

**MISSISSIPPI BOARD OF BAR ADMISSIONS
FEBRUARY 2022 BAR EXAMINATION
EVIDENCE
100 POINTS**

QUESTION 1.1 (50 POINTS)

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 MISSISSIPPI RULES OF EVIDENCE compare with the scope under the FEDERAL RULES OF EVIDENCE?

QUESTION 1.2 (50 POINTS)

A recurring courtroom evidentiary issue is the admissibility of photographs in a civil or a criminal trial. Assume you are in trial and your opponent seeks to introduce photographs purportedly depicting the other side’s version of events. The case arises from a motor vehicles accident and your opponent seeks to offer photographs that include: a) deceased bodies at the scene; and, b) the autopsy findings.

The photographs are graphic so, as a minimally competent attorney, you timely object to the photographs. In support of your objection, please answer the following questions:

- 1.2.1.** What is the appellate procedural standard of review for the trial court's decision regarding admission of photographs? (10 Points)
- 1.2.2.** What is the trial court procedural admissibility standard? (10 Points)
- 1.2.3.** What factors should the trial court weigh in determining whether to admit the photographs? (20 Points)
- 1.2.4.** Photographs are deemed to have evidentiary value when they meet one of three criteria; name two criteria. (5 Points Each)

NOTE: FOR PURPOSES OF THIS QUESTION, WHETHER THE TRIAL IS CIVIL OR CRIMINAL IS IRRELEVANT; YOU CAN ASSUME IT IS ONE OR THE OTHER IF IT HELPS YOUR ANALYSIS.

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MODEL ANSWER

QUESTION 1.1. (50 POINTS)

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 its 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 **(7 Points)**, including the party calling [the witness]." **(3 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 **(7 Points)** ("shall not be limited to the subject matter of the direct examination") and matters affecting the credibility of the witness. **(3 Points)**. This is commonly referenced to as "wide open cross". **(5 Points, alternatively)**.

1.1.5. How does the scope of cross-examination 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. (7 Points) ("should not go beyond the subject matter of the direct examination") and matters affecting the witness' credibility. (3 Points) This is commonly referred to as "limited cross". (5 Points, *alternatively*)

QUESTION 1.2. (50 POINTS)

A recurring courtroom evidentiary issue is the admissibility of photographs in a civil or a criminal trial. Assume you are in trial and your opponent seeks to introduce photographs purportedly depicting the other side's version of events. The case arises from a motor vehicles accident and your opponent seeks to offer photographs that include: a) deceased bodies at the scene; and, b) the autopsy findings. The photographs are graphic, so as a minimally competent attorney, you timely object to the photographs.

In support of your objection, please answer the following questions:

1.2.1. What is the appellate procedural standard of review for the trial court's decision regarding admission of photographs? (10 Points)

Abuse of discretion. *Martin v. State*, 289 So.3d 703, 705 (Miss. 2019)

GRADER'S NOTE: Identification of any standard of review is worth 3 Points

1.2.2. What is the trial court procedural admissibility standard? (10 Points)

Sound discretion of the trial court (7 Points); and the court is afforded wide latitude (3 Points). *Eckman v. Moore*, 876 So.2d 975 (Miss. 2004) (internal citations omitted).

GRADER'S NOTE: Identification of any standard of review is worth 3 Points

1.2.3. What factors should the trial court weigh in determining whether to admit the photographs? (20 Points)

First, the trial court must ascertain that the photographs are relevant. If the photographs are relevant, the trial court "must determine if the photographs are so gruesome and inflammatory as to lack any evidentiary purpose. *William v. State*, 222 So.3d 1066, 1073 (Miss. Ct. App. 2017)

A photograph that is gruesome, grisly, unpleasant or even inflammatory may still be admitted so long as it is probative in value and its introduction serves a meaningful evidentiary purpose. *Mosley v. State*, 307 So.3d 1261, 1268 (¶26) (Miss Ct. App. 2020).

Ultimately, a trial court will determine whether each photograph is more prejudicial than probative. The trial court should also consider cumulative evidence rule to limit the total number of photographs admitted, if any.

GRADER'S NOTE: Alternatively, meaningful discussion applying M.R.E.401-403 analysis should receive credit between 5-15 Points.

1.2.4. Photographs are deemed to have evidentiary value when they meet one of three criteria; name two criteria. **(5 Points each, 10 Points total)**

A photograph has evidentiary value where it:

- a) Describes the circumstances of a death;
- b) Describes the location of a body and cause of death; **or**
- c) Serves to supplement or clarify witness testimony.

McIntosh v. State, 917 So.2d 78, 83 (¶ 13) (Miss. 2005).

GRADER'S NOTE: Alternatively, meaningful discussion applying M.R.E. 401-403 analysis should receive credit between **2-5 Points**.

