MSE #1

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2018 BAR Examination
EVIDENCE
100 Points Total

QUESTION 1.1 (50 points total)

Evidence is the process by which facts are placed before a court. Evidence may be in the form of writings, oral statements, non-verbal actions or other means, yet all evidence is subject to some fundamental concepts. These questions seek to ensure your understanding of basic evidence concepts/rules.

Each question is worth a maximum of 10 Points.

1.1.1. What is "Relevant Evidence"?

1.1.2. Is Relevant Evidence always admissible? Why?

1.1.3. Who may impeach a witness?

1.1.4. What is the scope of cross-examination under the MISSISSIPPI RULES OF EVIDENCE?

1.1.5. How does the scope of cross-examination under the under the MISSISSIPPI RULES OF EVIDENCE compare with the scope under the FEDERAL RULES OF EVIDENCE?

QUESTION 1.2 (50 points total)

The Rules of Evidence 500 Series addresses the concept of privilege as it may pertain to witnesses. These questions seek to test your minimal competency and understanding of invoking a privilege to preclude certain testimony.

1.2.1. Name three of the four types of privileges specified in the Rules of Evidence (**5 Points each**).

1.2.2. With respect to claiming privilege, it is important to understand who can claim the privilege. Names three groups who can claim any privilege (**5 Points each**).

1.2.3. There are five exceptions to the lawyer-client privilege. As this privilege applies to many of your actions, it is important to understand when the privilege is limited. Name and define two of the exceptions (**10 Points each**).

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2018 BAR Examination
EVIDENCE
100 Points Total

ANALYSIS AND MODEL ANSWER

QUESTION 1.1 (50 points total)

Evidence is the process by which facts are placed before a court. Evidence may be in the form of writings, oral statements, non-verbal actions or other means, yet all evidence is subject to some fundamental concepts. These questions seek to ensure your understanding of basic evidence concepts/rules.

Each question is worth a maximum of 10 Points.

1.1.1. What is "Relevant Evidence"?

Answer: M.R.E. 401 states "Relevant Evidence" means evidence having any tendency to make the existence of any fact **(3 points)** that is of consequence **(3 points)** more probable or less probable than it would be without the evidence. **(4 points)**

1.1.2. Is Relevant Evidence always admissible? Why?

Answer: M.R.E. 403 states that "although relevant, evidence may be excluded **(3 points)** if it's probative value is substantially outweighed **(3 points)** by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by a consideration of undue delay, waste of time, or needless presentation of cumulative evidence". **(4 points)**

1.1.3. Who may impeach a witness?

Answer: M.R.E. 607 states that "the credibility of a witness may be attacked by any party **(5 points)**, including the party calling [the witness]." **(5 points)**

1.1.4. What is the scope of cross-examination under the MISSISSIPPI RULES OF EVIDENCE?

Answer: M.R.E. 611(b) permits cross-examination beyond the scope of direct examination (**5 points**) ("shall not be limited to the subject matter of the direct examination") and matters affecting the credibility of the witness. (**5 points**).

This is commonly referred to as "wide open cross". (**5 points**, *alternatively*).

1.1.5. How does the scope of cross-examination under the under the MISSISSIPPI RULES OF EVIDENCE compare with the scope under the FEDERAL RULES OF EVIDENCE?

Answer: FEDERAL RULES OF EVIDENCE 611(b) limits the scope of cross-examination to matters elicited on direct. (**5 points**) ("should not go beyond the subject matter of the direct examination") and matters affecting the witness' credibility (**5 points**).

This is commonly referred to as "limited cross". (**5 points**, *alternatively*)

QUESTION 1.2 (50 points total)

The Rules of Evidence 500 Series addresses the concept of privilege as it may pertain to witnesses. These questions seek to test your minimal competency and understanding of invoking a privilege to preclude certain testimony.

1.2.1. Name three of the four types of privileges specified in the Rules of Evidence (5 points each):

Answer:

- MRE 502 Lawyer-Client Privilege
- MRE 503 Physician and Psychotherapist-Patient Privilege
- MRE 504 Husband-Wife Privilege
- MRE 505 Priest-Penitent Privilege

1.2.2. With respect to claiming privilege, it is important to understand who can claim the privilege. Names three groups who can claim any privilege (5 points each).

Answer:

- The Professional (lawyer; physician/therapist; priest);
- The Individual in the relationship (client, patient; spouse; penitent);
- Someone on behalf of the individual (guardian; conservator; personal representative; successor; trustee; or similar corporate representative);

MRE 502(c); MRE 503 (c); MRE 504 (c); MRE 505 (c).

1.2.3. There are five exceptions to the lawyer-client privilege. As this privilege applies to many of your actions, it is important to understand when the privilege is limited. Name and define two of the exceptions (10 points each).

Answer:

(1) *Furtherance of the Crime or Fraud.* If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) *Claimants Through Same Deceased Client.* As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) *Breach of Duty by a Lawyer or a Client.* As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer;

(4) *Document Attested by a Lawyer.* As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

(5) *Joint Clients.* As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2018 BAR Examination
CONTRACTS
100 Points Total

QUESTION 2.1 (50 points total)

Owner has been negotiating with Buyer Johnson hoping that Johnson will purchase her condominium. Owner thinks Johnson will purchase the condominium if he is not pressured and is given a little more time. On July 15, 2017, Owner writes and delivers the following to Buyer Johnson:

> I, Owner, hereby offer to sell to Johnson my condominium at 123 CondoParks, Ourtown, Mississippi for $150,000. This offer will remain open until July 31, 2017. To accept this offer, Buyer Johnson must deliver written acceptance to me no later than July 31, 2017, at 5 p.m.

