

MISSISSIPPI BOARD OF BAR ADMISSIONS

July 2014 Bar Examination

EVIDENCE

100 Points Total

You represent the manufacturer of a hot water heater in a products liability suit brought by Jill Johnson. Mrs. Johnson alleges the hot water heater malfunctioned and exploding, causing a fire in her home that resulted in her husband's death due to smoke inhalation. Your client does not dispute that her husband died as a result of the fire. After inspection of the hot water heater, your expert determined that the pilot light on the water heater had been altered after it left your client's possession and the alteration caused the explosion. Mrs. Johnson has retained Earl Expert to testify that the cause of the fire was due to a manufacturing defect of the hot water heater. Earl Expert is a mechanical engineer with experience in fire investigations. Earl Expert never visited the fire scene nor did he perform any tests on the subject hot water heater. His opinions regarding the manufacturing defect in the hot water heater are based on a Consumer Product Safety Commission recall of the same brand and model of water heater in 2008. His opinions regarding the cause of the fire are based on review of photographs of the fire scene. The subject hot water heater was manufactured in 2009. In response to discovery requests, Mrs. Johnson produces the following documents and things:

- (1) Autopsy Photographs showing thermal burns on her husband's body; and
- (2) A document titled "Scene Search Report" describing "fire origin burns" near the water heater's location. The document is signed by Steve Smith, a retired police department investigator employed on a contract basis by Mrs. Johnson's attorney. The document is not notarized.

After Mrs. Johnson's document production, you learn that Steve Smith passed away two months after completing the "Scene Search Report". Steve Smith was never deposed in the case.

Analyze the admissibility at trial of the following testimony and evidence, citing any applicable Rule of Evidence and/or common law.

Question 1.1 (25 Points):

- Earl Expert's testimony.

Question 1.2 (25 Points):

- The 2008 water heater recall.
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Question 1.3 (25 Points):

- The Autopsy Photographs.

Question 1.4 (25 Points):

- The "Scene Search Report"

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July 2014 Bar Examination

EVIDENCE

100 Points Total

ANALYSIS AND MODEL ANSWER

Question 1.1 (25 points):

Rule of Evidence 702

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Earl Expert's opinions do not meet the standard for admissibility of expert opinion testimony as set forth in Rule of Evidence 702, *Daubert v. Merrill-Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kuhmo Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). This analysis requires a dual showing that the expert's opinions will be relevant and reliable. Earl Expert's opinions fail to meet the first prong of the three-prong test of Rule of Evidence 702, since his testimony is not based on any facts or data developed in this case. Earl Expert's proposed opinions are the result of guess work, speculation, or conjecture and are not properly admissible as evidence.

The better answers must recognize the importance of the fact that Earl Expert did not visit the scene of the fire and did not test the subject water heater to determine if a malfunction occurred.

Question 1.2 (25 points):

Rule of Evidence 402

Evidence which is not relevant is not admissible.

The subject water heater was not recalled. Therefore, evidence of a past recall is irrelevant.

Rule of Evidence 404(b)

Evidence of prior acts is not admissible to prove that a party acted in conformity with past behavior.

The subject water heater was manufactured in 2009, after products subject to the 2008 CPSC recall. Mrs. Johnson's purpose in introducing evidence of the 2008 recall would be to establish the manufacturer acted in conformity with the manufacturing process that resulted in the recall, a purpose not permitted by Rule 404(b).

Question 1.3 (25 points):

Rule of Evidence 402

All relevant evidence is admissible.

Rule of Evidence 403

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice and confusion of the issues.

It is well-settled Mississippi law that gruesome photographs whose only purpose is to influence and prejudice the jury should be excluded at trial. *Butler v. Chrestman*, 264 So. 2d 812 (Miss. 1972); *Walker v. Graham*, 582 So. 2d 431 (Miss. 1991). In this case, the autopsy photographs are highly prejudicial and more likely to inflame and prejudice the jury rather than serve any evidentiary purpose.

The photographs are gruesome and graphic, and any introduction of the photographs will only serve to prejudice a jury beyond the repair of any instruction a court may give. The manufacturer is not disputing that the minor died as a result of the fire. Further, the death certificate lists the husband's death as a result of smoke inhalation, not thermal burns as the photographs depict. It is likely the jury would confuse the cause of death due to the impact of viewing the autopsy photographs.

It is important thing that the examinee recognize that the autopsy photographs are relevant but unduly prejudicial.

Question 1.4 (25 points):

Rule of Evidence 701

A lay witness's opinion testimony is limited to those opinions or inference which are not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

There has been no proof that Steve Smith possesses the expertise necessary to provide an expert opinion regarding the cause and origin of the fire. As a lay witness, his opinion testimony is limited to those things not based on scientific, technical or other specialized knowledge.

Rules of Evidence 801 and 802

Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. Hearsay is not admissible except as provided for by law.

The "Scene Search Report" is inadmissible as hearsay and does not qualify under any hearsay exception.

