

Checklist of Points to be Covered for Complete Answers

FSM Bar Examination, August 4, 2016

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

ETHICS

(10 points)

I. (10 points)

A. conflict of interest

1. hospital was a client of law firm Hunt was a member of; it is therefore a former client of Hunt's even though he did not actively participate in its cases
2. lawyer who has formerly represented a client in a matter shall not [FSM MRPC R. 1.9] thereafter
 - a. represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
 - b. use information relating to the representation to former client's disadvantage
3. Hunt's cases are not the same or substantially related matters, the only danger here is that Hunt may have confidential information learned at his old law firm that he could use to hospital's disadvantage; as long as he has none or does not use it to hospital's disadvantage, Hunt is okay here

B. firm name

1. lawyer may state or imply that he practices in a partnership or other organization only when that is the fact [FSM MRPC R. 7.5(d)] and name "I. Hunt & Slaughter" implies a partnership when is the only lawyer in a professional corporation
2. law firm name may not be misleading but may use a trade name [FSM MRPC R. 7.5(a)]

C. referrals

1. payment for referrals by gifts and free services to Bill appears unethical
2. lawyer must not give anything of value to a person for recommending the lawyer's service except that a lawyer may pay the reasonable cost of advertising [FSM MRPC R. 7.2(c)]

D. solicitation of patients who had suffered serious complications

1. sending letters
 - a. lawyer may not solicit by letter or other writing professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in-person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain [FSM MRPC R. 7.3]
 - b. lawyer may send letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful [FSM MRPC R. 7.3]

- c. but that doesn't seem to be the case here since Hunt's letters are directed to specific persons known to have had "serious complications"
 - 2. misrepresentation
 - a. Hunt says he "specialized in medical malpractice"
 - b. lawyer must not state or imply that the lawyer is a specialist [FSM MRPC R. 7.4]
 - 3. Hunt can charge contingency fee since medical malpractice is not the type of case (domestic relations or criminal) for which it is unethical to take on a contingent fee basis [FSM MRPC R. 1.5(c) and (d)]
 - 4. advancement of costs
 - a. lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the matter's outcome or if client is indigent [FSM MRPC R. 1.8(e)]
 - b. can advance payment for physical therapy only if it's an expense of the litigation (is it necessary to determine or mitigate damages? if it is, then is okay)
- E. business transaction with Bill
 - 1. Hunt appears to be in business with Bill or sharing his legal fees with Bill since Bill's recovery (110% of his fee) is dependent on Hunt's recovery
 - 2. this arrangement seems unethical because
 - a. lawyer cannot form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law [FSM MRPC R. 5.4(b)]
 - b. lawyer can't enter into a business transaction with a client unless the transaction's terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client; the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and the client consents in writing [FSM MRPC R. 1.8]
 - c. is improper to pay an expert witness a contingent fee [FSM MRPC R. 3.4(b) cmt.]
 - d. lawyer cannot share legal fees with a nonlawyer [FSM MRPC R. 5.4(a)]

EVIDENCE
(20 points)

- II. (20 points)
 - A. (5 points) Defendant's prior conviction
 - 1. is not admissible to prove the character of a person in order to show that he acted in conformity therewith [FSM Evid. R. 404(b)]
 - 2. can be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident [FSM Evid. R. 404(b)]
 - 3. BUT if Defendant testifies, then evidence of his prior conviction is admissible to impeach his testimony because
 - a. it is less than 10 years old [FSM Evid. R. 609(b)]

