody of Charles and Nan, compute the amount of monthly child support Harry would be required to pay. (20 points)

If Sara receives custody of both children, Harry would have to pay child support for both of them. An adopting parents and child are vested with all rights and duties of natural parents and children. {Miss. Code Ann. §93-17-13 (2004)} The adopting parents have the same responsibility for support of the adopted child as a child born to them. Child support for two children would be 20% of gross income adjusted for taxes and other mandatory deductions. Harry would pay $800 (.20 x $4,000.00) monthly child support, under the statutory guidelines. (Miss. Code Ann. §49-19-101).

MSE # 6

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2016 Bar Examination
LEGAL ETHICS AND PROFESSIONAL CONDUCT
100 Points Total

FACTS

"Nice article in this week's *Mississippi Verdict Reporter*," your friend and fellow member of the Mississippi Bar, Steve, says as you answer the phone. "I didn't know you got such a favorable verdict in the Smith case."

"Sure did!" you acknowledge happily. "And I've been meaning to call you. I want to buy you a nice steak dinner for referring Mr. Smith to me! I am glad we were able to get him such a good recovery for his injuries."

"Dinner would be good," Steve admits. "But a share of your fee would be better."

"My fee?" you ask, sounding confused.

"Look, I know you got at least a $150,000 fee if you took the matter on a contingency. I figure ten percent (10%) of that to me is fair for my share. After all, you just admitted you wouldn't have gotten the case without me." says Steve.

"But ... isn't that unethical?" you sputter.

NOTE: All facts above occurred in Mississippi, transpired in an action filed in and governed by the laws of the State of Mississippi, and involve attorneys licensed to practice law in Mississippi. As such, the Mississippi Rules of Professional Conduct ("MRPC") are controlling. Any response should be based on the MRPC.

QUESTIONS

6.1 **Assume you proceed to share with Steve a portion of your attorneys' fee based solely on the facts above. Would the sharing of a fee like this (a pure referral fee) be permissible under the Mississippi Rules of Professional Conduct? Yes or No? (10 points).**

6.2 **Which ethical tenets and/or rule(s) of the Mississippi Rules of Professional Conduct is/are implicated? (10 points).**

6.3 **Assume that you and Steve do not practice within the same law firm and your legal practices are wholly separate from one another. List or explain the circumstances upon which lawyers who are not in the same law firm may divide a fee. (40 points).**

6.4 **Assume that were a fee to be shared among lawyers not in the same law firm, what obligations are owed to the client (Mr. Smith), if any? (20 points)**

6.5 **Assume that you and Steve are not in the same firm, and with the client's prior consent, Steve assisted you with some of the work pertaining to the case. Under a written agreement reached with the client, both you and Steve assumed joint responsibility for the representation; however, Steve does not perform that much work on the case beyond the referral. After the case concludes, Steve absconds with litigation proceeds, which are the property of the client. Are you liable or responsible to the client for Steve's acts? Explain why or why not. (20 points).**

END

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2016 Bar Examination
LEGAL ETHICS AND PROFESSIONAL CONDUCT
100 Points Total

ANALYSIS AND MODEL ANSWER

6.1 Assume you proceed to share with Steve a portion of your attorneys' fee based solely on the facts above. Would the sharing of a fee like this (a pure referral fee) be permissible under the Mississippi Rules of Professional Conduct? Yes or No? (10 points).

MODEL ANSWER TO 6.1: No.

According to *Professional Responsibility for Mississippi Lawyers* by Jeffrey Jackson and Donald Campbell, § 22:11 (MLI Press, 2010)(emphasis supplied):

> **MRPC 1.5(e) facilitates the association of lawyers from different firms for the purpose of client service. For example, a lawyer competent in negotiations and pretrial practice may need to associate a specialist for trial. The concern over such fee splitting is based on paying referral fees, in which the lawyer originating the client representation gets a fee for nothing other than finding the client. Under the rule, which allows for fee sharing when there is a joint service or joint responsibility, pure referral fees are still unethical.**

6.2 Which ethical tenets and/or rule(s) of the Mississippi Rules of Professional Conduct is/are implicated? (10 points).

MODEL ANSWER TO 6.2: MRPC 1.5 – Fees, specifically MRPC 1.5(e); also MRPC 5.1 – Responsibilities of a Partner or Supervisory Lawyer, and possibly MRPC 8.4 – Misconduct.

6.3 Assume that you and Steve do not practice within the same law firm and your legal practices are wholly separate from one another. List or explain the circumstances upon which lawyers who are not in the same law firm may divide a fee. (40 points).

MODEL ANSWER TO 6.3:

MRPC 1.5(e) expressly states the circumstances upon which a fee may be divided between lawyers who are not in the same firm. That rule states:

> (e) A division of fee between lawyers who are not in the same firm may be made only if:
>
> > (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
> >
> > (2) the client is advised of and does not object to the participation of all the lawyers involved; and
> >
> > (3) the total fee is reasonable.

The official Comment to Rule 1.5 states:

> Division of Fee. A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee on either the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole and the client is advised and does not object. It does not require disclosure to the client of the share that each lawyer is to receive. Joint responsibility for the representation entails the obligations stated in Rule 5.1 (Responsibilities of a Partner or Supervisory Lawyer) for purposes of the matter involved.

