

**MISSISSIPPI BOARD OF BAR ADMISSIONS  
FEBRUARY 2013 BAR EXAMINATION  
PRACTICE AND PROCEDURE OF  
MISSISSIPPI COURTS CHANCERY  
(100 POINTS)**

Renae is an unhappily married woman who meanders into your office. Renae desires to file for a divorce after having been married for 18 years. Kevin and Renae have a six-year-old daughter, Eve, and Renae has three children from three previous relationships. Renae is chronically unemployed or semi-employed, and thus, is requesting alimony, child support and “everything else” from Kevin. Kevin, bless his heart, is a high school educated auto mechanic who earns between \$45,000 and \$60,000 annually.

Assuming Renae has a valid reason for divorce, please answer the following questions:

- A. What factors will the court consider in determining whether to award alimony? (30 points)
- B. Please discuss and distinguish the different types of alimony available under Mississippi law. (30 points)
- C. Assuming Renae is awarded custody of Eve, is she entitled to child support? Also, discuss the purpose of child support and how the Court will determine the amount of any child support. (40 points)

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**ANALYSIS**

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## ANALYSIS

### ***A. What factors will the Court consider in determining whether to award alimony***

The statutory authority to award alimony is found at MISSISSIPPI CODE ANN. §93-5-23, which provides in pertinent part that the court may "...make all orders...touching the maintenance and alimony of the wife or the husband, or any allowance to be made to her or him...". By the very language of the statute, then, alimony is a remedy available for either spouse in divorce proceedings.

The award of alimony is largely within the discretion of the trial court. The court has at its disposal several ways in which to style alimony payments to best serve the parties' needs. The court may use one, several or all forms of aid in combination to provide for material needs of spouses' needs incident to divorce. ***Hubbard v. Hubbard***, 656 So.2d 124, 129 (Miss. 1995)(citing ***Bowe v. Bowe***, 557 So.2d 793, 794 (Miss. 1990)).

Factors to be considered in the determination of alimony are:

- the health of the husband and his earning capacity;
- the health of the wife and her earning capacity;
- the entire sources of income of both parties;
- the reasonable needs of the wife;
- the reasonable needs of the child(ren);
- the necessary living expenses of the husband;
- the estimated amount of income taxes the respective parties must pay on their incomes;
- the fact that the wife has the free use of the home, furnishings and automobile; and,
- such other facts and circumstances bearing on the subject that might be shown by the evidence.

***Hemsley v. Hemsley***, 639 So.2d 909, 912-13 (Miss. 1994) (paraphrasing those factors enumerated in ***Brabham v. Brabham***, 84 So.2d 147, 153 (Miss. 1955) as:

- 1) the income and expenses of the parties;
- 2) the health and earning capacities of the parties;
- 3) the needs of each party;
- 4) obligations and assets of each party;
- 5) length of the marriage;

- 6) 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;
- 7) age of the parties;
- 8) the standard of living of the parties, both during the marriage and at the time of the support determination;
- 9) tax consequences of the spousal support order;
- 10) fault or misconduct;
- 11) wasteful dissipation of assets by either party; and,
- 12) Any other factor deemed by the court to be “just and equitable” in connection with the setting of spousal support); see also, *Armstrong v. Armstrong*, 618 So.2d 1278, 1280 (Miss. 1993).

GRADER’S NOTE: The answer should recognize the ***Armstrong*** factors (20 points, or some fraction depending on how many factors are recognized). Additional points are awarded for recognition of statutory basis for alimony, discretion of the Chancellor and application of the factors to the factual scenario. While the facts are limited, a complete answer will recognize Renae’s limited education and income/earning capacity); sources of income of Renae and Kevin; length of marriage; and, presence of children in the home.

***B. Please discuss and distinguish the different types of alimony available under Mississippi law.***

**Periodic Alimony:** the monthly sum paid to the recipient spouse until the death or remarriage of the recipient spouse, or until the death of the paying spouse. ***Armstrong v. Armstrong***, 618 So.2d 1278 (Miss. 1993). There can be no fixed termination date. ***Cleveland v. Cleveland***, 600 So.2d 193 (Miss. 1992). It may be modified or terminated by the court in the event of a material change in circumstances. ***Varner v. Varner***, 666 So.2d 493 (Miss. 1995). Periodic alimony becomes vested on the date each periodic payment becomes due. ***Rubisoff v. Rubisoff***, 133 So.2d 534 (1961).

