

Checklist of Points to be Covered for Complete Answers

FSM Bar Examination, March 1, 2012

[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. (4 points)
- A. Lawyer A should
 1. first verify with the client that the client in fact wants to discharge Lawyer A
 2. counsel the client on the implications of changing counsel [FSM MRPC R. 1.4(b)] – whether
 - a. there would be increase in fees and costs
 - b. there would be any delay while successor counsel becomes acquainted with client's case
 - B. if client in fact wants to discharge Lawyer A, Lawyer A should also
 1. give client an accounting [FSM MRPC R. 1.15(b)]
 2. give client a report on the case's status [FSM MRPC R. 1.16(d)]
 - C. if the case is before a tribunal, the client should also be advised that
 1. judge may deny any motion to withdraw [*see, e.g., Wakuk v. Melander*, 12 FSM Intrm. 73, 74-75 (Kos. S. Ct. Tr. 2003)] &
 2. until judge grants motion to withdraw, Lawyer A remains responsible for client's representation [*see, e.g., Dereas v. Eas*, 12 FSM Intrm. 629, 631 (Chk. S. Ct. Tr. 2004)]
 - D. Lawyer A should send file to Lawyer B if the client directs it be shared with Lawyer B [*see* FSM MRPC R. 1.16(d); *McVey v. Etscheit*, 14 FSM Intrm. 207, 211-12 (Pon. 2006)]
- II. (6 points) Lexus's acceptance of the \$3,000 was unethical & sanctionable
- A. Lexus's conflict of interest
 1. a lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client [FSM MRPC R. 1.7 cmt.; FSM MRPC R. 1.8(f)]
 2. Lexus's acceptance of \$3,000 from Bizco compromises Lexus's duty of loyalty to Alaric since Bizco's payment reduces Bizco's assets from which Alaric's judgment can be paid
 - B. Lexus's ignoring court order
 1. a lawyer can be disciplined for "[w]illful disobedience or violation of a court order directing the attorney to do or cease doing an act which the attorney ought in good faith to do or forbear" [FSM Dis. R. 2(d)]
 2. Lexus knew of Bizco's financial trouble & ought in good faith to have forbore receiving Bizco's payment which disposed of or

alienated a Bizco asset (\$3,000)

EVIDENCE

(20 points)

- III. (12 points)
- A. (3 points) admissible & relevant evidence
1. "Hearsay" is a statement, other than one made by the declarant while testifying in court, offered in evidence to prove the truth of the matter asserted [FSM Evid. R. 801(c)]
 2. but Jacky's statement is statement by a party-opponent
 3. an admission of a party-opponent offered against that party is defined as not hearsay [FSM Evid. R. 801(d)(2)]
- B. (3 points) inadmissible
1. even though no lawsuit yet in place, it was an offer to compromise or settle
 2. offers to compromise or settle are inadmissible [FSM Evid. R. 408]
- C. (3 points) probably inadmissible [FSM Evid. R. 407]
1. evidence of remedial measures taken after an event, are not admissible to prove negligence or culpable conduct in connection with the event
 2. UNLESS the evidence of subsequent measures was offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment
- D. (3 points) admissible
1. to prove the content of a photograph, the original photograph is required [FSM Evid. R. 1002]
 2. an "original" of a photograph includes the negative or any print therefrom [FSM Evid. R. 1001(3)]
 3. photo Ms. Grundy received appears to be an original, but even if a duplicate, a duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the original's authenticity or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original [FSM Evid. R. 1003]
 4. Ms. Grundy can testify that photo accurately depicts scene at the time of the event; she does not have to have been the photographer
- IV. (4 points) inadmissible
- A. Nancy's statement is hearsay
1. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted [FSM Evid. R. 801(c)]
 2. hearsay isn't admissible unless it falls within one of the exceptions

in the rules [FSM Evid. R. 802]

- B. there are two out-of-court statements in Nancy's testimony
- C. hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule [FSM Evid. R. 805]
 - 1. Draco's statement to Gladys is admissible as non-hearsay – as an admission of a party-opponent [FSM Evid. R. 801(d)(2)]
 - 2. BUT Gladys's statement to Nancy is not admissible because
 - a. it is not a statement under belief of impending death [FSM Evid. R. 804(b)(2)] since
 - (1) although it was a statement made by a declarant while believing that her death was imminent
 - (2) it did not concern the cause or circumstances of what she believed to be her impending death
 - b. it was not an excited utterance [FSM Evid. R. 803(2)]
 - c. it was not a present sense impression FSM Evid. R. 803(1)]
 - d. is not admissible under the catchall provision for unavailable witnesses when there equivalent circumstantial guarantees of trustworthiness because
 - (1) 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 [FSM Evid. R. 804(b)(6)]
 - (2) the prosecutor didn't give advance notice to the defense because the testimony was "unanticipated"
- V. (4 points)
 - A. Riley was properly permitted to testify about Winton's reputation for truthfulness [FSM Evid. R. 608(a)]
 - 1. a witness's credibility may be attacked or supported by evidence in the form of opinion or reputation
 - 2. Riley's testimony was admitted to attack Winston's credibility
 - 3. but the evidence may refer only to character for truthfulness or untruthfulness
 - B. Riley should not have been allowed to testify that she saw Winston falsify an firearms permit application because
 - 1. for the purpose of attacking or supporting a witness's credibility, specific instances of the witness's conduct, other than conviction of crime, may not be proved by extrinsic evidence [FSM Evid. R. 608(b)]