**MISSISSIPPI BOARD OF BAR ADMISSIONS
FEBRUARY 2022 BAR EXAMINATION
CONTRACTS
100 POINTS**

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 2.1 (50 POINTS)

Anytown, Mississippi is governed by a three-member city council. Seller owns a parcel of land called Whiteacre and wants to sell it to Anytown for \$25,000. Seller spoke with all three council members, individually, and each council member told Seller that Anytown would purchase Whiteacre from him for \$25,000. At its next meeting, the Anytown City Council votes unanimously to purchase Whiteacre for \$25,000. The vote is spread upon the minutes which are signed by the appropriate authority for Anytown. Before a written contract for the sale of Whiteacre is drafted, the City Council decides the purchase would be a bad idea and refuses to follow through with the agreement announced at the City Council meeting. Assume for purposes of your answers that there is no dispute as to the legal description of Whiteacre.

2.1.1. Is there an enforceable contract between the Council and Seller? (20 Points)

2.1.2. Explain fully. (30 Points)

QUESTION 2.2 (50 POINTS)

Landlord leased a large tract of farmland to Lessee for a 10 year lease term beginning January 1, 2012 and ending December 31, 2021. The annual rent was \$120,000, payable in semiannual installments. The lease agreement contained the following extension or renewal option:

Lessor hereby gives and grants unto Lessee the right and option to lease said land for one (1) additional ten (10) year term as follows: If not in default under the terms and conditions of this lease, a ten (10) year extension period beginning January 1, 2022, and ending on December 31, 2031, upon the same terms, except that the rental to be paid by Lessee to Lessor shall be re-negotiated and may increase by the amount of increase from January 1, 2012, to January 1, 2021, in land rent customary in the area for similar property.

It is specifically understood and agreed that Lessee's option to renew herein granted shall automatically take effect unless Lessee notifies Lessor in writing of his intention not to renew prior to September 1st of the last year of his primary term.

In early 2021, Landlord and Lessee began re-negotiating the lease for the ten-year renewal period. Landlord sought to increase annual rent to \$280,000. Lessee balked at that price and offered to have an arbitrator determine what rent should be. Landlord refused to arbitrate, and no further discussions were had regarding Lessee's option to renew. In January of 2022, Lessee tendered the same semiannual rent payment it had paid during the initial lease term. Landlord rejected the payment and declared the lease terminated.

2.2.1. Did Landlord have the right to terminate the lease? (20 Points)

2.2.2. Explain fully. (30 Points)

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CONTRACTS
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MODEL ANSWER

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2.1.1. Is there an enforceable contract between the Council and Seller? **(20 Points)**

2.1.2. Explain fully. **(30 Points)**

Answer to Question 2.1.1:

YES. **(20 Points)**

Answer to Question 2.1.2:

The issue in this question deals with the statute of frauds. Pursuant to the Miss. Code Ann. § 15-3-1(c) states that

An action shall not be brought whereby to charge a defendant or other party: . . . upon any contract for the sale of lands, tenements or hereditaments, or the making of any lease thereof for longer than one year . . . unless, in each of said cases, the promise or agreement upon which such action may be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or signed by some person by him or her thereunto lawfully authorized in writing. **(15 Points)**

The only writing about the sale is the entry in the minutes of the Council meeting. Although not a formal contract, the minutes could constitute a memorandum sufficient to satisfy the statute of frauds. The memorandum or note must be in writing and signed either by the party to be charged or someone the party lawfully authorizes in writing to sign on behalf of the party to be charged. **(5 Points)** Here, the party to be

charged is the Anytown City Council. The minute entry evidenced an intent to buy, identified the land, and set out the purchase price, and as long as the minutes were signed by the appropriately authorized person and approved at a subsequent meeting of the Council, the minutes constitute a memorandum or note sufficient to satisfy the statute of frauds. **(10 Points)** See *Putt v. Corinth*, 579 So.2d 534, 538 (Miss. 1991).

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2.2.1. Did Landlord have the right to terminate the lease? **(20 Points)**

2.2.2. Explain fully. **(30 Points)**

Answer to Question 2.2.1:

YES. **(20 Points)**

Answer to Question 2.2.2:

Because the parties left an essential term of the lease renewal—rent—to future negotiations, without a definite method to determine that amount, the option was rendered unenforceable. **(10 Points)** "To be enforceable, a contract to enter into a future contract must specify all its material and essential terms and leave none to be agreed upon as the result of future negotiations." *Intrepid, Inc. v. Bennett*, 176 So. 3d 775, 778 (Miss. 2015) (quoting *Etheridge v. Ramzy*, 276 So.2d 451, 454 (Miss.1973)). "If any essential term is left open to future consideration, there is no binding contract, and an agreement to reach an agreement imposes no obligation on the parties thereto." *Etheridge*, 276 So.2d at 454. "[W]hile courts may supply reasonable terms which the parties omitted in the contracting process, such as a time for

performance, essential terms such as price cannot be left as open-ended questions in contracts which anticipate some future agreement." *Duke v. Whatley*, 580 So.2d 1267, 1273–74 (Miss.1991). **(10 Points)**

