

Checklist of Points to be Covered for Complete Answers

FSM Bar Examination, March 6, 2014

[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. (9 points)

1. in the course of representing a client a lawyer must not knowingly make a false statement of material fact or law to a third person [FSM MRPC R. 4.1(a)]
 - a. assuming that there is a criminal statute under which Imelda could be convicted & jailed for passing bad checks
 - b. if Haddock said Imelda *could* go to jail, then the statement is correct, BUT
 - c. if Haddock said Imelda *would* go to jail if he said so, then the statement is false & Haddock has violated an ethical rule
 - d. either way, it is generally considered unethical to threaten criminal charges solely to gain an advantage in a civil matter; & in representing a client, a lawyer cannot use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate such a person's legal rights [FSM MRPC R. 4.4]
2. since an unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client
 - a. a lawyer in dealing on a client's behalf with an unrepresented person, the lawyer should not give advice to the unrepresented person other than the advice to obtain counsel [FSM MRPC R. 4.3 & cmt.]
 - b. it is uncertain whether Haddock did this when he drafted a very one-sided stipulation for the judgment & the order in aid that waived Imelda's legal rights such as the 15% limit on attorney's fees in debt collection matters [Bank of Hawaii v. Jack, 4 FSM Intrm. 216, 221 (Pon. 1990)]
 - c. repeated motions for contempt may be made for improper purpose (to increase attorney's fees) in violation of Rule 11 and of obligation to charge only a reasonable fee [FSM MRPC R. 1.5(a)]; also, is \$138 an hour too high for the work involved?

- B. (1 point) disciplinary counsel
 - 1. must prove the violations by clear and convincing evidence [FSM Dis. R. 5(e)]
 - 2. clear and convincing evidence is considered to be more than a preponderance of the evidence while not quite approaching the degree of proof necessary to convict a person of beyond a reasonable doubt [In re Attorney Disciplinary Proceeding, 9 FSM Intrm. 165, 173 (App. 1999)]

EVIDENCE

(20 points)

- II. (20 points)
 - A. (3 points) Pone's reputation for truthfulness in his home village
 - 1. once plaintiff Pone testifies at trial [& if he doesn't testify on his own behalf in his case-in-chief, defense can subpoena and call him as its own (hostile) witness]
 - 2. his character for truthfulness may be attacked [FSM Evid. R. 404(a)(3); FSM Evid. R. 608(a)]; therefore witnesses may testify that Pone is known in his home village as a liar
 - 3. once defense has attacked Pone's reputation for truthfulness, Pone may introduce evidence of his truthful character [FSM Evid. R. 608(a)(2)]
 - B. (3 points) Pone's false statement about COM degree on job application
 - 1. is a specific instance of conduct
 - 2. it may be inquired into on cross-examination of Pone [FSM Evid. R. 608(b)(1)] or on cross-examination of any witness Pone has called to testify about his truthfulness [FSM Evid. R. 608(b)(2)]
 - 3. BUT cannot call the COM representative to prove that the statement was false because specific instances (other than conviction of crime) of a witness's conduct, for the purpose of attacking or supporting the witness's credibility may not be proved by extrinsic evidence [FSM Evid. R. 608(b)]
 - C. (3 points) Pone's conviction for false statement
 - 1. to attack a witness's the credibility, evidence that he has been convicted of a crime shall be admitted [FSM Evid. R. 609(a)] if elicited from him or established by public record during cross-examination
 - a. but only if the crime was
 - (1) punishable by imprisonment in excess of one year and
 - (2) the court determines that the probative value of admitting this evidence outweighs its prejudicial

