

Checklist of Points to be Covered for Complete Answers

FSM Bar Examination, August 6, 2009

[bracketed citations to statutes, rules, and the like are an aid to those reviewing this exam; a test taker is not expected to memorize and repeat these numbers so long as the legal principles are cited and discussed]

ETHICS

(10 points)

- I. (10 points)
 - A. (3 points) Virginia must turn over the file as requested because
 1. a client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services [FSM MRPC R. 1.16 cmt.]
 2. upon termination of representation,
 - a. a lawyer must surrender papers & property to which the client is entitled & may retain papers as security for a fee only to the extent permitted by law [McVey v. Etscheit, 14 FSM Intrm. 207, 211-12 (Pon. 2006)]
 - b. a lawyer must take steps to the extent reasonably practicable to protect a client's interests regardless of the reason she was terminated [FSM MRPC R. 1.16(d)]
 3. since Arizona is in the middle of a criminal case against him, withholding Arizona's file from him would unfairly prejudice him
 - B. (2 points) answer Burr that the provision will be waived since
 1. a partnership or employment agreement that restricts a lawyer's rights to practice after termination of the relationship is barred by the Model Rules of Professional Responsibility [FSM MRPC R. 5.6(a)]
 2. it's therefore unenforceable at law
 - C. (5 points) the firm must
 1. pay the client the net proceeds without delay because
 - a. lawyer must promptly deliver to the client any funds that the client is entitled to receive [FSM MRPC R. 1.15(b)] &
 - b. upon the client's request must promptly render a full accounting regarding such property [FSM MRPC R. 1.15(b)]
 - c. lawyer is responsible for another lawyer's violation of the rules of professional conduct if the lawyer is a partner in the law firm in which the other lawyer practices [FSM MRPC R. 5.1(c)(2)]
 2. even if the client suffers no loss, must file disciplinary report against Burr because
 - a. funds in client trust account cannot be used

for own because lawyer must hold property of clients or third persons that is in lawyer's possession in connection with a representation separate from the lawyer's own property [FSM MRPC R. 1.15(a)]

- b. Virginia & you know that Burr violated the ethical rules
- c. lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, must inform the appropriate professional authority [FSM MRPC R. 8.3(a)]

EVIDENCE

(20 points)

II. (20 points)

- A. (3 points) judge should rule that Bellotti's investigation notes are admissible since Bellotti was able to recall making the notes
 - 1. define hearsay as out of court statement that is being offered to prove the truth of the matter asserted therein [FSM Evid. R. 801(c)];
 - 2. general rule: hearsay inadmissible unless falls within one of the exceptions to the hearsay rule [FSM Evid. R. 802];
 - 3. applicable hearsay exception – recorded recollection – a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully & accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory & to reflect that knowledge correctly is admissible [FSM Evid. R. 803(5)]
- B. (3 points) judge should rule that the neighbor's statement is inadmissible
 - 1. neighbor's statement in Bellotti's notes is hearsay within hearsay
 - a. hearsay included within hearsay is admissible under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule [FSM Evid. R. 805]
 - b. while rest of Bellotti's notes can come in, no hearsay exception allows the neighbor's statement
 - 2. impeachment by reputation is not available through hearsay exceptions
 - a. when character or a trait of character of a

