MISSISSIPPI BOARD OF BAR ADMISSIONS
July 2013 BAR Examination
EVIDENCE
100 Points Total

QUESTION 1 (50 points)

You are retained in a personal injury action to represent Plaintiff. Allegedly, the Plaintiff slipped and fell on a stair case at the Utopia Nightclub, sustaining severe and disabling injuries. Plaintiff states that she stepped on a step covered in water that leaked from a busted pipe inside the adjoining wall. You file suit against the owner of Utopia alleging negligent maintenance of the premises. The owner denies responsibility on the basis that the manager of the Nightclub, who has leased the property from the owner under the same oral agreement for ten years, allegedly has control of the premises and responsibility for maintenance of the premises. Discovery reveals that five other individuals have slipped and fell on the same step within the past three months, and the owner paid the medical expenses incurred by each of the five. The owner had previously refused to pay your client's expenses. Further, it was discovered that the owner of Utopia hired a plumber to repair the busted pipe the day after your client fell.

A. Discuss the relevancy and admissibility at trial of the previous slip-and-fall incidents and the owner's payment of medical expenses (25 points)

B. Discuss the relevancy and admissibility at trial of the fact that Defendant repaired the busted pipe? (25 points)

QUESTION 2 (50 points)

Mable Plaintiff files a federal court action against Davey Defendant and her employer, Widgets, Inc. for sexual harassment. The complaint alleges, *inter alia*, that Davy's actions were the proximate cause of Mable's alleged mental anguish and emotional distress. At Mable's deposition, Mable states that her OB/GYN physician, Dr. Luckett, had prescribed medication for a nervous stomach, which Mable testified, in her opinion, was a result of the mental anguish and emotional distress caused by Davey. Mable testified that, otherwise, she sought no medical attention. Thereafter, Davey serves a Subpoena Duces Tecum on Dr. Luckett requiring her to produce "all records in your possession pertaining to your treatment of Mable Plaintiff". Mable and Dr. Luckett move to quash the Subpoena based upon Mable's medical privilege. Contained in Mable's medical records are matters very private in nature which, in no way, reflect on Mable's mental or emotional condition.

Fully discuss the factual and legal basis in support of Mable's claim for medical privilege and Davey's entitlement to the records, if any. (50 points) Your answer should include what actions the Court could take in response to the motion to quash.

MISSISSIPPI BOARD OF BAR ADMISSIONS
July 2013 BAR Examination
EVIDENCE
100 Points Total
ANALYSIS

QUESTION 1 (50 points)

You are retained in a personal injury action to represent Plaintiff. Allegedly, the Plaintiff slipped and fell on a stair case at the Utopia Nightclub, sustaining severe and disabling injuries. Plaintiff states that she stepped on a step covered in water that leaked from a busted pipe inside the adjoining wall. You file suit against the owner of Utopia alleging negligent maintenance of the premises. The owner denies responsibility on the basis that the manager of the Nightclub, who has leased the property from the owner under the same oral agreement for ten years, allegedly has control of the premises and responsibility for maintenance of the premises. Discovery reveals that five other individuals have slipped and fell on the same step within the past three months, and the owner paid the medical expenses incurred by each of the five. The owner had previously refused to pay your client's expenses. Further, it was discovered that the owner of Utopia hired a plumber to repair the busted pipe the day after your client fell.

A. Discuss the relevancy and admissibility at trial of the previous slip-and-fall incidents and the owner's payment of medical expenses (25 points)

B. Discuss the relevancy and admissibility at trial of the fact that Defendant repaired the busted pipe? (25 points)

ANALYSIS

A. Both the Federal and State Rule of Evidence, 404(b), provide:

> Evidence of other crimes, wrongs or acts is not admissible to show the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation plan, *knowledge*, identity or absence of mistake or accident.

See also, ***Carter v. State***, 450 So.2d 67 (Miss. 1984).While the prior accidents are not admissible to show that Defendant acted in conformity therewith (continuing to negligently maintain the premises), it is admissible to show Defendant's knowledge of the condition of the step and busted water pipe.

Rule 409, M.R.E. and F.R.E., provide that evidence of furnishing or offering or promising to pay medical expenses resulting from an injury is not admissible to prove liability for the *injury*. The owner did not offer or promise to pay for Plaintiff's medical expenses and, therefore, the evidence is not being offered to prove liability for Plaintiff's injury. However, since the oral lease agreement between the owner and the manager has remained the same since before the previous five injuries, evidence that the owner paid the medical expenses of the others would be relevant to show control.

B. M.R.E. and F.R.E. prohibits the admission of evidence of *subsequent remedial measures*, or "measures which, if taken previously, would have made the event less likely to occur," for the purpose of proving negligence or culpable conduct in connection with the subject event. However, the evidence is admissible to show control of the premises.

QUESTION 2 (50 points)

Mable Plaintiff files a federal court action against Davey Defendant and her employer, Widgets, Inc. for sexual harassment. The complaint alleges, *inter alia*, that Davy's actions were the proximate cause of Mable's alleged mental anguish and emotional distress. At Mable's deposition, Mable states that her OB/GYN physician, Dr. Luckett, had prescribed medication for a nervous stomach, which Mable testified, in her opinion, was a result of the mental anguish and emotional distress caused by Davey. Mable testified that, otherwise, she sought no medical attention. Thereafter, Davey serves a Subpoena Duces Tecum on Dr. Luckett requiring her to produce "all records in your possession pertaining to your treatment of Mable Plaintiff". Mable and Dr. Luckett move to quash the Subpoena based upon Mable's medical privilege. Contained in Mable's medical records are matters very private in nature which, in no way, reflect on Mable's mental or emotional condition.