**Rehabilitative Periodic Alimony:** also called periodic transitional alimony, is an equitable mechanism allowing a party who needs assistance sufficient temporary means to become self-supporting after the divorce, without becoming destitute in the process. ***Hubbard v. Hubbard***, 656 So.2d 124 (Miss. 1995). A chancellor may award periodic alimony and place a time limitation on how long it is to be paid, thus creating “rehabilitative periodic alimony.” ***Hubbard***, 656 So.2d at 129-30. Like periodic alimony, this type of

alimony is modifiable during the period in which it accrues. *Id.* at 130. It does not automatically terminate upon the recipient's spouse's remarriage. **Waldron v. Waldron**, 743 So.2d 1064 (Miss. App. 1999).

**Lump Sum Alimony**: also called alimony in gross, is a lump sum payment or a fixed and certain sum of money which is due and payable over a definite period of time. **Wray v. Wray**, 394 So.2d 1341 (Miss. 1981). This type of alimony is intended as a final settlement and as an equalizer between the parties and is not modifiable, absent fraud. **Bowe v. Bowe**, 557 So.2d 793 (Miss. 1990). Lump sum alimony may be payable in a single lump sum or in fixed periodic payments for a total sum certain. Further, it may be payable in cash, in kind, or in any combination thereof. **Holleman v. Holleman**, 527 So.2d 90 (Miss. 1988). Lump sum alimony is vested in the recipient spouse when the judgment awarding it becomes final, retroactive to the date the judgment is entered. It becomes an obligation of the estate of the obligor if he or she dies before payment. **Bowe v. Bowe**, 557 So.2d 793 (Miss. 1990)(citations omitted). The source of the paying spouse's ownership of assets has never been a factor in the determination of a lump sum alimony award. **Bland v. Bland**, 629 So.2d 582 (Miss. 1993).

GRADER'S NOTE: The question is worth 30 points; identification of each type of alimony and discussion of distinct characteristics is worth 10 points each. Identification of each type without discussion is worth 5 points each.

**C. Assuming Renae is awarded custody of Eve, is she entitled to child support? Also, discuss the purpose of child support and how the Court will determine the amount of any child support.**

Child Support. Child support obligations arise from legal obligations to one's child, not to a spouse or child's parent. A chancellor may consider factors such as the age of a child, health of the child, physical and emotional needs, activities of the child and the child's educational status. Child support is payable until the age of majority (21 in Mississippi) and may continue longer or discontinue earlier based on: agreement (longer); military enlistment, discontinuing school/college, obtaining full-time employment (shorter). Additionally, the chancellor may order that a parent maintain health insurance, if reasonably available. The chancellor may consider Kevin's fluctuating income and enter written findings deviating from the guidelines. Also, the chancellor may consider Kevin's health, any obligations to other children and other equitable circumstances. Finally, the issue of Renae's children from other relationships is a red herring. No facts would allow one to conclude that Kevin

has an obligation to those non-biological children. (No points deducted for not addressing/incorrectly addressing. Grader may award up to three bonus points for correctly addressing). Thus, Renae, assuming she is awarded custody of Eve, should request statutory child support from Kevin on behalf of Eve.

MISS. CODE ANN. §43-19-101 sets the following guidelines as a rebuttable presumption for the correct amount of child support, either in initial award or by modification by any court or administrative proceeding:

Number of Children Due Support	Percentage of the Adjusted Gross Income That Should be Awarded for Support
1	14%
2	20%
3	22%
4	24%
5 or more	26%

GRADER'S NOTE: Recognizing Kevin's income fluctuation and the statutory scheme is worth 25 points. Because more facts are present for this subsection, application of the facts to the law results in some or all of the additional 15 points.



MISSISSIPPI BOARD OF BAR ADMISSIONS  
February 2013 Bar Examination  
**BUSINESS ORGANIZATIONS**  
100 Points Total

Danielle Smith and Lakata Jones, both residents of Mississippi, decided to open a retail clothing store together called the Corner Store, which was located in Everytown, Mississippi. Things went well for the store and Smith and Jones' relationship until they did not. Jones finally demanded that Smith leave the operation of the Store completely in Jones' hands, with Smith taking a limited role handling only the merchandise ordering. Smith let Jones have his way for several months. During that time, sales declined dramatically, and ultimately, The Corner Store was unable to pay for merchandise already ordered for and delivered to the Store.

Demands were made by the Katie Clothing Company to the Corner Store for payment of overdue bills for clothing delivered. Jones refused to make any payment because he claimed it was Smith's foolish orders that had caused the Store's sales to decline. In Jones' view, Smith was personally and solely responsible for any payment of the bills. Smith announced she would pay for nothing because it was Jones' poor customer and sales skills that had caused the rapid decline in the business, not a problem with Smith's ability to order types of clothing that would sell in the Store.