Rental amount in a lease agreement is akin to the price amount in a sales contract; thus, it is an essential and basic requirement, and "[w]ithout a definite agreement as to the amount of rent, there can be no binding lease agreement." *Id.* The renewal option here contains no definite method to determine the rent upon renewal. By its very terms, the option required that rent "shall be re-negotiated," and it provided no formula for determining the amount of any increase. For example, the permitted increase is not tethered to a particular index or formula, the geographic area mentioned in the provision is not defined, and there is no provision that would permit the parties to turn to a qualified third party to determine the new rent. See *Intrepid*, 176 So. 3d at 780. **(10 Points)**

**MISSISSIPPI BOARD OF BAR ADMISSIONS
FEBRUARY 2022 BAR EXAMINATION
CONSTITUTIONAL & CRIMINAL LAW & CRIMINAL PROCEDURE
100 POINTS**

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QUESTION 3.1 (33 POINTS)

John and Stacy had been dating for one year before they broke up. Stacy claims that the break up was due in part to John's strange and unusual behavior that developed after they began dating.

After the break up, Stacy's friend encouraged her to look at John's facebook page. Stacy still had John's username and password, so she visited the facebook page and what she saw terrified her. Although John never used Stacy's name, the page had several quotes that Stacy assumed referred to her: "If I can't have you, no one can"; "I can't live without you"; and "this will be our last day together."

Later, while Stacy was at work, she received flowers from an unknown source. Stacy went to the florist and requested a description of the person that purchased the flowers. The clerk described John.

This was the last straw. Stacy went to the local municipal court and filed stalking charges against John. John has hired you, noted defense attorney to represent him.

3.1.1. Is John guilty of stalking? (15 Points)

3.1.2. Explain fully. (18 Points)

Question 3.2 (34 POINTS)

On a Saturday night in Small Town, America, the local party club had just closed its doors for the night and the crowd was dispersing. Several young African-American men piled into Dave's sedan and began to drive away.

Officer Tom had been dispatched to help with crowd control. As Dave's car drove past Officer Tom, someone shouted "F-12 the police." Officer Tom gave chase and stopped Dave's car. Dave, who was driving was ticketed for public profanity.

At the trial of this matter, Officer Tom testified that "F-12" is a derogatory and slanderous expression used to describe the police. The trial judge found Dave guilty of public profanity. Dave has hired you to appeal the trial court's decision.

- 3.2.1.** Please explain fully why the judge's ruling was constitutionally incorrect.
(34 Points)

QUESTION 3.3 (33 POINTS)

Steve and Pamela were living together in Pamela's home. In fact, the home was deeded to Pamela and taxes were paid by her, but they shared typical home expenses. After several months of living together, Pamela began to suspect Steve of being unfaithful. While looking through Steve's cellular phone, Pamela saw the name "Susan." Pamela didn't recognize the name, but being extra cautious, she texted Susan and instructed her to leave Steve alone and never come to her house.

Steve saw the text message and became irate, accusing Pamela of not trusting him. The argument escalated to the point where Pamela decided to leave and let things cool off. The next morning she returned home and, using her key, she entered the home only to find Steve and a young lady (later identified as Susan) asleep in the bedroom.

Pamela exited the room and went to the front porch where she retrieved her son's Louisville Slugger baseball bat. She returned inside the home and began to pommel both Steve and Susan with the bat, causing severe and painful injuries, especially to Susan. When Susan recovered she decided to file charges against Pamela. In turn, Pamela decided to file charges against Susan.

- 3.3.1.** Explain fully what charges Susan should file against Pamela? (17 Points)

- 3.3.2.** Explain fully what charges Pamela might bring against Susan? (16 Points)

**MISSISSIPPI BOARD OF BAR ADMISSIONS
FEBRUARY 2022 BAR EXAMINATION
CONSTITUTIONAL & CRIMINAL LAW & CRIMINAL PROCEDURE
100 POINTS**

MODEL ANSWER

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3.1.1. Is John guilty of stalking? (15 Points)

3.1.2. Explain fully. (18 Points)

Answer to Question 3.1.:

3.1.1. John should be found not guilty of stalking. (15 Points)

3.1.2. John's defense is simple. According to Mississippi Code Annotated, 97-3-107 (as amended 1972), stalking is defined as "willful, malicious and repeated following or harassing or threatening with intent to place in reasonable fear death or bodily injury." None of the required elements of stalking are present. (18 Points)

QUESTION 3.2. (34 POINTS)

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Officer Tom had been dispatched to help with crowd control. As Dave's car drove past Officer Tom, someone shouted "F-12 the police." Officer Tom gave chase and stopped Dave's car. Dave, who was driving was ticketed for public profanity.

At the trial of this matter, Officer Tom testified that "F-12" is a derogatory and slanderous expression used to describe the police. The trial judge found Dave guilty of public profanity. Dave has hired you to appeal the trial court's decision.