- b. &, even though it's a misdemeanor & therefore the maximum sentence was a year or less, it involved a false statement [FSM Evid. R. 609(a)(2)]
 - c. prior conviction is probative (because it shows the defendant may have propensity for lying) and prejudicial but is not unfairly prejudicial [FSM Evid. R. 403]
- B. (6 points) friend's testimony
- 1. friend's statement victim was stable
 - a. is opinion testimony by lay witness
 - b. probably admissible [FSM Evid. R. 701] because
 - (1) witness is not testifying as an expert
 - (2) testimony in the form of opinions or inferences is limited to those opinions or inferences which are
 - (a) rationally based on the witness's perception and
 - (b) helpful to a clear understanding of his testimony or the determination of a fact in issue
 - 2. friend's statement about what victim said she was planning to do
 - a. victim's statement is hearsay
 - b. hearsay is out of court statement that is being offered to prove the truth of the matter asserted therein [FSM Evid. R. 801(c)]
 - c. general rule: hearsay is inadmissible unless it falls within one of the exceptions to the hearsay rule [FSM Evid. R. 802]
 - d. exception for then existing mental, emotional, or physical condition [FSM Evid. R. 803(3)] because it was
 - (1) statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)
 - (2) victim planned to leave defendant, look for place to stay, considered enrolling in college
- C. (9 points) mother's testimony; probably inadmissible
- 1. victim's statement to mother about Defendant's statement to victim is hearsay within hearsay
 - 2. 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]
 - 3. Defendant's statement to victim is not hearsay if it is the Defendant's own statement offered against him; it is the admission of a party-opponent [FSM Evid. R. 801(d)(2)]
 - 4. if victim were alive she could testify about the Defendant having threatened to kill her
 - 5. BUT victim's statement to her mother is hearsay
 - a. although relevant does not seem to fit under any recognized exception
 - b. doesn't qualify as statement made under belief of impending death (dying declaration) [FSM Evid. R.

- 804(b)(2)] because victim had no reason to believe her death was imminent when statement made
- c. could argue that it's admissible under "other exceptions" [FSM Evid. R. 804(b)(6)] as statement not specifically covered by any other exception but having equivalent circumstantial guarantees of trustworthiness, if the court determines
- (1) the statement is offered as evidence of a material fact
 - (2) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
 - (3) the general purposes of the evidence rules and the interests of justice will best be served by admission of the statement into evidence
 - (4) statement is material, probative, & declarant (victim) is unavailable and would not be expected to lie to her mother
 - (5) BUT a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant

GENERAL

(70 points)

III. (8 points)

- A. statement to Officer Jonas that "he got what he deserved"
1. was Mark in custody when Jonas asked what happened?
 2. person is considered "arrested," for the purposes of the right to be advised of his rights to remain silent when one's freedom of movement is substantially restricted or controlled by a police officer exercising official authority based upon the officer's suspicion that the detained persons may be, or may have been, involved in commission of a crime [FSM v. Edward, 3 FSM R. 224, 232 (Pon. 1987)]
 - a. Mark's freedom of movement was substantially restricted or controlled by a police officer exercising official authority
 - b. but was it because the officer suspected that Mark may have been involved in commission of a crime or only to give paramedics room to do their job?
 - c. more facts may be needed before court can decide either way
- B. statement to Detective Gray
1. Mark was arrested & thus had to be informed of each of his rights under 12 F.S.M.C. 218 of his rights before he can be questioned

- [FSM v. Menisio, 14 FSM R. 316, 319 (Chk. 2006)]
2. Mark had right to be informed of his constitutional rights to remain silent and the right to counsel and his statutory rights not to be denied access to counsel, family members, or other interested persons; the right to send a message, or other communications; the right to stop all questioning until such persons are present; the right to remain silent; and the right to be brought before a judge or released within a reasonable time [FSM v. Ezra, 19 FSM R. 497, 509 & n.4 (Pon. 2014)]
 3. Mark's statement was made before he was informed of these rights; Mark had asserted his right to silence ("not gonna answer anything") but then, before Gray could inform him of his rights, volunteered a statement not in response to any question; that statement therefore should be admissible