Johnson finally decides on July 30, 2017, 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 Williams 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 Williams.

2.1.1. Is there a contract between Owner and Buyer Johnson which Buyer Johnson can enforce? Explain all the reasons that support your conclusion. (50 points total)

QUESTION 2.2 (50 points total)

Jim Jones, the owner, and K.C. Wright, the tenant, sign an eight-month lease on a house in an area zoned for neighborhood commercial operations. The lease provides that if Wright conducts any business operations in the house which involve visits by members of the public not related to Wright within the third degree of relationship, whether or not permitted by zoning regulations, Wright'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.

Jones visits Wright often as they are acquaintances, and Jones 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. Jones has never questioned Wright or the people about whether they are related to Wright or what is in the packages. Jones has commented on the delicious smells coming from the double ovens in Wright'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 Jones suffers some financial losses, he claims to have suddenly learned Wright is operating a business in the house that, under the lease, entitles Jones 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 Jones have against Wright 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 Jones may face in attempting to enforce the rights you identify. (40 points)

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

MISSISSIPPI BOARD OF BAR ADMISSIONS
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CONTRACTS
100 Points Total

ANALYSIS AND MODEL ANSWER

QUESTION 2.1 (50 points total)

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2.1.1. Is there a contract between Owner and Buyer Johnson which Buyer Johnson can enforce? Explain all the reasons that support your conclusion. (50 points total)

ANSWER TO 2.1.1.

Owner's written note is clearly an offer to sell the condominium. (**10 points**) The issue here is whether the contract also qualifies as an option contract (**10 points**), requiring Owner to hold the property for Buyer Johnson until July 31, 2017. 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 Johnson to keep the option until July 31, 2017, and no consideration is recited in the contract. Therefore, Owner had no obligation to hold the option open. (**10 points**)

The second issue is whether Buyer Johnson accepted the offer prior to its being revoked by Owner. (**10 points**) Although Buyer Johnson stated on the telephone that he wanted to purchase the property, the offer clearly states that any acceptance on Buyer

Johnson's part must be in writing. Buyer Johnson attempted to follow up on his oral acceptance with a written acceptance, but by this time, Buyer Johnson was already aware that the offer had been revoked by the sale of the property to another. Buyer Johnson has no recourse. (**10 points**)

QUESTION 2.2 (50 points total)

Jim Jones, the owner, and K.C. Wright, the tenant, sign an eight-month lease on a house in an area zoned for neighborhood commercial operations. The lease provides that if Wright conducts any business operations in the house which involve visits by members of the public not related to Wright within the third degree of relationship, whether or not permitted by zoning regulations, Wright'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.

Jones visits Wright often as they are acquaintances, and Jones 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. Jones has never questioned Wright or the people about whether they are related to Wright or what is in the packages. Jones has commented on the delicious smells coming from the double ovens in Wright's kitchen and the many cupcakes and layer cakes on the large stainless steel table in the dining room.

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2.2.1. What rights, if any, does Jones have against Wright 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 Jones may face in attempting to enforce the rights you identify. (40 Points)

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

ANSWER

Question 2.2.1. (40 points total)

The language of the lease appears to give Jones the right to demand increased rent for every month in which Wright operated a business open to the public. The facts support that Wright did so from the beginning of the lease term, so Jones would be entitled to the increased rent for the entire six months, and Wright has been in breach for not paying the higher rent. (**10 points**)

On the other hand, the facts also make clear that Jones has been to Wright's house often and has seen not only people coming and going with some frequency with packages, but Jones has seen and smelled baking going on. Jones cannot ignore what he is observing and continue to receive the lower rent without protest. (**10 points**)

The concept of waiver may be raised by Wright. 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 Jones otherwise would be entitled. *E.g.*, *Canizaro v. Mobile Communications Corp. of America*, 655 So.2d 25, 29 (Miss. 1995). (**10 points**)

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). (**10 points**)

Question 2.2.2. (10 Points)

Yes. Although Jones 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) (**10 points**)

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2018 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 with one another in any manner. They should each be analyzed separately and independently.

Question #3.1 (50 points total)

Interstate 10 in south Mississippi and Interstate 20 in central Mississippi are known to be major, secondary methamphetamine ("meth") transportation routes. To combat this problem, the DEA and various Mississippi law enforcement agencies have established a High Intensity Drug Trafficking Area program office in Jackson, Mississippi (the "Mississippi HIDTA"). The Mississippi HIDTA's first official act was to authorize the Mississippi Highway Patrol to set up "meth checkpoint" roadblocks on I-10 in Gulfport and I-20 in Jackson. Each roadblock was staffed with 15 highway patrol officers and several narcotics detection dogs specially trained to detect meth. The officers were instructed to randomly stop vehicles so that the dogs could circle the vehicles to smell for the presence of meth. Paul and Penny Petitioner were stopped at the meth checkpoint in Gulfport in early January 2018.

