

**MISSISSIPPI BOARD OF BAR ADMISSIONS
July 2016 BAR Examination
EVIDENCE
100 Points Total**

QUESTION 1 (50 Points)

Evidence is the process by which facts are placed before a court. Evidence may be in the form of writings, oral statements, non-verbal actions or other means, yet all evidence is subject to some fundamental concepts. These questions seek to ensure your understanding of basic evidence concepts/rules. **Each question is worth a maximum of 10 Points.**

1. What is "Relevant Evidence"?
2. Is Relevant Evidence always admissible? Why?
3. Who may impeach a witness?
4. What is the scope of cross-examination under the MISSISSIPPI RULES OF EVIDENCE?
5. How does the scope of cross-examination under the under the MISSISSIPPI RULES OF EVIDENCE compare with the scope under the FEDERAL RULES OF EVIDENCE?

QUESTION 2 (50 Points)

1. What is hearsay, and is it admissible? **(10 Points)**
2. Please state the types of “statements” that are governed by the hearsay definitions. **(15 Points)**
3. Some 25 Hearsay exceptions exist. Please list five such exceptions and define them. (Listing of more than five hearsay exceptions will not result in increased points.) **(25 points)**.

MISSISSIPPI BOARD OF BAR ADMISSIONS
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ANALYSIS AND MODEL ANSWER

QUESTION 1 (50 Points)

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ANALYSIS

1. What is "Relevant Evidence"?

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

2. Is Relevant Evidence always admissible? Why?

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

3. Who may impeach a witness?

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

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

Answer: M.R.E. 611(b) permits cross-examination beyond the scope of direct examination (**5 Points**) (“shall not be limited to the subject matter of the direct examination”) and matters affecting the credibility of the witness. (**5 Points**). This is commonly referenced to as “wide open cross”. (**5 Points, alternatively**).

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

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

This is commonly referred to as “limited cross”. (**5 Points, alternatively**)

QUESTION 2 (50 Points)

1. What is hearsay, and is it admissible? (**10 Points**)
2. Please state the types of “statements” that are governed by the hearsay definitions. (**15 Points**)
3. Some 25 Hearsay exceptions exist. Please list five such exceptions and define them. (Listing of more than five hearsay exceptions will not result in increased points.) (**25 points**).

ANALYSIS

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

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. M.R.E. 801 (c). (**7.5 Points**). Hearsay is not admissible except as provided by law. M.R.E. 802 (**2.5 Points**).

2. Please state the types of “statements” that are governed by the hearsay definitions. (15 Points)

A “statement” subject to the hearsay analysis may consist of:

- (1) Oral assertion (5 Points)
- (2) Written assertion (5 Points)
- (3) Non-verbal conduct of a person, if it is intended by the person as an assertion (5 Points). M.R.E. 801(a)

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

Please see M.R.E. 803. The Grader should award 5 points for each correct definition. Identification of an exception without a definition should receive 3 points for each.

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

Arthur 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. Arthur negotiated with Will, and mailed Will the following signed memorandum: "To Will: I am willing to sell you my land in Any County consisting of about 20 acres for \$50,000. Dated June 10, 2016." Will wanted assurance that Arthur would not sell to someone else while Will inspected the land. On June 10, Arthur told Will: "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." Will replied, "I will go to Any County to inspect the land and get back with you within 10 days."

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

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

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

Two weeks later, Will learned about the highway extension and immediately sought your advice about any rights he may have regarding the Any County land. Please advise Will on any relevant legal issues and include the reasoning for your advice regarding the following questions:

Question 1: Did Will 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: Assume for purposes of this question that Will had a valid contract for the purchase of the land. Was that contract validly assigned to George so that Arthur, Will and George 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 2016 BAR Examination
CONTRACTS
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ANALYSIS AND MODEL ANSWER

Arthur 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. Arthur negotiated with Will, and mailed Will the following signed memorandum: "To Will: I am willing to sell you my land in Any County consisting of about 20 acres for \$50,000. Dated June 10, 2016." Will wanted assurance that Arthur would not sell to someone else while Will inspected the land. On June 10, Arthur told Will: "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." Will replied, "I will go to Any County to inspect the land and get back with you within 10 days."