effect

- b. or if crime involved dishonesty or false statement, regardless of the punishment
 2. Pone's crime was misdemeanor so punishment was under one year but crime involved false statement so is admissible [FSM Evid. R. 609(a)(2)]
 - a. if Pone admits to it while testifying or
 - b. if Pone denies it while testifying, extrinsic evidence such as the public record may be used to prove conviction
 - c. unlike for other criminal convictions, no balancing test used
 - D. (2 points) Pone's drunk driving conviction
 1. Pone's conviction is for felony because facts say so
 2. admissible only if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to Pone [FSM Evid. R. 609(a)]
 - E. (3 points) Pone's statement "didn't hurt a bit"
 1. is out-of-court statement to be admitted for the truth of the matter
 2. such statements are normally hearsay [FSM Evid. R. 801(c)] and inadmissible unless within exception to hearsay rule [FSM Evid. R. 802]
 3. BUT Pone's out-of-court statement is the admission of a party-opponent and is defined as not hearsay [FSM Evid. R. 801(d)(2)] & is therefore admissible
 - F. (3 points) store's liability insurance
 1. not admissible on the issue whether the defendant acted negligently or otherwise wrongfully or is liable [FSM Evid. R. 411]
 2. but would be admissible IF offered as proof of agency, ownership, or control, or bias or prejudice of a witness [*Id.*]
 3. if business does not contest ownership or control of the business's car lot then evidence should be excluded (since would be damaging to your client you would seek to exclude it)
 - G. (3 points) business's changed policies about oil spill clean-ups in the car lot
 1. evidence of the subsequent remedial measures is not admissible to prove negligence or culpable conduct in connection with the event [FSM Evid. R. 407]
 2. but would be admissible IF offered as proof of ownership, or control, or feasibility of precautionary measures, if controverted, or impeachment [*Id.*]
 3. since would be damaging to your client you would seek to exclude it

GENERAL
(70 points)

- III. (12 points)
- A. motion to suppress Tommy's confession
1. show that there no probable cause for the arrest & therefore interrogation and confession fruit of poisonous tree & should be suppressed
 - a. previous arson convictions should not be enough to establish probable cause unless there was something about them that made them "signature crimes"
 - b. facts suggest that there was no other evidence pointing to Tommy as suspect except his previous arson convictions; if so the confession should be suppressed as result of illegal arrest because when an arrest was executed in violation of law, the remedy is to suppress the defendant's statement to the police [*e.g.*, Kosrae v. Anton, 12 FSM Intrm. 217, 219 (Kos. S. Ct. Tr. 2003)]; or
 2. show that Tommy's confession was obtained in derogation of his right to remain silent & his right to an attorney
 - a. once Tommy told police he wanted to talk to you first & have you present, all questioning should have ceased
 - b. police could only resume questioning after Tommy had conferred with counsel or if Tommy initiated the new session
 - c. Tommy did not confer with you before confessing so confession was in violation of his right to counsel & to remain silent unless Tommy (which seems unlikely) initiated the new interrogation session on Saturday afternoon [*see* Chuuk v. Suzuki, 16 FSM Intrm. 625, 631 (Chk. S. Ct. Tr. 2009)]; or
 3. show that Tommy's statement, even if otherwise lawfully given (*e.g.*, that there was probable cause for the arrest & Tommy voluntarily initiated new interrogation session) confession was made after he had been detained over 24 hours without being charged before a judge or released
 - a. evidence and statements lawfully obtained from a defendant before he had been illegally detained over 24 hours will be admissible, but the defendant is entitled to the suppression of any evidence or statements obtained from him after his first 24 hours of detention [FSM v. Sato, 16 FSM Intrm. 26, 30 (Chk. 2008)]

- b. chance to assess employee's appearance and demeanor
 - 2. interrogatories
 - a. to defendant store arguably could discover employee's version
 - b. or complaint could be amended to make employee a party & then written interrogatories could be addressed to employee
 - 3. motion to produce to discover if store has any routine reports or records about accident might that might include an employee statement about the incident
 - C. (3 points) witnesses' names
 - 1. could be determined by interrogatories
 - 2. might also be produced through
 - a. deposition of store employee (if the employee knows) or
 - b. requests for production (if in accident report if there is one)
 - 3. requesting names of defendant's trial witnesses might not be helpful since, if witnesses are unfavorable to defendant, defendant may not intend to call them
 - D. (3 points) witnesses' version of incident
 - 1. although not a method of discovery, first contact the witnesses & see if are willing to talk informally, but if unwilling or if desirable to have testimony under oath
 - 2. take the witnesses' depositions
 - a. this is only method of discovery available unless the witnesses are also store employees
 - b. interrogatories & requests for admission are not available because the witnesses are not parties
 - c. since not parties, subpoenas would need to be issued to ensure their attendance at a deposition
 - E. (2 points) store's ownership
 - 1. this is what requests for admissions are made for; it is the most economical & expeditious method to establish this fact
 - 2. prepare short concise statement about store's ownership & submit to defendant
 - 3. defendant has 30 days to admit it (in which case it is conclusively established [FSM Civ. R. 36(b)] & no further action need be taken) or deny it (if later proven true can obtain costs [FSM Civ. R. 37(c)]) or state that it can neither admit nor deny, which would in this case be an inappropriate answer given the nature of the request
 - 4. if defendant does not respond then the requests are deemed admitted [FSM Civ. R. 36(a)]
- V. (6 points)