2. Riley's testimony about the permit falsification was extrinsic evidence & therefore should not have been permitted
3. BUT, in the court's discretion, if probative of truthfulness or untruthfulness, specific instances may be inquired into on a witness's cross-examination [FSM Evid. R. 608(b)] concerning his character for truthfulness or untruthfulness, or concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified
4. SO prosecution could've asked the court to allow it to ask Winston on cross-examination about the firearms permit application falsification

GENERAL

(70 points)

VI. (5 points)

- A. the summary judgment motion should be filed soon
- B. a motion to dismiss for lack of subject-matter jurisdiction is properly considered under Civil Procedure Rule and may be raised at any time [FSM Civ. R. 12(h)(3); Hartman v. FSM, 6 FSM Intrm. 293, 296 (App. 1993); Udot Municipality v. FSM, 9 FSM Intrm. 560, 562 (Chk. 2000)]
- C. & if the FSM Supreme Court lacks jurisdiction the motion will be granted because any decision when court lacks subject-matter jurisdiction is void [FSM Dev. Bank v. Arthur, 15 FSM Intrm. 625, 633 (Pon. 2008); Lee v. Lee, 13 FSM Intrm. 252, 256 (Chk. 2005)]

VII. (16 points)

- A. Section 5 of Declaration of Rights protects persons, their houses, papers, and other possessions from unreasonable search, seizure, or invasion of privacy [FSM Const. art. IV, § 5]
- B. search & seizure without a warrant is unreasonable
 1. unless
 - a. probable cause exists
 - b. circumstances establishing exception to warrant requirement exist
 2. possible search warrant exceptions here
 - a. exigent circumstances is warrant exception [FSM v. Sapusi, 16 FSM Intrm. 315, 318 (Chk. 2009)]
 - (1) validity of entry to dwelling in exigent circumstances must based on facts as perceived by law enforcement at time of entry
 - (2) entire premises may be examined if it relates to the actual emergency

- b. plain view is a warrant exception [FSM v. Sato, 16 FSM Intrm. 26, 29-30 (Chk. 2008); FSM v. Mark, 1 FSM Intrm. 284, 294 (Pon. 1983)]
 - (1) police officer can seize evidence in the officer's plain view
 - (2) if he has a right to be in the position to have that view
 - c. search by consent is a warrant exception [FSM v. George, 1 FSM Intrm. 449, 458 (Kos. 1984)]
 - d. can also argue that evidence should not be excluded if would have inevitably found the evidence lawfully
- C. prosecution's arguments applied to facts in this question
1. Officer Jack entered curtilage (yard) of home without a warrant
 2. generally police may, without an intention to look for evidence, enter private property and knock on door to ask preliminary questions of occupants [FSM v. Mark, 1 FSM Intrm. 284, 289 (Pon. 1983)]
 3. so Officer Jack's knock & talk investigative technique at the front door should be okay & since no answer there good argument can then try the back door & that also okay (after all had reasonably believed someone was inside)
 4. since Officer Jack legitimately at back door & looking through window from back door the Bunsen burner with a very high flame burning under a petri dish filled with liquid and solid substances was in plain view
 5. Officer Jack then forcibly entered home without a warrant under exigent circumstances
 - a. Jack believed that a crime recently committed on the premises,
 - b. that the premises contained evidence of that illegal activity,
 - c. that the evidence was about to be destroyed,
 - d. there was specific & objective factual evidence, based on Officer Jack's perceptions, that Jack's immediate action was necessary to prevent imminent destruction of evidence and to protect Officer Jack and persons in nearby homes from danger
 6. exigent circumstance exception will justify only seizure of Bunsen burner, petri dish filled with liquid and solid substances, and the drugs found in the same room, not the seizure of cash and guns found in closet elsewhere in house
 7. prosecution will argue that Dimitri's parents at the police station freely & voluntarily gave their consent to the search of their home

8. defense will argue that the consent was only given after Jack's search of the home
9. prosecution will counter that nevertheless Jack's discovery of the guns & cash was inevitable because the parents were at the police station & if Jack had waited to search the home until after they gave their consent he would inevitably have discovered the cash & guns