- person is admissible
 - b. proof may be made by testimony as to reputation or by testimony in the form of an opinion [FSM Evid. R. 405(a)]
- C. (3 points) judge erred in admitting Weld's testimony
- 1. lay witness opinion testimony generally inadmissible [FSM Evid. R. 701]
 - 2. evidence of a persons's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion [FSM Evid. R. 404(a)]
 - 3. a witness's credibility may be attacked or supported by evidence in the form of opinion or reputation only if the evidence refers only to character for truthfulness or untruthfulness
 - a. facts don't say that Flynn has already testified
 - b. Weld's opinion doesn't refer to Flynn's truthfulness
- D. (3 points) judge should sustain objection because
- 1. evidence of other crimes, wrongs, or acts is not admissible to provide the character of a person in order to show that he acted in conformity therewith [FSM Evid. R. 404(b)]
 - 2. to attack a witness's the credibility evidence that he has been convicted of a crime must be admitted if elicited from him or established by public record during cross-examination [FSM Evid. R. 609] but only if
 - a. the crime was punishable by death or imprisonment in excess of one year under the law under which he was convicted
 - b. the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant
 - c. or it involved dishonesty or false statement, regardless of the punishment
 - d. but it is not admissible if a period of more than ten years has elapsed since
 - (1) the date of the conviction
 - (2) or of the release of the witness from the confinement imposed for that conviction
 - (3) whichever is the later date
 - (4) unless the court determines, in the interests of justice, that the probative value of the conviction, supported by specific facts & circumstances substantially outweighs its prejudicial effect
 - 3. armed robbery is a felony; therefore punishable by

- over year in jail, BUT
4. conviction over 10 years old & facts don't state if Flynn was in jail & released less than 10 years before trial, so is possible it could have come in if prosecution had laid proper foundation
 5. Menino could establish fact of conviction by public record – certified copy of conviction, but hasn't done so
 6. evidence of a conviction more than 10 years old is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence & no written notice appears to have been given
- E. (3 points) judge should rule that the transcript is admissible if
1. Zonino's testimony is relevant
 2. Flynn's attorney had opportunity to be present & to cross-examine Zonino because
 3. Zonino's deposition is hearsay since it is out-of-court statement offered for the truth therein
 - a. Zonino is unavailable to testify [FSM Evid. R. 804(a)(5)] since
 - (1) he is in jail in Guam
 - (2) & his presence can't be obtained by process or other reasonable means because FSM court process not effective on Guam
 - b. prior testimony given as a witness in a deposition is admissible [FSM Evid. R. 804(b)(1)] if
 - (1) taken in compliance with law in the course of the same or another proceeding,
 - (2) if the party against whom the testimony is now offered had an opportunity & similar motive to develop the testimony by direct, cross, or redirect examination
- F. (3 points) judge correctly admitted Sullivan's testimony
1. Flynn's whisper is an admission of a party-opponent, by definition non-hearsay [FSM Evid. R. 801(d)(2)]
 2. attorney-client doesn't apply even if made with expectation would be confidential because when overheard by third party no privilege applies
- G. (2 points) the judge should uphold objection because
1. although Flynn's statements would be admission of party opponent which is defined as non-hearsay [FSM Evid. R. 801(d)(2)]
 2. relevant evidence may be excluded if protected by privilege

- a. a person's privilege is governed by the principles of the common law as they may be interpreted by FSM courts in the light of reason & experience, including local custom & tradition [FSM Evid. R. 501]
- b. statements made to clergy in the course of seeking religious guidance with the intent that such statements be confidential are privileged

GENERAL

(70 points)

III. (9 points)

A. (3 points)

1. discovery of facts known & opinions held by experts, otherwise discoverable & acquired or developed in anticipation of litigation or for trial, may be obtained through interrogatories [FSM Civ. R. 26(b)(4)(A)(i)]
2. other party must identify each person whom the other party expects to call as an expert witness at trial, to state the substance of the facts & opinions to which the expert is expected to testify & a summary of the grounds for each opinion [*id.*]
3. upon motion, court may order further discovery by other means [FSM Civ. R. 26(b)(4)(A)(ii)]
4. Deimos improperly refused to provide any information other than a summary of expert's expected testimony
5. court should order Deimos to produce the other information required by Rule 26 & only if not provided then preclude expert testimony
6. BUT court will deny motion to produce copies or summaries of the proposed expert's testimony in three other cases because those documents aren't relevant to current action

