

**Checklist of Points to be Covered for Complete Answers
FSM Bar Examination, March 2, 2023**

[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 recite them so long as the legal principles involved are discussed]

ETHICS

(10 points)

I. (10 points)

- A. (3 points) Tom's fee arrangement is not proper because it is a contingent fee arrangement and
1. any fee in a domestic relations matter is improper if 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 [FSM MRPC R. 1.5(d)(1)] and the size of Tom's fee is contingent on Kate's divorce & the size of her property settlement
 2. contingent fee agreements must be in writing & state the method of calculation [FSM MRPC R. 1.5(c)]; Tom's is oral
- B. (7 points)
1. Tom is responsible for his secretary's conduct because
 - a. lawyers commonly employ assistants to help with their practice
 - b. a lawyer is responsible for conduct of lawyer's non-lawyer assistants that could be a violation of the rules of professional conduct if engaged in by a lawyer if the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved [FSM MRPC R. 5.3(c)(1)]
 - c. Tom approved (although reluctantly) of his secretary's actions; he ratified her actions
 2. Tom's conduct is thus unethical because
 - a. it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation [FSM MRPC R. 8.4(c)]
 - b. deceit was used to gain access to Dr. Shepard's girlfriend's Facebook page
 - c. unlikely the adulterous photos would've been found if it hadn't been for Tom's secretary's phony Facebook page

EVIDENCE

(20 points)

II. (20 points)

- A. (5 points) trial judge improperly admitted the police report
1. objection will be on ground of hearsay – 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)]; general rule hearsay inadmissible unless falls within one of the exceptions to the hearsay rule [FSM Evid. R. 802]
 2. public records are an exception to hearsay rule [FSM Evid. R. 803(8)], but that exception generally excludes, in criminal cases matters observed by police officers and other law enforcement personnel [FSM Evid. R. 803(8)(B)], but
 3. even if police report admissible, statements within report that are

hearsay are inadmissible (as hearsay within hearsay) unless each part of the combined statements conforms to an exception to the hearsay rule [FSM Evid. R. 805]; Hydra's statement may fall within "excited utterance" exception where statement related to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition [FSM Evid. R. 803(2)]

- B. (3 points) trial judge properly admitted emergency room physician's statement because, although hearsay, it
1. falls within the "dying declaration" exception to hearsay rule [FSM Evid. R. 804(b)(2)] since this
 - a. a prosecution for homicide &
 - b. declarant is unavailable
 - c. statement was made by Lynx while believing that his death was imminent & it concerned the cause or circumstances of what he believed to be his impending death
 2. hearsay exception of statement made for medical diagnosis [FSM Evid. R. 803(4)] would appear not to apply because statement wasn't related to a diagnosis
- C. (3 points) trial judge may have improperly taken judicial notice
1. judicial notice is to be given of adjudicative facts when the fact is one not subject to reasonable dispute in that it is either (1) generally known within the trial court's territorial jurisdiction or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned [FSM Evid. R. 201(b)]
 2. although dates that movie played might be easily verifiable, for instance, by resort to newspaper ads showing which dates what movies were playing at local theater, these were not introduced
 3. is whether *Avatar 2* (rather than some other movie) playing relevant?
- D. (6 points) final judgments of prior conviction [FSM Evid. R. 803(22)]
1. probably properly admitted
 - a. witness's conviction may be used to attack witness's credibility [FSM Evid. R. 608(b)] if conviction is for a crime punishable by death or imprisonment in excess of one year under the law under which he was convicted, and if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant [FSM Evid. R. 609(a)(1)], &
 - b. generally evidence of witness's conviction is admissible if less than ten years have elapsed since the date of the conviction or of the witness's release from the confinement imposed for that conviction [FSM Evid. R. 609(b)]
 - c. although unclear whether Cetus's release was less than 10 years ago, court can determine, in the interests of justice, that the probative value of the conviction, supported by specific facts and circumstances substantially outweighs its prejudicial effect & admit older convictions, only if 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 [FSM Evid. R. 609(b)]
 2. improperly admitted; Cetus's conviction for idle & disorderly conduct appears to be a misdemeanor – less than one year maximum sentence