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

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Question 1: Did Will 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)

ANALYSIS

In order for a valid contract to exist, there must be an objectively discernable **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. §15-3-1(c) (1972). Here, Arthur's letter of June 10 appears to be a **valid offer**. (10 Points). Arthur may argue that the land is not adequately described ("My land in Any County consisting of about 20 acres"), but the fact that Will inspected the land weighs in favor of a clearly discernable piece of property to both parties. *Taylor v. Sayle*, 163 Miss. 822, 142 So. 3 (1932). (8 Points). Also potentially relevant is whether Arthur owns any other property in Any County. (2 Points).

Assuming an offer does exist, it remains **open for a reasonable time unless revoked by Arthur 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). Will, however, **accepted the offer upon mailing the letter** of June 14 because absent an express method of acceptance by Arthur, Will can accept his offer with a writing. (5 Points). Here, multiple counterparts satisfy the Statute of Frauds because Arthur's letter is signed by him (5 Points) and acceptance occurred via the Mail Box Rule [Explain what this rule is in the model answer]. (4 Points). **Arthur's revocation is only effective upon Will's receipt**, and acceptance occurred prior to June 16. (3 Points). Arthur 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 Will (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: Assume for purposes of this question that Will had a valid contract for the purchase of the land. Was that contract validly assigned to George so that Arthur, Will and George all must honor the assignment? (Include all legal elements and reasoning for your advice on this question.) (35 Points)

ANALYSIS

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. §15-3-1(c) (1972). (10 Points).

Will and George **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 2016 Bar Examination
CONSTITUTIONAL & CRIMINAL LAW & CRIMINAL PROCEDURE
(2) two questions for a total of (100) one hundred points
(30) thirty minutes

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

Question #1: [50 points]

DEFENDANT, who is male, is on trial for forcible sexual battery of a well known local woman and personality known as "The Flower Lady." During jury selection, the State goes through the first twenty four jurors and tenders to DEFENDANT a panel of twelve women jurors having exercised all twelve State peremptory strikes against potential male jurors since this is a rape case and the victim is female. While still in the jury selection process, are there any potential constitutional challenges the Defense may bring before the Court ? Explain fully.

Question #2: [50 points]

DEFENDANT is lawfully stopped for speeding. During the writing of the speeding citation, a drug detection sniffing dog arrives on the scene. Before the driver's license check is complete using reasonable standard operating procedures, the drug dog walks around DEFENDANT 's car and alerts as trained indicating that, according to the dog, there is the presence of an illegal narcotic drug in DEFENDANT 's car. DEFENDANT is subsequently given his speeding ticket but is prohibited from leaving the road side. The police then begin dismantling his car and find a false gas tank containing over two kilograms of pure methamphetamine "ICE." What, if any, defense motion should be made regarding the methamphetamine "ICE" and how should the trial court rule? Explain fully.

MISSISSIPPI BOARD OF BAR ADMISSIONS
July 2016 Bar Examination
CONSTITUTIONAL & CRIMINAL LAW & CRIMINAL PROCEDURE
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IMPORTANT Notice to BAR Examinees: All questions are independent of one another and are not related with one another in any manner. They should each be analyzed separately and independently.

Model Answer and Grader's Outline to Question #1 [25 points]:

Yes. DEFENDANT should make a *J.E.B.* (Gender) challenge to the State's strikes. *J.E.B. v. Alabama*, 114 S.Ct. 1419 (1994). DEFENDANT will assert that the State has unlawfully excluded jurors solely based on gender. The identification of this issue and explanation of why it is or could be a constitutional issue is the paramount answer. [Note: There is insufficient information in the question for a "right" or "wrong" answer regarding the strikes individually so no specific explanation to that effect is required by applicant.]