In February 2018, the Petitioners filed a lawsuit on behalf of themselves and the class of all motorists who had been stopped or were subject to being stopped in the future at the Mississippi HIDTA meth checkpoints. The Petitioners claimed that the roadblocks violated the Fourth Amendment of the United States Constitution. Respondents requested declaratory and injunctive relief for the class, as well as damages and attorney's fees for themselves.

3.1.1. Was the Mississippi HIDTA meth checkpoint program constitutional? **(20 points)**

3.1.2. Explain fully. **(30 points)**

Question #3.2 (50 points total)

Danny Defendant and Vicky Victim spent an evening playing pool at the Billiards Room and Bar. After leaving the pool hall, they went to Defendant's home. At some point, Defendant accused Victim of stealing his money, and he severely beat her with a bottle and refused to let her leave. Eventually, Victim escaped. Defendant was arrested on November 8, 2015 on one count of kidnapping and on one count of aggravated assault

with a deadly weapon. He was indicted and served with the indictment on December 15, 2015. On January 26, 2016, Defendant was arraigned and trial was set for September 20, 2016. On August 6, 2016, Defendant filed a motion for continuance, alleging that he had just learned his trial date had been moved up by two weeks; however, this motion was never heard or ruled on. On September 16, 2016, the State filed a motion for continuance on the ground that Victim was hospitalized and could not appear at trial. On March 24, 2017, before a new trial date was set, the second judge recused himself. The case was reassigned to a third judge on April 4, 2017 and trial was set for June 6, 2017. On May 26, 2017, the court entered an Agreed Order of Continuance, which was prompted by a motion filed by Defendant, and trial was reset for September 12, 2017. The trial was later moved to March 10, 2018 due to the court's crowded docket. Defendant has filed a pre-trial motion to dismiss his indictment for violating his constitutional right to a speedy trial under the Sixth Amendment to the U.S. Constitution.

3.2.1. What are the four factors a court considers when analyzing whether or not there has been a constitutional violation of a defendant's right to a speedy trial? (16 points)

3.2.2. What are the three interests that a speedy-trial is designed to protect? (12 points)

3.2.3. How does a court assign weight to different reasons for delay, and what is the result of that analysis under these facts? (22 points)

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2018 Bar Examination
CONSTITUTIONAL & CRIMINAL LAW & CRIMINAL PROCEDURE
100 Points Total

ANALYSIS AND MODEL ANSWER

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3.1.1. Was the Mississippi HIDTA meth checkpoint program constitutional? (20 points)

3.1.2. Explain fully. (30 points)

Answer to Question #3.1:

3.1.1. Was the Mississippi HIDTA meth checkpoint program constitutional? (20 points)

Answer: NO. The Fourth Amendment prohibits unreasonable searches or seizures. (**20 points**)

3.1.2. Explain fully. (30 points)

Answer: To be reasonable, a search must be done only when there is probable cause. Probable cause is suspicion of wrongdoing based on an individual's actions. (**15 points**) Here, there was no individualized suspicion of wrongdoing. *See Chandler v. Miller*, 520 U. S. 305, 308 (1997). (**5 points**) In *Indianapolis v. Edmond*, 531 US 32, 41-42 (2000), the Court held that a general purpose roadblock for detecting narcotics violates the Fourth Amendment's prohibition of unreasonable searches. The Court further held that there are only very limited exceptions to this rule. Drunk driving checkpoints have been ruled constitutional because they are designed to ensure highway safety. However, the purpose here was not highway safety. The *Edmond* Court refused to allow the "general interest in crime control" as justification for a regime of suspicionless stops. (**10 points**)

Question #3.2 (50 points total)

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3.2.1. What are the four factors a court considers when analyzing whether or not there has been a constitutional violation of a defendant's right to a speedy trial? (16 points)

3.2.2. What are the three interests that a speedy-trial is designed to protect? (12 points)

3.2.3. How does a court assign weight to different reasons for delay, and what is the result of that analysis under these facts? (22 points)

Answer to Question #3.2:

3.2.1. What are the four factors a court considers when analyzing whether or not there has been a constitutional violation of a defendant's right to a speedy trial? (16 points)

Answer: Four factors must be considered and weighed: (1) the length of delay, (2) the reason for delay, (3) whether the defendant timely asserted his right, and (4) whether the defendant was prejudiced by the delay. *Barker v. Wingo*, 407 U.S. 514, 530 (1972) (**4 Points per factor**)

3.2.2. What are the three interests that a speedy-trial is designed to protect? (12 points)

Answer: The speedy-trial right is for: (1) preventing oppressive pretrial incarceration, (2) minimizing anxiety and concern, and (3) limiting impairment of the defense. *Barker v. Wingo*, 407 U.S. 514, 532 (1972). (**4 points per factor**)

3.2.3. How does a court assign weight to different reasons for delay, and what is the result of that analysis under these facts? (22 points)

Answer: Different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. (**3 points**) A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. (**3 points**) Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay. (**3 points**) *Murray v. State*, 967 So.2d 1222, 1230 (Miss.2007) (quoting Barker, 407 U.S. at 531, 92 S.Ct. 2182).