- & therefore not admissible under to impeach [FSM Evid. R. 609(a)(1)] since does not involve dishonesty or false statement [FSM Evid. R. 609(a)(2)]
3. improperly admitted – actual conviction must exist [FSM Evid. R. 609; 803(22)] & this is only a charge of dishonest act; prosecution might try to admit as evidence of Cetus’s bias, but would likely fail because what Cetus charged with is not related to charges against Fornax
- E. (3 points) properly admitted because is defined as non-hearsay since prior statement was consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive [FSM Evid. R. 801(d)(1)(B)]

GENERAL
(70 points)

III. (15 points)

- A. Reg & Ben formed valid contract because there was offer, acceptance, consideration, & definite terms, which were
 1. reduced to writing, but the writing mistakenly states a term – the price – which the parties had agreed upon
 2. when a mistake is made in reducing a term to writing, a court of equity will reform the writing to that it will reflect the parties’ actual agreement; reformation is the sole remedy in the case of an incorrect reduction of a term to writing [FSM Dev. Bank v. Arthur, 13 FSM R. 1, 9 (Pon. 2004), *aff’d*, 14 FSM R. 390, 397 (App. 2006)]
 3. court will therefore reform written agreement between Reg & Ben to reflect actual contract price – \$10 per dozen
- B. anticipatory repudiation or anticipatory breach – Ben sued before the Reg’s ten-month performance period was up, but since Reg unequivocally stated he would not perform, Ben can file suit
- C. damages
 1. Prayer 1 – actual or compensatory damages
 - a. Ben’s damages are the difference between the contract price (\$10 per dozen) and the price (\$14 per dozen) he had to pay to obtain replacement goods
 - b. the contract price was \$10 per dozen, not the mistaken \$13 per dozen in the written agreement before it was reformed
 - c. \$2,000 is therefore correct
 2. Prayer 2 – consequential damages of Reg’s breach [Ben’s liquidated damages to Maker]
 - a. consequential damages are recoverable when they may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract as the probable result of the breach of it [FSM Dev. Bank v. Adams, 14 FSM R. 234, 256 (App. 2006)]
 - b. since Reg neither knew or had reason to know that Ben might be liable to Maker if Reg breached, no consequential damages can be awarded; Ben takes nothing on Prayer 2
 3. Prayer 3 - punitive damages
 - a. punitive damages are not a contract remedy; only compensatory damages are allowed for breach of contract

- [Kelly v. Lee, 11 FSM R. 116, 117 (Chk. 2002)]
- b. nor can punitive damages be awarded as a result of breach of contract under non-contract (i.e., tort) causes of action unless the defendant's actions were alleged and proven to be willful, wanton, and malicious or with deliberate violence [Hartman v. Krum, 14 FSM R. 526, 532 (Chk. 2007)]
 - c. not enough evidence to show that Reg's breach was willful, wanton, and malicious; therefore punitive damages can't be awarded

IV. (12 points)

- A. Seth's arguments – Seth's statement should be suppressed under "fruit of poisonous tree" doctrine as illegally obtained because
 1. statement not given after knowing, intelligent, voluntary waiver because Seth not informed of what he would be questioned about before he agreed to answer questions – cannot knowingly, intelligently, voluntarily waive a right unless know what are waiving
 2. right to remain silent may have been waived, but right to have attorney present was not waived, therefore statement taken illegally
 3. Seth, probably not free to leave, therefore under arrest, not accorded other, statutory rights of arrested person, e.g., to call a family member, etc.
- B. prosecution's arguments
 1. right to have attorney present was waived by implication, because Seth knew and understood had that right and voluntarily started answering questions anyway;
 2. Seth, not under arrest – came to station voluntarily, in response to request, and was free to leave at any time
 3. even if Seth was not informed what would be questioned about he knew as soon as questions were asked and he knew he did not have to answer so could have stopped there, but continued voluntarily
- C. court's ruling – argue either way but, defense's arguments more convincing
 1. for a defendant to waive his right to silence or to counsel he must do so knowingly and intelligently; a presumption exists against such waivers [Moses v. FSM, 5 FSM R. 156, 159 (App. 1991)]
 2. must clearly waive both right to silence and to counsel; clear waiver of one but not both not enough [see Moses v. FSM, 5 FSM R. 156, 161 (App. 1991) (form which advises a suspect of his right to lawyer, and of his right to remain silent but only asks if the suspect wants a lawyer now, is confusing and lacks a specific waiver as to the right to remain silent)]
 3. defendant's statement will be suppressed when the defendant has not been advised of all the rights set forth in 12 F.S.M.C. 218 (1)-(5), even though he was advised of the right to remain silent and the right to counsel and he waived those rights [FSM v. Sangechik, 4 FSM R. 210, 211-12 (Chk. 1990)]