MISSISSIPPI BOARD OF BAR ADMISSIONS

July 2014 Bar Examination

CONTRACTS

100 Points Total

Alan advertised for sale a parcel of land he owned in Any County, Mississippi. The land was not located near any major traffic artery, and therefore didn't appear to be desirable for development. Alan negotiated with Wade, and mailed Wade the following signed memorandum: "To Wade: I am willing to sell you my land in Any County consisting of about 20 acres for \$50,000. Dated January 10, 2014." Wade wanted assurance that Alan would not sell to someone else while Wade inspected the land. On January 10, Alan told Wade: "I promise not to revoke the offer, sell the land to anyone else, or raise the price for 10 days to give you the opportunity to examine the land." Wade replied, "I will go to Any County to inspect the land and get back to you within 10 days."

Wade traveled to Any County and examined the land. He returned home on January 13 and took the \$50,000 to Gwen, an attorney. He instructed Gwen to hold the funds for him as he expected to purchase a parcel of land from Alan and wanted her to represent him in the purchase. She deposited Wade's check into her bank account entitled, "Gwen K. Barnes, Attorney-at-Law, P.A." On January 14, Wade signed and mailed a letter to Alan stating, "I have examined the land and I accept your offer."

On January 13, Alan learned that the county planned to build an interstate highway extension next to the parcel, which would drastically increase its value. Alan immediately dispatched a signed letter to Wade stating, "The Any County deal is off." Wade did not receive the letter until January 16.

On January 15, Wade stopped by Gwen's office and said, "I've changed my mind about purchasing Alan's land, but if you are interested, I'm willing to assign you my contract in the land for \$500." Gwen had no knowledge of the interstate development announcement but did think Wade was getting a good deal and orally agreed to accept assignment.

Two weeks later, Wade learned about the highway extension and immediately sought your advice about any rights he may have regarding the Any County land. Please advise Wade on any relevant legal issues and include the reasoning for your advice. Among the issues you should consider and address are:

Question 2.1 Did Wade have a valid contract for the purchase of the land? Explain all factors and legal reasoning that support your advice on this question. **(65 points)**

Question 2.2 Assume for purposes of this question that Wade had a valid contract for the purchase of the land. Was that contract validly assigned to Gwen, so that Alan, Wade, and Gwen all must honor the assignment? (Include all legal elements and reasoning for your advice on this question.) **(35 points)**

MISSISSIPPI BOARD OF BAR ADMISSIONS

July 2014 Bar Examination

CONTRACTS

100 Points Total

ANALYSIS AND MODEL ANSWER

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Wade on any relevant legal issues and include the reasoning for your advice. Among the issues you should consider and address are:

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ANALYSIS

Question 2.1 Did Wade have a valid contract for the purchase of the land? **(65 points total)**

In order for a valid contract to exist, there must be an objectively discernible offer, acceptance of that offer and consideration to support the bargain. **(5 points)** In a land sale contract, the agreement must be in writing to satisfy the Statute of Frauds. Miss. Code Ann. Sec. 15-3-1(c) (1972). Here, Alan's letter of January 10 appears to be a valid offer. **(10 points)** Alan may argue that the land is not adequately described ("My land in Any County consisting of about 20 acres"), but the fact that Wade inspected the land weighs in favor of a clearly discernible piece of property to both parties. *Taylor v. Sayle*, 163 Miss. 822, 142 So. 3 (1932). **(8 points)** Also potentially relevant is whether Alan owns any other property in Any County. **(2 points)**

Assuming an offer does exist, it remains open for a reasonable time unless revoked by Alan prior to acceptance. **(5 points)** Here, the 10 day option was not supported by consideration, nor is it in writing, and since common law applies, the offer is revocable. **(5 points)** Wade, however, accepted the offer upon mailing the letter on January 14 because absent an express method of acceptance by Alan, Wade can accept his offer with a writing. **(5 points)** Here, multiple counterparts satisfy the Statute of Frauds because Alan's letter is signed by him **(5 points)** and acceptance occurred via the Mailbox Rule [Explain what this rule is in the model answer.]. **(4 points)** Alan's revocation is only effective upon Wade's receipt, and acceptance occurred prior to January 16. **(3 points)** Alan may also argue that "I am willing to sell" is not a promise, but his later promise "not to revoke the offer" suggests otherwise, so offer and acceptance should be found here. **(8 points)** Moreover, reliance by Wade (he examined the land) argues in his favor as

consideration supporting the option, which he successfully accepted in the same way the offer was presented (mirror image). **(5 points)** In conclusion, a contract appears to be established.

Question 2.2 Was the contract validly assigned? **(35 points total)**

Generally, contracts are assignable absent express language to the contrary. **(10 points)** For the assignment to be enforceable, however, the Statute of Frauds requires that all agreements for the sale or purchase of land be in writing, and that there be a valid offer and consideration. Miss. Code Ann. Sec. 15-3-1(c) (1972). **(10 points)**

Wade and Gwen orally agreed to the assignment which does not constitute a mutually agreed upon writing for acceptance of assignment. **(10 points)** Therefore, the assignment should not be considered enforceable. **(5 points)**

MISSISSIPPI BOARD OF BAR ADMISSIONS

July 2014 Bar Examination

CONSTITUTIONAL & CRIMINAL LAW & CRIMINAL PROCEDURE

100 Points Total

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 (33 points):

Police separately interview Defendant and his wife about the stabbing of an unrelated man with whom neither resided. Each gave recorded statements admitting being present at the crime, that the Defendant did the stabbing and that the stabbing happened in a particular manner. Consequently, self defense developed as the primary issue or defense during the trial on the merits of the case. Because of the marital privilege, Defendant's wife could not testify against him. Therefore, the State, over Defendant's objection, used the tape-recorded statement she gave to police against her husband to refute Defendant's claim of self defense. The Defendant was convicted.