Here, there is no indication of intentional delay by the State, and the length of delay caused by the absence of the State's key witness and victim should not be weighed against the State, because it is deemed a good-cause reason for delay under *Barker v. Wingo*. (**5 points**) Any delay caused by the succession of judges and the delay caused by an overcrowded docket should be weighed only slightly against the State. *Id.* (**4 points**) The "reason for delay" factor weighs only slightly in favor of Defendant because a portion of the delay was based on a good reason, and there is no finding that the State acted intentionally in its delay. **(4 points).**

MSE #4

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2018 BAR Examination
MISSISSIPPI PRACTICE AND PROCEDURE
100 Points Total

Mr. and Mrs. P were forced from a rural road when an 18-wheeler coming towards them from the opposite direction swerved to avoid several cows entering the road from a breach in a fence. Mr. and Mrs. P suffered property damage and personal injuries as a result of the incident. The 18-wheeler was owned and operated by D Company. The farmer whose fence was breached and who owned the escaped cattle was Mr. F, the owner of "F Farms."

Mr. and Mrs. P filed suit in Circuit Court where the accident occurred against D Company alleging that the truck driver had been negligent and against Mr. F. alleging that he too had been negligent in his failure to properly maintain his fence. D Company and Mr. F answered the complaint denying liability.

Counsel for Mr. and Mrs. P subsequently failed to pursue the matter further and the matter was dismissed with prejudice pursuant to Miss. Rule Civ. P 41(b) for lack of prosecution.

Mr. and Mrs. P learn of the dismissal, hire new counsel, and file a new lawsuit. Mr. and Mrs. P now assert a new cause of action against "F Farms" only alleging that it was strictly liable for their damages as the cattle had known "dangerous propensities" to enter the roadway. (Assume for purposes of this question that all applicable statutes of limitation are three years.)

"F Farms" moves to dismiss Mr. and Mrs. P's second lawsuit.

Question 4.1 (60 points total)
Discuss whether the court should properly entertain or dismiss the second complaint and the legal basis for your answer. NOTE: In responding to this question, you will need to number your responses as 4.1.1. and 4.1.2. below and respond to each subpart accordingly.

4.1.1. Your answer should name and describe any law or doctrine(s) governing these litigants' ability to file a new and viable lawsuit when their first-filed suit has been dismissed. (40 points)

4.1.2. Moreover, your answer should analyze the elements of any applicable law or doctrine in light of the operative facts in order to determine the effect upon the parties. (20 points).

Question 4.2 (40 points total)

4.2.1. Please discuss the significance of a dismissal without prejudice as opposed to one with prejudice. (17 points)

4.2.2. Please assume for purposes of this portion of the question that the first lawsuit was (a) dismissed without prejudice and (b) filed five months after the incident (c) was then dismissed three years later and (d) the second complaint was filed three years and five months after the incident occurred.

NOTE: Your answer should address how the statute of limitations is affected, if at all, by the filing and dismissal of the first lawsuit. **(23 points)**

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2018 BAR Examination
MISSISSIPPI PRACTICE AND PROCEDURE
100 Points Total

ANALYSIS AND MODEL ANSWER

Question 4.1 (60 points total)

Answer to 4.1.1. (40 points total)
The doctrine of res judicata prevents the refilling of claims that were or could have been brought in a prior lawsuit. **(30 points)**

Mississippi law provides that all claims, which have been litigated in a prior lawsuit, as well as all claims which *should* have been litigated in the prior lawsuit, are barred from relitigation under the doctrine of res judicata. See *Johnson v. Howell*, 592 So. 2d 998, 1002 (Miss.1991); *Riley v. Moreland*, 537 So. 2d 1348, 1354 (Miss.1989); *Dunaway v. W.H. Hopper & Assoc.*, 422 So. 2d 749, 751 (Miss.1982).

Res judicata, as a doctrine of claim preclusion, has two functions. Under the principle known as "bar," res judicata precludes claims, which were actually litigated in a previous action. Under the principle known as "*merger*,"(10 points) res judicata prevents subsequent litigation of any claim that should have been litigated in a previous action.

The Mississippi Supreme Court has held "'that when a court of competent jurisdiction enters a final judgment on the merits of an action, the parties or their privies are precluded from re-litigating claims that were decided or could have been raised in that action.'" *Miss. Dep't of Human Services v. Shelby*, 802 So. 2d 89, 95 (Miss. 2001) (citing *Aetna Cas. & Ins. Co. v. Berry*, 669 So. 2d at 66).

If subsequently raised claims "stem from a common nucleus of operative fact" **(5 points)** and "could have" been raised in the prior litigation they will be precluded pursuant to the doctrine of res judicata.

Harrison v. Chandler-Sampson Ins., Inc., 891 So. 2d 224, 231-35 (Miss. 2005).

The Restatement (Second) of Judgments (1982) has been referenced by the United States Supreme Court in *Nevada v. United States*, 463 U.S. 110, 103 S. Ct. 2906, 77 L. Ed. 2d 509 (1983), states that:

causes of actions are the same if they arise from the same "transaction"; whether they are products of the same "transaction" is to be determined by "giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage."**(5 points)**

Harrison v. Chandler-Sampson Ins., Inc., 891 So. 2d 224, 231-35 (Miss. 2005).