- A. (3 points) no, not likely to be upheld because
 - 1. insufficient evidence that there was any actual damages & none were awarded
 - 2. punitive damages are a derivative, not an independent cause of action, and must rest upon some other, underlying cause of action because it is merely an element of damages in that cause of action; if the plaintiff fails on all other causes of action then plaintiff must necessarily also fail on punitive damages [Semwen v. Seaward Holdings, Micronesia, 7 FSM Intrm. 111, 113 (Chk. 1995)]
 - B. (3 points) no, would not be upheld because
 - 1. governments are generally not liable for punitive damages [Damarlane v. United States, 6 FSM Intrm. 357, 361 (Pon. 1994); Herman v. Municipality of Patta, 12 FSM Intrm. 130, 138 (Chk. 2003)]
 - 2. FSM's waiver of sovereign immunity doesn't specifically mention that its immunity from punitive damages claims is waived
 - 3. personal injury claims against FSM are only waived up to a total of \$20,000 [6 F.S.M.C. 702(4)] & \$20,000 compensatory damages already awarded
- VI. (13 points)
- A. (5 points) default judgment
 - 1. appropriate when
 - a. defendant has been properly served with the complaint and summons and has not appeared to answer or otherwise defend
 - (1) party seeking default must file affidavit setting forth the facts necessary for entry of default [FSM Civ. R. 55(a)]
 - (2) if party has appeared but failed to plead, notice of the application for default must be served on the party or the party's legal representative {FSM Civ. R. 55(b)(2)}
 - b. once the clerk has entered the default, default judgment can be entered
 - (1) by clerk if for a sum certain [FSM Civ. R. 55(b)(1)]
 - (2) or by the court in all other cases [FSM Civ. R. 55(b)(2)]
 - 2. default judgment also appropriate when the court has entered a party's default as a sanction against a disobedient party [FSM Civ. R. 37(b)(2)(C)]
 - 3. judgment by default cannot be different in kind from or exceed in amount that prayed for in the demand for judgment [FSM Civ. R.

- 54(c)]
4. if defendant wishes to set aside default judgment
 - a. Civil Rule 60(b) controls & excusable neglect for setting aside default judgment [FSM Civ. R. 55(c)]
 - b. criteria to be met in order to justify setting aside a default judgment are [UNK Wholesale, Inc. v. Robinson, 11 FSM Intrm. 118, 122 (Chk. 2002)]
 - (1) whether the default was willful, caused by the defendant's culpable conduct,
 - (2) whether the defendant has a meritorious defense, and
 - (3) whether setting aside the default would prejudice the plaintiff
 5. {NOTE: plaintiff's failure to prosecute its case results in a dismissal [FSM Civ. R. 41(b)] not a default judgment}
- B. (4 points) judgment on the pleadings
1. can be sought by either plaintiff or defendant
 2. from the face of the complaint and the answer that [Kyowa Shipping Co. v. Wade, 7 FSM Intrm. 93, 96 (Pon. 1995)]
 - a. the movant has demonstrated that there are no issues of material fact, and that the movant is entitled to judgment as a matter of law
 - b. movant must carry its burden by reference solely to the pleadings
 - c. the court must evaluate all facts and inferences in the light most favorable to the non-moving party
 3. if the motion for judgment on the pleadings presents matters outside the pleadings that are not excluded by the court, the motion must be treated as one for summary judgment under Rule 56 [FSM Civ. R. 12(c)]
 4. judgment on the pleadings is a final appealable decision
- C. (4 points) summary judgment
1. basis for summary judgment motion is that there is no genuine issue of material fact present and that the movant is entitled to judgment as a matter of law [Nahnken of Nett v. United States, 7 FSM Intrm. 581, 586 (App. 1996)]
 2. court must view the facts presented and inferences made in the light most favorable to the nonmoving party [*Id.*]
 3. court may enter summary judgment for either party, including non-moving party [Phillip v. Marianas Ins. Co., 12 FSM Intrm. 464, 470 (Pon. 2004)]
 - a. when a party's summary judgment motion has been denied

as a matter of law and it appears the nonmoving party is entitled to judgment as a matter of law