Authority and Explanation for Question #1 [25 points total]

No Gender Based Exclusions: You may not exclude a potential juror based on gender. *McGee v. State*, 953 So.2d 211 (Miss.,2007) {The State's use of gender as a reason for the exclusion of a male juror from the jury panel will violate a defendant's rights under the equal protection clause. **[13 points]** See *J.E.B.*, 511 U.S. at 130-31, 114 S.Ct. 1419... Allowing the State to exclude the potential juror based on his gender was indeed a deviation from sound precedent. See *J.E.B.*, 511 U.S. at 139-41, 114 S.Ct. 1419; *Duplantis v. State*, 644 So.2d 1235, 1246 (Miss.1994). A "defendant [has] the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria. *J.E.B.*, 511 U.S. at 129, 114 S.Ct. 1419. In *J.E.B.*, the Supreme Court stated, we have reaffirmed repeatedly our commitment to jury selection procedures that are fair and nondiscriminatory. We have recognized that whether the trial is criminal or civil, *potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.* *Id.* (emphasis added). More specifically, the Court held "[i]ntentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women." *Id.* at 130-31, 114 S.Ct. 1419. **[12 points]**

Model Answer and Grader's Outline to Question #2: [25 points total]

DEFENDANT will file a Motion to Suppress [5 points] the methamphetamine "ICE" alleging a fourth amendment violation. [10 points]. DEFENDANT'S Motion to Suppress should be **DENIED** by the circuit judge. [10 points].

Authority and Explanation for Question #2: [25 points total]:

When DEFENDANT was stopped for speeding, and the drug dog signaled at his vehicle during the course of the stop, that generated probable cause for a complete search of his car. The Court held that during a lawful traffic stop, there is no expectation of privacy which would prohibit an officer from running a drug-sniffing dog around the stopped vehicle, so long as the use of the dog does not unreasonably extend the length of the stop. *Illinois v. Caballes*, 543 U.S. 405, 407 (2005); *Arizona v. Johnson*, 555 U.S. 323 (2009); See also *Rodriguez v. United States*, 135 S.Ct. 1609 (2015) adhering to the 2005 holding of *Caballes*.

In the facts of the question it clearly states that the stop was lawful for speeding, thus the officer was in a place where he had a right to be to be able to have the drug dog sniff the vehicle. [13 points] The drug dog performed the sniff and alerted before the regular cause of the stop was completed, i.e. the writing of the ticket and license check. Therefore, the use of the drug dog did not prolong or lengthen the time reasonably required to complete the 'mission' of issuing a ticket for the violation. [12 points] "The seizure remains lawful only 'so long as [unrelated] inquiries do not measurably extend the duration of the stop.'" *Johnson*, 555 U.S. at 333; *Rodriguez*, 135 S.Ct. at 1615. Accordingly, there is no fourth amendment violation.

**MISSISSIPPI BOARD OF BAR ADMISSIONS
July 2016 BAR Examination
PRACTICE AND PROCEDURE OF MISSISSIPPI COURTS
100 Points Total**

Ms. H was injured in a restaurant when another patron, Mr. A, became intoxicated and assaulted her. She files a complaint against Mr. A. She seeks punitive damages against him.

Question 4.1 What type(s) 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 2016 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 2016 BAR Examination

DOMESTIC RELATIONS

100 Points Total

Lori and Frank were married only a short time before Lori's untimely death. Frank had difficulty caring for their three minor children, ages 2, 4 and 5. Therefore, he took the children to live with their grandparents (Lori's parents) in Destiny County, while he continued to work and reside eighty miles away in Washburg County. Lori's parents provided total support for the children. They did not want to bother Frank because he appeared to be stressed. Frank began abusing drugs that had been prescribed for him by his doctor to treat his depression. Although he did little else, Frank continued to work full time. He visited his children only on Christmas, bearing expensive gifts for each child. Initially the children looked forward to these visits, however, as they grew older they acquired other interests.

On the tenth Christmas after Lori's death, Frank arrived with his new wife Leigh. She had agreed to help rear the children. However, when Frank informed the children's grandparents that he intended to take the children, the grandparents refused to let them go. They had grown attached to the children and insisted that Frank leave. Further, the children were happy with their grandparents, had become active in numerous school activities and did not want to move. The grandparents informed Frank that they intended to file for custody. Frank stated they could not prevail because he was the children's father.