VIII. (12 points)

A. (9 points)

1. actionable negligence is [Hauk v. Lokopwe, 14 FSM Intrm. 61, 65 (Chk. 2006)]
 - a. a duty on the part of one person to protect another from injury
 - b. the breach of that duty, and
 - c. that breach is the proximate cause of
 - d. an injury to the person to whom the duty is owed
2. duty
 - a. Dan owes duty as landowner to persons on his land to act as reasonable landowner
 - b. Dan would assert that there's nothing unreasonable about him climbing a ladder in his own backyard
3. breach of duty
 - a. Dan would argue that he did not owe Pam a duty not to climb a ladder in his backyard
 - b. not foreseeable that his climbing a ladder could cause harm to Pam
 - c. therefore he didn't breach a duty to Pam
4. causation
 - a. Dan would argue that his climbing the ladder, even if it was negligent, wasn't the [legal] cause of Pam's broken ankle
 - b. Pam could not establish that her slip & fall wouldn't have happened if Dan hadn't climbed his tree or that it was a substantial factor
 - c. Dan would argue that Pam's fall was caused by a supervening factor – Pam's unreasonable reaction by running across his yard

B. (3 points) impact on Pam's claims if Pam's fall is over hidden drainage pipe

1. Dan's duty as reasonable landowner is implicated
2. hidden drainage pipe is hazard that Pam couldn't have appreciated without warning
3. depending on how hidden pipe was, Dan should've either warned Pam of danger or taken steps to eliminate the danger (remove pipe?)

- put barriers around it?)
4. Pam's claim of that her broken ankle was due to Dan's negligence is much stronger than under VIII.A
- IX. (15 points)
- A. (3 points)
 1. Eco-resort doesn't have to wait until after SCUI's performance is due because
 2. SCUI has repudiated the contract (anticipatory breach) on December 1, 2011
 3. if a party to a contract unequivocally declares its intention not to perform its obligations before they are due, the non-breaching party may immediately bring an action for damages
 - B. (8 points)
 1. fact Eco-Resort no longer holds the top eco-tourism rating is not adequate excuse for SCUI to breach the contract even though it was discussed during the contract negotiations
 - a. the express merger or integration clause [that the contract constituted "a merger of all previous proposals, negotiations, and representations with reference to the reservation described in this contract"] provided
 - (1) that the contract was the parties' complete agreement
 - (2) therefore the contract does not make Eco-Resort's retention of the eco-tourism top rating a condition for SCUI to perform
 - b. even if maintaining the top rating was meant to be part of the agreement
 - (1) the parol evidence rule bars evidence of a contemporaneous or prior oral agreement that contradicts or alters the terms of the written agreement unless the collateral agreement is one that in the circumstances might naturally be omitted from the writing [Western Sales Trading Co. (Phils) v. B & J Corp., 14 FSM Intrm. 423, 425 (Chk. 2006)]
 - (2) a requirement that Eco-Resort maintain the top eco-tourism rating would've altered the terms of the contract & wasn't a collateral agreement that might naturally be omitted
 - (3) SCUI can't argue that contract void because made under mistake of fact because the mistake wasn't mutual [FSM Dev. Bank v. Arthur, 10 FSM Intrm.

479, 480 (Pon. 2001)]

2. impossibility, frustration of purpose, or impracticality defense
 - a. contract must be executory
 - b. frustrated part's purpose in making contract must be known to other party
 - c. contract's purpose must be thoroughly frustrated by an event not reasonably foreseeable when contract made & that was not the fault of the frustrated party
 - d. object must be so completely part of the contract that contract would make little sense without it
 - e. unlikely SCUI can successfully defend on this ground because object wasn't so completely part of the contract that contract would make little sense without it
 - (1) meeting was for more than strategic planning
 - (2) SCUI was party that accelerated strategic planning
 - (3) sales downturn not unforeseeable

C. (4 points) damages

1. usual measure of damages is expectancy damages & if expectation damages can't be recovered, then reliance damages awarded [Pohnpei v. Ponape Constr. Co., 7 FSM Intrm. 613, 623 (App. 1996)]
2. expectation interest would be lost profits –
 - a. what Eco-Resort would have received under the contract (the unpaid \$25,000)
 - b. minus the expenses Eco-Resort avoided by not having to perform (buying food, transportation to & from airport, cleaning crew or staff not hired because no work)
 - c. plus any other reasonably foreseeable loss, if any (expenses incurred (advertisements?) To find replacement customers
3. mitigation of damages
 - a. Eco-Resort has duty to mitigate damages
 - b. Eco-Resort has done its duty by trying to find other customers for that week
 - c. (if Eco-Resort rents any rooms that week, damages would be reduced by profit on those rooms)
4. no punitive damages available for contract breach, since only compensatory damages are allowed for breach [Amayo v. MJ Co., 10 FSM Intrm. 244, 249 (Pon. 2001)]