- b. the court may grant summary judgment to the nonmoving party in the absence of a cross motion for summary judgment if the original movant has had an adequate opportunity to show that there is a genuine issue and that his nonmoving opponent is not entitled to judgment as a matter of law
4. relief from judgment
 - a. if the summary judgment disposes of entire case, it is an appealable final order
 - b. if the summary judgment does not dispose of entire case, and if there was no Civil Procedure Rule 54(b) order stating that there was no just cause for delay and directing the entry of a final judgment for that part of the case, then must wait for final judgment of entire case before the summary judgment can be appealed [Smith v. Nimea, 16 FSM Intrm. 346 (App. 2009)]

VII. (6 points)

- A. (3 points) deny remand
 1. although trespass is a state law cause of action
 2. FSM Supreme Court has jurisdiction when the citizenship of the parties is diverse [FSM Const. art. XI, § 6(b)]
 3. although incorporated in Pohnpei, the corporation is considered a foreign citizen since one of its owners is a foreign citizen [Luzama v. Ponape Enterprises Co., 7 FSM Intrm. 40, 44 (App. 1995)] and the plaintiff landowner is a Pohnpei citizen
- B. (3 points) remand probably granted
 1. wrongful discharge is generally a state law cause of action
 2. locally-incorporated tour company is foreign citizen because it is owned by a foreign citizen [Luzama v. Ponape Enterprises Co., 7 FSM Intrm. 40, 44 (App. 1995)]
 3. no diversity jurisdiction because all parties are foreigners and there is no diversity jurisdiction when all parties are foreigners [Geoffrey Hughes (Export) Pty, Ltd. v. America Ducksan Co., 12 FSM Intrm. 413, 414 (Chk. 2004)]
 4. BUT if some of the plaintiff's claims arise under FSM national law regarding the hiring and employment of foreign workers, the FSM Supreme Court would have jurisdiction over the case since it has jurisdiction cases arising under national law [FSM Const. art. XI, § 6(b)] and remand would be denied

VIII. (12 points)

- A. (8 points) Xavier's revocation
1. a contract is formed when there is an offer, an acceptance of the offer, and an exchange of promises
 2. if advertisement is considered an invitation for an offer & Xavier's completed form & \$65 check was the offer
 - a. offer can be revoked or withdrawn by offeror anytime before acceptance
 - b. depending on language of the order form, acceptance will be either by performing or by promising to perform
 - (1) if by promising to perform then Yvonne's start of performance constitute Yvonne's acceptance as an implied promise to perform
 - (2) if by performance, the Yvonne's completion of the bronzing is acceptance
 - (3) promising to perform & substantial performance most likely possibility
 3. if advertisement is specific enough it could be considered offer & Xavier's completion of form & mailing it and check would be acceptance & under "mailbox rule" Xavier's revocation of his acceptance would have to be received before his completed order form & check
- B. (4 points) Yvonne's delegation of work
1. contract party is generally free to delegate performance of duties as long as the delegatee's performance would be substantially the same as performance by the delegator; Yvonne can delegate to TD
 2. UNLESS contract is a "personal services" contract then delegation would not obtain substantially similar performance & delegation to TD not permitted
- IX. (7 points)
- A. (3 points) unconstitutional
1. this is a bill of attainder; a bill of attainder is any legislative act that applies to either named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial by substitution of a legislative for a judicial determination of guilt [Robert v. Mori, 6 FSM Intrm. 394, 401 (App. 1994)]
 2. bills of attainder are prohibited in the Declaration of Rights {FSM Const. art. IV, § 11}
 3. refusal to issue or renew FSM passport might also violate FSM citizens' constitutional right to travel [FSM Const. art. IV, § 12]
- B. (4 points) this statute would be analyzed under the equal protection clauses
1. Constitution's Declaration of Rights has two equal protection

guarantees:

- a. one provides that a person may not be denied the equal protection of the laws [FSM Const. art. IV, § 3]
 - b. other provides that equal protection of the laws may not be denied or impaired on account of sex, race, ancestry, national origin, language, or social status [FSM Const. art. IV, § 4]
2. if the classification is based on the individual's membership in one of the Article IV, section 4 enumerated classes, or if it affects a "fundamental right," the law or regulation is subject to strict scrutiny review is a fundamental right
- a. where fundamental rights are involved, the classification constitutes a suspect criteria
 - b. as such, the burden of proving that the classification bears a close rational relationship to some compelling governmental interests shifts to the government
 - c. fundamental rights are presumed to be absolute until the government proves a compelling governmental interest to curtail or restrain them
3. if marriage is considered a fundamental right then strict scrutiny will be used and law will be upheld only if the state proves that the classification bears a close rational relationship to lessening divorce and lessening divorce is a compelling state interest