3.2.1. Please explain fully why the judge's ruling was constitutionally incorrect.

Answer to Question 3.2.1:

The First Amendment to the United States Constitution prevents Congress from, "making any law respecting . . . or abridging the freedom of speech." (10 Points) Even assuming that the Mississippi Supreme Court has determined that the "F" word is profane, the judge's ruling is still incorrect. In *Brendle v. City of Houston*, 759 So. 2d 1274 (Miss. Ct. App. 2000), the Mississippi Court of Appeals held that "Mississippi cannot, under the confines of the U.S. Constitution, regulate speech which does not fall into the categories of 'fighting words,' 'obscene words,' or some 'libelous words.'" (10 Points) As in *Brendle*, "in this case we are not, obviously, dealing with libelous words" and "we are not dealing with 'obscene words[,]'" which "are defined as those that appeal to prurient interests and are in some way erotic." *Id.* (6 Points) Neither is the language considered "fighting words." As in *Brendle*, "[e]ven assuming that [Dave] used the 'F' word in his speech, [Dave]'s language while vulgar, indecent, and arguably profane, did not rise to the level of 'fighting words.'" *Id.* (6 Points) As in *Brendle*, there is nothing in this factual scenario that suggest that Dave's language sought to incite others. (2 Points)

QUESTION 3.3. (33 POINTS)

Steve and Pamela were living together in Pamela's home. In fact, the home was deeded to Pamela and taxes were paid by her, but they shared typical home expenses. After several months of living together, Pamela began to suspect Steve of being unfaithful. While looking through Steve's cellular phone, Pamela saw the name "Susan." Pamela didn't recognize the name, but being extra cautious, she texted Susan and instructed her to leave Steve alone and never come to her house.

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**3.3.1. Explain fully what charges Susan should file against Pamela?
(17 Points)**

**3.3.2. Explain fully what charges Pamela might bring against Susan?
(16 Points)**

Answer to Question 3.3:

3.3.1. Susan should file charges against Pamela for aggravated assault. Mississippi Code Ann. § 97-3-7(2)(a)(i) states that "a person is guilty of aggravated assault if he . . . attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under the circumstances manifesting extreme indifference to the value of human life." (17 Points)

3.3.2. It is without any doubt that Pamela intentionally, purposely and knowingly caused bodily injury to Susan. But, in Pamela's defense, she had previously warned Susan against coming to her home and according to the factual scenario, she never invited Pamela to her home on this particular occasion. According to Mississippi Code Ann. § 97-17-93(1), "[a]ny person who knowingly enters the lands of another without the permission of or without being accompanied by the landowner or lessee of the land, shall be guilty of a misdemeanor ." (16 Points)

**MISSISSIPPI BOARD OF BAR ADMISSIONS
FEBRUARY 2022 BAR EXAMINATION
PRACTICE AND PROCEDURE OF MISSISSIPPI COURTS
100 POINTS**

QUESTION 4.1 (10 POINTS)

4.1.1. Define the terms (1) statute of limitations and (2) statute of repose and explain the difference(s), if any between the two? (10 Points)

QUESTION 4.2 (10 POINTS)

4.2.1. Discuss at least two ways in which a statute of limitations may be tolled. (10 Points)

QUESTION 4.3 (15 POINTS)

4.3.1. What is the general statute of limitations for claims of negligence in Mississippi? (15 Points)

QUESTION 4.4 (15 POINTS)

4.4.1. What is the statute of limitations for actions brought pursuant to the Mississippi Tort Claims Act? (15 Points)

QUESTION 4.5 (10 POINTS)

4.5.1. What is the general statute of limitations for medical negligence in Mississippi? (10 Points)

QUESTION 4.6 (5 POINTS)

4.6.1. What is the statute of limitations for Assault and Battery in Mississippi? (5 Points)

QUESTION 4.7 (5 POINTS)

4.7.1. What is the statute of limitations for false imprisonment in Mississippi?
(5 Points)

QUESTION 4.8 (10 POINTS)

4.8.1. What is the general statute of limitations for breach of a written contract in Mississippi? (10 Points)

QUESTION 4.9 (10 POINTS)

4.9.1. What is the general statute of limitations for all torts not specifically ascribed a limitations period by statute in Mississippi? (10 Points)

QUESTION 4.10 (10 POINTS)

4.10.1 What is the statute of limitations for fraud in Mississippi? (10 Points)

MISSISSIPPI BOARD OF BAR ADMISSIONS
FEBRUARY 2022 BAR EXAMINATION
PRACTICE AND PROCEDURE OF MISSISSIPPI COURTS
100 POINTS

MODEL ANSWER

QUESTION 4.1. (10 POINTS)

- 4.1.1.** Define the terms (1) statute of limitations and (2) statute of repose and explain the difference(s), if any between the two? **(10 points)**.