**NOTE:** Assume for purposes of this question that no issues exist under the Uniform Commercial Code with respect to the purchase or delivery of the clothing ordered from the Katie Clothing Company. Assume further that all questions are based on the facts presented.

**QUESTION NO. 2.1 (5 POINTS).** What is the type of business relationship Smith and Jones created?

**QUESTION NO. 2.2 (10 POINTS).** Under the facts given, does the intent of either Smith or Jones affect the type of business relationship they formed?

**QUESTION NO. 2.3 (5 POINTS).** Was the business relationship required to be memorialized in writing? Why or why not?



**QUESTION NO. 2.4 (25 POINTS).** What effect, if any, does Smith and Jones' type of business relationship have on Katie Clothing Company's ability to recover from the Corner Store business itself? Include in your answer the basis(es) for your determination.

**QUESTION NO. 2.5 (20 POINTS).** What, if any, impact on Katie Clothing Company's right to recover payment for merchandise delivered does Smith and Jones' internal dispute about responsibility for payment have? Explain the basis(es) for your response.

**QUESTION NO. 2.6 (35 POINTS).** Within the context of the type of business relationship Smith and Jones formed, what, if anything, could they have done to limit Smith's authority to act on behalf of the Corner Store as to Katie Clothing Company and other vendors?

MISSISSIPPI BOARD OF BAR ADMISSIONS  
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100 Points Total  
**ANALYSIS**

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NOTE: Assume for purposes of this question that no issues exist under the Uniform Commercial Code with respect to the purchase or delivery of the clothing ordered from the Katie Clothing Company. Assume further that all questions are based on the facts presented.

**QUESTION NO. 2.1 (5 POINTS).** What is the type of business relationship Smith and Jones created?

**MODEL ANSWER:** A general partnership.

**QUESTION NO. 2.2 (10 POINTS).** Under the facts given, does the intent of either Smith or Jones affect the type of business relationship they formed?

**MODEL ANSWER:** No. (3 points). Under Miss. Code Ann. §79-13-202(a) (Supp. 2012), "the association of two or more persons to carry on as co-owners of a business for profit forms a partnership, whether or not the persons intend to form a partnership." (4 points). Under the facts given, Smith and Jones decided to open a retail clothing business together. That was sufficient to form a partnership under the cited statute. (3 points). It is not vital to the examinee's answer that the exact statutory citation be given; it is a factor to be considered in determining how many points to award for an answer. This guidance applies to all model answers that include a specific statutory citation(s).

**QUESTION NO. 2.3 (5 POINTS).** Was the business relationship required to be memorialized in writing? Why or why not?

**MODEL ANSWER:** No. (1 point). Under Miss. Code Ann. §79-13-202 (Supp. 2012), a general partnership was formed when Smith and Jones decided to open a retail clothing business together. (2 points). Nothing in §79-13-202 or other provisions of Mississippi's Uniform Partnership Act requires that the partnership be memorialized in writing. (2 points)

**QUESTION NO. 2.4 (25 POINTS).** What effect, if any, does Smith and Jones' type of business relationship have on Katie Clothing Company's ability to recover from the Corner Store business itself? Include in your answer the basis(es) for your determination.

**MODEL ANSWER:** The creation of a partnership triggers application of Mississippi's Uniform Partnership Act. (5 points). Under Miss. Code Ann. §79-13-203, "[p]roperty acquired by a partnership is property of the partnership, not of the partners individually." (10 points). Thus, when the merchandise ordered from Katie Clothing Company by Smith in his capacity as a partner of the Store was delivered, it became property of the partnership. See Miss. Code Ann. §79-13-204 (Supp. 2012)(property is partnership property when acquired in the name of the partnership and presumed to be partnership property if purchased with partnership assets). (10 points).

**QUESTION NO. 2.5 (20 POINTS).** What, if any, impact on Katie Clothing Company's right to recover payment for merchandise delivered does Smith and Jones' internal dispute about responsibility for payment have? Explain the basis(es) for your response.

**MODEL ANSWER:** Under Miss. Code Ann. §79-13-306 (Supp. 2005), "all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law." (10 points). Thus, under the facts given, both Smith and Jones were jointly and severally liable for the amount owed to Katie. (10 points).

**QUESTION NO. 2.6 (35 POINTS).** Within the context of the type of business relationship Smith and Jones formed, what, if anything, could they have done to limit Smith's authority to act on behalf of the Corner Store as to Katie Clothing Company and other vendors?