B. (3 points)

1. party may obtain discovery of any other party by deposition [FSM Civ. R. 26; FSM Dev. Bank v. Adams, 14 FSM Intrm. 234, 254 (App. 2006)]
2. on a party's motion or one by the person from whom discovery is sought, & for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including a designation of the time or place [FSM Civ. R. 26(c)(2)]
3. party may in the party's notice & in a subpoena name a corporation as the deponent & describe with

- reasonable particularity the matters on which examination is requested [FSM Civ. R. 30(b)(6)]
4. in that event, the corporation must designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, & may set forth, for each person designated, the matters on which the person will testify [*id.*]
 5. thus, any designated corporation officers are considered party representatives & since Phobos is a party-plaintiff must appear on Pohnpei for deposition [see McGillivray v. Bank of the FSM (II), 6 FSM Intrm. 486, 488 (Pon. 1994)]
 6. any officer or former officer not designated (& former officers not likely to be designated) is a non-party & must be subpoenaed
 - a. subpoenas generally unenforceable in foreign country
 - b. BUT subpoena may be issued for FSM national or resident in foreign country [FSM Civ. R. 45(e)(2)(A)] if the court finds
 - (1) that particular testimony is necessary in the interest of justice, &
 - (2) in addition, that it is not possible to obtain the testimony in admissible form without a personal appearance or to obtain the production of the document or other thing in any other manner
 - (3) but the person to whom the subpoena is addressed must be tendered estimated necessary travel & attendance expenses, as determined by the court & stated in the order directing subpoena's issuance
 - c. since unlikely the officers & former officers are FSM nationals, no subpoena could require them to appear in FSM, so court won't issue
- C. (3 points)
1. a party may serve on another party a request to produce documents [FSM Civ. R. 34(a)] that constitute or contain matters that are
 - a. relevant
 - b. not privileged
 2. response must state, if the request is objected to, the reasons for objection [FSM Civ. R. 34(b)]
 3. court should order Deimos to suitably describe the documents withheld so Phobos can decide whether it agrees with Deimos's work product & privilege claims
 4. if Phobos disagrees with any claim, it may file motion to compel [FSM Civ. R. 37(a)(2)]
 - a. party may obtain discovery of relevant & not

privileged documents prepared in anticipation of litigation or for trial (work product) by or for another party or by or for that other party's representative (including the other party's attorney) [FSM Civ. R. 26(b)(3)] only upon a showing that

- (1) the party seeking discovery has substantial need of the materials in the preparation of the party's case &
 - (2) the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means requested party not required to produce
- b. Phobos, may, if successful, seek an award of its reasonable expenses, including attorney's fees, incurred in obtaining order unless Deimos's opposition to the motion was substantially justified or other circumstances make an award of expenses unjust [FSM Civ. R. 37(a)(4)]

IV. (8 points)

- A. basis upon which FSM Supreme Court can hear appeal – regardless of state constitution anything involving national constitution, law, or treaty may be appealed to FSM Supreme Court [FSM Const. art. XI, § 7]; motion to dismiss denied if Theodric had asserted FSM Constitutional rights in state court
- B. issues considered by FSM Supreme Court on appeal
1. because was state crime tried in state court FSM Supreme Court, based on facts as presented, will only consider issues raised by accused's rights under the FSM Constitution if Theodric asserted those rights
 2. was Theodric's confession obtained in violation of FSM Constitution
 3. right against self-incrimination [FSM Const. art. IV, § 7]
 4. right to counsel [FSM Const. art. IV, § 6]
- C. likely outcome; explanation
- a. Theodric may waive his FSM constitutional rights if done so knowingly, voluntarily, & intelligently
 - b. argue whether waiver voluntary (or done intelligently or knowingly) if done
 - (1) while drunk &
 - (2) in sleep-deprived state &
 - (3) police would not let Theodric sleep until he confessed [also was it
 - c. likely FSM Supreme Court will overturn

- (1) vacate conviction
- (2) suppress confession, &
- (3) remand to state court for new trial