Question: Using a constitutional analysis, without regard to either the Mississippi or Federal Rules of Evidence, was the State's use of the wife's tape-recorded statement against Defendant proper? Yes or No? Explain fully.

Question 3.2 (34 points):

Victim makes a 911 call during which she describes an assault and battery which has been done to her by Defendant, as well as Defendant's identity and that Defendant was the aggressor. The police arrive at the scene of the 911 call, take Defendant into custody and charge him with domestic violence against his live-in girlfriend at the time, Victim. Victim is given medical attention and taken to the police station where she provides a more detailed written statement of events in her own handwriting. The 911 call that was recorded per standard operating procedure was downloaded to a disc and preserved for trial at a later date if needed. The State called the case for trial against Defendant and proceeded with the prosecution. During its case-in-chief, and over the objection of Defendant, the State presented the 911 tape as substantive evidence which was received and played for the jury. Victim was not present during the trial. Defendant was convicted.

Question: Using a constitutional analysis, without regard to either the Mississippi or Federal Rules of Evidence, was the 911 tape properly admitted ? Yes or No? Explain fully.

Question 3.3 (33 points):

The District Attorney presents a felony case against Defendant to the Grand Jury which returns a True Bill indictment against Defendant for human trafficking. The police, who have an indictment and *capias* in hand against him, go to Defendant's home and knock on the door. Defendant answers the door. The police politely asked to speak with Defendant. Defendant, unaware that he has already been indicted, agreed to speak with the police and invite the police inside his home. They all went inside for about fifteen minutes and discussed the subject matter of the indictment without counsel present, a valid waiver, or the defendant being given his ***Miranda*** warnings. During this time the defendant makes several criminal admissions. Defendant is then arrested inside his home on the indictment, taken to jail at the police station, advised of his ***Miranda*** rights orally, and also signs a written ***Miranda*** waiver resulting in Defendant repeating the same criminal admissions that he initially disclosed at his home. At trial, Defendant makes a Motion to Suppress his statements at his home.

Question: What constitutional ground(s) should be the basis of Defendant's Motion and how should the trial court rule?

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July 2014 Bar Examination

CONSTITUTIONAL & CRIMINAL LAW & CRIMINAL PROCEDURE

100 Points Total

ANALYSIS AND MODEL ANSWER

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Question: Using a constitutional analysis, without regard to either the Mississippi or Federal Rules of Evidence, was the State's use of the wife's tape-recorded statement against Defendant proper? Yes or No? Explain fully.

Grader's Outline and Model Answer

(15 points) = **NO**. The wife's tape recorded statement was inadmissible and should NOT have been admitted into evidence.

(18 points total) = Rationale;

Use of the tape-recorded statement violated Defendant's Sixth Amendment right to confrontation (**9 points**) since the statements were testimonial evidence (**5 points**) and not subject to cross-examination. (**4 points**). Police interrogations are considered testimonial evidence.

Authority: The Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). *Crawford* has restored the unavailability and the cross-examination requirements for admissible testimonial hearsay evidence and overruled the "reliability standard for admissible hearsay in *Ohio v. Roberts*, 448 U.S. 56 (1980). (Citations omitted).

Question 3.2 (34 points):

Victim makes a 911 call during which she describes an assault and battery which has been done to her by Defendant, as well as Defendant's identity and that Defendant was the aggressor. The police arrive at the scene of the 911 call, take Defendant into custody and charge him with domestic violence against his live-in girlfriend at the time, Victim. Victim is given medical attention and taken to the police station where she provides a more detailed written statement of events in her own handwriting. The 911 call that was recorded per standard operating procedure was downloaded to a disc and preserved for trial at a later date if needed. The State called the case for trial against Defendant and proceeded with the prosecution. During its case-in-chief, and over the objection of Defendant, the State presented the 911 tape as substantive evidence which was received and played for the jury. Victim was not present during the trial. Defendant was convicted.

Question: Using a constitutional analysis, without regard to either the Mississippi or Federal Rules of Evidence, was the 911 tape properly admitted? Yes or No? Explain fully.

Grader's Outline and Model Answer

(15 points) = **YES**. The admission of the 911 tape was proper.

(19 points) = Rationale;

Admission of the 911 tape was proper as it was non-testimonial evidence, **(5 points)** and thus, admission of it did not violate the 6th Amendment Confrontation Clause or *Crawford v. Washington*, 541 U.S. 36 (2004). **(5 points)** "Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." **(9 points)** *Davis*, at 822.

Authority: *Davis v. Washington*, 547 U.S. 813 (2006):

Question 3.3 (33 points):

The District Attorney presents a felony case against Defendant to the Grand Jury which returns a True Bill indictment against Defendant for human trafficking. The police, who have an indictment and *capias* in hand against him, go to Defendant's home and knock on the door. Defendant answers the door. The police politely asked to speak with Defendant. Defendant, unaware that he has already been indicted, agreed to speak with the police and invite the police inside his home. They all went inside for about fifteen minutes and discussed the subject matter of the indictment without counsel present, a valid waiver, or the defendant being given his *Miranda* warnings. During this time the defendant makes several criminal admissions. Defendant is then arrested inside his home on the indictment, taken to jail at the police station, advised of his *Miranda* rights orally, and also signs a written *Miranda* waiver resulting in Defendant repeating the same criminal admissions that he initially disclosed at his home. At trial, Defendant makes a Motion to Suppress his statements at his home.