V. (9 points)

- A. (2 points) unconstitutional; the power to pardon persons convicted in the FSM Supreme Court rests solely with the President [FSM Const. art. X, § 2(c)] and state governors have the power to pardon persons only "with respect to persons convicted under state law" [FSM Const. art. X, § 2(c)]; person seeking pardon was not convicted under state law
- B. (4 points) the statute concerns classifications based on gender and ancestry

thus implicating the equal protection clause in FSM Const. art. IV, § 4 ("Equal protection of the laws may not be denied or impaired on account of sex, race, ancestry, national origin, language, or social status.")

1. FSM courts apply strict scrutiny in sex discrimination cases since sex is an enumerated class in the FSM Constitution's equal protection clause [Berman v. College of Micronesia-FSM, 15 FSM R. 582, 591 n.2 (App. 2008)]
2. the same is true for ancestry from a different island [*see* Buruta v. Walter, 12 FSM R. 289, 295 (Chk. 2004)]
3. statute is thus subject to a strict scrutiny review, under which it will be upheld only if the state can demonstrate that the classification upon ~~which that law is based bears a close rational relationship to some~~ compelling governmental interest [Berman v. College of Micronesia-FSM, 15 FSM R. 582, 591 (App. 2008)]
4. these classifications are probably unconstitutional; unlikely statute would survive strict scrutiny because it discriminates on the basis of sex and ancestry and don't appear to be closely related to a compelling governmental interest

C. (3 points)) this "fee" is a tax

1. nat'l gov't has power to levy only two types of taxes – on imports [FSM Const. art. IX, § 2(d)] and on income [FSM Const. art. IX, § 2(e)];
2. this appears to be a sales tax which is a state power;
3. but Congress does have authority to regulate foreign and interstate commerce [FSM Const. art. IX, § 2(g)];
4. if this \$5 "tax" can be considered "regulation" of foreign and interstate commerce could be constitutional, otherwise unconstitutional tax

VI. (12 points)

A. (6 points) setting aside default judgment

1. ~~although defendant must serve an answer within 20 days after the~~ service of the summons and complaint upon that defendant, except when a different time is prescribed under an FSM statute [FSM Civ. R. 12(a)]
2. service was made on client in a foreign country so FSM long-arm statute applies [*e.g.* Foods Pacific, Ltd. v. H.J. Heinz Co. Australia, 10 FSM R. 200, 204 & n.2 (Pon. 2001)]
3. long-arm statute provides that "No default shall be entered until the expiration of at least 30 days after service" [4 F.S.M.C. 204(3)] so client had 30 days to answer [*e.g.* Boston Agrex, Inc. v. Helgenberger, 12 FSM R. 611, 613 (Pon. 2004);]
4. when a plaintiff fails to properly serve the complaint and summons on a defendant, the court does not have personal jurisdiction over that defendant, and the case may be dismissed without prejudice. [Berman v. Santos, 6 FSM R. 532, 534 (Pon. 1994)]
 - a. default judgment should not have been entered only 28 days after service
 - b. summons was insufficient because it said client had to answer ~~within 20, not 30 days~~
 - c. service of process was therefore insufficient and judgment may be vacated for being void [FSM Civ. R. 60(b)(4)]
5. default judgment rendered on service made under long-arm statute may be set aside only on a showing which would be timely and