Answer to 4.1.2. (20 points total)

For the doctrine of res judicata to apply, four identities must exist with respect to each action:

(1) identity of the subject matter of the action; (2) identity of the cause of action; (3) identity of the parties to the cause of action; and (4) identity of the quality or character of a person against whom the claim is made. *Quinn v. Estate of Jones*, 818 So. 2d 1148, 1151 (Miss. 2002); *Dunaway v. W.H. Hopper & Assocs., Inc.*, 422 So. 2d 749, 751 (Miss. 1982).
Absence of any one of the elements is fatal to the defense of res judicata. *Estate of Anderson v. Deposit Guar. Nat'l Bank,* 674 So. 2d 1254, 1256 (Miss. 1996). **(10 points)**

Here all four identities are the same.

(1) The identity of the subject matter is the same. The subject matter is the vehicular accident causing Plaintiffs' injuries. Bullock v. Resolution Trust Corp., 918 F. Supp. 1001 (S.D. Miss. 1995) Identity of the subject matter of the action exists where both lawsuits arise out of or address the same subject matter. **(3 points)**

(2) The identities of the causes of action are the same even though Mr. and Mrs. P asserted a new theory of liability in the second action.

A party may not elude the bar of res judicata by alleging a new legal theory of recovery in a second lawsuit where the underlying facts and circumstances are the same as those involved in the first lawsuit. *Walton v. Bourgeois*, 512 So. 2d 698, 702 (Miss.1987); *DeFoe v. Great Southern National Bank*, 547 So. 2d 786, 788 (Miss. 1989). **(4 points)**

(3) The identity of the parties is the same. If the parties are the same or are in privity with one another, they will be regarded as the same for purposes of the doctrine of res judicata.

Mississippi law requires that the parties to the two actions must be substantially identical in order for res judicata to apply. "`Substantially identical' does not mean `exactly the same.'" *Bullock v. Resolution Trust Corp.*, 918 F. Supp. 1001 (S.D. Miss. 1995)(interpreting Mississippi law). Privity, succession of interest, and relationship are terms used to express the identity of parties required for the application of res judicata. Id. citing *State, ex rel. Moore v. Molpus*, 578 So. 2d 624, 640 (Miss.1991); *Walton,* 512 So. 2d at 701. See also *Russell v. SunAmerica Securities, Inc.*, 962 F.2d 1169, 1173 (5th Cir.1992) (recognizing under Mississippi law privity is broad concept which requires court to "look to the surrounding circumstances to determine whether claim preclusion is justified.").

As Mr. F is the owner of "F Farms" the two are "in relationship" and pursuant to surrounding circumstances would likely qualify as satisfying the "identity of party" requirement. **(3 points)**

Question 4.2 (40 points total)

Answer to 4.2.1. (17 points)

A dismissal without prejudice generally does not prohibit the refilling of the action whereas a dismissal with prejudice precludes the filing of any further related action. A dismissal without prejudice does not constitute a ruling on the merits whereas a dismissal with prejudice does. **(17 points)**

Answer to 4.2.2. (23 points total)

The filing of a complaint usually tolls the statute of limitations until the date of its dismissal. The general rule with dismissals without prejudice is that it may be refilled provided the statute has not run. Here, the statute would have been tolled during the three-year pendency of the litigation and the refilling would be within the remaining statute of limitations.

"The general rule in Mississippi is " 'that, unless process is not timely served, the statute of limitations is tolled upon the filing of the complaint, and does not begin to run again until litigation has ended.' **(17 points)** [Until recently] this rule applied even when a case was dismissed for failure to prosecute." *Hill v. Ramsey*, 3 So.3d 120, 123 (Miss.2009).

But because the first lawsuit was dismissed without prejudice and because the litigants did not diligently pursue the first litigation, the statute of limitations will be deemed to have run.

> a statute of limitations is not tolled during a proceeding that is dismissed ultimately for failure to prosecute, regardless of

whether the dismissal is initiated by the clerk, the judge, or a party. Said differently, while the general rule in this State remains that the timely filing of a complaint and service of process tolls the statute of limitations, we have carved out an exception to that rule for all cases dismissed for failure to prosecute. And because the statute was not tolled in this case, the statute of limitations barred Ingram's second complaint, and the circuit judge erred by denying Thornhill's motion to dismiss.

Thornhill v. Ingram, No. 2014-IA-00959-SCT
(6 points)

MSE #5

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2018 BAR Examination
DOMESTIC RELATIONS
100 Points Total

Geno comes to your law office enraged, holding a letter in one hand and his two-year-old twin toddlers with the other hand. He explains that his wife, Sue, left him six months earlier without giving any reason. They have been married for eleven years. The letter simply stated: I want a divorce and you can keep the children as long as I get to visit with them.

Sue works as a personal trainer at the local gym and makes $40,000 annually. Geno, a self-employed photographer, had similar earnings until the children were born. His earnings and client base declined when he put his work aside and dedicated most of his time to caring for the twins. It has been difficult maintaining the household without help from Sue and Geno has become delinquent on his car note. He informs you that he may have to file bankruptcy. They live in a house that Geno inherited from his parents and his photography office is there.

He wants to know whether he is entitled to alimony and whether Sue has any rights to the house.