Question: What constitutional ground(s) should be the basis of Defendant's Motion and how should the trial court rule?

Grader's Outline and Model Answer:

(18 points): The basis of Defendant's Motion to suppress must be for violating his 6th Amendment Right to Counsel.

Authority: The Sixth Amendment right to counsel is triggered "at or after the time that judicial proceedings have been initiated ... 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' *Brewer v. Williams*, 430 U.S. 387, 398, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689, 92 S.Ct.1877, 32 L.Ed.2d 411 (1972)).

(15 points): The trial judge should grant the Defendant's motion to suppress his statements inside his home. Because the ensuing discussion took place after the defendant had been indicted, outside the presence of counsel, and in the absence of any waiver of the defendant's Sixth Amendment rights, the defendant's Sixth Amendment rights were violated by the police's "deliberate elicitation" of his statements. "We have expressly distinguished this standard from the Fifth Amendment custodial interrogation standard. The Sixth Amendment provides a right to counsel even when there is no interrogation and no Fifth Amendment applicability." *Fellers v. United States*, 540 U.S. 519, 523 (2004)

Authority:

Fellers v. United States, 540 U.S. 519 (2004): This case reaffirms the "deliberate elicitation" standard applied in a Sixth Amendment analysis.(Citations omitted). The Sixth Amendment right to counsel is triggered "at or after the time that judicial proceedings have been initiated ... 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' *Brewer v. Williams*, 430 U.S. 387, 398, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689, 92 S.Ct.1877, 32 L.Ed.2d 411 (1972)). We have held that an accused is denied "the basic protections" of the Sixth Amendment "when there [is] used against him at his trial evidence of his own incriminating words, which federal agents ... deliberately elicited from him after he had been indicted and in the absence of his counsel." *Massiah v. United States*, 377 U.S. 201, 206, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964); *Fellers v. United States*, 540 U.S. 519, 523 (2004)

MISSISSIPPI BOARD OF BAR ADMISSIONS

July 2014 BAR Examination

PRACTICE AND PROCEDURE OF MISSISSIPPI COURTS

100 Points Total

A homeowner's property is damaged by strong winds associated with a severe thunderstorm and by flash flooding that follows the storm. She submits a claim to her insurance carrier. The insurer refuses to pay for any of the damage, relying on a provision in the policy that excludes coverage for "flood." The policy does, however, cover damage "caused by wind." She files a complaint against the insurance carrier, alleging that her insurer wrongfully denied her claim for coverage under the insurance policy. She seeks punitive damages against the company.

Question 4.1 What types of conduct must the plaintiff allege in her complaint in order to state a claim for punitive damages? And with what degree of specificity must it be pled pursuant to the Rules of Procedure? **(40 points)**

Question 4.2 What is the plaintiff's burden of proof at trial with respect to her claim for punitive damages? **(25 points)**

Question 4.3 Explain how punitive damage awards are handled from a procedural perspective in a trial. Your response should include an explanation of when the necessary proof is offered and what role(s) the judge and/or jury play in the award of punitive damages. **(35 points)**

MISSISSIPPI BOARD OF BAR ADMISSIONS

July 2014 BAR Examination

PRACTICE AND PROCEDURE OF MISSISSIPPI COURTS

100 Points Total

ANALYSIS AND MODEL ANSWER

Question 4.1 *What types of conduct must a plaintiff allege in her complaint in order to state a claim for punitive damages? And with what degree of specificity must it be pled pursuant to the Rules of Procedure? (40 total points)*

In her complaint, in order to adequately assert a claim for punitive damages, a plaintiff must allege that the defendant "acted with actual malice, gross negligence which evidences a willful, wanton, or reckless disregard for the safety of others, or committed actual fraud." Miss Code Ann § 65-1-11(1)(a). **(15 points)**.

Mississippi is a "notice pleading" state. **(5 points)**. According to Miss Rule Civ P 8, "[a] pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, **(10 points)**. Miss Rule Civ P 8(e) provides: "Pleading to Be Concise and Direct: Consistency. (1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." **(5 points)**.

However, if the plaintiff does allege fraud, its nine elements must be pled with specificity and particularity pursuant to Miss Rule Civ. P. 9(b). **(5 points)**.

Question 4.2 *What is the plaintiff's burden of proof at trial with respect to her claim for punitive damages? (25 points)*

Clear and convincing evidence. "Punitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant against whom punitive damages are sought."

Question 4.3

Explain how punitive damage awards are handled from a procedural perspective in a trial. Your response should include an explanation of when the necessary proof is offered and what role(s) the judge and/or jury play in the award of punitive damages. (35 points total)

A punitive damages award is handled in a bifurcated manner at trial. § 11-1-65(b) requires that the trier of fact (the jury in a jury trial, the judge in a bench trial) first find that compensatory damages are to be awarded and in what amount. **(20 points)**

If compensatory damages are awarded, an evidentiary hearing is had before the judge. § 11-1-65(c). The judge then determines whether the issue is to be turned over to the trier of fact. If it is turned over, the trier of fact shall determine whether to award them and in what amount. 11-1-65(d) **(10 points)**.