A statute of limitations provides the time limit within which a cause of action must be filed relative to the accrual of the cause of action. There are exceptions to a statute of limitations and it may be tolled. A statute of repose provides an absolute time limit beyond which a cause of action can be filed-under any circumstances and irrespective of when the cause of action accrued. *Evans v. Boyle Flying Service, Inc.* 680 So. 2d 821, 826 n.4 (Miss. 1996).

A statute of limitation is distinguishable from a statute of repose in the sense that the latter 'cuts off the right of action after a specified period of time measured from the delivery of a product or the completion of work. [Statutes of repose] do so regardless of the time of the accrual of the cause of action or of notice of the invasion of a legal right.'

Id. citing *Universal Engineering Corp. v. Perez*, 451 So. 2d 463, 465 (Fla. 1984).

QUESTION 4.2. (10 POINTS)

- 4.2.1.** Discuss at least two ways in which a statute of limitations may be tolled. **(10 Points) (each tolling mechanism listed below is worth 5 Points)**

(a) The timely filing of a complaint will toll the statute of limitations for a period of 120 days within which time service must be effected. Miss Rule Civ Pro 4(h) provides: If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

(b) Fraudulent concealment can toll the statute of limitations for a cause of action. (*Robinson v. Cobb*, 763 So.2d 883, 887 (¶ 18) (Miss.2000))

(c) The statute of limitations can be tolled in favor of minors or persons with a mental disability (statutes providing for tolling in these situations are known as “savings statutes”.) See e.g., Miss. Code Ann. § 15-1-59 and § 15-1-36(3) (tolling for certain minors in cases of medical malpractice).

(d) Under the Tort Claims Act the statute of limitations may be tolled for a period of 95 days by filing a notice of claim. Miss. Code Ann. § 11-46-11(3) (Supp. 1998)

(3)(a) All actions brought under this chapter shall be commenced within one (1) year next after the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based, and not after, except that filing a notice of claim within the required one-year period will toll the statute of limitations for ninety-five (95) days from the date the chief executive officer of the state entity or the chief executive officer or other statutorily designated official of a political subdivision receives the notice of claim.

(e) Rule 9(h) of the Mississippi Rules of Civil Procedure acts to toll the statute of limitations when, “in good faith, the plaintiff is unable to identify unknown defendants.”

(f) when the defendant has filed bankruptcy. *Trustmark National Bank v. Pike County National Bank*, No. 97-CA-00184-SCT (Miss. 1996).

See generally 5 MS Prac. Encyclopedia MS Law § 44:22 (2d ed.), (Oct. 2021 update) Jeffrey Jackson, Mary Miller, Donald Campbell (Tolling the period of Limitation).

QUESTION 4.3. (15 POINTS)

4.3.1. What is the general statute of limitations for claims of negligence in Mississippi? **(15 points)**

The general negligence statute of limitations in Mississippi is three years. The general three-year limitations period applies to most negligence claims including those for personal injury, product liability, property damage and wrongful death. (Miss. Code § 15-1-49) provides, in relevant part, that:

- (1) All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of action accrued, and not after.
- (2) In actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury.

Miss. Code Ann. § 15-1-49(1)-(2) (Rev. 2003).

See also, *Kelly v. Ocwen Loan Servicing*, No. 2020-CA-01217-SCT, ¶23 (10/01/2020)

QUESTION 4.4. (15 POINTS)

4.4.1. What is the statute of limitations for actions brought pursuant to the Mississippi Tort Claims Act? **(15 points)**

Miss. Code Ann §11-46-11(3)(Supp. 1998) provides:

(3)(a) All actions brought under this chapter shall be commenced within one (1) year next after the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based, and not after, except that filing a notice of claim within the required one-year period will toll the statute of limitations for ninety-five (95) days from the date the chief executive officer of the state entity or the chief executive officer or other statutorily designated official of a political subdivision receives the notice of claim.

The Mississippi Legislature has conclusively stated that the one year statute of limitations set out in Miss. Code Ann. § 11-46-11(3) applies to all actions against governmental entities under the Mississippi Tort Claims Act, regardless of any other statutes of limitations that would otherwise apply.

QUESTION 4.5. (10 POINTS)

4.5.1. What is the general statute of limitations for medical negligence in Mississippi? **(10 Points)**

Two years.

(2) For any claim accruing on or after July 1, 1998, and except as otherwise provided in this section, no claim in tort may be brought against a licensed physician, osteopath, dentist, hospital, institution for the aged or infirm, nurse, pharmacist, podiatrist, optometrist or chiropractor for injuries or wrongful death arising out of the course of medical, surgical or other professional services unless it is filed within two (2) years from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered.

Miss Code Ann. § 15-1-36.

QUESTION 4.6. (5 POINTS)

4.6.1. What is the statute of limitations for Assault and Battery in Mississippi? **(5 Points)**

One year. Miss. Code Ann § 15-1-35 provides that:

All actions for assault, assault and battery, maiming, false imprisonment, malicious arrest, or menace, and all actions for slanderous words concerning the person or title, for failure to employ, and for libels, shall be commenced within one (1) year next after the cause of action accrued, and not after.