Thus, the model response from an examinee should discuss the following elements upon which lawyers who are not in the same law firm may divide a fee:

1. Division of the fee is based upon the work each lawyer has performed (*i.e.*, dividing the fee in proportion to the services performed by each lawyer or for "joint services"). No written agreement is required for lawyers not in the same firm to share fees based on joint service; or

2. **by written agreement with the client, each lawyer assumes "joint responsibility" for the representation. In order to share fees based on joint responsibility, the lawyers must have a "written agreement with the client." However, no written agreement is required for lawyers not in the same firm to share fees based on joint service. "Joint responsibility" is viewed as being financially and ethically responsible for the litigation. Commenters to Model Rule of Professional Conduct Rule 1.5 clarify that if a lawyer who has only referred a case and done no other work on it expects to share a fee, she must agree to be financially and ethically responsible for the representation in order to be considered "jointly responsible." Therefore, malpractice exposure and liability is the biggest risk for a referring lawyer.**

3. **the total fee is reasonable.**

6.4 Assume that were a fee to be shared among lawyers not in the same law firm, what obligations are owed to the client (Mr. Smith), if any? (20 points)

MODEL ANSWER TO 6.4:

Whether lawyers not in the same firm share fees based on joint service or joint responsibility under Rule 1.5(e)(2), the client must be advised of the participation of the lawyers involved and not object. Thus, if the client objects, the lawyers may not share the fee. Also, Rule 1.5(e)(3) requires that the total fee be reasonable, which is redundant with the reasonableness requirement of Rule 1.5(a), which applies to all fees.

That said, under Mississippi's version of Rule 1.5(e), there is no requirement that the client be advised what portion of the fee each lawyer receives. "[Rule 1.5(e)] does not require disclosure to the client of the share that each lawyer is to receive."

6.5 Assume that you and Steve are not in the same firm, and with the client's prior consent, Steve assisted you with some of the work pertaining to the case. Under a written agreement reached with the client, both you and Steve assumed joint responsibility for the representation; however, Steve does not perform that much work on the case beyond the referral. After the case concludes, Steve absconds with litigation proceeds, which are the property of the client. Are you liable or responsible to the client for Steve's acts? Explain why or why not. (20 points).

MODEL ANSWER TO 6.5:

Yes, you would be liable to the client for Steve's acts of malpractice, especially considering that there was a written agreement with the client wherein both attorneys would share "joint responsibility" for the representation, meaning that both you and Steve would be held jointly financially and ethically responsible for the representation.

According to *Professional Responsibility for Mississippi Lawyers* by Jeffrey Jackson and Donald Campbell, § 22:11 (MLI Press, 2010):

> **Lawyers who remain jointly responsible for client work have an obligation of supervision pursuant to MRPC 5.1. These lawyers can be held jointly liable for malpractice in the representation, and can be subject to discipline for deviance in the work.**

MRPC 5.1 – Responsibilities of a Partner or Supervisory Lawyer states:

> **(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct.**
>
> **(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the rules of professional conduct.**
>
> **(c) A lawyer shall be responsible for another lawyer's violation of the rules of professional conduct if:**
>
> > **(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or**
> >
> > **(2) the lawyer is a partner in the law firm or has comparable authority in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable action.**

According to the official comment to MRPC 5.1:

> **Paragraph (c)(2) defines the duty of a lawyer having direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Partners of a private firm have at least indirect responsibility for all work being done by the firm, while a partner in charge of a particular matter ordinarily has direct authority over other firm lawyers engaged in the matter. Appropriate remedial action by a partner would depend on the immediacy of the partner's involvement and the seriousness of the misconduct. The supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.**
>
> **Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.**
>
> **Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.**

Moreover, according to the case of Duggins v. Guardianship of Washington through Huntley, 632 So.2d 420 (Miss. 1993), the Mississippi Supreme Court ruled that two (2) Mississippi attorneys who had formed a joint venture in their joint representation of a client wherein the fees would be split 50/50 between them, and where one of the lawyers who associates another lawyer and absconds with litigation proceeds, may be responsible to the client based upon principles of vicarious liability. See Duggins, 632 So.2d at 428. Punitive damages can even be assessed. Id. at 430.

Thus, an examinee's response to this question should address what degree, if any the attorneys in this section of the question were in a joint venture, and if so, what degree, if any, one lawyer had supervisory control over the actions of the other lawyer. That said, assuming there was a supervisory lawyer relationship, so long as there was not an "arguable question of professional duty" attributable to the acts or inactions of the

supervisory lawyer, there may not be any disciplinary liability on the part of the supervisory lawyer under the MRPC; however, as the official comment and the Duggins case demonstrates, a lawyer can still be held *civilly* liable for the acts of another lawyer, especially when a joint venture exists between two attorneys, even though the two attorneys may not technically be within the same law firm, yet agreed with split any fee between them 50 / 50.

Again, the point of this subsection of the question, and the response of the examinee as a whole, should be to demonstrate that malpractice liability can be an issue for a referring lawyer, and it is hoped that lawyers will only refer cases to attorneys they know to be diligent and ethical.

END