V. (8 points)

- A. (4 points) action on Edwin's behalf
 1. file immediate petition for writ of habeas corpus (explain writ is brought to test legality of Edwin's confinement)
 2. seek prompt hearing on petition (same day or early next day)
- B. (4 points) pretrial motion & grounds
 1. motion to suppress Edwin's signed confession
 2. grounds for suppression – Edwin's right to due process of law violated – confession is fruit of the poisonous tree because
 - a. Edwin not released or charged within reasonable time [violation of 12 F.S.M.C. 218(4)] & Edwin not brought for initial appearance before a judge within 24 hours of his arrest [violation of 12 F.S.M.C. 218(5)] & no good cause for delay; therefore any evidence obtained as a result of Edwin's detention beyond the initial 24 hours should be suppressed [12 F.S.M.C. 220]
 - b. confession was also obtained after police had refused to let Edwin's attorney speak with him in violation of Edwin's right to be informed that attorney was available for him [12 F.S.M.C. 218(1)] & not allowed to see counsel or family member at place of detention [12 F.S.M.C. 218(2)]; therefore entitled to suppression [under 12 F.S.M.C. 220]
 - c. other possible grounds not clear from facts as given – Edwin may not have been informed of his right to remain silent & to have an attorney present during questioning & may not have made a valid (voluntary, knowing, & intelligent) waiver of those rights
 3. if insufficient evidence left after suppression of confession motion to dismiss on that ground as well as for egregious violation of due process

VI. (13 points)

- A. Tourist v. Ambulance, Inc.
 1. negligence cause of action is only possible claim; negligence is
 - a. duty of reasonable care
 - b. breach of that duty
 - c. causation
 - d. damages

2. Ambulance, Inc.
 - a. breached
 - b. its duty of reasonable care to Tourist when stretcher broke & Tourist fell
 - c. which proximately caused
 - d. Tourist's injuries - damages - cut arm & subsequent injury
 3. Ambulance, Inc.'s defense - statute of limitations
 - a. limitation period for injury caused by negligence is two years [6 F.S.M.C. 803(4)]
 - b. Tourist knew of Ambulance, Inc.'s negligence when the stretcher broke so cause of action accrued then
 - c. suit by Tourist against Ambulance, Inc. will be barred by statute of limitations
- B. Tourist v. Island Hospital
1. Island Hospital liable to Tourist for employee's negligence when employee working within scope of employment [*respondeat superior*]
 2. Tourist's claims against hospital's employees
 - a. battery & false imprisonment (holding Tourist down & refusing to let her go)
 - (1) ER nurse
 - (2) Hospital's security guards
 - b. Doctor's negligence (malpractice)
 3. Hospital will be liable for these claims only if the employees are liable (see below)
- C. Tourist v. Doctor (individually)
1. negligence
 - a. Doctor's medical treatment was negligent
 - (1) Doctor owed duty of reasonable care to Tourist
 - (2) Doctor breached duty by stitching up cut & leaving needle inside
 - (3) proximately caused
 - (4) damages (subsequent medical problems)
 - b. Doctor's negligence is medical malpractice
 - c. Doctor's defense - statute of limitations
 - (1) limitation period for medical malpractice is two years [6 F.S.M.C. 803(3)]
 - (2) limitation period starts when the cause of action accrued [6 F.S.M.C. 812]
 - (3) cause of action accrues when suit may first be successfully maintained thereon [*e.g.*, Kosrae v. Skilling, 11 FSM Intrm. 311, 315 (App. 2003)]
 - (4) medical malpractice not discovered until five years after incident since proximate cause (needle left in) of damages not known

until then

- (a) Tourist will argue cause of action accrued then & thus
- (b) statute of limitations hasn't run yet for Tourist to present claim in writing & sue for
 - i) Doctor's medical malpractice &
 - ii) Hospital's respondeat superior liability for Doctor's malpractice