Fully discuss the factual and legal basis in support of Mable's claim for medical privilege and Davey's entitlement to the records, if any. (50 points) Your answer should include what actions the Court could take in response to the motion to quash.

ANALYSIS

Rule 501, F.R.E., provides that, unless otherwise required by the United States Constitution, Acts of Congress or Supreme Court rules, the privilege of a witness in a civil action shall be governed in accordance with State Law. Rule 503, M.R.E. establishes a Physician and Psychotherapist-Patient Privilege. Rule 503 (f) provides:

> "Any party to an action or proceeding subject to these rules who by his or her pleadings places in issue any aspect of his or her physical, mental or emotional condition thereby and to that extent only waives the privilege otherwise recognized by this rule. This exception does not authorize ex parte contact by the opposing party." (Emphasis Supplied).

The comment to Rule 503 provides, in pertinent part:

> "With respect to any aspect of the party's physical, mental or emotional condition not put in issue of his or her pleadings, the privilege remains in full force and effect."

Mable's claim of privilege is based upon the fact that the subpoena is overbroad and seeks to discover medical records regarding aspects of Mable's physical condition not placed in issue by her pleadings. Therefore, the privilege is not waived as to matters not touching on Mable's mental and emotional condition.

Davey will argue that a person's physical ailments or illnesses can have an adverse effect on one's mental or emotional condition. Because Mable's pleadings allege that she suffered emotional distress and mental anguish as a result of Davey's actions, Davey is entitled to discover aspects of Mable's physical condition which might have caused or contributed to the alleged mental anguish and emotional distress.

In this matter, the Court could request production of the records for *in camera* review. Such a review would allow the Court to pre-determine whether the records

should be produced in their entirety or with redactions. Hence, Mable's privilege remains in effect, unless the Court otherwise finds specific relevancy of the records to the claims. Alternatively, the Court could order production of the records and then later determine admissibility via motion *in limine* before trial or *ore tenus* evidentiary motion at trial.

MISSISSIPPI BOARD OF BAR ADMISSIONS
July 2013 BAR Examination
CONTRACTS
100 Points Total

QUESTION 2.1 (30 POINTS)

Carpenter made a personal loan to Borrower of $400 which Borrower promised to repay. The amount of the loan is undisputed. Borrower then hired Carpenter to perform some work at Borrower's house. Carpenter and Borrower did not agree in advance as to the value of the work to be performed. After Carpenter completed the work, Borrower and Carpenter had an honest and reasonable difference of opinion on the value of the work. Borrower sent Carpenter a payment of $400, with a letter stating that acceptance of the payment would constitute full settlement of both the original debt and the carpentry work performed. Carpenter negotiated the payment and then sent Borrower a bill for $300 for the carpentry work. Is Carpenter entitled to collect the $300? Explain fully the basis or bases for your answer.

QUESTION 2.2 (20 POINTS)

Assume the same facts for this question as in question 2.1 with the following exception: The letter from Borrower to Carpenter included a payment of $600. Would your answer change? Explain the basis or bases of your answer.

QUESTION 2.3 (50 POINTS)

Seller attends the Board of Supervisors meeting in Blank County, Mississippi, where the Board discusses whether to purchase Blackacre from Seller. The Board votes to purchase the property, and an entry is made upon the minutes, which states that the Board "voted unanimously to purchase Blackacre from Seller for $30,000." No written contract for the sale is ever prepared. Subsequently, the Board decides the purchase would be a bad idea and refuses to follow through with the agreement announced at the previous Board meeting. Assume for purposes of your answer that there is no dispute as to the legal description of Blackacre. Is there an enforceable contract between the Board and Seller? Explain the basis or bases of your answer.

MISSISSIPPI BOARD OF BAR ADMISSIONS
July 2013 BAR Examination
CONTRACTS
100 Points Total

QUESTION AND MODEL ANSWER

QUESTION 2.1 (30 POINTS)

Carpenter made a personal loan to Borrower of $400 which Borrower promised to repay. The amount of the loan is undisputed. Borrower then hired Carpenter to perform some work at Borrower's house. Carpenter and Borrower did not agree in advance as to the value of the work to be performed. After Carpenter completed the work, Borrower and Carpenter had an honest and reasonable difference of opinion on the value of the work. Borrower sent Carpenter a payment of $400, with a letter stating that acceptance of the payment would constitute full settlement of both the original debt and the carpentry work performed. Carpenter negotiated the payment and then sent Borrower a bill for $300 for the carpentry work. Is Carpenter entitled to collect the $300? Explain fully the basis or bases for your answer.

MODEL ANSWER:

Borrower is already under an obligation to repay Carpenter the $400 loan. **(10 points)**. Because there is no dispute concerning this amount Borrower's payment under this initial agreement cannot function as consideration supporting the second contract to have carpentry work performed. **(10 points)**. *See Service Electric Supply Co. v. Hazelhurst Lumber Company, Inc.*, 932 So.2d 863, 870 (Miss. Ct. App. 2006). As a consequence, Carpenter is entitled to be paid an additional sum for the carpentry work. **(8 points)**. Since the value of the work is in dispute, whether he is entitled to the full $300 also is in dispute. **(2 points)**.