Miss. Code Ann § 15-1-35 (Rev.2003). See *Angle v. Koppers, Inc.* 42 So.3d 170 (Miss. 2010).

QUESTION 4.7. (5 POINTS)

4.7.1. What is the statute of limitations for false imprisonment in Mississippi? **(5 Points)**

One year. (Miss. Code § 15-1-35);

QUESTION 4.8. (10 POINTS)

4.8.1. What is the general statute of limitations for breach of a written contract in Mississippi? **(10 Points)**

There is a three (3) year statute of limitations on written contracts. Miss. Code Ann. § 15-1-49 (2012); *USF & G Co. v. Conservatorship of Melson*, 809 So. 2d 647 (Miss. 2002).

QUESTION 4.9. (10 POINTS)

4.9.1. What is the general statute of limitations for all torts not specifically ascribed a limitations period by statute in Mississippi? **(10 Points)**

Three years. Mississippi Code Section 15-1-49(2) applies to all claims in the event that Section 15-1-35 does not govern the intentional tort claim. Section 15-1-49 provides, in relevant part, that:

(1) All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of action accrued, and not after.

(2) In actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury.

Miss.Code Ann. § 15-1-49(1)-(2) (Rev.2003). See also, *Angle v. Koppers, Inc.* 42 So.3d 170 (Miss. 2010).

QUESTION 4.10. (POINTS)

4.10.1. What is the statute of limitations for fraud in Mississippi? **(10 Points)**

Fraud claims fall under the same statute as personal injury claims in Mississippi. "The Mississippi Code Annotated § 15-1-49 (Rev.2003) imposes a three year statute of limitations on claims for fraud. 'A fraud claim accrues upon the completion of the sale induced by false representation or upon the consummation of the fraud.' "*Dunn v. Dent*, 169 Miss. 574, 153 So. 798 (Miss. 1934).

**MISSISSIPPI BOARD OF BAR ADMISSIONS
FEBRUARY 2022 BAR EXAMINATION
DOMESTIC RELATIONS
100 POINTS**

Simba and Nala, residents of East County, Mississippi, married in 2011. They were married for five years when Nala decided to file for divorce. Although she initially approved of Simba's entertainment job in Florida, she could no longer tolerate his absence from home. As Simba's popularity grew over the years and Florida became a very lucrative venue, he spent more and more time in Florida. Simba received free room and board while on location. Because his living expenses were negligible, Simba always sent his paycheck to Nala.

Nala often called Simba's room late at night only for a female to answer but then hang up when Nala questioned her. During the first two years of their marriage, Simba would only make weekend trips to Florida. The weekend trips gradually morphed into extended-stay trips. Nala became furious when Simba was gone for fifteen consecutive months. When he returned, he moved into an apartment in West County, Mississippi.

When Nala asked Simba for a divorce, he advised her that it was not necessary because he never divorced his first wife, Princess. Nala checked the records at the local courthouse and learned that Simba married Princess in 2010. Upon further inquiry of Simba's family, Nala also learned Princess was Simba's first cousin, and the two of them worked together in Florida.

QUESTION 5.1 (15 POINTS)

Considering the facts of the various marriages, answer the following:

- 5.1.1.** What is the legal status to Simba's marriage to Princess? (5 Points)
- 5.1.2.** What is the legal status of Simba's marriage to Nala? (5 Points)
- 5.1.3.** Is a divorce action required to end Nala's marriage to Simba? (5 Points)

QUESTION 5.2 (30 POINTS)

- 5.2.1.** Name ten (10) grounds for divorce in Mississippi? (30 Points)

QUESTION 5.3 (35 POINTS)

- 5.3.1.** Discuss three (3) relevant grounds that Nala may use in her effort to obtain a divorce from Simba. (35 Points)

QUESTION 5.4 (20 POINTS)

Upon commencing her divorce proceedings, Nala must select the appropriate jurisdiction and venue in which to file her petition. Discuss the following:

- 5.4.1.** In which Court should Nala file her petition? (10 Points)
- 5.4.2.** Explain which venue is proper. (10 Points)

**MISSISSIPPI BOARD OF BAR ADMISSIONS
FEBRUARY 2022 BAR EXAMINATION
DOMESTIC RELATIONS
100 POINTS**

MODEL ANSWER

QUESTION 5.1: Considering the facts of the various marriages, answer the following:

5.1.1. What is the legal status to Simba's marriage to Princess? **(5 Points)**

Answer 5.1.1: The marriage between Simba and Princess is incestuous and void. A marriage between persons related within the 1st degree is void under Mississippi Code Section 93-1-1. (5 points).

5.1.2. What is the legal status of Simba's marriage to Nala? **(5 Points)**

Answer 5.2.1: It is valid. Simba married Princess in 2010, prior to his marriage to Nala in 2011. However, because that marriage was incestuous and void, it does not constitute a marriage at all.