**MODEL ANSWER:** Each partner of a partnership is an agent of the partnership and authorized to act on behalf of the partnership in the ordinary course of business under Miss. Code Ann. 79-13-301 (Supp. 2012). (10 points). However, this authority is subject to the effect of a statement of partnership authority under §79-13-303. (10 points). Under the latter statute, Smith and Jones as the Corner Store partnership could have filed a statement of authority which sets forth, among other things, any limitations on the authority of one or both of the partners to enter transactions on behalf of the partnership. (10 points). The statement is filed in the Mississippi Secretary of State's office and must be executed by both partners under §79-13-105(a) and (c). (5 points).



**MISSISSIPPI BOARD OF BAR ADMISSIONS  
February 2013 Bar Examination  
CONSTITUTIONAL LAW, CRIMINAL LAW & CRIMINAL PROCEDURE  
100 total points**

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

**Question #1: Thirty-two (32) points**

**(A.)** To be valid, government regulations on speech and assembly in public places must possess three (3) characteristics. Name them. (12 points)

**(B.)** Strict scrutiny is applied when a fundamental right is limited.

**(1)** The law will only be upheld if it promotes what type of interest? (8 points)

**(2)** Name three (3) of a person's First Amendment fundamental rights. (12 points)

**Question 2: Thirty-three (33) points**

In 2009, you are a Mississippi criminal defense attorney representing "Defendant" who is indicted and prosecuted for murder of "Victim." A petit trial jury is selected, sworn, and seated. At the conclusion of the State's case-in-chief, you move for a directed verdict of acquittal due to insufficiency of the evidence. Viewing the evidence in the light most favorable to the State, the trial judge grants your motion, commenting that the State had failed to produce any evidence whatsoever, direct or circumstantial, connecting Defendant to the murder of Victim.

Subsequently, the livid District Attorney begins re-investigating Defendant and discovers that Defendant had video-taped the entire murder of Victim by Defendant. In 2010, the District Attorney re-presents the case to the Grand Jury with a copy of the newly discovered video tape, which was not known about until after the 2009 trial. Upon viewing the horrific murder of Victim by Defendant (in vivid color and high definition), Defendant is re-indicted by the Grand Jury for the murder of Victim.

You still represent Defendant, who is now facing his 2010 murder indictment of Victim. What motion(s) should you file and how should the trial judge rule? Explain fully.

**Question 3: Thirty-five (35) points**

You are representing the State of Mississippi as the Assistant District Attorney in Hinds County, Mississippi, responsible for prosecuting "Defendant." Defendant was properly indicted by the Grand Jury as a section 99-19-83 habitual offender with one count of grand larceny for stealing an all-terrain vehicle (atv) valued at \$750.00. You have made a plea offer of less than the maximum to Defendant as a non-habitual offender, which he has rejected prior to trial and on the record in the presence of his attorney with the circuit judge. Defendant is still indicted as a section 99-19-83 habitual offender when you proceed to a petit jury trial. After being presented with all the evidence, hearing arguments of counsel, and receiving the instructions of law, the petit jury finds Defendant guilty beyond a reasonable doubt of the felony offense of grand larceny.

- (A.) As ADA, you are still pursuing to have defendant sentenced as a section 99-19-83 habitual offender, what is the potential maximum period of incarceration that the defendant is facing ? Explain fully. (17 points)
  
- (B.) Presuming that Defendant is given an adequate opportunity to challenge the prosecution's proof, what must you as ADA do now during the sentencing hearing for Defendant to be eligible for sentencing as a section 99-19-83 habitual offender ? Explain fully. (18 points)

**MISSISSIPPI BOARD OF BAR ADMISSIONS  
February 2013 Bar Examination  
CONSTITUTIONAL LAW, CRIMINAL LAW & CRIMINAL PROCEDURE  
100 Points  
ANALYSIS**

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**MODEL ANSWER to Question #1: Thirty-two (32) points total**

**(A.)** (1) Regulations must be content-neutral (4 pts); (2) narrowly tailored to serve a significant government interest (4 pts); and (3) leave open alternative channels of communication (4 pts). **Grader's Outline:** four (4) points for each characteristic.

**(B.)** (1) The law will only be upheld if it is necessary to promote a compelling or overriding interest. **Grader's Outline:** eight (8) points.

**(2)** The First Amendment rights are speech, religion, press, assembly, and to petition the government for redress of grievances. **Grader's Outline:** four (4) points for each correctly identified right (only three of five needed).