If a punitive damage award is made, but before judgment is entered, the judge shall ascertain that the award is reasonable in its amount and rationally related to the purpose to punish what occurred giving rise to the award and deter repetition by defendant and others. Miss. Code Ann. § 11-1-65 (f)(1) **(5 points)**.

MISSISSIPPI BOARD OF BAR ADMISSIONS

July 2014 BAR Examination

DOMESTIC RELATIONS

100 Points Total

Marie and Frank were married only a short time before Marie's untimely death. Frank felt he would have difficulty working full time and caring for their three minor children, ages 2, 4 and 6. Therefore, he took the children to live with Marie's parents in Jackson, Mississippi, while he continued to work and reside in Tupelo, Mississippi. Frank began abusing medication that had been prescribed to him for depression. Although he did little else, his addiction did not negatively affect his employment. He visited and gave gifts to the children only on Christmas. Marie's parents provided total support for the children.

Ten years after Marie's death, Frank began dating Fran. She moved in with him. He was delighted when she agreed to help rear his children. However, when he arrived at the home of Marie's parents to pick the children up there was a problem. Marie's parents refused to let them go. They had grown attached to the children and insisted that Frank leave the children with them. Further, the children were happy living with their grandparents. They had become active in numerous school activities and did not want to move. Marie's parents filed for custody. Frank advised them that they could never prevail because he was the children's natural father. He then filed his answer and counter-complaint for custody.

Question 5.1 What legal basis can Frank rely on to support his position? (20 points)

Question 5.2 What legal bases can Marie's parents rely on to support their claim for custody? (30 points)

Question 5.3 Apply current Mississippi law to the facts and determine the prevailing party? (40 points)

Question 5.4 What standard of proof applies? (10 points)

MISSISSIPPI BOARD OF BAR ADMISSIONS

July 2014 BAR Examination

DOMESTIC RELATIONS

100 Points Total

ANALYSIS AND MODEL ANSWER

Question 5.1. In a custody dispute between a **natural parent** and a **third party** there is a **presumption** in favor of the natural parent that it is in the best interest of the children to award custody to the natural parent. *Sellers v. Sellers*, 638 So.2d 481 (Miss. 1994). *Vaughn v. Davis*, 36 So.3d 1261 (Miss. 2010). Frank can rely on the presumption that it is in the best interest of the children to be in his custody. **(20 Points)**

Question 5.2. A third party could overcome the presumption in favor of the parents if they prove that it is in the **best interest** of the children, **and** a.) the natural parent **abandoned** the children, b) the conduct of the natural parent is so **immoral** as to be detrimental to the children, or c.) the natural parent is mentally or otherwise **unfit** to have custody of the children. *Sellers v. Sellers*, 638 So.2d 481 (Miss. 1994). **(30 Points)**

Question 5.3. The facts indicate that Frank had limited visitation with his children, failed to support them, abused prescription drugs and lived with Fran. These facts would likely cause the presumption in his favor to be forfeited as discussed below **(40 points Total)**:

5.3.1.1 Abandonment: Marie's parents will likely argue that Frank's **once-a-year visits over a 10 year period** and **failure to financially support** his children constitutes abandonment. Abandonment may be **actual or constructive**. Abandonment is any course of conduct on the part of a parent evincing a settled purpose to forgo all duties and relinquish all parental claims to the child. *Ethredge v. Yawn*, 605 So.2d 761 (Miss. 1992). Constructive abandonment is defined as voluntary abandonment of parental responsibility and removal from active participation in a child's life for so long that the effect is the same as actual abandonment. *Hill v. Mitchell*, 818 So.2d 1221 (Miss. Ct. App. 2002).

If behavior does not escalate to the status of abandonment, a natural parent could be charged with **desertion** of the child and lose the benefit of the presumption. *Vaughn v. Davis*, 36 So.3d 1261 (Miss. 2010). Frank would argue that failure to provide support, by itself, does not constitute abandonment. *Ethredge v. Yawn*, 605 So.2d 761 (Miss. 1992). Further, allowing the grandparents to be in the position of loco parentis is not enough to overcome the presumption in favor of the natural parent. *Wells v. Smith*, No. 2009-CA-01955-COA. However, Frank's actions/inactions will likely be considered abandonment or desertion, resulting in forfeiture of the presumption. **(10 Points)**

5.3.1.2 Immoral Conduct: Frank's abuse of prescription drugs and living arrangements may be construed as immoral as to be detrimental to the children. In *Irle v. Foster*, No. 2012-CA-00711-COA the court found that exposing children to illegal drug use and extramarital relationships was detrimental to the children and resulted in loss of the natural parent presumption. **(10 Points)**