2. battery

- a. person is liable to another for battery [Elymore v. Walter, 9 FSM Intrm. 450, 458 (Pon. 2000)] for
 - (1) a harmful, offensive contact with another person
 - (2) resulting from an act intended to cause the contact
- b. Doctor's defense - statute of limitations
 - (1) limitation period for battery is two years [6 F.S.M.C. 803(1)]
 - (2) limitation period starts when the cause of action accrued [6 F.S.M.C. 812]
- c. Tourist knew of Doctor's battery (unconsented touching) when it happened so battery cause of action accrued then
- d. any battery claim by Tourist against Doctor will be barred by statute of limitations

D. Tourist v. Nurse (individually) & Hospital security guards (individually)

1. battery

- a. person is liable to another for battery for
 - (1) a harmful, offensive contact with another person
 - (2) resulting from an act intended to cause the contact
- b. guards' & nurse's contact with by holding her down was
 - (1) offensive &
 - (2) the result of their acts intending to cause contact
 - (3) Tourist didn't give permission
- c. damages resulted

2. false imprisonment

- a. false imprisonment's elements [Warren v. Pohnpei State Dep't of Public Safety, 13 FSM Intrm. 483, 492 (Pon. 2005)] are
 - (1) restraint or detention of one against his or her will &

- (2) unlawfulness of the restraint or detention
 - b. guards' & nurse's holding Tourist down was
 - (1) restraint against Tourist's will
 - (2) not lawful
 - c. damages resulted
 - 3. guards' & nurse's defense – statute of limitations
 - a. limitation period for battery & false imprisonment is two years [6 F.S.M.C. 803(1)]
 - b. Tourist knew of battery & false imprisonment when they happened so cause of action accrued then
 - c. any suit by Tourist against guards & nurse will be barred by statute of limitations
- E. Tourist v. Colonia Town
 - 1. possible claim – negligence in maintaining sidewalk
 - 2. Colonia Town's defense – statute of limitations
 - a. limitation period for injury caused by negligence is two years [6 F.S.M.C. 803(4)]
 - b. Tourist didn't make written claim to Colonia Town within two years of tripping on sidewalk
 - c. no standing to sue for falling on sidewalk, time has run out

VII. (8 points)

- A. was contract formed?
 - 1. an enforceable contract requires [*e.g.*, Bank of Hawaii v. Helgenberger, 9 FSM Intrm. 260, 262 (Pon. 1999)]
 - a. an offer,
 - b. an acceptance,
 - c. definite terms, &
 - d. consideration
 - 2. no contract formed when Jackson was shown operation of cement mixer; no definite terms (no price)
 - 3. meeting at airport
 - a. offer (if you want to keep cement mixer price is \$3,000)
 - b. acceptance (Jackson's promise to pay for mixer)
 - c. definite terms (\$3,000 price for mixer)
 - d. consideration (promise to pay \$3,000 for permission to keep mixer)
 - 4. therefore contract formed at airport
- B. if no enforceable contract formed, then Prince could recover
 - 1. under tort theory – conversion
 - a. elements of an action for conversion [Bank of Hawaii v. Air Nauru, 7 FSM Intrm. 651, 653 (Chk. 1996)]
 - (1) the plaintiffs' ownership & right to possession of the personalty
 - (2) the defendant's wrongful or unauthorized