- sufficient to set aside a default judgment entered upon personal service within the FSM [4 F.S.M.C. 204(3)]
6. motion to set aside default judgment must be made within a reasonable time, and for excusable neglect not more than one year after the judgment [FSM Civ. R. 60(b)(1)]
- B. (6 points) discovery requests
1. party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, & it is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence [FSM Civ. R. 26(b)(1)]
 2. interrogatories [FSM Civ. R. 33(a)]
 - a. may be served with or after service of the summons and complaint
 - b. party served has 30 days after the service of the interrogatories to serve a copy of the answers, and objections if any, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant
 - c. client has 45 days to answer because the interrogatories were served with the complaint & summons
 3. requests for admission [FSM Civ. R. 36(a)]
 - a. plaintiff must separately set forth each matter of which an admission is requested &
 - b. the matter is admitted
 - c. unless, within 30 days, client serves upon the plaintiff a written answer or objection addressed to the matter, signed by the party, or by the party's attorney or trial counselor, but answers or objections before the expiration of 45 days after service of the summons and complaint upon that defendant
 - d. if objection is made, client must state the reasons therefor & the answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter
 4. client may move for a protective order to protect client from annoyance, embarrassment, oppression, or undue burden or expense [FSM Civ. R. 26(c)] if any of those apply to any of the not relevant matter requested by the plaintiff
 5. sanctions may be imposed on client for failure to respond to discovery requests within time allowed [FSM Civ. R. 37] & may include
 - a. order compelling discovery [FSM Civ. R. 37(a)]
 - b. award of expenses to opposing party [FSM Civ. R. 37(a)(4)]
 - c. & for failure to comply with order compelling discovery
 - (1) an order that facts shall be taken to be established. or refusing to allow the disobedient party to support or oppose designated claims or defense, or prohibiting that party from introducing designated matters in evidence; or striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof [FSM Civ. R. 37(b)(2)]

- (2) or rendering a judgment by default against the disobedient party [FSM Civ. R. 37(b)(2)(C)]
- (3) reasonable expenses for failure to admit [FSM Civ. R. 37(c)]

VII. (9 points)

- A. (3 points) motion to remand granted
 1. wrongful discharge is state law cause of action
 2. all parties are foreign citizens
 3. no diversity jurisdiction when all parties are foreign citizens [International Trading Co. v. Hitec Corp., 4 FSM R. 1, 2 (Truk 1989)]
- B. (3 points) remand denied
 1. Stone Money Tours, Inc. is considered a foreign citizen because
 - a. a corporation's citizenship is determined by the citizenship of its owners & it has a U.S. citizen owner
 - b. a corporation is considered a foreign citizen when any of its shareholders are not FSM citizens [*e.g.*, Luzama v. Ponape Enterprises Co., 7 FSM R. 40, 44 (App. 1995) (only minimal diversity required); Island Dev. Co. v. Yap, 9 FSM R. 220, 223 (Yap 1999); Geoffrey Hughes (Export) Pty. Ltd. v. America Ducksan Co., 12 FSM R. 413, 414 (Chk. 2004); Federated Shipping Co. v. Ponape Transfer & Storage (III), 3 FSM R. 256, 260 (Pon. 1987)]
 2. plaintiff is Yap citizen & defendant corporation is foreign citizen; therefore FSM Supreme Court has diversity jurisdiction over case [FSM Const. art. XI, § 6(b)]
- C. (3 points) remand denied
 1. case involves a ship mortgage
 2. enforceability of ship mortgages is a matter that falls within the FSM Supreme Court's maritime jurisdiction under article XI, section 6(a) of the Constitution [Federal Business Dev. Bank v. S.S. Thorfinn, 4 FSM R. 367, 376 (App. 1990)]
 3. FSM Supreme Court has exclusive jurisdiction [FSM Const. art. XI, § 6(a)]

VIII. (13 points)

- A. legal theories and possible defendants
 1. against Mike
 - a. negligence
 - (1) elements of negligence [Ruben v. Chuuk, 18 FSM R. 425, 430 (Chk. 2012)] are
 - (a) the breach of
 - (b) a duty of care on the part of one person to protect another from injury
 - (c) and that breach is the proximate cause of
 - (d) an injury to the person to whom the duty is owed
 - (2) negligence is the failure to use such care as a reasonably prudent and careful person would use under similar circumstances [Etse v. Pohnpei Mascot, Inc., 19 FSM R. 468, 478 (Pon. 2014)]
 - (3) Mike failed to conduct himself in a reasonable manner in connection with his reckless & negligent conduct in