**AUTHORITY: UNITED STATES CONSTITUTION, AMENDMENT I:**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**MODEL ANSWER to Question 2: Thirty-three (33) points**

You, Defendant's attorney, should file a motion to dismiss the 2010 indictment on the ground of double jeopardy. You should argue that the judge's directed verdict in 2009 for the same murder of Victim is of equal effect to a petit jury's verdict of not guilty. The trial judge should grant your motion to dismiss. The defense motion should be granted. To prosecute Defendant under the 2010 Murder Indictment for the same crime and victim as in the 2009 case would be prohibited by the double jeopardy clause of the Mississippi and United States Constitutions and Mississippi

Supreme Court and United States Supreme Court case precedent. Double jeopardy is a fifth amendment guarantee protecting a person against a second prosecution for the same offense after acquittal or conviction, and against multiple punishments for the same offense.

**Grader's Outline:** Seventeen (17) points should be awarded for the correct decision that a motion to dismiss based on double jeopardy grounds should be filed. Sixteen (16) points should be awarded for a correct explanation of why the trial judge should grant the motion to dismiss and what double jeopardy is.

**AUTHORITY: MS CONST. ART. 3, § 22:**

No person's life or liberty shall be twice placed in jeopardy for the same offense; but there must be an actual acquittal or conviction on the merits to bar another prosecution.

**UNITED STATES CONSTITUTION, AMENDMENT V:**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

If a defendant is acquitted on the merits by reason of a directed verdict based on insufficiency of the evidence, such an acquittal is a bar to any future prosecution for the same offense. “. . . the [directed verdict of acquittal] order of the court protects the defendant from future prosecutions for the crime for which she was acquitted. Miss.Const. § 22 (1890).” *State v. Thornhill*, 171 So. 2d 308, 312 (Miss. 1965); *State v. Cox*, 339 So. 2d 1374, 1377 (Miss. 1976); *State v. Russell*, 358 So. 2d 409, 413, (Miss. 1978); *Carlson v. State*, 597 So. 2d 657, 659 (Miss. 1992); *State v. Insley*, 606 So.2d 600, 604 (Miss. 1992); *McGraw v. State*, 688 So. 2d 764, 767 (Miss. 1997).

See also, *United States v. Ball*, 163 U.S. 662 (1896); *Green v. United States*, 355 U.S. 184 (1957); *Fong Foo v. United States*, 369 U.S. 141 (1962); *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977); *Sanabria v. United States*, 437 U.S. 54 (1978).



**MODEL ANSWER to Question #3 Thirty-five (35) points**

(A.) The maximum period of incarceration that Defendant is potentially facing is life imprisonment without parole. Defendant is facing life imprisonment without parole because Mississippi has a sentencing enhancement statute, section 99-19-83, for alleged violent habitual offenders. Section 99-19-83 is a statute that increases the potential punishment for a third, or more, violent-felony offenders, above and beyond the regular statutory maximum sentence of incarceration. The imposition of this enhancement is contingent upon the State being able to prove the specific statutory requirements beyond a reasonable doubt. In the present case, the potential punishment is elevated from a potential ten (10) years maximum period of incarceration to life imprisonment without parole. **Seventeen (17) points**

**Grader's Outline:** Nine (9) points should be awarded for the correct answer of life without parole. Eight (8) points should be awarded for identifying that there must be two or more prior felony convictions to constitute a habitual offender. The explanation should include the distinction about how the law recognizes that some individuals are habitual offenders if they have two or more prior felony convictions. Some applicants may include this information in their answer to Question B as well and should be credited. See below.

(B): For Defendant to be sentenced as a section 99-19-83 habitual offender, the ADA is required to prove three (3) things beyond a reasonable doubt to the circuit judge, not a jury, by either credible sworn testimony or properly authenticated documents. First, the ADA must prove that this specific defendant has been convicted of and sentenced to one (1) year or more for at least two (2) separately brought, and arising out of separate incidents and at different times, felony offenses. **(6 points)** Second, the ADA must prove beyond a reasonable doubt that the defendant actually served one (1) year or more of actually being incarcerated on both or more of the aforementioned prior felony convictions. **(6 points)** Third, the ADA must prove that at least one (1) of the prior aforementioned felony convictions was a "crime of violence." **(6 points); Total (18) eighteen points**

**Grader's Outline:** Six (6) points should be awarded for each of the three (3) requirements. Any additional argument explaining what constitutes any one (1) of the three (3) requirements is unnecessary for full six (6) point credit. i.e. It is not necessary that the bar examinee define what is, or is not, a "crime of violence."

**AUTHORITY:** Miss. Code Ann. § 99-19-83

Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, and where any one (1) of such felonies shall have been a crime of violence shall be sentenced to life imprisonment, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

Laws 1976, Ch. 470, § 2, eff. January 1, 1977.