QUESTIONS

5.1. What factors will the court consider in determining whether to award alimony? (30 points total)

5.2 Discuss and distinguish the different types of alimony? (30 points total)

5.3 Discuss whether Geno would be entitled to alimony. (10 points)

5.4 Discuss whether Sue would have any rights to the home? (20 points)

5.5 What impact would a bankruptcy filing have on the divorce proceedings? (10 Points)

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2018 BAR Examination
DOMESTIC RELATIONS
100 Points Total

ANALYSIS AND MODEL ANSWER

5.1 What factors will the court consider in determining whether to award alimony? (30 points total - 2.5 points for each factor of the 12 factors)

The Chancellor has discretion as to whether alimony should be awarded and the amount thereof. Factors to be considered in determining alimony are:

- The income and expenses of the parties;
- The health and earning capacities of the parties;
- The needs of each party;
- Obligations and assets of each party;
- Length of the marriage;
- The presence or absence of minor children in the home, which may require that one or both of the parties either pay, or personally provide, child care;
- Age of the parties;
- The standard of living of the parties, both during the marriage and at the time of the support determination;
- Tax consequences of the spousal support order;
- Fault or misconduct;
- Wasteful dissipation of assets by either party; and,
- Any other factor deemed by the court to be just and equitable" in connection with the setting of spousal support.

Armstrong v. Armstrong, 618 So.2d 1278, 1280 (Miss 1993)
M.C.A. Section 93-5-23

5.2 Discuss and distinguish the different types of alimony? (30 points total - 10 points for each of the 3 type for a total of 30 points)

Alimony may be Permanent or Periodic, Rehabilitative, or Lump Sum:

- Permament or periodic alimony is a monthly payment to the recipient spouse that continues until the death of either spouse or remarriage of the recipient spouse. It is modifiable based on a change in circumstances. Armstrong v. Armstrong, 618 So.2d 1278 (Miss. 1993); Hubbard v. Hubbard, 656 So.2d 124 (Miss. 1995); Sides v. Pittman, 150 So.2d 211 (Miss. 1993).

- Rehabilitative alimony is temporary. It is awarded for a period of time to allow the recepient spouse to become self sufficient. Rehabiitative alimony does not automatically terminate upon remarriage of the recipient spouse, but does terminate upon death of either spouse. It may be modified based on change in circumstances. Hubbard v. Hubbard, 656 So.2d 124 (Miss. 1995); Waldron v. Waldron, 743 So.2d 1064 (Miss. App. 1999).

- Lump Sum Alimony is a vested sum certain payable at one time or in a series of payments. It is not modifiable and does not terminate upon death of either spouse. It carries over to the estates of the parties. It does not terminate upon remarriage. It is intended as an equity equalizer between the parties. Wray v. Wray, 394 So.2d 1341 (Miss. 1981); Bowe v. Bowe, 557 So.2d 793 (Miss. 1990); Holleman v. Holleman, 527 So.2d 90 (Miss. 1988).

5.3 Discuss whether Geno would be entitled to alimony. (10 points)

Credit should be given for a reasonable application of alimony to Geno similar to the following: Based on the disparity of income, the length of the marriage, the presence of children in the home and misconduct of Sue, alimony should be awarded to Geno on a permanent or a temporary basis. If Geno is expected to increase his business, alimony may be awarded for a period of time and be rehabitative in nature. Because the children are two years old, he may need alimony until they are school age, at a minimum. The only assets that the couple have are a house and car, that will likely be awarded to Geno, therefore, lump sum alimony would not likely be awarded to Geno.

5.4 Discuss whether Sue would have any rights to the home? (20 points total)

Property received by inheritance by a spouse is separate property. However, it may be converted to marital property based on the family use doctrine. **(10 points)** This doctrine almost always converts a family residence to marital property. Geno's wife and children lived in the home and it is very likely marital property. As marital property the Chancellor would consider the property division factors of Ferguson v. Ferguson, 639 So.2d 921 (Miss. 1994) in determining whether Sue is entitled to a share of equity of the home. The Ferguson factors **(10 points)** are:

1. Substantial contribution to the accumulation of property . . . ;
2. The degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets . . . ;
3. The market value and the emotional value of the assets subject to distribution;
4. The value of assets not ordinarily, absent equitable factors to the contrary, subject to such distribution, such as property brought to the marriage by the parties and property acquired by inheritance or inter vivos gift by or to an individual spouse;

5. Tax and other economic consequences, and contractual or legal consequences to third parties, of the proposed distribution;
6. The extent to which property division may, with equity to both parties, be utilized to eliminate periodic payments and other potential sources of future friction between the parties;
7. The needs of the parties for financial security with due regard to the combination of assets, income and earning capacity; and
8. Any other factor which in equity should be considered.

All Ferguson factors are not required to be listed. Credit will be given for a reasonable response to Geno's concern over Sue's rights to the house. The Answer may include the following: The inherited home will likely be determined to be marital property, giving Sue rights to it. However, factors considered by a chancellor in determining property division may allow Geno to keep the house. The majority of relevant factors favor Geno. A house inherited from his parents would have emotional value for him. Due to his diminished income, home based business and custody of the children, the home would provide needed financial security. The need for alimony may also be reduced.

5.5 What impact would a bankruptcy filing have on the divorce proceedings? (10 points)

If Geno files bankruptcy during the proceedings the automatic stay pursuant to 11 United States Code, Section 362 would operate to stay the determination of property division. The domestic relations exception from the stay in section 362(b)(2) excepts domestic support obligations, it does not extend to property division. A motion to lift the stay would need to be filed in bankruptcy court to proceed with property division.