5.3.1.3 Unfit: Unfit is defined as conduct presenting a genuine serious danger to the children *Sellers v. Sellers*, 638 So.2d 481 (Miss 1994). Specific factors to determine whether a parent is unfit are addressed in M.C.S. 93-15-103(3) Termination of Rights of Unfit Parents. Under the statute, if a parent has no contact with a child under the age of three for six months, or a child age three or older for a period of one year there are grounds for termination of parental rights. Addiction to drugs is also a factor considered in termination of parental rights. Frank's limited visitation and failure to support along with his addiction may indicate he is unfit. **(10 Points)**

5.3.2 Best Interest of the children

If the evidence is sufficient to overcome the presumption in favor of the natural parent, then best interest of the child is considered. In Mississippi, the Albright factors are then used to determine best interest of the child in a custody dispute. *Albright v. Albright*, 437 So.2d 1003 (Miss. 1983). **(10 Points Total)**

1. Age, health and sex of the children **(1 point)**
2. Continuity of care **(1 point)**
3. Parenting skills of the parties and willingness and capacity to provide primary care **(1 point)**
4. Employment responsibilities **(1 point)**
5. Physical and mental health and age of the parties **(1 point)**
6. Emotional ties with the children **(1 point)**
7. Moral fitness **(1 point)**
8. Home, school and community record **(1 point)**

9. Custody preference of the children (1 point)

10. Stability of the home environment and other factors (1 point)

Factors 2, 3, 6, 7, 8, 9 and 10 appear to favor Marie's parents. They will likely prevail.

Question 5.4. Proof must be clear and convincing. (10 Points)

MISSISSIPPI BOARD OF BAR ADMISSIONS

July 2014 Bar Examination

LEGAL ETHICS AND PROFESSIONAL CONDUCT

100 Points Total

FACTS

Attorney Betty Gaines was retained by a client for the purpose of providing financial and estate planning for the client's disabled husband who is mentally incompetent, and otherwise incapable of handling his business and personal affairs. Client wants to make sure her disabled husband is taken care of if client predeceases her disabled husband.

Upon Gaines' advice, the client established a trust for the protection of the client's husband, to be funded primarily by life insurance that would be paid to the trust in the event of the client's death. Attorney Gaines prepared the trust document and appointed herself as trustee, serving without bond. Among her responsibilities as trustee, Gaines had the duty to pay premiums on the life insurance policy wherein the trust was named beneficiary. As premiums became due on the life insurance policy, the client issued a check made payable to the trust and delivered it to the trustee for payment of the premium in her fiduciary capacity. The reason the trust was created was based upon the motive that the life insurance proceeds would be used to take care of the husband in the event the client predeceased her husband. Attorney Gaines prepared the trust document in such a way that the client's objectives would be met and the client approved and signed the trust document.

After a life insurance policy was issued insuring the client's life, the client sent Gaines a check for life insurance premiums in the amount of \$1,500.00 dated December 30, 2013. On or about March 1, 2014, the client received a notice from the life insurance company that the policy had lapsed due to non-payment of premiums (*i.e.*, a lapse notice). Unbeknownst to the client, the \$1,500.00 check payable to the trust to be used for payment of life insurance premiums was negotiated by Betty Gaines as trustee, but apparently it was not used to pay life insurance premiums.

When the client called Gaines to discuss the lapse of the policy, Gaines could not find any record of paying the life insurance premium and could not recall what happened to the \$1,500.00. Gaines thought she might have deposited the check in her law firm operating account, but could not locate her bank statements to determine exactly where the check may have went. When the

client pressed Gaines about what had happened, Gaines offered to refund the money to the client; however, it was too late.

At the time of the lapse of the life insurance policy, the face amount of the policy was in excess of \$500,000.00; however, the client's attempts to have the life insurance policy reinstated failed due to a change in the client's health shortly before the policy lapsed. Now that the policy has lapsed and cannot be reinstated, the client finds herself ineligible for life insurance; thus, there will be no life insurance proceeds to fund the trust. Weeks later while checking her bank statements, the client located a copy of the cancelled check indicating the check had been endorsed by "Betty Gaines, Trustee," but apparently had been deposited in Gaines' law firm operating account.

In addition to the trust Attorney Gaines prepared for the client, Gaines also prepared a last will and testament for client listing Gaines' law office secretary (who is unrelated to the client) as both executrix and as a beneficiary under the will. The reason Gaines did this is because since Gaines' secretary typed up the will, Gaines wanted for her secretary to be compensated in some manner, especially considering the sizeable amount of life insurance that would be available when the client died. Moreover, Gaines knew she could count on the cooperation of her secretary as executrix since Gaines would be serving as trustee of the trust. Even though the last will and testament was typed by the secretary, it was prepared under Gaines' supervision. Gaines also billed the client for preparing the last will and testament similar to the manner that she billed the client for preparation of the trust.

QUESTIONS

Question 6.1 As it pertains to her duties as trustee and the handling of the monies to be used to pay life insurance premiums, did the attorney's actions violate The Mississippi Rules of Professional Conduct? If so, what Rule(s)? (30 points).

Question 6.2 What duty or duties does an attorney owe to a client in the handling of a client's property? (40 points).

Question 6.3 Does the fact that there was no clear showing that the attorney intended to use or misappropriate client funds for the attorney's own use and/or that the attorney offered to refund the \$1,500.00 to the client "take care of" any violation that may have occurred? (10 points).

Question 6.4 As it pertains to the preparation of the last will and testament, did the attorney's actions violate The Mississippi Rules of Professional Conduct? If so, what Rule(s)? (20 points).