1. What legal basis can Frank rely on to support his position? **(10 Points)**
2. Explain the fact(s) that support Frank's position? **(10 Points)**
3. What legal basis can the children's grandparents rely on to support their position? **(20 Points)**
4. Explain the facts that support the grandparents' position? **(20 Points)**
5. What factors should be considered in determining the best interest of the children in this custody dispute? **(40 Points)**

MISSISSIPPI BOARD OF BAR ADMISSIONS

July 2016 BAR Examination

DOMESTIC RELATIONS

100 Points Total

ANALYSIS AND MODEL ANSWER

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 remain with the natural parent. *Simpson v. Rast*, 258 So.2d 233 (Miss. 1972). **(10 Points)**

2. Frank is the **natural father** of the children and can rely on the presumption that it is in the children's best interest for him to retain custody. He does not have the burden to prove his fitness as a parent. *Davis v. Vaughn*, 126 So. 3d 33 (Miss. 2013). **(10 Points)**

3. To overcome the presumption, the grandparents must prove that Frank is **unfit**, **abandoned** the children or **relinquished** custody. *Sellers v. Sellers*, 638 So.2d 481 (Miss. 1994) Miss. Code Section 93-15-121(c). **(20 Points)**
 - a. Unfit involves conduct presenting a genuine serious danger to the children. *Sellers v. Sellers*.
 - b. 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). Failure to provide support is not, by itself, abandonment. Leaving a child with a relative for a long period of time has been found not to be abandonment because the natural parent visited and sent gifts. However, the court has made an exception to the traditional rule regarding abandonment and determined that constructive abandonment can apply even in situations where the natural parent maintains contact with the child. 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. The best interest test must be applied in this case *Hill v. Mitchell*, 818 So.2d 1221 (Miss. Ct. App. 2002).
 - c. Relinquishment of legal custody must be through a court of competent jurisdiction. The facts do not indicate that Frank voluntarily relinquished custody through a court order, therefore this provision does not apply.

4. Frank's current drug abuse, if proven to present a genuine serious danger to the children, may justify a determination that he is unfit. His lack of support and sparse visits may constitute abandonment. Christmas visits and gifts may allow Frank to escape actual abandonment. However, his long absence from his children's lives may be considered constructive abandonment. Ten years is a long time to leave his children with someone else, particularly when he lived only 80 miles away. In addition, Frank worked full time and was able to, but did not, provide financial support for the children. **(20 Points)**

5. 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 used to determine best interest of the child in a custody dispute. *Albright v. Albright*, 437 So.2d 1003 (Miss. 1983). **(40 Points)**
 - a. Age, health and sex of the children
 - b. Continuity of care
 - c. Parenting skills of the parents and willingness and capacity to provide primary care
 - d. Employment responsibilities
 - e. Physical and mental health and age of the parties
 - f. Emotional ties with the children
 - g. Moral fitness
 - h. Home, school and community record
 - i. Custody preference of the children
 - j. Stability of the home environment and other factors

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

FACTS

Attorney John Williams ("Williams") passed the Mississippi Bar Examination in 1987, and since then, has been a solo practitioner in Southaven, MS. Williams is an accomplished criminal defense attorney, but will accept an occasional divorce case, especially if he knew the client beforehand.

One of Williams' friends came to his law office seeking representation. The client, Mrs. Kristin Stanton, believes that her husband, Dr. Steve Stanton, a prominent physician in the area, is cheating on her with one of his office assistants, who is 20 years younger than Mrs. Stanton. Since Dr. Stanton has a successful practice, Mrs. Stanton has not worked in years, thus she has no access to funds, other than through her husband's accounts. As such, she cannot, nor does she desire to pay Williams's standard "\$5,000 up-front" retainer, primarily because she fears her husband might discover she has retained an attorney. Moreover, Mrs. Stanton only "suspects" that Dr. Stanton may be cheating on her and has "no actual proof, at least not yet." In explaining her dilemma to Williams, Mrs. Stanton quips that she'll gladly pay Williams a percentage of anything she recovers in alimony and/or via a property settlement from Dr. Stanton once the divorce is final. Along these lines, she informs Williams that Dr. Stanton has a net worth of over \$10 million dollars, which Williams knows from observing Mrs. Stanton's lifestyle that she's probably good for such a fee. Therefore, Williams agrees to the fee arrangement proposed by Mrs. Stanton, but elects not to memorialize any fee arrangement in writing, primarily because he and Mrs. Stanton are friends, plus the actual dollar amount of the fee has yet to be determined.