QUESTION 2.2 (20 POINTS)

Assume the same facts for this question as in question 2.1 with the following exception: The letter from Borrower to Carpenter included a payment of $600. Would your answer change? Explain the basis or bases of your answer.

MODEL ANSWER:

In this instance, Borrower was satisfying the earlier obligation *and* providing additional consideration. **(10 points)**. If Carpenter accepted the payment under these circumstances, Carpenter will not be entitled to further payment for the carpentry work. **(10 points)**. Examinees are entitled to full points if they combine all of these principles within a sentence rather than separating them as the model answer does.

QUESTION 2.3 (50 POINTS)

Seller attends the Board of Supervisors meeting in Blank County, Mississippi, where the Board discusses whether to purchase Blackacre from Seller. The Board votes to purchase the property, and an entry is made upon the minutes, which states that the Board "voted unanimously to purchase Blackacre from Seller for $30,000." No written contract for the sale is ever prepared. Subsequently, the Board decides the purchase would be a bad idea and refuses to follow through with the agreement announced at the previous Board meeting. Assume for purposes of your answer that there is no dispute as to the legal description of Blackacre. Is there an enforceable contract between the Board and Seller? Explain the basis or bases of your answer.

MODEL ANSWER:

The issue in this question is the statute of frauds. Under Mississippi's statute of frauds, a contract for the sale of land must be in writing. Miss. Code Ann. § 15-3-1(c)(1972). **(5 points)**. The only writing about the sale is the entry in the minutes of the Board meeting quoted in the question. Although not a formal contract, the minutes could constitute a memorandum sufficient to satisfy the statute of frauds. **(10 points)**. The memorandum or note must be in writing and signed either by the party to be charged or someone the party lawfully authorizes in writing to sign on behalf of the party to be charged. **(5 points)**. Here, the party to be charged is the Board of Supervisors. **(5 points)**. The minute entry evidenced an intent to buy, identified the land, and set out the purchase price. **(10 points)**. As long as the minutes were signed by the appropriately authorized person and approved at a subsequent meeting of the Board, the minutes constitute a memorandum or note sufficient to satisfy the statute of frauds. **(15 points)**. *Putt v. Corinth,* 579 So. 2d 534, 538 (1991); *see Yarbrough v. Camphor, 645 So. 2d 867, 869-70 (1994)(statute of frauds satisfied as long as memorandum or note of the oral agreement).*

MSE #3

MISSISSIPPI BOARD OF BAR ADMISSIONS
July 2013 Bar Examination
CONSTITUTIONAL LAW, CRIMINAL LAW & CRIMINAL PROCEDURE

Thirty (30) Minutes
One hundred (100) total points

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

Question #1: Fifty (50) points total

You are an Assistant District Attorney representing the State of Mississippi in 2013. "Officer" has had a long "working history" with "Defendant" and knows him by sight. Officer just clocked in at the station house and saw an outstanding felony kidnaping arrest warrant signed by the local justice court judge for Defendant of "Victim." Officer physically left the arrest warrant at the police station. Shortly thereafter, Officer visually sees Defendant driving his own Crown Victoria automobile and not committing any traffic offenses or misdemeanors in Officer's presence. Nevertheless, Officer conducts a traffic stop on the car driven by Defendant. Immediately, Officer informs Defendant that he is being arrested for kidnaping, handcuffed Defendant, reads him his *Miranda* rights, and places Defendant in Officer's patrol car. Defendant responded that he "know's the drill", and he "ain't saying nothing til I get my lawyer." Officer returns to Defendant's car to perform a roadside inventory search. Officer discovers the dismembered mutilated body of the kidnap Victim in Defendant's trunk. Furious at the atrocity he has seen, Officer returns to Defendant in the back of his patrol car and tells Defendant "you know I found Victim all cut up, you better start talking or you're going to get the needle!" Defendant in response states, "what's the big deal? He was no good to nobody, ain't nobody gonna miss him, and I did him a favor cause he never used his head when he had one anyway. If you weren't so nosy I could have put him in the river where he actually could have done some good for once by feeding the fish and alligators!"

Questions:

1A. Was Officer's initial arrest of Defendant valid? Yes or No and explain fully. **(25 points)**

1B. Is Defendant's confession to Officer admissible against Defendant during your case in chief ? Yes or No and explain fully. **(25 points)**

Question #2: Fifty (50) points total

You are a licensed Mississippi criminal defense attorney. You represent "Defendant." Defendant was arrested July 1, 2011 for possession with intent to sell cocaine. Defendant was indicted and served with his indictment on October 1, 2011. To defend him on these charges, Defendant employs you on October 2, 2011. You get him released on bail the same day. On October 3, 2011, you make an entry of appearance in circuit court for Defendant, execute a waiver of arraignment and enter a plea of not guilty, file a Motion for Discovery, a Motion for a Speedy Trial, and a request for a plea offer. The case is set for trial by jury on December 1, 2011. While out on bail, Defendant requests that you ask for a continuance from the December 1, 2011, jury trial date so that he can attend a rock concert. The continuance is granted by agreement with the State until June 1, 2012. Prior to the June 1, 2012 trial date the prosecutor requests a continuance due to a death in her family which You and Defendant agree to do. The case is reset again for trial December 1, 2012. On November 30, 2012, You and Defendant again ask for a continuance, this time to allow Defendant to "negotiate with the State." The State does not object and an Agreed Continuance Order is entered. The case is reset for trial June 1, 2013. Today's date is June 1, 2013 and you have filed a pre-trial motion to dismiss defendant's indictment for violating his right to a speedy trial.