All that is required for defendant to be validly convicted as habitual offender is that defendant be properly indicted as an habitual offender; that the prosecution proves prior offenses by competent evidence; and that defendant be given reasonable opportunity to challenge prosecution's proof. *Keyes v. State* 549 So. 2d 949 (Miss. 1989).

With regard to the prosecution's burden of proving applicability of the habitual-offender statute, the Mississippi Supreme Court has held that the State "must show[,] and the trial court must determine[,] that the records of the prior convictions are accurate, that they fulfill the requirements [for habitual-offender status], and that the defendant sought to be so sentenced is indeed the person who was previously convicted." *London v. State*, 80 So. 3d 837, 841, (Miss. Ct. App. 2011), certiorari denied 80 So. 3d 111; see also *Phillips v. State*, 421 So. 2d 476, 481 (Miss. 1982).

Habitual offender status is not crime, in and of itself, but merely status which, if proven, will enhance sentence imposed for conviction of offense. *Gray v. State*, 605 So. 2d 791 (Miss. 1992).

See also *Smallwood v. State*, 930 So. 2d 448 (Miss. Ct. App. 2006); *Wilson v. State*, No. 2010-KA-01276-COA, (MS Ct. App. 2013).



**MISSISSIPPI BOARD OF BAR ADMISSIONS**

**February 2013 Bar Examination**

**TORTS**

**100 Points Total**

Please briefly discuss the applicable statutes of limitations for the following torts:

(a) Medical malpractice claim against a doctor in his capacity as an employee for a community hospital and any factors that might extend the statute of limitations period.  
(20 points)

(b) Insurance bad faith (10 points)

(c) Assault (10 points)

(d) Malicious Prosecution (10 points)

(e) Breach of written contract (10 points)

(f) Breach of oral contract (10 Points)

(g) Bad faith breach of contract (10 Points)

(h) Negligence (10 Points)

(i) Intentional infliction of emotional distress (10 Points)

MISSISSIPPI BOARD OF BAR ADMISSIONS

February 2013 Bar Examination

**TORTS**

100 Points Total

**ANALYSIS**

Please provide applicable statutes of limitations and respond to any additional questions regarding the statute for the following torts:

(a) The statute of limitations for a claim against an employee of a community hospital, one year, is governed by the Mississippi Tort Claims Act. [Miss. Code Ann. §§ 11-46-1 *et seq.*] (10 Points) Mississippi courts have extended the discovery rule to actions governed by the Tort Claims Act, such that the one-year statute is tolled where negligence is not discoverable by reasonable diligence.(5 Points) Additionally, in the case of a cause of action which accrues from and after May 15, 2000, the statute is tolled if any person entitled to bring an action under Mississippi Code section 11-46-11 is under the disability of infancy or unsound mind, until after the disability is lifted, but for a period no longer than 21 years.(5 Points)

(b) The statute of limitations for a claim for insurance bad faith is three years. [Miss. Code Ann. § 15-1-49] (10 Points)

(c) The statute of limitations for a slander claim is one year. This one year statute serves as a general catch-all for all intentional torts. [Miss Code Ann. § 15-1-35] (10 Points)

(d) The statute of limitations for malicious prosecution is one year. [Miss Code Ann. § 15-1-35] (10 Points)

(e) The statute of limitations on a breach of written contract claim is three years. [Miss. Code Ann. § 15-1-49] (10 points)

(f) The statute of limitations for breach of oral contract is one year. (10 points)

(g) The statute of limitations on a bad faith breach of contract is three years. [Miss. Code Ann. § 15-1-49] (see also *B & C v. Ovella*, 2012 WL 2953722) (10 Points)

(h) The statute of limitations for a general negligence claim is three years. [Miss Code Ann. § 15-1-49] (10 Points)

(i) The statute of limitations for intentional infliction of emotional distress is one year. [Miss. Code Ann. § 15-1-35] (10 Points)



MISSISSIPPI BOARD OF BAR ADMISSIONS  
February 2013 Bar Examination  
**DOMESTIC RELATIONS**  
100 Points Total

Harold and Wilma, residents of Mississippi, had been married for five years before Wilma decided to file for divorce. Although she initially approved of Harold's New York job, she could no longer tolerate Harold's absence from home. Although it was not as profitable as they anticipated, Harold continued to pursue a music career in New York. He performed at a hotel, and was paid gross wages averaging \$2,500 per month, \$2,000 after taxes, social security and retirement contributions. He received free room and board at the hotel and sent his check to Wilma. Wilma often called his room late at night and a woman answered, but hung up when Wilma inquired about her. During the first two years of their marriage Harold would only make week-end trips to New York. Now he had been gone for fifteen consecutive months. Wilma became furious when he did not return home to celebrate their 2012 wedding anniversary. Their two-year old daughter does not remember Harold.