IV. (9 points)

- A. was an enforceable contract reached between the parties? an enforceable contract requires an offer, an acceptance, definite terms, and consideration [Bank of Hawaii v. Helgenberger, 9 FSM R. 260, 262 (Pon. 1999)]
- B. offer
 1. Seller's advertisement was an invitation to contract or an invitation to make an offer [*see* Johnny v. Occidental Life Ins., 19 FSM R. 350, 357 (Pon. 2014)]
 2. since parties agreed that Buyer would provide written intent to purchase once he was satisfied that he could afford the boat, parties' telephone exchanges, Buyer's April 15 e-mail constitutes a valid offer because it contained all the essential terms of an offer to purchase, including subject, price, and tender terms
 3. [NOTE: partial credit will be given for an analysis that the Seller's advertisement was an offer and the Buyer's April 15 e-mail was a counteroffer]
- C. acceptance
 1. Seller's April 23 e-mail was not an acceptance of Buyer's April 15 offer since Seller resurrected the "F.O.B. San Diego" term from the magazine ad that was inconsistent with Buyer's "delivery to Pohnpei" expectation
 2. when parties agree to have items delivered by the seller, they have a contract for delivery to buyer's destination, and the risk of loss will pass from the seller to the buyer on seller's tender at point of destination; but if it's f.o.b. seller's place, then risk of loss passes at seller's place
 3. Buyer's silence could, in some circumstances, be considered acceptance of the counteroffer, but not here when Buyer specifically informed Seller that after April 19 he'd be "out of touch in the outer islands until . . . June 28"
- D. condition precedent
 1. when the parties to a proposed contract have agreed that the contract is not to be effective or binding until certain conditions are performed or occur, no binding contract will arise until the conditions specified have occurred or been performed [Etscheit v. Adams, 6 FSM R. 365, 388 (Pon. 1994)]

2. conditions to contractual obligations are not favored in the law because they tend to have the effect of creating forfeitures, parties may create a condition to a contract through plain and unambiguous language, through necessary implication manifested by the contract itself, or in some other way that makes their intent to create a condition clear [Pohl v. Chuuk Public Utility Corp., 13 FSM R. 550, 555 (Chk. 2005); Kihara v. Nanpei, 5 FSM R. 342, 344 (Pon. 1992)]
3. but once a condition has been found, a rule of strict compliance applies, even if harsh [*see* Uehara v. Chuuk, 14 FSM R. 221, 227 (Chk. 2006)]
4. Buyer's performance (payment of \$105,000) was subject to Seller's satisfaction of condition to deliver boat to Pohnpei by July 1
5. Seller may argue that his satisfaction of condition was excused because of impossibility, commercial impracticality, or force majeure
6. BUT since Seller committed to delivery of boat to Pohnpei Seller bore the risk of loss so Seller's excuses should be disallowed
7. Buyer's performance (payment) was therefore excused

V. (17 points)

- A. (2 points) unless extended by motion or agreement, the deadline for filing a response is 20 days after service of complaint & summons [FSM Civ. R. 12(a)]; two responses possible:
 1. Anne may file either an answer or a Rule 12(b) motion to dismiss
 2. an answer must respond to all allegations in the complaint and state any affirmative defenses; failure to respond to any averment is deemed an admission of that averment [FSM Civ. R. 8(d)]; may make counterclaims
- B. (3 points) Anne may move to dismiss for improper venue [FSM Civ. R. 12(b)(3)]
 1. civil action should be brought in the state where the defendant lives [6 F.S.M.C. 301(1)]; Anne lives on Pohnpei
 2. if this affirmative defense is not raised in a motion to dismiss filed before the answer is filed or raised in the answer, it is waived [FSM Civ. R. 12(h)(1)]
 3. court may deny dismissal and instead transfer venue from Kosrae to Pohnpei [6 F.S.M.C. 304(2)]
- C. (3 points) Anne could file either
 1. a permissive counterclaim – a claim against an opposing party (Bob) not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim [FSM Civ. R. 13(b)] because Anne's claim on the maintenance contract and bike repair agreement are separate contracts; or
 2. file a separate action against Bob
- D. (3 points) Anne could object to request for marital affairs & probably at least some criminal convictions that could not be related to any issue in upcoming trial and seek a protective order
 1. parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending

- action [FSM Civ. R. 26(b)(1)]
2. on motion by a party from whom discovery is sought, and 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 [FSM Civ. R. 26(c)]
- E. (3 points) disclosure of experts' reports
1. Anne must disclose the second report since that expert has been retained for trial [FSM Civ. R. 26(b)(4)(A)(i)]
 2. in her interrogatory responses, she must identify each person whom she expects to call as an expert witness at trial & state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion [*Id.*]
 3. Anne doesn't have to disclose first expert's report unless she chooses to use him at trial, unless Bob can show exceptional circumstances under which it's impractical for Bob to obtain facts or opinions on the subject by any other means [FSM Civ. R. 26(b)(4)(B); 35(b)]
- F. (3 points) January 10 contract
1. is discoverable (is relevant) & has been requested since it is a document that is "related to the performance of the . . . maintenance contract signed January 1, 2015"
 2. Bob might not remember the January 10 contract but that doesn't limit the scope of his discovery request
 3. Anne's attorney should advise her that the document must be disclosed
 4. Anne's attorney can't simply defy Anne's explicit instructions so the attorney should warn her that the attorney will have file a motion to withdraw as Anne's counsel if Anne persists in refusing to disclose the document
- VI. (6 points)
- A. (2 points) exhaustion of remedies – when administrative remedy is provided by statute, relief ordinarily must not only be sought initially from the appropriate administrative agency but such remedy usually must be exhausted before a litigant may resort to the courts [*see, e.g., Choisa v. Osia*, 8 FSM R. 567, 569 (Chk. S. Ct. Tr. 1998)]; person who has exhausted all administrative remedies available within an agency and who is aggrieved by a final decision in a contested case may seek judicial review [*International Bridge Corp. v. Yap*, 9 FSM R. 362, 365 (Yap 2000)]
 - B. (2 points) case or dispute – a justiciable controversy between adverse parties with standing (a material interest in the outcome), not academic hypothetical or moot; a constitutional requirement for the FSM Supreme Court to exercise jurisdiction over the matter, FSM Const. art. XI, § 6. [*In re Sproat*, 2 FSM R. 1, 5 (Pon. 1985)]
 - C. (2 points) standing – generally, a party's material interest in an action's outcome; a party has standing sufficient to allow him to sue when that party has a sufficient stake or interest in an otherwise justiciable case or dispute to obtain judicial resolution of the controversy; if a plaintiff does not have a material interest in the outcome or standing then the action is academic, hypothetical, or moot and does not constitute a case or dispute,

which is a constitutional requirement for the FSM Supreme Court to exercise jurisdiction over the matter, FSM Const. art. XI, § 6 [Urusemal v. Capelle, 12 FSM R. 577, 583 (App. 2004)]

- VII. (6 points)
- A. (3 points) remand denied
1. state law cause of action but diversity of citizenship present
 2. FSM Supreme Court has subject-matter jurisdiction when even minimal diversity is present [Luzama v. Ponape Enterprises Co., 7 FSM R. 40, 48 (App. 1995)]
 3. case may be removed from a municipal court to the FSM Supreme Court when diversity of citizenship exists [Damarlane v. Harden, 8 FSM R. 225, 227 (Pon. 1998)]
- B. (3 points) remand denied
1. although since all parties are foreign citizens, there is no diversity jurisdiction [Trance v. Penta Ocean Constr. Co., 7 FSM R. 147, 148 (Chk. 1995)]
 2. a dispute over the ownership of a sea-going vessel is an admiralty case over which the FSM Supreme Court has exclusive jurisdiction [FSM Const. art. XI, § 6(a)]
- VIII. (4 points) motion for leave to amend complaint should be granted
- A. leave to amend should, as the rule [FSM Civ. R. 15(a)] requires, be "freely given" unless undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the amendment's allowance, or futility of amendment is shown [People of Eauripik ex rel. Sarongelfeg v. F/V Teraka No. 168, 19 FSM R. 88, 92 (Yap 2013)]
- B. amended pleading in a personal injury suit filed after the statute of limitations ran out would be futile unless it can be related back to an earlier date [Tom v. Pohnpei Utilities Corp., 9 FSM R. 82, 87 (App. 1999)]
- C. under the rule [FSM Civ. R. 15(c)], whenever the claim or defense asserted in an amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading [Chuuk Health Care Plan v. Department of Educ., 19 FSM R. 435, 438-39 (Chk. 2014)]
- IX. (9 points)
- A. (3 points)
1. state may constitutionally regulate fishing within 12 miles of baselines around its shores
 2. unconstitutional for state to regulate beyond 12 miles; nat'l gov't has exclusive right to regulate in EEZ beyond 12 miles [FSM Const. art. IX, § 2(m)]
 3. constitutional if seen as regulation of fishing within 12 nautical miles of the atoll
- B. (3 points) both municipal constitutional provision and municipal ordinance unconstitutional
1. the nat'l gov't has the power to appropriate, & thus to spend, public funds [FSM Const. art. IX, § 3(a)]