X. (9 points)

A. (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 Intrm. 40, 44 (App. 1995); Island Dev. Co. v. Yap, 9 FSM Intrm. 220, 223 (Yap 1999); Geoffrey Hughes (Export) Pty, Ltd. v. America Ducksan Co., 12 FSM Intrm. 413, 414 (Chk. 2004); Federated Shipping Co. v. Ponape Transfer & Storage (III), 3 FSM Intrm. 256, 260 (Pon. 1987)]
2. plaintiff is Yap citizen & defendant corporation is foreign citizen; therefore FSM Supreme Court has diversity jurisdiction over case
- B. (3 points) remand denied
1. FSM Supreme Court has diversity jurisdiction because
 2. One defendant is Chuuk citizen while plaintiff & other defendant are Pohnpei citizens
 3. minimal diversity of citizenship, not complete diversity, is the rule in the FSM [*e.g.*, Luzama v. Ponape Enterprises Co., 7 FSM Intrm. 40, 48 (App. 1995); Lee v. Han, 13 FSM Intrm. 571, 576 (Chk. 2005)]
- C. (3 points) unconstitutional [Truk Continental Hotel, Inc. v. Chuuk, 7 FSM Intrm. 117, 120 (App. 1995)] because if a state wishes to obtain funding from a consumption tax, it can avoid a constitutional confrontation by
1. making the taxable incident the sale or rental transaction, and
 2. by expressing the requirement that the tax be paid by the buyer (consumer)
 3. therefore a state tax on a percentage of the seller's receipts is an unconstitutional tax on income
- XI. (13 points)
- A. (9 points) Jerome's response to complaint
1. file a motion to dismiss
 - a. for insufficiency of process [FSM Civ. R. 12(b)(4)] because no summons was served with the complaint as required [FSM Civ. R. 4(c)]
 - b. for insufficiency of service of process [FSM Civ. R. 12(b)(5)] because service by taping complaint to front door was improper
 - (1) complaint could've been served at Jerome's dwelling place by leaving complaint with person of suitable age and discretion [FSM Civ. R. 4(d)(1)], or
 - (2) complaint could've been served by registered or certified mail [FSM Civ. R. 4(d)(8)]

- c. for failure to state a claim [FSM Civ. R. 12(b)(6)]
 - (1) statute of limitations
 - (a) is generally an affirmative defense that may be pled in the answer & is not one of the enumerated defenses under Rule 12(b), but rather is one of the specific defenses named in Rule 8(c), where a party must set forth affirmatively in the answer
 - (b) statute of limitations defense may, however, be raised by a Rule 12(b)(6) motion (or, if affidavits are filed with the motion, by a Rule 56 summary judgment motion), as well as by answer if there is no question of fact about the defense's existence [John v. Chuuk Public Utility Corp., 15 FSM Intrm. 169, 171-72 (Chk. 2007)]
 - (c) here, on complaint's face, accident took place over two years ago
 - (d) two years is the statute of limitations for personal injury (Mary Plain's broken leg) [6 F.S.M.C. 803(4)] & wrongful death (Seth Plain) [6 F.S.M.C. 803(4); 6 F.S.M.C. 503(2)]
 - (2) complaint alleges mental distress, but mental distress must be accompanied by either physical injury or result in physical manifestation [Narruhn v. Aisek, 13 FSM Intrm. 97, 99 (Chk. S. Ct. App. 2004)]; no allegation that either happened to Frank Plain
 - (3) Plain Corporation's computer, since Plain Corp. not a party complaint fails to state a claim because Frank Plain can't sue for Plain Corp.; Plain Corp. must sue for its own damages [*see* Sipos v. Crabtree, 13 FSM Intrm. 355, 363 (Pon. 2005)]
- 2. file answer with affirmative defenses of
 - a. statute of limitations (as above)
 - b. Plain Corp. not a plaintiff so no claim for computer (as above)
 - c. comparative negligence
 - (1) Mary Plain's negligence in abruptly exiting hidden drive
 - (2) contributory negligence is not available as a defense

in Pohnpei or FSM because is contrary to Micronesian custom [e.g., Koike v. Ponape Rock Products, Inc. (II), 3 FSM Intrm. 182, 185 (Pon. S. Ct. Tr. 1987); Kileto v. Chuuk, 15 FSM Intrm. 16, 18 (Chk. S. Ct. App. 2007)]

- B. (3 points) notice of deposition
1. move to quash notice of deposition because
 2. leave of court is needed to depose someone before 30 days after summons & complaint served [FSM Civ. R. 30(a)]
 3. 25 days after service of complaint [no summons served] is too soon
 4. also, deposition can occur somewhere else besides the Plains' attorney's office