Questions:

2A. What is the state statutory length of time within which an accused has a right to be tried in Mississippi? **(5 points)**

2B. When does this state statutory right begin? **(5 points)**

2C. After what period of time does a presumption of prejudice arise in Mississippi? **(5 points)**

2D. What Amendment to the United States Constitution gives a Defendant the right to a speedy trial? **(5 points)**

2E. What are the four factors a court uses in analyzing whether or not there has been a constitutional violation of a Defendant's right to a speedy trial? **(20 points)**

2F. When does an accused's federal constitutional right to a speedy trial begin? **(5 points)**

2G. Name the primary interest behind an accused's constitutional right to a speedy trial? **(5 points)**

MISSISSIPPI BOARD OF BAR ADMISSIONS
July 2013 Bar Examination
CONSTITUTIONAL LAW, CRIMINAL LAW & CRIMINAL PROCEDURE
Thirty (30) Minutes
One hundred (100) total points

ANALYSES

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

Question #1: Fifty (50) points total

You are an Assistant District Attorney representing the State of Mississippi in 2013. "Officer" has had a long "working history" with "Defendant" and knows him by sight. Officer just clocked in at the station house and saw an outstanding felony kidnaping arrest warrant signed by the local justice court judge for Defendant of "Victim." Officer physically left the arrest warrant at the police station. Shortly thereafter, Officer visually sees Defendant driving his own Crown Victoria automobile and not committing any traffic offenses or misdemeanors in Officer's presence. Nevertheless, Officer conducts a traffic stop on the car driven by Defendant. Immediately, Officer informs Defendant that he is being arrested for kidnaping, handcuffed Defendant, reads him his *Miranda* rights, and places Defendant in Officer's patrol car. Defendant responded that he "know's the drill", and he "ain't saying nothing til I get my lawyer." Officer returns to Defendant's car to perform a roadside inventory search. Officer discovers the dismembered mutilated body of the kidnap Victim in Defendant's trunk. Furious at the atrocity he has seen, Officer returns to Defendant in the back of his patrol car and tells Defendant "you know I found Victim all cut up, you better start talking or you're going to get the needle!" Defendant in response states, "what's the big deal? He was no good to nobody, ain't nobody gonna miss him, and I did him a favor cause he never used his head when he had one anyway. If you weren't so nosy I could have put him in the river where he actually could have done some good for once by feeding the fish and alligators!"

QUESTIONS

1A. Was Officer's initial arrest of Defendant valid? Yes or NO and explain fully. **(25 points total)**

MODEL ANSWER 1A: Yes. = (13 points)

EXPLANATION: Although Defendant had not committed a crime in his presence, Officer was aware of an outstanding felony arrest warrant for Defendant and was in compliance with Mississippi Code Annotated § 99-3-7 (1972). Section 99-3-7 permits Officer, a law enforcement officer, to make a felony arrest, which is based upon probable cause, i.e. the valid arrest warrant signed by a judge, despite not having personal knowledge of the felony crime of kidnaping. Officer did not have to have physical possession of the arrest warrant. = (12 points)

AUTHORITY:
Mississippi Code Annotated § 99-3-7 (1972).
§ 99-3-7. Warrantless arrests; domestic violence and protection order violations; intensive supervision program violations

(1) An officer or private person may arrest any person without warrant, for an indictable offense committed, or a breach of the peace threatened or attempted in his presence; or when a person has committed a felony, though not in his presence; or when a felony has been committed, and he has reasonable ground to suspect and believe the person proposed to be arrested to have committed it; or on a charge, made upon reasonable cause, of the commission of a felony by the party proposed to be arrested. And in all cases of arrests without warrant, the person making such arrest must inform the accused of the object and cause of the arrest, except when he is in the actual commission of the offense, or is arrested on pursuit. . . . .

1B. Is Defendant's confession to Officer admissible against Defendant during your case in chief ? Yes or No and explain fully. **(25 points total)**

MODEL ANSWER (1B): No. = (13 points).
EXPLANATION : The identification and explanation of the defendant being in "custody" issue and this being a "custodial interrogation" &/or "functional equivalent" are necessary to receive the other twelve points. The Answer needs to include that this was an improper police initiated interrogation because the accused had already invoked his fifth and sixth amendment rights. (12 points)

AUTHORITY:
Because of *Miranda v. Arizona*, 86 S. Ct. 1602 (1966), the prosecution may not use statements, whether exculpatory or incriminating, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. Once the accused invokes his or her right against self-incrimination and right to counsel, the police cannot reinitiate interrogation or its functional equivalent. Only if the accused himself or herself initiates further communication, exchanges, or conversations with police may a custodial interrogation resume. *Edwards v. State*, 452 U.S. 477, 484-85

(1981); *see also Minnick v. Mississippi*, 498 U.S. 146, 150 (1990); *Sanders v. State*, 835 So. 2d 45, 50 (Miss. 2003). *see also Pannell v. State*, 7 So.3d 277, 285 (COA 2008) *cert denied* 11 So.3d 277 (2009).