2. foreign financial assistance received by nat'l gov't must go into separate fund [FSM Const. art. XII, § 1(b)]
 3. FSM Const. is supreme law of the land [FSM Const. art. II, § 1]
 4. municipal constitution can't overrule or restrict the nat'l gov't's power to spend its money as Congress directs
 5. municipal ordinance; unconstitutional because it tries to enforce unconstitutional municipal constitutional provision
- C. (3 points) unconstitutional
1. appears to be tax on income, a power reserved exclusively to nat'l gov't [FSM Const. art. XI, § 2(e)]
 2. if is regulation of insurance industry, that is also power reserved to nat'l gov't [FSM Const. art. XI, § 2(g)]
- X. (11 points)
- A. (8 points) causes of action
1. against Manny Miner
 - a. trespass (for driving thru Smith's driveway without permission and for leaving rocks on their property)
 - b. negligence (for driving with unstable load of rock) – breach of duty of care to others when drove with unstable load, which caused damages when it fell on Smiths' car
 2. against Bang Co.
 - a. nuisance – intentional invasion of Smith's interest in use & enjoyment of their own land [*see Nelper v. Akinaga, Pangelinan & Saita Co.*, 8 FSM Intrm. 528, 534 (Pon. 1998)] either because
 - (1) gravity of harm outweighed usefulness of Bang Co.'s conduct, or
 - (2) harm caused to Smiths is serious and Bang Co.'s financial burden of compensating for it and similar harm to others would not force it out of business
 - (3) gravity of harm – court considers the extent and character of the harm, the social value and suitability to the community of the use and enjoyment involved, and the burden on the person harmed of avoiding the harm
 - (4) conduct's utility – court considers conduct's social value and suitability to the community, and the impracticability of preventing or avoiding the invasion
 - b. strict liability
 - (1) arises when activity performed is not merely dangerous, but abnormally dangerous
 - (2) Smiths will contend that use of 50% more dynamite than permit allows made blasting abnormally dangerous
 - (3) whoever carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm [*Nelper*, 8 FSM Intrm. at 535]

- c. negligence
 - (1) breach of duty to use reasonable care shown in blasting by failure to announce on radio as required by permit & by exceeding by 50% the amount of dynamite permit allows them to use; caused damages (cracks in Smiths' house) [is violation of permit negligence per se or just some evidence of negligence?]
 - (2) on respondeat superior theory for Manny Minor's negligence
- d. negligent infliction of emotional distress – negligence (see (3)(a) above); to be compensable, a physical manifestation is required [Pau v. Kansou, 8 FSM Intrm. 524, 526 (Chk. 1998)], Smiths will claim their sleeplessness qualifies;
- e. trespass
 - (1) for landslides that deposited rocks on Smiths' property;
 - (2) on respondeat superior theory (for Manny Minor's trespass)
- 3. against Hiro Fuji & David Santos – if the Bang Co. joint venture is a partnership between two individuals then the two partners are individually liable for everything partnership (Bang Co.) is liable; if Bang Co. is a corporation then Fuji and Santos not liable unless Smiths can pierce corporate veil on ground corporation has acted fraudulently (e.g., deliberately impoverished itself) & is alter ego of Fuji & Santos
- 4. against Kosrae State – negligence unlikely to succeed because gov't's generally cannot be held negligent for failing to enforce its laws and regulations because duty owed to public at large, not to individual members of public
- B. (3 points) to halt blasting Smiths can
 - 1. seek injunctive relief
 - a. temporary restraining order (TRO); if Smiths seek *ex parte*, must have affidavit or verified complaint showing reasons that immediate irreparable injury to the applicant will result unless TRO granted without notice; also Smiths must post bond in case TRO wrongfully granted
 - b. TRO with notice if cannot show immediate irreparable injury will result to applicant unless TRO granted without notice; BUT all TRO's good only 14 days, may be renewed for another 14 days (longer, only with agreement of all parties), then must have preliminary injunction hearing before TRO expires. Therefore might be wiser to seek
 - c. preliminary injunction – done at hearing with notice to other parties (parties can also stipulate to one); remains in place until disposition of case when it is either vacated or permanent injunction is granted
 - 2. factors to prove for injunctive relief prior to disposition of case – Smiths must show that a balancing of the following four factors weighs in their favor

- a. likelihood of success on the merits
- b. irreparable harm (lack of adequate legal remedy)
- c. relative harms to the parties, and
- d. the public interest