MISSISSIPPI BOARD OF BAR ADMISSIONS

July 2014 Bar Examination

LEGAL ETHICS AND PROFESSIONAL CONDUCT

100 Points Total

ANALYSIS AND MODEL ANSWER

Question 6.1 As it pertains to her duties as trustee and the handling of the monies used to pay life insurance premiums, did the attorney's actions violate The Mississippi Rules of Professional Conduct? If so, what Rule(s)? (30 points).

MODEL ANSWER TO 6.1:

Yes. MRPC 1.2(a), 1.15 and 8.4.

First, by not following the client's objectives as to how the monies were to be used to pay life insurance premiums, the attorney violated **Rule 1.2(a)** of the MRCP, which provides that a lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued.

As to the attorney's use of the client's money for what appears to be the attorney's own use and benefit, the attorney violated **MRPC 1.15**, which provides that a lawyer shall hold property of clients that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. "There is probably no easier path for a lawyer to be subjected to professional discipline than in comingling client and lawyer funds or in treating a client's property as if it belongs to the lawyer. **The Mississippi Supreme Court has referred to comingling of lawyer and client funds as a 'cardinal sin' for which a lawyer will be subject to suspension or disbarment regardless of the lawyer's motive in comingling.** In *Gex v. Mississippi Bar*, 656 So.2d 1124 (Miss. 1995), the Supreme Court noted that '[t]here may be worse sins, but the ultimate wrong of a lawyer to his profession is to divert clients' and third parties' funds entrusted to him to an unauthorized use. A lawyer guilty of such conduct exhibits a character trait totally at odds with the purposes, ideals and objectives of our profession.' Such deviance suggests a lack of trustworthiness and inability to observe professional boundaries. Further, when it involves comingling funds, professional deviance is easily detectable as there is usually a readily available

banking paper trail demonstrating deposits, disbursements and withdrawals.” §23:2 Professional Responsibility for Mississippi Lawyers, Jeffrey Jackson and Donald Campbell, (MLI Press 2010)(emphasis added).

The exact Rules violated in this question are as follows:

Rule 1.2 Scope of Representation

- (a) A lawyer shall abide by a client’s decisions concerning the objectives of the representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client’s decision whether to accept an offer of settlement of a matter. In a criminal case, a lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Rule 1.15 Safekeeping Property.

- (a) A lawyer shall hold property of clients or third persons that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property....

Rule 8.4 Misconduct.

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;
- (d) engage in conduct that is prejudicial to the administration of justice.

Depositing client funds in an attorney’s office account is a **per se violation** of Rule 1.15(b) regardless of whether the attorney has no intent to personally use the funds, and regardless of whether the client or third party suffers no loss through the lawyer’s activity.

There are two Mississippi cases with facts similar to those set forth in this question. First, as set forth on pages 37-38 the July-October 2006 edition of *The Mississippi Lawyer*, former attorney James T. Mallette was **disbarred** on July 13, 2006 by a Complaint Tribunal in Cause Number 2005-B-993 for violations **nearly identical** to those presented in this question. Likewise, in *Mississippi Bar v. Coleman*, 849 So.2d 867 (Miss. 2002) an attorney in the process of changing law firms deposited client monies in his personal checking account intending to transfer those funds to another trust account. While the attorney, who had no previous history of misconduct or disciplinary actions, claimed that he did not intend to use those client funds for his own benefit, he and his wife wrote seventy-seven (77) checks on their personal checking account, which was then

overdrawn, thereby demonstrating unlawful conversion of client funds for the attorney's personal use.

Below are some of the salient portions of the Supreme Court's opinion in *Coleman*:

Commingling of client funds is the cardinal sin of the legal profession, whether done intentionally or not; it is the ultimate breach of fiduciary trust. *Haines v. Miss. Bar*, 601 So.2d 851, 854 (Miss. 1992). See also *Cotton v. Miss. Bar*, 809 So.2d 582, 587 (Miss. 2000); *Miss. Bar v. Gardner*, 730 So.2d 546, 547 (Miss. 1998); *Reid v. Miss. State Bar*, 586 So.2d 786 (Miss. 1991). In many cases, it has been grounds of disbarment or denial of reinstatement. It is indeed the ultimate breach of fiduciary trust.

Coleman, 849 So.2d at 874 (emphasis added).

There can be no legal profession in the absence of scrupulous honesty by attorneys with other people's money. Public confidence here is vital. There may be worse sins, but the ultimate wrong of a lawyer to his profession is to divert clients' and third parties' funds entrusted to him to an unauthorized use. A lawyer guilty of such conduct exhibits a character trait totally at odds with the purposes, ideals and objectives of our profession. There can be no more damaging evidence ... to a lawyer's fitness to practice law than mishandling a trust account.

Coleman at 875, quoting *Reid*, 586 So.2d at 788. (emphasis added).

When a lawyer puts a client's money into his personal account, he can always say that any check he wrote for his personal benefit came from his money in the account, not the client's, and there is no way to actually prove otherwise. Because of this, it is an unethical practice of the most serious order for a lawyer to even mix his client's funds in with his own, or conversely, to use a trust account for personal as well as his client's transactions.