Question 2: Fifty (50) points

You are a licensed Mississippi criminal defense attorney. You represent "Defendant." Defendant was arrested July 1, 2011 for possession with intent to sell cocaine. Defendant was indicted and served with his indictment on October 1, 2011. To defend him on these charges, Defendant employs you on October 2, 2011. You get him released on bail the same day. On October 3, 2011, you make an entry of appearance in circuit court for Defendant, execute a waiver of arraignment and enter a plea of not guilty, file a Motion for Discovery, a Motion for a Speedy Trial, and a request for a plea offer. The case is set for trial by jury on December 1, 2011. While out on bail, Defendant requests that you ask for a continuance from the December 1, 2011, jury trial date so that he can attend a rock concert. The continuance is granted by agreement with the State until June 1, 2012. Prior to the June 1, 2012 trial date the prosecutor requests a continuance due to a death in her family which You and Defendant agree to do. The case is reset again for trial December 1, 2012. On November 30, 2012, You and Defendant again ask for a continuance, this time to allow Defendant to "negotiate with the State." The State does not object and an Agreed Continuance Order is entered. The case is reset for trial June 1, 2013. Today's date is June 1, 2013 and you have file a pre-trial motion to dismiss defendant's indictment for violating his right to a speedy trial.

Questions

2A. What is the statutory length of time within which an accused has a right to be tried in Mississippi?
Answer: 270 days. **Five [5] points**

2B. When does this statutory right begin ?
Answer: After the accused is arraigned. **Five [5] points**

Authority (2A&2B): Mississippi Code Annotated Section 99-17-1 states that, "[u]nless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days *after the accused has been arraigned." Murray v. State,* 967 So.2d 1222 (Miss.2007).

2C. After what period of time does a presumption of prejudice arise in Mississippi?
Answer: (8) eight months **Five [5] points**
Authority (2C): *Noe v. State,* 616 So.2d 298, 300 (Miss.1993); *Smith v. State,* 550 So.2d 406, 408 (Miss.1989)

2D. What Amendment to the United States Constitution gives a Defendant the right to a speedy trial?
Answer: Sixth Amendment to the United States Constitution **Five [5] points**
Authority (2D): The Sixth Amendment to the United States Constitution states, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...." U.S. Const. amend. VI.

2E. What are the four factors a court uses in analyzing whether or not there has been a constitutional violation of a Defendant's right to a speedy trial?
Answer: 1] the Length of Delay; 2] the reason for the delay; 3] the defendant's assertion of his right, and 4] prejudice to the defendant. **Twenty [20] points total / Five [5] points for each of the four (4) factors**
Authority (2E): *Barker v. Wingo*, 407 U.S. 514, 515 (1972)

2F. When does an accused's constitutional right to a speedy trial begin?
Answer: Beginning with the date of arrest when someone becomes an accused. **Five [5] points**
Authority (2F): *Murray v. State*, 967 So.2d 1222, 1230 (Miss.2007)

2G. Name the primary interest behind an accused's federal constitutional right to a speedy trial?
Answer: ". . . to limit the possibility that the defense will be impaired." **Five [5] points**
Authority (2G): *Barker v. Wingo,* 407 U.S. 514, 532 (1972)

MSE #4

Mississippi Board of Bar Admissions
July 2013 Bar Examination
Practice and Procedure of Mississippi Courts
(100 Points Total)

Gizmo Corporation (Gizmo), a citizen of Tennessee, manufactures blenders. Gizmo's blenders are distributed to retailers throughout the United States by DEALERZ, Inc. (DEALERZ), a citizen of Mississippi. Plaintiff, a citizen of Mississippi, purchased a Gizmo blender from a retailer in her hometown. Shortly after purchasing the blender, Plaintiff was seriously injured when the blender overheated and exploded.

Plaintiff sued Gizmo in Mississippi, Smith County Circuit Court. Plaintiff sought $100,000 in damages on two state-law tort theories: (1) failure to warn, and (2) sale of a dangerously defective product.

Under a newly enacted Mississippi law, a manufacturer's duty to warn is fully discharged if a proper warning is affixed to the product *at the point of delivery to its distributor.* A distributor's duty is fully discharged if the warning is affixed a*t the point of delivery to the retailer.* State law further provides that both manufacturers and distributors may be held separately and strictly liable for selling a "dangerously defective" product, even if they have given adequate warning of the risks.

Plaintiff's complaint alleged both that Gizmo had failed to affix a warning label to the product and that Gizmo's blenders had a dangerous propensity to overheat.

After extensive discovery, Gizmo filed a motion for summary judgment on the failure to warn claim. It attached to its motion the supporting affidavits of employees of both Gizmo and DEALERZ attesting that a proper warning label had been affixed to the blender both at the time of delivery to DEALERZ and at the time of distribution to the retailer who sold the blender to Plaintiff. While conceding that the warning label usually provided with the product did give adequate notice of the danger of overheating and explosion under certain circumstances, Plaintiff nevertheless contested the motion for summary judgment with her own affidavit, in which she stated that there had been no warning label affixed to her blender when she purchased it from her local retailer.

The court granted Gizmo's motion for summary judgment on the failure to warn claim and entered judgment on that claim against Plaintiff. No appeal was taken. Soon afterward, Gizmo and Plaintiff settled the dangerous defect claim for an undisclosed amount.