5.1.3. Is a divorce action required to end Nala's marriage to Simba? **(5 Points)**

Answer 5.1.3: Yes. The marriage between Nala and Simba is valid and would require a divorce to end it.

QUESTION 5.2: Name ten (10) grounds for divorce in Mississippi? **(30 Points)**

Answer 5.2.1: Divorces in Mississippi may be granted on the following Grounds (3 points each for any 10 of the 13 grounds):

- a. Desertion
- b. Natural impotency
- c. Insanity or idiocy
- d. Wife's pregnancy by another person at the time of marriage
- e. Adultery
- f. Custody by the Mississippi Dept of Corrections
- g. Incurable insanity that develops after the marriage
- h. Habitual drunkenness
- i. Excessive drug use

- j. Habitual cruel and inhuman treatment
 - k. Bigamy
 - l. Incest
 - m. Irreconcilable differences
- M.C.A. 93-5-1,2

QUESTION 5.3. Discuss three (3) relevant grounds that Nala may use in her effort to obtain a divorce from Simba. **(35 Points)**

Answer 5.3.1: If both spouses agree to the terms, they may obtain a divorce on the ground of Irreconcilable differences. They may agree to the divorce and agree to submit financial matters to the court. **(5 Points)**

Desertion is a spouse's abandonment of the marriage for more than one year without the consent of the other spouse, just cause, excuse or intent to return. Simba had been away for 15 months. Initially, he had a good defense because his wife consented to the arrangement. He was working in Florida and financially supporting her by sending his check home to her. However, when he failed to return home for more than 12 months, just cause, excuse or intent to return became questionable. When he returned and moved into another apartment it showed an intent not to return to the marriage. A divorce may be granted based on desertion. **(15 Points)**

Adultery requires clear and convincing evidence of an adulterous inclination and a reasonable opportunity to satisfy that inclination. Larson v. Larson 122 So.3d 1213,1215 (Miss Ct. App. 2013). An adulterous inclination may be proven by circumstantial evidence of infatuation with a particular person. Based on the facts presented, Simba's marriage, although void, and continuous contact with Princess may supply the circumstantial evidence for a claim on the ground of adultery. A woman answering a phone at a hotel at night, by itself, may not be enough. However, together with the other facts may provide enough circumstantial evidence of adultery. **(15 Points)**

Question 5.4: Upon commencing her divorce proceedings, Nala must select the appropriate jurisdiction and venue in which to file her petition. Discuss the following:

5.4.1. In which Court should Nala file her petition? **(10 Points)**

Answer 5.4.1: Mississippi Chancery Courts has jurisdiction over divorce proceedings.

5.4.2. Explain which venue is proper. **(10 Points)**

Answer 5.4.1: For irreconcilable differences divorces, venue is proper in the county of residence of either party where both are Mississippi residents. If one party is a non-resident,

venue must be in the county where the resident resides. Simba and Nala are both residents of Mississippi therefore the petition may be filed in East County or West County.

For fault divorces, venue is proper where the defendant resides, if the defendant resides in Mississippi or where the plaintiff resides if the defendant does not reside in Mississippi. If the plaintiff still lives in the same county where the parties resided at the time of their separation, venue is also proper in the county in which the parties separated. M.C.A. 93-5-11

**MISSISSIPPI BOARD OF BAR ADMISSIONS
FEBRUARY 2022 BAR EXAMINATION
LEGAL ETHICS AND PROFESSIONAL CONDUCT
100 POINTS**

QUESTION 6.1 (100 POINTS)

Angela Smith has a general practice in Jefferson, Mississippi and has one associate attorney working for her. Angela represents John Jones in litigation opposite John's prior business partners in a failed development project. Central to the dispute are the terms of the LLC's Operating Agreement, that Angela drafted at John's request several years prior. Written discovery that has been exchanged in the matter includes mutual requests from the parties to produce "any and all documents or materials that pertain or relate to a claim or defense at issue in this case."

One day, Angela receives an email from an email address she does not recognize. That email contains a forwarded email from one of the opposing parties that reads as follows:

Jimmy, I've added my questions and comments. Please give me a call when you can about this.

With regard to the forwarded email, Angela recognizes the name of the opposing party and the recipient as James Cannon, her opposing counsel in the John Jones matter. Further, the "subject" line of the forwarded email contains the style of the John Jones litigation.

Attached to the forwarded email is a word processor file, which Angela then opens and reads. The file is a case evaluation of the John Jones litigation prepared by opposing counsel Cannon. One section of the evaluation discusses an argument that the terms of the LLC Operating Agreement are ambiguous and that Cannon intends on calling Angela as a witness at trial as part of parol evidence to determine the parties' intent.

Angela sends a reply to the email she received, asking "Who is this?" She receives no response. She then calls her client, John Jones, who acts surprised and disclaims any knowledge of who might have forwarded the email to Angela.