Coleman at 879, quoting *Miss. State Bar Ass'n v. Moyo*, 525 So.2d 1289, 1297 (Miss. 1988)(emphasis added).

Indeed, the viability of the legal profession hinges upon the conservation of its character, a primary component of which is trust, an additional component of which is consistent and responsible self-regulation.

Coleman, 849 So.2d at 876.

The offending attorney, Joe Price Coleman, was not disbarred, but was suspended from the practice of law in Mississippi for three (3) years. *Id.* at 877. In *Catledge v. Mississippi Bar*, 913 So.2d 179 (Miss. 2005) however, the Supreme Court imposed a far less severe suspension for comingling (a ninety (90) day suspension) where the Court found a lack of egregious conduct compared to other comingling cases where client funds were appropriated for client use. Nonetheless, even though the Supreme Court in *Catledge* and *Coleman* expressed differences in the penalty applied, the Court has consistently ruled that a violation based upon this type of misconduct existed and the offending attorney is subject to punishment.

Question 6.2 What duty or duties does an attorney owe to a client in the handling of a client's property? (40 points)

MODEL ANSWER TO 6.2:

Mississippi's Rules of Professional Conduct impose **strict fiduciary standards** on any Mississippi lawyer who holds the property of others. A lawyer under **MRPC 1.15** has an obligation to keep property and funds of clients and third parties safe, identified, accounted for and, in the case of funds, deposited separate from the lawyer's own accounts. Recognizing that **when it comes to client or third party property the lawyer is trustee and fiduciary**, Rule 1.15 requires that the lawyer maintain for funds a separate trust account "in the state where the lawyer is situated, or elsewhere with the consent of the client or third party." The lawyer is not required to open a separate bank trust account for each deposit or client of third party funds, although a separate trust account may be appropriate in some cases, when the lawyer handles estates. Instead a single trust account will generally do for all such funds, as long as the lawyer can account for which funds belong to which client and/or third person.

A lawyer is obligated under Rule 1.15 to keep "[c]omplete records of such trust account funds and other property....¹ These records must be preserved for seven years after termination of the representation²." See §23:3 Professional Responsibility for Mississippi Lawyers, Jeffrey Jackson and Donald Campbell, (MLI Press 2010).

¹ MRPC 1.15(a).

² MRPC 1.15. See *Miss. Bar v. Abioto*, 987 So.2d 913 (Miss. 2007)(Reciprocal discipline for violation of Tennessee's Rule 1.15 for failing to maintain adequate trust accounts, misplacing client property, and failing to return two videotapes).

The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule. See Official Comment to Model Rules of Professional Comment 1.15.

The Mississippi Bar has also published a detailed an informational handout for all Mississippi attorneys available in both print and on the Bar's website entitled "*Lawyer Trust Funds Guidelines*."

Question 6.3 Does the fact that there was no clear showing that the attorney intended to use or misappropriate client funds for the attorney's own use and/or that the attorney offered to refund the \$1,500.00 to the client "take care of" any violation that may have occurred? (10 points)

MODEL ANSWER TO 6.3:

No. Repayment of the funds does not rectify the violation, but is a mitigating factor. See *The Mississippi Bar v. Coleman*, 849 So.2d at 876; *Miss. Bar v. Gardner*, 730 So.2d 546, 547 (Miss. 1998) (repayment is a mitigating factor).

Question 6.4 As it pertains to pertains to the preparation of the last will and testament, did the attorney's actions violate The Mississippi Rules of Professional Conduct? If so, what Rule(s)? (20 points)

MODEL ANSWER TO 6.4:

Yes. MRPC 1.8(c) and 5.3(b and c).

This portion of the question is virtually identical to a public reprimand issued to an attorney on page 42 of the Summer 2011 edition of *The Mississippi Lawyer* wherein Mississippi attorney Sherry S. Deakle ("Deakle") was issued a public reprimand in docket number 09-372-2 for violation of Rules 1.8(c) and 5.3(b and c) of the MRPC.

Attorney Deakle received a bar complaint alleging that her office had prepared a will which listed her secretary, Bridgette Bonner, as both executrix and as a beneficiary. In responding to the bar complaint and as part of the investigatory hearing of this matter, Deakle admitted her secretary prepared the will for the client; that the will was prepared under Deakle's supervision; and

acknowledged that the will named Deakle's employee, Ms. Bonner, as beneficiary.

Rule 1.8(c), MRPC, requires that a lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee. By including her secretary in the document, Deakle prepared a will which included a testamentary gift to an employee of the drafting lawyer's firm.

Rule 5.3(b), MRPC, requires that a lawyer having direct nonsupervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer. Ms. Deakle herself was precluded from being a beneficiary; as Ms. Bonner was employed to assist in preparing the client's will, she was likewise precluded. Thus, Deakle failed to ensure and maintain Ms. Bonner's professional obligations.

Lastly, **Rule 5.3(c), MRPC**, requires that a lawyer shall be responsible for the conduct of a non-lawyer employee and will be responsible for conduct in violation of a rule of professional conduct if (1) the lawyer orders or, with the knowledge of the specific conduct, ratified the conduct involved; or (2) the lawyer has managerial authority or direct supervisory authority of the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action. Deakle knew that throughout the drafting of the will that a precluded testamentary gift was being included.

END