A few weeks after the initial consultation, a complaint for divorce was filed in Marshall County Chancery Court wherein Williams is listed as counsel of record for Mrs. Stanton. Shortly after the complaint is filed, Mrs. Stanton arrives for a consultation in Williams' office wherein she suspects that there might be "pictures out there on the Internet" with Dr. Stanton and his "sweet young thing." She asks Williams how they might be able to get these pictures, but without Dr. Stanton or his attorney knowing that they have them. Following additional discussion, they learn that these pictures are not the property of Dr. Stanton, but are those of his "new squeeze" that

she has posted on a social media website, Facebook®, picturing her and Dr. Stanton, but do not otherwise list Dr. Stanton's name.

Neither Williams nor Mrs. Stanton have a Facebook® account and are not that knowledgeable about social media whatsoever. Williams' office assistant overhears some of Williams' and Mrs. Stanton's discussion about the Facebook® photos. Williams' assistant is around the same age of Dr. Stanton's girlfriend, and is aware through discussions with mutual friends of hers and Dr. Stanton's girlfriend that "she lives on her iPhone® and posts on just about everything on Facebook®." Assuming that Dr. Stanton's girlfriend likely has a treasure trove of information on her Facebook® page, Williams' assistant suggests that Williams open a Facebook® account so that he can attempt to "friend" Dr. Stanton's girlfriend in order to access her pictures. Williams informs his assistant that he does not like that idea, but has no objection if his assistant fakes an identity, or better yet, poses as some other friend of Dr. Stanton's girlfriend (not yet on Facebook®) so that she'll accept the "friend request" and be able to view her pictures. As such, and with Williams' consent, Williams' assistant creates a Facebook® account for someone that she knows is both a friend of hers and Dr. Stanton's girlfriend, but without that friend's knowledge. Sometime later, a Facebook® account is opened by Williams' assistant using a real friend's name and picture who is a known acquaintance of both Dr. Stanton's girlfriend and Williams' assistant, but the e-mail associated with the Facebook® account is Williams' assistant's e-mail address at the law firm.

The plan concocted by Williams and his assistant worked. Dr. Stanton's girlfriend accepted the "imposter friend request," and as a result, Williams was able to view and save multiple photos from Dr. Stanton's girlfriend's Facebook® page. Some of the pictures showed Dr. Stanton and his girlfriend hugging and kissing, and one picture was taken (and tagged) at a luxurious beach resort on a date when Dr. Stanton told his wife he was out of town at a medical conference (nowhere near any beach). With this adulterous proof now in hand, Williams informs Mrs. Stanton that "getting at least half of Dr. Stanton's net worth in a property settlement should not be a problem, and we can discuss the details of my fee later."

As the case progresses, Williams continues to speculate about the sizeable fee he'll land once the Stanton's divorce is finalized. Now that he's been able to tap into a treasure trove of information available on social media websites, Williams is also considering expanding his now lucrative domestic relations practice. Attorney Williams is also proud of himself as to how the information on Facebook® was obtained since very little information, with the exception of his assistant's e-mail address, can be traced directly back to him and was acquired at virtually no investigative expense.

QUESTIONS

(1) Was the fee arrangement between Williams and Mrs. Stanton proper?

(1)(A) Yes or No? (5 points).

(1)(B) Which rule(s) of the Model Rules of Professional Conduct is/are implicated? Discuss. (30 points).

(2) Was the manner in which Williams and/or Williams' legal assistant collected information about the case (e.g., Facebook® photos of Dr. Stanton and his girlfriend) permissible?

(2)(A) Yes or No? (5 points).

(2)(B) Which rule(s) of the Model Rules of Professional Conduct is/are implicated? Discuss. (30 points).

(3) Assume that the "imposter friend account" Williams' legal assistant set up is revealed and later discovered by Dr. Stanton, Dr. Stanton's legal counsel and/or Dr. Stanton's girlfriend. Is Williams responsible in any way for his legal assistant's conduct? (Please limit discussion and analysis according to the Model Rules of Professional Conduct. Do not discuss any employment or agency theories of liability)(30 points).