MSE #6

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2018 Bar Examination
LEGAL ETHICS AND PROFESSIONAL CONDUCT
100 POINTS TOTAL

FACTS

Angela and John were study partners during law school and became fast friends. Following law school, John opened a solo general litigation practice in North Mississippi while Angela went to work for a large firm on the Mississippi Gulf Coast. Several years into their respective practices, Angela contacts John and offers to refer a lucrative plaintiff's car wreck case to John. "The Plaintiff is a friend of my cousin who lives just thirty minutes away from you," Angela said, "plus, it's a good case, with clear liability. You just have to fight over the amount of damages. I don't know the Judges up there and I'm several hours away. If you want to just take the ball and run with it, I'll only take 25% of any fee you get. Get her signed up, then just let me know when its over and you're ready to disburse the fees." John agrees and then confirms the agreement with Angela in a letter. Angela provides John with the client's contact information.

After contacting the prospective client Theresa Smith and meeting with her alone at her house, John confirms that it is an excellent case with a large anticipated amount of recoverable damages. However, Theresa tells John that she is in dire financial straits because of her medical bills from the accident, telling him she will be evicted "any day now" from her apartment and medical providers are threatening to sue her. Theresa tells John that she won't hire him as her attorney unless he helps her pay some bills now.

John tells Theresa that he normally charges a 33% contingency fee in these kinds

of cases, but will agree to advance the funds requested if she agrees to a 40% contingency fee. He further tells her that he will share that fee with Angela, but that won't increase what she has to pay for attorney's fees. Theresa agrees and the two of them shake hands on the deal, with John telling Theresa he will email her a written contingency fee agreement to sign. The following week, John starts paying Theresa's $800.00 monthly apartment rent and also gives her $700.00 per month to make payments toward her outstanding medical bills.

John then files a lawsuit on behalf of Theresa and the case proceeds. John spends a substantial amount of time participating in discovery over the next year, including Theresa's deposition. After discovery is complete, the attorneys defending the case file motions to strike a large portion of Theresa's recoverable damages and John believes the motion may be granted. Feeling he can't properly respond to the motions without help, John calls Michael, another local attorney, for assistance. Michael agrees to work with John on the case until conclusion, including helping at trial if needed, in exchange for 25% of the fee. John agrees. Michael spends the next week working on the motion responses, responds to the motions and then argues at the motion hearing later that month. The Judge hearing the case denies the defense motions and soon after, John negotiates a favorable settlement for Theresa, subject to her approval.

John calls Theresa on her cell phone and speaks to her for the first time since her deposition to discuss the settlement and she agrees to the settlement amount. Once the settlement is concluded and proceeds are paid, John issues checks to Angela, Theresa and Michael for the amounts agreed to, along with a brief letter that simply states that their funds from the lawsuit were enclosed.

After receiving her check, Theresa calls John and is angry. "With what I agreed to settle for, this check is way too small," she said. John explained that he deducted the money he had advanced her, as well as other case expenses, and then a 40% contingency attorney's fee. "You told me you normally charged a one-third fee and that's what I agreed to," Theresa yelled. "I know you're sharing your fee with Angela, but that's no reason to overcharge me. I also didn't agree to your other 'expenses,' whatever those are. This is why lawyers have bad reputations - I'm going to call the bar on you." John tries to further explain, but Theresa hangs up on him.

John then pulls his file, but does not find where he ever sent a written contingency fee agreement to Theresa for signature.

QUESTIONS

6.1. Does Angela and John's agreement for the referral of a client and attorney's fee sharing comply with the Mississippi Rules of Professional Conduct governing attorney's fees ? Explain. (30 points)

6.2. Does John and Michael's agreement for sharing the attorney's fee comply with the Mississippi Rules of Professional Conduct governing attorney's fees? Explain. (20 points)

6.3. Does John's agreement to advance funds to Angela comply with the Mississippi Rules of Professional Conduct governing conflicts of interest and transactions with clients? Explain. (20 points)

6.4. Does John's contingency fee agreement with Angela comply with the Mississippi Rules of Professional Conduct governing attorney's fees? Explain. (30 points)

MISSISSIPPI BOARD OF BAR ADMISSIONS
February 2018 Bar Examination
LEGAL ETHICS AND PROFESSIONAL CONDUCT
100 POINTS TOTAL

ANALYSIS AND MODEL ANSWER

6.1. Does Angela and John's agreement for the referral of a client comply with the Mississippi Rules of Professional Conduct? Explain. (30 points total)

No. The agreement does not comply with the provisions of Mississippi Rule of Professional Conduct 1.5(e). The Mississippi Rules of Professional Conduct provides:

> (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.

Miss. R. Prof. Cond.1.5(e). **(15 Points)**

A forty percent (40%) contingency fee may be reasonable as a total fee, although it can be argued that it is not reasonable since damages are expected to be very substantial and liability is admitted. Even so, John appears to have had to perform a substantial amount of work in the case.

Secondly, John did inform the client of the participation of both John and Angela in the case.