When Wilma spoke with Harold regarding a divorce he advised Wilma that it was not necessary because he never divorced his other wife. He also told her he wanted custody of their daughter. Wilma then checked the records at her local courthouse and learned that Harold had actually married two other women. He had married Olivia in 1996 and Tina in 2000. Olivia had died in 2005 but Tina lived in New York.

**QUESTIONS**

1. In light of Wilma's research, is it necessary for her to proceed with the divorce? Explain your answer. (20 Points)
2. On what grounds may one seek a divorce in Mississippi? (26 Points)
3. Explain the available grounds applicable to Wilma in her efforts to obtain a divorce. (20 Points)
4. What factors should the Chancellor consider in determining custody of the couple's child? (19 Points)
5. Compute the statutory amount of child support Harold will be assessed if custody is awarded to Wilma. (15 Points)

MISSISSIPPI BOARD OF BAR ADMISSIONS  
February 2013 Bar Examination  
**DOMESTIC RELATIONS**  
100 Points Total  
ANALYSIS

1. The Divorce proceeding would be necessary because the marriage between Harold and Wilma is valid **(5 points)**. It is valid because the marriage to Tina is void. Marriage to Tina took place in 2000 while Harold was still married to Olivia, whom he married in 1996. Therefore, it was bigamous **(5 points)** and void **(5 points)** pursuant to MCA 93-7-1. Where the marriage was void, it may be shown in any proper proceeding in which the fact of marriage is material, and this may be done in any court, between any parties, whether the action is for an annulment or the issue arises collaterally in other proceedings. Harold's marriage to Olivia was terminated upon her death in 2005 **(5 points)**. Harold and Wilma married in 2007 (in 2012 they had been married for five years). Therefore, their marriage took place after Tina's death.
  
2. Divorces in Mississippi may be granted on the following Grounds **(2 points each)**:
  - a. Desertion
  - b. Natural inpotency
  - 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
  
3. "Irreconcilable differences" **(20 points)** is the most applicable ground for Wilma's divorce. This ground would require Harold to agree to the divorce. 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. Harold has been away for 15 months. However, he may have a good defense because he is working in New York and supporting his family with the money. Further, Wilma consented to the arrangement. Although he has been away for more than one year, it would likely constitute just consent, just cause or



excuse or intent to return. Adultery, based on the facts presented, would likely not be proven. A woman answering a phone at a hotel at night, and an ex-spouse (of a marriage that is void) living in the same state would likely not be clear and convincing proof of adultery.

4. The following factors should be considered by the chancellor in determining custody: **(3 points for a and 2 points for b-i)**
  - a. Age, health and sex of the child
  - b. Parenting skills
  - c. Capacity to provide primary child care and employment responsibilities
  - d. Physical and mental health and age of parents
  - e. Emotional ties of the parent and child
  - f. Moral fitness
  - g. Home, school, and community record of the child
  - h. Stability of the home environment and employment of each parent
  - i. Other e.g. religion
  
5. Computation of statutory child support:  $14\%$  of  $\$2,000 = \$280$  per month  
**(15 points)** M.C.A. 43-19-101



MISSISSIPPI BOARD OF BAR ADMISSIONS  
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LEGAL ETHICS AND PROFESSIONAL CONDUCT  
100 Points Total

FACTS

During the course of representing them in a personal injury case, Attorney Michael White entered into a loan agreement with his clients, James and Betty Brown. The terms of the loan agreement included an express provision that Attorney White was to split attorney's fees with the Browns (who are not attorneys) in the event Attorney White received a contingency fee in a separate and unrelated case from the matter Attorney White was representing the Browns.

About one year after the loan agreement was executed, Attorney White failed to repay the loan from the proceeds of another client's lawsuit from which Attorney White had also borrowed funds.

While the loan agreement with the Browns was in writing, Attorney White failed to make it clear to the Browns that they should seek independent legal advice about the loan. Further, Attorney White failed to advise the Browns about the realistic risks or possibilities of seeing any return in the other client's litigation from which the loan with the Browns was to be repaid.

After attempting to collect on the terms of the loan agreement for over eighteen (18) months on their own, the Browns ultimately turned to the Mississippi Bar's General Counsel. Attorney White maintains that he did not do anything wrong, and one day when he gets another big contingency fee, the Browns will eventually be repaid.