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

ANALYSIS AND MODEL ANSWER

(1) Was the fee arrangement between Williams and Mrs. Stanton proper?

(1)(A) Yes or No? (5 points).

MODEL ANSWER TO (1)(A):

No.

(1)(B) Which rule(s) of the Model Rules of Professional Conduct is are/implicated? Discuss. (30 points).

MODEL ANSWER TO (1)(B):

MRPC RULE 1.5 – Fees.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof....

According to Section 22:10 – When contingent fees are prohibited from Jackson & Campbell’s Professional Responsibility for Mississippi Lawyers (MLI Press 2010), under **Rule 1.5(d)(1)**, a **contingent fee is unethical in a “domestic relations matter” where payment is contingent upon securing a “divorce or upon the amount of alimony or support or property settlement.”** The policy behind this traditional prohibition is to prevent lawyers from taking a fee position that might give the lawyer an incentive to oppose reconciliation of the parties. The language of the prohibition refers to “domestic relations matters” rather than only to divorce. As such, that language would prevent a contingent fee in cases involving separation of persons who cohabitated but were unmarried. Too, the reference to “domestic relations” and to “property

settlements” would prohibit a contingent fee in negotiating pre-nuptial or post-nuptial agreements between the parties about to join as a couple, or considering the possibility of separation. The state bar’s opinion is that Rule 1.5(d)(1) does not, however, prevent a lawyer from charging a contingent fee for the collection of past due support or alimony. See Miss. Bar Ethics Opinion 88, Contingent Legal Fees (1983); Miss. Rules of Prof’l Conduct R. 1.5(c) cmt.

Although this type of fee arrangement is prohibited in domestic relations cases, fee agreements should be established at the outset of representation. Rule 1.5(b) provides that “[w]hen a lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation. While Rule 1.5(b) states a clear preference for written memorials of fee agreements, the rule does not mandate a writing in all cases.

Rule 1.5 (b) and (c) states:

- (b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.**

- (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a manner in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recover, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter, and, if there is a recovery, showing the remittance to the client and the method of its determination.**

Again, although the fee arrangement between Williams and Mrs. Stanton was not deduced to writing, Rule 1.5 (c) still indicates the matter is one in which a contingent fee is prohibited by Rule 1.5(d).

(2) Was the manner in which Williams and/or Williams' legal assistant collected information about the case (e.g. Facebook photos of Dr. Stanton and his girlfriend) permissible?

(2)(A) Yes or No? (5 points).

MODEL ANSWER TO (2)(A):

No.

(2)(B) Which rule(s) of the Model Rules of Professional Conduct is are/implicated? Discuss. (30 points).

MODEL ANSWER TO (2)(B):

MRPC 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;**
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;**
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;**
- (d) engage in conduct that is prejudicial to the administration of justice;**
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or**
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.**

According to Section 35:5 –Conduct involving dishonesty, fraud, deceit or misrepresentation from Jackson & Campbell's Professional Responsibility for Mississippi Lawyers (MLI Press 2010), "Given the relevance to the characteristics necessary to practice law, whether criminal or tortious, a lawyer's conduct involving dishonesty, fraud, deceit, or misrepresentation is professional

misconduct under Rule 8.4(c). In *Rogers v. Mississippi Bar*¹, the Mississippi Supreme Court defined each of these terms....Deceit was defined as a 'fraudulent and deceptive misrepresentation, artifice or device, used by one to deceive and trick another, who is ignorant of the facts, to the prejudice and damage of the party imposed upon.'" *Id.*

In the context of this question, **deceit** was used in order to gain access to Dr. Stanton's girlfriend's Facebook® page. Had deceptive tactics not been utilized, it is unlikely that the adulterous pictures would not have been revealed, especially since Facebook® contains settings and controls to keep a user's information private, unless the user "friends" a person and allows them permission to view their page and pictures.

A 2010 poll found 81% of matrimonial lawyers have used evidence from social networks.² Regardless of how lawyers feel about social networks, they contain too much valuable information to ignore. However, informally obtaining that information, while generally easy, is fraught with ethical pitfalls.