Plaintiff retained Attorney A in Mississippi to represent her in this action against Gizmo. Plaintiff paid her Mississippi Attorney a $10,000 retainer, which he agreed to bill against until such time as it was depleted. At such time, it was agreed that he would begin sending her monthly bills. Plaintiff paid the $10,000 retainer to the Attorney at the outset. The Attorney, knowing that the case would likely entail accumulation of fees well in excess of $10,000, deposited her check in his operating account and immediately used the money to pay down his firm credit line at his bank. He did this knowing that if, for any reason, he did not bill more than the sum she had put up as a retainer, he could always go to his credit line in order to repay her what she might be owed. Surely enough, at the time settlement was reached, Plaintiff still had a $3300 credit on her retainer. Attorney A promptly withdrew this amount from his credit line and timely returned this sum to Plaintiff. He carried out all other obligations with respect to her representation in a capable manner and the settlement went through. Plaintiff was satisfied with his representation.

Question 1. In Plaintiff's suit against Gizmo, did the court properly grant Gizmo's motion for summary judgment on the failure to warn claim? Explain. **(60 Points)**

Question 2. Has the Attorney for the Plaintiff committed any ethical violations in the handling of the Plaintiff's retainer? Explain. **(40 Points)**

Mississippi Board of Bar Admissions
July 2013 Bar Examination
Practice and Procedure of Mississippi Courts
(100 Points Total)

ANALYSIS

Question 1 Analysis: (60 points)
Under Miss. R. Civ. P. 56, should summary judgment be granted to a defendant who supports his motion with evidence negating the plaintiff's claim when the plaintiff's response fails to directly controvert that evidence?

In the first court action, defendant Gizmo's motion for summary judgment was premised on the claim that a proper warning label was attached to its blender at the time the blender was delivered to the distributor. Under the applicable state law, Gizmo's duty to warn was fully discharged if that fact were true. To support its claim, Gizmo provided affidavits of witnesses who said the label was present at the relevant time. In the face of this evidence, Plaintiff had a duty to present evidence of "specific facts" showing that there was a genuine issue for trial. Plaintiff's affidavit, which asserted only the absence of a label *when she purchased the blender*, did not contradict Gizmo's evidence that a label was present when it delivered the blender to the distributor. Hence, summary judgment was appropriate on that issue.

Because Plaintiff's response to Gizmo's motion for summary judgment failed to demonstrate a genuine issue of material fact as to Gizmo's supported assertion that a warning label was affixed to the product at the time of delivery to the distributor, the court properly granted summary judgment to Gizmo on the failure to warn claim.

A motion for summary judgment should be granted in favor of a party if "there is no genuine issue as to any material fact" and the party is "entitled to a judgment as a matter of law." Miss. R. Civ. P. 56(c). A defendant on a claim may move for summary judgment by attacking any *necessary* element of the plaintiff's case. In determining whether there are any genuine issues of material fact, the court should construe all factual matters in the light most favorable to the non-moving party. However, where the moving party presents evidence of facts that would defeat the non-moving party's claim, the non-moving party "may not rest upon the mere allegations" of her pleading. The non-moving party has a responsibility to offer, "by affidavits or as otherwise provided" in Rule 56, evidence of "specific facts showing that there is a genuine issue for trial." Miss. R. Civ. P. 56(e).

On the facts of this problem, the court properly granted Gizmo's motion for summary judgment on the failure to warn claim. The new law of Mississippi

states that a manufacturer fully discharges its duty to warn if adequate warning labels are affixed to the product *at the time of delivery to its distributor.* Thus, to win on her failure to warn claim, Plaintiff must prove that no proper warning label was affixed to the blender at the time of delivery to the distributor.

Defendant Gizmo's summary judgment motion alleged that adequate warning labels were, in fact, affixed to the product at the relevant time, and that allegation was supported by affidavits attesting to the presence of the warning label at the time of delivery to the distributor. This properly supported motion therefore negates a key element of Plaintiff's claim, thereby discharging Gizmo's duty to support its summary judgment motion under Miss. R. Civ. P. 56(e).

At this point, the burden shifted to Plaintiff to come forward with controverting evidence. Plaintiff responded to the summary judgment motion with her own affidavit, in which she attested that no warning label had been present on her blender when she purchased it. This does not directly controvert Gizmo's motion, since it does not contend that the warning label was missing at the point of delivery to the distributor, the critical moment for manufacturer liability under applicable state law. Consequently, Plaintiff failed to meet her burden to produce evidence controverting Gizmo's version of the facts. Thus, Gizmo has demonstrated that no genuine issue of material fact exists on a key element of Plaintiff's claim, and that it is, therefore, entitled to judgment as a matter of law. Miss. R. Civ. P. 56(c).

Question 2 Analysis: (40 points)

The Plaintiff's lawyer has committed an ethical violation by placing the Plaintiff's funds in his operating account, as opposed to his trust account, at the outset. Rule 1.15 of the Mississippi Rules of Professional Conduct provides: (a) A lawyer shall hold clients' and third persons' property separate from the lawyer's own property. Funds shall be kept in a separate trust account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person.

The Plaintiff's lawyer further committed an ethical violation by using the Plaintiff's funds for his own purposes, when they were, in fact, not yet earned. Rule 1.15(j) of the Rules of Professional Conduct provides "[a] lawyer generally may not use, endanger, or encumber money held in trust for a client or third person without the permission of the owner given after full disclosure of the circumstances. Except for disbursement based upon four..." exceptions [not implicated in this factual scenario]. Monies should only be transferred into an attorney's operating account upon such time as the fee is earned. The fact that the lawyer ensured that he would have the funds available to repay the Plaintiff is no consolation according to the above-cited rule.