QUESTIONS

- (1) Did Attorney White's actions violate The Mississippi Rules of Professional Conduct? If so, what Rule(s)? (40 points)
- (2) Upon what conditions may an attorney enter into a business transaction with an existing client? (40 points)
- (3) As it pertains to repayment of the loan, was it permissible for Attorney White to share his contingency fee with the Browns? If not, what Rule governs attorneys sharing legal fees with non-lawyers? (20 points)

MISSISSIPPI BOARD OF BAR ADMISSIONS  
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LEGAL ETHICS AND PROFESSIONAL CONDUCT  
100 Points Total

ANALYSIS AND MODEL ANSWER

- (1) Did Attorney White's actions violate the Mississippi Rules of Professional Conduct? If so, what Rules (40 points).

MODEL ANSWER TO (1):

Yes. See MRPC 1.8(a), 5.4(a) and 8.4.

**Rule 1.8(a), MRPC**, provides that a lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or pecuniary interest adverse to a client unless: (1) the transaction and terms on which the lawyer acquires the interests are fair and reasonable to the client; (2) fully disclosed and transmitted in writing to the client; (3) in a manner which can be reasonably understood by the client; (4) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and (5) the client consents in writing.

**Rule 5.4(a), MRPC**, provides that a lawyer or a law firm shall not share legal fees with a nonlawyer, except that:

- (1) an agreement by a lawyer with the lawyer's firm, partner or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
- (2) a lawyer who purchases the practice of law of a deceased, disabled or disappeared lawyer may pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; and
- (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

**Rule 8.4, MRPC**, provides in part that, it is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; or
- (d) engage in conduct that is prejudicial to the administration of justice.

**(2) Upon what conditions may an attorney enter into a business transaction with an existing client? (40 points).**

**MODEL ANSWER TO (2):**

Lawyers may wish to enter into business dealings with a current client for various reasons – for example, the client may be a friend or may have come to the lawyer with a profitable business idea and the lawyer may want to be involved in the enterprise. The concern in such a situation is that the lawyer, as a party to the business dealing, may overreach or take advantage of a client who may believe the lawyer is providing independent legal advice when, in fact, the lawyer is protecting the lawyer's own interests.

To overcome the concern of lawyer overreaching, Rule 1.8(a) places a number of conditions on a lawyer's entering into a business transaction with a client or knowingly acquiring ownership, possessory, security or pecuniary interest adverse to a client. **First, the terms of the agreement must be "fair and reasonable to the client" and "fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client."** See *Miss. Bar v. Rexrode*, 939 So.2d 755, 756 (Miss. 2005)(imposing reciprocal discipline or disbarment where lawyer "engaged in business transaction with clients without informing them of the risks involved or advising them to seek independent counsel."). **Next, the client must be given a "reasonable opportunity to seek the advice of independent counsel in the transaction."** Finally, **the client must consent in writing to the transaction.** See *Attorney AAA v. Miss. Bar*, 735 So.2d 294, 303 (Miss. 1999).

The concern of Rule 1.8(a) is the transaction between the lawyer and the client itself, not the subject of the transaction. In other words, there is no requirement that the transaction relate to the subject matter of the underlying representation to be subject to the requirements of Rule 1.8(a). See also §12:2

Professional Responsibility for Mississippi Lawyers, Jeffrey Jackson and Donald Campbell, (MLI Press 2010).

- (3) **As it pertains to repayment of the loan, was it permissible for Attorney White to share his contingency fee with the Browns? If not, what Rule governs attorneys sharing legal fees with non-lawyers? (20 points).**

**MODEL ANSWER TO (3):**

**No. Rule 5.4, MRPC** prohibits a lawyer or a law firm from sharing legal fees with a nonlawyer, unless an exception exists as identified in Rule 5.4(a)(1) – (3). None of the exceptions identified in Rule 5.4 are present within this question.

According to the official comment to Rule 5.4, the provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment.

The traditional and apparently continuing concern is that if lawyers were allowed to share fees with non-lawyers, the incentive to serve the economic interests of such non-lawyers could restrict or impede the exercise of independent judgment by counsel. See §33:3 Professional Responsibility for Mississippi Lawyers, Jeffrey Jackson and Donald Campbell, (MLI Press 2010).

**SPECIAL NOTE:** This question is factually analogous, if not identical to, a report of final disciplinary action as reported in the October – December 2009 edition of *The Mississippi Lawyer* found on page 39-40 re: **Michael J. Brown of Jackson, Mississippi**, Docket Number 08-002-1, of which Attorney Brown received a public reprimand.

**END**