- performing stunts in close proximity of parade participants and spectators
- (4) Mike failed to obtain authorization from the Parade Committee; reasonable person
 - (a) would've obtained the Parade Committee's authorization &
 - (b) would've foreseen the risk to spectators & to the parade participants of performing dangerous stunts in the middle of the parade route
- (5) Officer Jonah should be able to show that Mike's actions caused (at least in part) his injuries & therefore could recover under this theory
- b. gross negligence
 - (1) gross negligence has been construed as requiring willful, wanton, or reckless misconduct, or such utter lack of care as will be evidence thereof [Hauk v. Lokopwe, 14 FSM R. 61, 65 (Chk. 2006)]
 - (2) if a case can be made that Mike acted with reckless and wanton disregard for the safety of others, this cause of action may be appropriate, esp. if it can be shown that there was a high degree of improbability
- 2. against Mike's parents
 - a. each cause of action against Mike may apply to his parents because
 - (1) of their legal responsibility for Mike since he is a minor &
 - (2) they furnished him with the motorcycle
 - b. & as a practical matter Mike's parents might have insurance that covers Mike & his motorcycle or at least greater financial resources than Mike
- 3. against Liberation Day Parade Committee
 - a. negligence
 - b. Parade Committee failed to act reasonably
 - (1) to screen parade participants &
 - (2) to insure unauthorized persons do not enter the parade
 - c. reasonably foreseeable that this failure could result in injuries to parade spectators and participants
 - d. since Parade Committee is not a guarantor, Officer Jonah must show that the Parade Committee failed to reasonable precautions to prevent the occurrence of this or similar incidents
 - e. Officer Jonah might not recover since
 - (1) Parade Committee apparently arranged for state police to patrol route &
 - (2) Officer Jonah was assigned the duty of preventing unauthorized vehicles from participating in parade &
 - (3) Mike's motorcycle was an unauthorized vehicle that Officer Jonah should've prevented from participating instead of watching perform.
- 4. against Dr. Cutter
 - a. negligence (medical malpractice) [William v. Kosrae State

Hosp., 18 FSM R. 575, 580-81 (Kos. 2013)]

(1) medical malpractice is negligence in rendering professional medical services

(2) one who undertakes to render professional service is under a duty to the person for whom the service is to be performed to exercise such care, skill, and diligence as someone in that profession ordinarily exercises under like circumstances

b. if competent expert testimony shows that Dr. Cutter's actions were negligent & below the reasonable standard of care for surgeons of similar skill & training with the available equipment and that departure from this standard caused Officer Jonah's injuries, Jonah can recover on this claim

c. if competent expert testimony shows that Dr. Cutter was in complete control of the situation & that Officer Jonah was in no way negligent himself at the hospital, Officer Jonah may rely on the *res ipsa loquitur* doctrine to establish negligence

5. hospital

a. negligence (medical malpractice)

b. doctor's employer may be held liable for doctor's malpractice under *respondeat superior* doctrine [Amor v. Pohnpei, 3 FSM R. 519, 536 (Pon. 1988)]

B. defenses

1. assumption of risk & contributory negligence

a. disfavored defenses not available in FSM because contrary to FSM custom [Amayo v. MJ Co., 10 FSM R. 244, 250 (Pon. 2001); Kileto v. Chuuk, 15 FSM R. 16, 17-18 (Chk. S. Ct. App. 2007); Epiti v. Chuuk, 5 FSM R. 162, 167 (Chk. S. Ct. Tr. 1991);

2. comparative negligence, not assumption of risk, is the rule [Amayo v. MJ Co., 10 FSM R. 244, 250 (Pon. 2001)]

a. Officer Jonah was negligent when he breached his duty to keep unauthorized vehicles out of the parade

b. Officer Jonah's recovery will be reduced by whatever percentage of his damages his negligence was liable for

3. the other defendants cannot raise Dr. Cutter's medical malpractice as a defense because medical malpractice by hospital staff does not relieve a tortfeasor of his responsibility for damages since any injuries that might have been caused by the staff flowed naturally from Mike's own acts [Primo v. Refalopei, 7 FSM R. 423, 429 (Pon. 1996)]