6.1.1. What is the relevant Rule or Rules of the Mississippi Rules of Professional Conduct governing the inadvertent receipt of documents related to the representation of a client? (10 Points)

- 6.1.2.** What is the relevant Rule or Rules of the Mississippi Rules of Professional Conduct governing an attorney's obligations to respond to discovery requests? (10 Points)
- 6.1.3.** What is required of Angela by the relevant Rule or Rules of the Mississippi Rules of Professional Conduct related to the receipt of the mysterious email? In answering, address the rules responsive to questions 6.1 and 6.2. (30 Points)
- 6.1.4.** What is the relevant Rule or Rules of the Mississippi Rules of Professional Conduct regarding a lawyer as a witness? (20 Points)
- 6.1.5.** What is required of Angela by the relevant Rule or Rules of the Mississippi Rules of Professional Conduct regarding a lawyer as a witness? (30 Points)

**MISSISSIPPI BOARD OF BAR ADMISSIONS
FEBRUARY 2022 BAR EXAMINATION
LEGAL ETHICS AND PROFESSIONAL CONDUCT
100 POINTS**

MODEL ANSWER

QUESTION 6.1 (100 POINTS)

- 6.1.1** What is the relevant Rule or Rules of the Mississippi Rules of Professional Conduct governing the inadvertent receipt of documents related to the representation of a client? **(10 POINTS)**

Rule 4.4(b) of the Mississippi Rules of Professional Conduct provides:
RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

- 6.1.2.** What is the relevant Rule or Rules of the Mississippi Rules of Professional Conduct governing an attorney's obligations to respond to discovery requests? **(10 POINTS).**

Rule 3.4(d) of the Mississippi Rules of Civil Procedure provides:

RULE 3.4 FAIRNESS TO
OPPOSING PARTY AND COUNSEL

A lawyer shall not:

....

- (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party

- 6.1.3.** What is required of Angela by the relevant Rule or Rules of the Mississippi Rules of Professional Conduct related to the receipt of the mysterious email? In answering, address the rules responsive to questions 6.1.1 and 6.2.1. **(30 POINTS).**

With respect to the mysterious email, Rule 6.1 provides that a lawyer shall promptly notify the sender of a communication that relates to the representation of a client and that Angela knows or reasonably should know was "inadvertently" sent. Under the facts given, the sender is unknown and it is also unknown whether the email was itself "inadvertently" sent. Since the email conveyed what appears to be privileged attorney work product and a privileged attorney-client communication, it is reasonable to believe that the email may have been inadvertently sent.

However, it may also be argued that Angela has insufficient information to make any determination about inadvertence. **(10 Points)**

There is also a question of whether Angela should have even opened the email attachment in light of recognizing that the forwarded email was a communication between an opposing party and their attorney. The Rule does not address this question and the comments to the Rule simply state that: Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it is inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. **(5 Points)**

To the extent that any response by Angela is required, her response email asking "Who is this?" does not specifically notify the sender that Angela believes the communication may have been inadvertent. However, it may be argued that the mere fact that Angela responded at all would notify the sender that she had received it. **(5 Points)**.

Regardless, the email does fall within the scope of written discovery requests for the production of documents relevant to claims and defenses in this matter. While the email attachment would appear to be a document already in the possession of opposing counsel, the email that conveyed it is not and the mere fact that it was sent is discoverable. There is no indication that the email is privileged. As such, Rule 3.4(d) requires Angela to disclose the email in a supplemental discovery response. **(10 Points)**

6.1.4. What is the relevant Rule or Rules of the Mississippi Rules of Professional Conduct regarding a lawyer as a witness? **(20 POINTS)**

Rule 3.7 of the Mississippi Rules of Professional Conduct provides:

RULE 3.7 LAWYER AS WITNESS

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

6.1.5. What is required of Angela by the relevant Rule or Rules of the Mississippi Rules of Professional Conduct regarding a lawyer as a witness? **(30 POINTS)**

At first blush, it would appear that Angela will be precluded from serving as counsel at trial of the John Jones matter. However, the question is whether she is a "necessary" witness, which in turn

is dependent upon the legal issues to which her testimony would speak and whether that is an issue for trial. That it is simply contended by opposing counsel to be an issue at trial does not end the analysis. For example, Angela may be able to favorably resolve the question of whether the LLC provisions are ambiguous with a pre-trial motion, eliminating the necessity of her testimony at trial. **(10 Points)**

If Angela is in fact a “necessary” witness at trial, then the exceptions to the rule must be considered. The subject of Angela’s potential testimony does not relate to an uncontested issue, nor does it relate to the to the nature and value of legal services rendered in the *present* case. There is insufficient information given to determine whether Angela’s disqualification as trial counsel would work a substantial hardship to the client. **(10 Points)**

To the extent that Angela is not permitted to represent her client at trial because she is a necessary witness, then her associate may act as trial counsel unless the conflicts rules of Rule 1.7 or 1.9 preclude that representation. **(10 Points)**