MSE #5

MISSISSIPPI BOARD OF BAR ADMISSIONS
July 2013 BAR Examination
DOMESTIC RELATIONS
100 Points Total

Harry and Wilma were married in June, 1999, days after meeting in San Diego, California at a Technology Exposition. Wilma happened to be there on family vacation to celebrate her graduation from high school the previous month. San Diego was Harry's home. He had earned an engineering degree from the University of San Diego. After graduation Harry began working at an engineering firm earning $90,000 annually. Harry also wrote articles for Technology Magazine earning $12,000 annually.

After remaining in San Diego a few months, the couple moved to Tunica, Mississippi, Wilma's hometown, into a house that Wilma inherited from her grandmother upon her death in 1998. The house was valued at $100,000. Harry managed its renovation which increased the value to $180,000.

Not only had Wilma inherited the house, she was also the beneficiary of a flower shop located on the property. She had helped her grandmother operate the flower shop since she was a small child. The flower shop was her grandmother's sole proprietorship. The three employees whom her grandmother hired basically ran the shop. Wilma checked on things occasionally. The shop continued to generate net income of $30,000 per month. Harry quit his engineering job and stopped writing. The family lived on the flower shop income. Harry helped with flower deliveries on three occasions. The couple had two daughters and both parties participated in the care of the children, except when Harry was away on one of his frequent trips to San Diego.

During 2010 Wilma discovered airline, hotel and entertainment receipts and learned that Harry had maintained a relationship with his lover in San Diego. He had taken her on a trip abroad as well as trips to New York, and Hawaii. Wilma immediately filed for divorce in Tunica County, Mississippi on the grounds of adultery, asking for custody of her two daughters, the house and flower shop.

Harry denied the adultery claim, and filed a counter- petition requesting custody of the children, and to be awarded the house, the flower shop and alimony.

1. Discuss the classification of the following assets as separate or marital property:
   a. House (10 Points)
   b. Flower shop (10 Points)

2. Ferguson v. Ferguson, 639 So.2d 921, sets out eight factors that should be considered in property division. Assuming the chancellor finds Harry guilty of adultery and awards the children to Wilma, determine property settlement by applying the Ferguson factors (40 Points)

3. Armstrong v. Armstrong, 618 So.2d 1278 sets out twelve (12) factors to be considered in awarding alimony. Discuss at least two (2) of them that would weigh against Harry in his alimony claim. (40 Points)

MSE #5

MISSISSIPPI BOARD OF BAR ADMISSIONS
July 2013 BAR Examination
DOMESTIC RELATIONS
100 Points Total
ANALYSIS

1. a. Gifts and **inheritances** are classified as separate assets. However **separate assets may become marital property by gift or family use, joint titling or commingling.** There is no evidence of gift or joint titling. Mississippi has a **family use doctrine** whereby separate property is almost always converted to marital property. The house was used by the family as their residence. It could be argued that the house became marital property as a result. If separate property appreciates during the marriage, the appreciation may become marital property. Mississippi stands with the majority of states that hold that appreciation attributable to active efforts of either spouse is marital property. Craft v. Craft, 825 So.2d 605 (Miss. 2002). The **appreciation** due to renovation became marital property as a result of **contribution** by Harry (note that contribution could be by either spouse). The house was clearly the separate asset of Wilma because she inherited it from her grandmother. However, as a result of family use and renovation during marriage, it may have been converted to a marital asset or a **mixed asset. (10 POINTS)**

   b. The flower shop, because it was **inherited**, was the separate property of Wilma. The family used the proceeds of the shop to live. However, **use of the proceeds does not convert separate property to marital property.** Pearson v. Pearson, 761 So.2d 157 (Miss. 2000). There was **negligible contribution** by Harry. There was no appreciation during the marriage. The shop would likely remain the separate property of Wilma. **(10 POINTS)**

2. The following factors should be considered in determining property settlement pursuant to Ferguson v. Ferguson, 639 So.2d 921: **(5 POINTS EACH)**

   a. **Substantial contribution** to property accumulation, including direct or indirect economic contribution, contribution to marital and family stability, and contribution to the education or training of the wage-earning spouse; **Harry directly contributed to the increased valuation of the house by managing the renovation that increased the value by $80,000. Three flower deliveries over a ten year period would be an insignificant contribution. It does not appear that either spouse made a significant contribution to the flower shop during the marriage. However, because it was inherited, the flower shop should be awarded to Wilma as her separate property. Harry's travel cost was a dissipation of marital assets and detracted from marital and family stability. Neither spouse contributed to the education and training of the other.**

b. Spousal use or disposition of assets and distribution by agreement; **Harry spent family money on travel and entertainment with his lover, this would be determined to be wasteful dissipation of assets. This certainly would not have been by agreement.**

c. The market and emotional value of assets; **The house and flower shop were inherited from Wilma's grandmother and she would have great emotional attachment to both. In addition, Wilma's work in the flower shop with her grandmother during childhood likely created even greater sentimental value.**

d. The value of each spouse's separate estate; **Wilma has a house that she inherited that was worth $100,000, but increased in value to $180,000 due to renovation. She also owns a flower shop that generates a significant amount of income. Her assets are significantly more than Harry's. He has no assets. Equitable division would require division of marital assets. The house, because it was inherited, would be Wilma's separate property. However, the renovation would be marital property and should be divided, $40,000 each.**

e. Tax consequences and legal consequences to third parties; **There are no apparent tax consequences because none of the asset are being liquidated. If a sale of marital assets is ordered by the chancellor, the tax burden would also require allocation.**

f. The extent to which property division can eliminate the need for alimony; **a $40,000 property settlement from appreciation of the house would provide temporary funds to Harry and likely eliminate the necessity for alimony.**

g. The needs of each spouse; **Harry would need a place to live if the house is awarded to Wilma. As the custodian of the two minor children, Wilma would have an immediate housing need greater than Harry's.**

h. Other factors which should be considered in equity.