- act of dominion over the plaintiff's property inconsistent with or hostile to the owner's right, &
 - (3) resulting damages
 - b. Jackson converted Prince's cement mixer
 - (1) Prince owned cement mixer
 - (2) Jackson exercised unauthorized dominion over it by taking it without Prince's knowledge to use in his business
 - (3) resulting damages Prince no longer had mixer he could sell for \$3,000 & for which he'd paid \$4,000
 - 2. unjust enrichment theory
 - a. doctrine of unjust enrichment generally applies [Etschreit v. Adams, 6 FSM Intrm. 365, 392 (Pon. 1994)] when
 - (1) there is an unenforceable contract due to impossibility, illegality, mistake, fraud, or another reason &
 - (2) requires a party to either
 - (a) return what has been received under the contract
 - (b) or pay the other party for it
 - (3) unjust enrichment doctrine is based on the idea one person should not be permitted unjustly to enrich himself at the expense of another
 - b. Jackson was using mixer for his construction business
- C. returned checks
- 1. plaintiff may join, either as independent or as alternate claims, as many claims as the party has against an opposing party [FSM Civ. R. 18(a)], so may add returned check claim
 - 2. check amounts recoverable on
 - a. breach of contract theory – checks were payments for goods, thus a sales contract, breached by non-payment
 - b. conversion theory – received goods without paying
- D. damages
- 1. \$3,000 – agreed price of mixer
 - 2. \$265.58 – amount of bounced checks with penalties
 - 3. no attorney's fees award
 - a. not part of recoverable costs under common law
 - b. recoverable if contract or statute provides for [FSM Dev. Bank v. Adams, 14 FSM Intrm. 234, 256 (App. 2006)]
 - c. no evidence that attorney's fees was part of

- contract
4. costs awarded prevailing party [FSM Civ. R. 54(d)]
- VIII. (14 points)
- A. (6 points) both motions likely denied because
1. employment contract for work at sea is admiralty or maritime matter; FSM Supreme Court exclusive jurisdiction [FSM Const. art. XI, § 6(a)] [abstention not possible]
 2. if not an admiralty matter
 - a. then diversity jurisdiction [FSM Const. art. XI, § 6(b)]
 - b. Yap state law cannot divest FSM Supreme Court of jurisdiction granted by FSM Constitution [Gimnang v. Yap, 5 FSM Intrm. 13, 23 (App. 1991)]
 3. Cap'n Kelly did exhaust administrative remedies by sending letter, receiving no answer, & being told something would be done & nothing was, thereby making any further attempts at administrative relief futile
- B. (5 points)
1. steps for Cap'n Kelly's attorney to take
 - a. move for enlargement of time for discovery on relationship between the parties
 - b. move to amend complaint to
 - (1) join Rock Enterprises, Inc. as an indispensable party (analyze requirements) [FSM Civ. R. 19]
 - (2) add cause of action against state for tortious interference with contractual relationship
 2. court's ruling
 - a. would allow enlargement of time
 - b. allow motion to add party-defendants
 - c. will be considered a summary judgment motion if matters outside pleadings considered
 3. likely result if only step is to oppose motion – judgment for state
- C. (3 points)
1. if action against Rock Steady, Inc. is considered action for seaman's wages, then is admiralty case – exclusive jurisdiction in FSM Supreme Court (or possibly court on Guam with admiralty jurisdiction – U.S. District Court)
 2. if not admiralty, then no diversity jurisdiction (since all parties are foreigners) then either Yap State Court or a court on Guam (or Canadian court?)
- IX. (10 points)
- A. (3 points) state "entertainment tax" is unconstitutional
1. a percentage tax levied on business is an income tax [Truk Continental Hotel, Inc. v. Chuuk, 7 FSM Intrm.

- 117, 120 (App. 1995)]
2. national gov't has sole power to levy income taxes [FSM Const. art. IX, § 2(e)]
- B. (3 points) probably constitutional
1. states can't impose taxes that restrict interstate commerce [FSM Const. art. VIII, § 3]
 2. only nat'l gov't has power to impose taxes based on imports [FSM Const. art. IX, § 2(d); FSM Const. art. VIII, § 1]
 3. BUT (argue) not an income tax since tax is not imposed on all imports or on all goods received through interstate commerce & is imposed only on those goods, imported or not, in inventory on January 1st
- C. (4 points) constitutional
1. nat'l gov't has exclusive authority to regulate banking, foreign & interstate commerce, insurance [FSM Const. art. IX, § 2(g)]
 2. can therefore regulate banks & insurance agencies & make certain acts regarding banks or insurance agencies a crime
 3. money wire transfer agencies, although not strictly banks, seem to be in the banking business & are engaged only in foreign & interstate commerce so nat'l gov't ought to be able to regulate those agencies too & criminalize conduct regarding them