Social networking websites ("social networks") like Facebook® are massive databases of self-reported information, ranging from pictures of pets to evidence of fraud to the details of criminal conspiracies. These websites are heavily used and still growing. Nearly 70% of all Americans age 12 to 29 have profiles on social networking websites.³ The majority of these profiles are on Facebook®, which as of February 2011, reported that the average user shared 90 pieces of content, such as photographs, links, or messages a month.⁴ Altogether, Facebook® users share more than 30 billion pieces of total content a month. There is substantial growth in the number of online profiles, making social networks invaluable research tools for learning about almost anyone's actions, interests, and thoughts.

¹ *Rogers v. Mississippi Bar*, 731 So.2d 1158, 1170 (Miss. 1999).

² Leanne Italie, *Divorce Lawyers: Facebook Tops in Online Evidence in Court, USA TODAY*, June 29, 2010.

³ Amanda Lenhart, Kristen Purcell, Aaron Smith & Kathryn Zickuhr, *Social Media & Mobile Internet Use Among Teens and Young Adults, PEW INTERNET & AMERICAN LIFE PROJECT 3,5* (Feb. 3, 2010).

⁴ Facebook Timeline, FACEBOOK, <http://www.facebook.com/prtess/info.php?timeline>; Facebook Statistics, FACEBOOK.

Lawyers should be able to use information that is publicly available (e.g., Google® Internet search results). **Conversely, because lawyers are barred from engaging in deceptive acts, creating a fake profile or utilizing other overtly deceptive means of covertly obtaining information is unethical.**

Using a fake account to collect information covertly would violate the terms of use of most social networking websites. Facebook® explicitly prohibits the use of fake or fictitious user accounts. Facebook® users agree to not “provide any false personal information on Facebook®.”⁵ Violations of the terms of use could also be a contractual violation. Although unlikely to be repeated often, the government has brought criminal charges for creating a fake account, arguing that accessing a website in violation of its terms of use is unauthorized access to a computer system, which is criminal under the Computer Fraud and Abuse Act.⁶ A criminal violation for fraud would certainly violate Rule 8.4.

The fact that Williams knew that his assistant intended to create an imposter Facebook® account, did nothing to prevent such action, and knowingly acquiesced in allowing that act of deceit to happen is also separate violation of Rule 8.4(a). According to Section 35:3 – Rules violations; attempts; misconduct by and through others from Jackson & Campbell’s Professional Responsibility for Mississippi Lawyers (MLI Press 2010), under MRPC 8.4(a), it is professional misconduct to violate or attempt to violate the Rules of Professional Responsibility. As such, any rules violation is misconduct. It is also misconduct under Rule 8.4(a) for a lawyer to knowingly assist or to induce another to violate the professionalism rules. Further, a lawyer cannot accomplish through another what the lawyer could not accomplish herself.

- (3) Assume that the “imposter friend account” Williams’ legal assistant set up is revealed and later discovered by Dr. Stanton, Dr. Stanton’s legal counsel and/or Dr. Stanton’s girlfriend. Is Williams responsible in any way for his legal assistant’s conduct? (Please limit discussion according to the Model Rules of Professional Conduct. Do not discuss any employment or agency theories of liability)(30 points).**

MODEL ANSWER TO (3):

Yes, Williams is responsible for his legal assistant’s conduct, and failed to assure, arguably through his own failure, that his assistant’s conduct was compatible with the professional obligations or the lawyer.

⁵ Facebook Terms of Use, FACEBOOK, <http://www.facebook.com/terms.php>

⁶ See e.g., 18 U.S.C. §1030 (2006); *United States v. Drew*, 259 F.R.D. 449, 452 (C.D. Cal. 2009).

According to **MRPC Rule 5.3 – Responsibilities Regarding Non-Lawyer Assistants:**

With respect to a non-lawyer employed or retained by or associated with a lawyer:

- (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;
- (c) the lawyer shall be responsible for conduct of such a person that would be a violation of the rules of professional conduct is engaged in by a lawyer if:**
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or**
 - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over 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.

Official Comment to MRPC 5.3

Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in the rendition of the lawyer's professional services. A lawyer must make reasonable efforts to give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measure employed in

supervising non-lawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that non-lawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Williams ratified the misconduct of his assistant, and is responsible for her misconduct according to MRPC 5.3(c)(1).

END