However, Angela does not agree to perform any real work on the case, reflected by her comments that John would "take the ball and run with it" and only contact her once it

was time to disburse the fee. As such, it does not appear that Angela's portion of the fee (25%) is in proportion to the services she will render in the case and there is no written agreement where Angela agrees to assume joint responsibility for the representation. The fee division here would violate Rule 1.5(e). **(15 points)**

6.2. Does John and Michael's agreement for sharing the fee comply with the Mississippi Rules of Professional Conduct? Explain. (20 points).

No. The agreement also does not comply with the provisions of Mississippi Rule of Professional Conduct 1.5(e).

With respect to John's agreement with Michael, Rule 1.5(e) is again implicated. Michael appears to engage in substantial and important work in the case and while trial is ultimately not necessary, agrees to help with trial. It may be argued that his participation over one month is not sufficient to justify a full 25% portion of the fee, but his involvement creates a much more substantial issue on this element.

As with the analysis of the agreement with Angela, a total 40% contingency fee may be reasonable, although it may be argued that it is excessive.

Regardless, there is no evidence that Theresa was ever informed or agreed to Michael's involvement. For this reason alone, the agreement does not comply with Rule 1.5(e)(2).

6.3. Does John's agreement to advance funds to Angela comply with the Mississippi Rules of Professional Conduct? Explain. (20 points).

No. The agreement violates the provisions of Miss. R. Prof. Conduct 1.8.

Rule 1.8(e) of the Mississippi Rules of Professional Conduct Provides:

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, or administrative proceedings, except that:

1. A lawyer may advance court costs and expenses of litigation, including but not limited to reasonable medical expenses necessary to the preparation of the litigation for hearing or trial, the repayment of which may be contingent on the outcome of the matter; and

2. A lawyer representing a client may, in addition to the above, advance the following costs and expenses on behalf of the client, which shall be repaid upon successful conclusion of the matter.

   a. Reasonable and necessary medical expenses associated with treatment for the injury giving rise to the litigation or administrative proceeding for which the client seeks legal representation; and

   b. Reasonable and necessary living expenses incurred.

   The expenses enumerated in paragraph 2 above can only be advanced to a client under dire and necessitous circumstances, and shall be limited to minimal living expenses of minor sums such as those necessary to prevent foreclosure or repossession or for necessary medical treatment. There can be no payment of expenses under paragraph 2 until the expiration of 60 days after the client has signed a contract of employment with counsel. Such payments under paragraph 2 cannot include a promise of future payments, and counsel cannot promise any such payments in any type of communication to the public, and such funds may only be advanced after due diligence and inquiry into the circumstances of the client.

   Payments under paragraph 2 shall be limited to $1,500 to any one party by any lawyer or group or succession of lawyers during the continuation of any litigation unless, upon ex parte application, such further payment has been approved by the Standing Committee on Ethics of the Mississippi Bar. An attorney contemplating such payment must exercise due diligence to determine whether such party has received any such payments from another attorney during the continuation of the same litigation, and, if so, the total of such payments, without approval of the Standing Committee on Ethics shall not in the aggregate exceed $1,500. Upon denial of such application, the decision thereon shall be subject to review by the Mississippi

> Supreme Court on petition of the attorney seeking leave to make further payments. Payments under paragraph 2 aggregating $1,500 or less shall be reported by the lawyer making the payment to the Standing Committee on Ethics within seven (7) days following the making of each such payment. Applications for approval by the Standing Committee on Ethics as required hereunder and notices to the Standing Committee on Ethics of payments aggregating $1,500 or less, shall be confidential.

Miss. R. Prof. Cond.1.8(e). **(10 Points)**

Here, John's agreement violates Rule 1.8(e). While it may be argued that the funds are "reasonable medical expenses" and "living expenses" within the meaning of the rule and that Theresa's circumstance is a "dire and necessitous" one, John fails to comply with the time limitation of payment (*i.e.*, 60 days after client signs contract for employment of counsel) and exceeds the maximum amount allowable without first obtaining permission from the Standing Committee on Ethics of the Mississippi Bar. Additionally, he does not appear to have performed any "due diligence and inquiry into the circumstances of the client" before making payments, but simply agrees after merely being told by the client of the claimed circumstances. **(10 points)**

6.4. Does John's contingency fee agreement with Angela comply with the Mississippi Rules of Professional Conduct? Explain. (30 points).

No. The agreement violates Mississippi Rule of Professional Conduct 1.5

Generally, an attorney may enter into a contingency fee agreement as long as the case does not involve a domestic relations matter where payment is contingent upon securing divorce, alimony or support, or where there is a contingent fee for representing a defendant in a criminal case. Miss. R. Prof. Conduct 1.5(d). **(5 points)**

When a contingent fee is permissible, there are certain requirements:

Miss. R. Prof. Cond. 1.5(c) - Fees

> (c) 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 a recovery, showing the remittance to the client and the method of its determination.

Miss. R. Prof. Cond. 1.5(C). **(15 points)**

Here, while a written agreement was intended, John never obtained a written contingency fee agreement from Theresa that contained the information provided for under Rule 1.5(C). Moreover, since John's only sent with Theresa's check a "brief letter that simply stated that their funds from the lawsuit were enclosed," he further failed to comply with 1.5(C)'s provision that requires a written statement showing the method of determining the client's recovery. **(10 points)**