3. Alimony should be considered only after division of marital property. Alimony is equally available to husbands and wives (M.C.A. 93-5-23). The Chancellor has discretion in deciding whether to award alimony and considers twelve factors. Armstrong v. Armstrong 618 so.2d 1278. Financial disparity is a frequent reason for awarding alimony. Two of the Armstrong factors that weigh against Harry in his alimony claim are:

a. Earning capacity of the parties; **Harry has a degree in engineering and writing ability and therefore his earning capacity is greater than Wilma's. Wilma has only a high school education. Harry quit a job where he was earning $90,000 annually and abandoned his writing career that generated $12,000 annually. The flower shop income is the only source of income that Wilma has.**

b. Fault or misconduct; **Harry's misconduct caused the marriage to end. This would be a factor in denying alimony to him. Although this would not prohibit him from receiving alimony. The majority of states completely eliminated fault as a factor in alimony awards. In states where fault is still considered, it is generally one of a number of factors for consideration rather than a reason in itself to deny alimony. In 1992 the Mississippi Supreme Court abandoned the "innocent spouse" rule, holding that marital fault is merely one factor for consideration in an alimony award (Hammonds v. Hammonds, 597 So.2d 653).**

c. Wasteful dissipation of assets by either party; **Harry spent family money on travel and entertainment with his lover, this would be determined to be wasteful dissipation of assets. The facts state that he made frequent trips to San Diego. He had taken his lover to on a trip abroad as well as to New York and Hawaii. This is an important factor in determining alimony.**

(A total of 40 POINTS may be awarded for any two of the above three answers: a, b or c. Other Armstrong factors listed below would not weigh against Harry's alimony claim. Allow minimal credit for any of these factors: d - l.)

d. Income and expenses of the parties;
e. The needs of each party;
f. The obligations and assets of each party.
g. The length of the marriage;
h. The presence or absence of minor children in the home, which in the home, which may require that one or both of the parties either pay, or personally provide, child care;
i. Age of the parties
j. Standard of living of the parties;
k. The tax consequences of the spousal support order;
l. Any other factor deemed by the court to be just and equitable in connection with the setting of spousal support.

MSE #6

MISSISSIPPI BOARD OF BAR ADMISSIONS
July 2013 Bar Examination
PROFESSIONAL CONDUCT AND ETHICS
100 Points Total

FACTS

Attorney John Williams ("Williams") passed the Mississippi Bar in 1977, and since that time, has been a solo practitioner in Southaven, MS. Williams is an accomplished criminal defense attorney, but is known to take an occasional divorce case, especially if he knew the client beforehand.

One of Williams' friends came to his law office seeking representation for filing divorce from her husband. 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's practice does so well, Mrs. Stanton has not worked in years, and 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 retainer, because she fears her husband may discover she has retained an attorney. Moreover, Mrs. Stanton only "suspects" that Dr. Stanton is cheating on her and has no "actual proof, at least not yet." In explaining this dilemma to Williams, Mrs. Stanton states that she'll gladly pay Williams a percentage of anything she recovers in alimony and/or via a property settlement from Dr. Stanton once they are divorced. Along these lines, she informs Williams that Dr. Stanton has a net worth of over $8 million dollars, which Williams knows from observing Mrs. Stanton's "lifestyle" that she's probably good for such a fee, and that such a fee would eventually be sizeable. Thus, Williams agrees to the fee arrangement proposed by Mrs. Stanton, and decides not to place the fee arrangement to writing, primarily on the basis that he and Mrs. Stanton are friends.

A few weeks after the initial consultation, a complaint for divorce was filed in DeSoto 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 are pictures 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" which

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

Neither Williams nor Mrs. Stanton have a Facebook® account and are not that knowledgeable about social media websites. 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 possibly 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 hopes of accessing 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 give permission to be able to view her pictures. As such, and with Williams' blessing, 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. With this adulterous proof 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 my fee more in depth later."

As the case progresses, Williams continues to speculate about the sizeable fee he'll land once the Stanton's divorce is finalized and now that he's been able to tap into a gold mine of information available on social media websites, he's considering expanding his domestic relations practice. Attorney Williams is also proud of himself about how the information on Facebook® was acquired because very little information, with the exception of his assistant's e-mail address, can be traced directly back to him.

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? (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? (30 points).

(3) Assume that the "imposter friend account" that Williams' legal assistant setup is revealed and leads to legal repercussions for his legal assistant. 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).

MISSISSIPPI BOARD OF BAR ADMISSIONS
July 2013 Bar Examination
PROFESSIONAL CONDUCT AND ETHICS
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? (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? (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 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 disclosed, 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.

Lawyers should be able to use information that is publicly available (*e.g.*, Google® search results). **Conversely, because lawyers are barred from**

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[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.

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 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 occur 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" that Williams' legal assistant setup is revealed and leads to legal repercussions for his legal assistant. 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.

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[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 form 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 or 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 knowingly ratified the misconduct of his assistant, and is thus responsible for her misconduct according to MRPC 5.3(c)(1).

END