

## Checklist of Points to be Covered for Complete Answers

FSM Bar Examination, March 3, 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. lawyers must abide by a client's decision whether to accept an offer of settlement of a matter [FSM MRPC R. 1.2(a)]; Alvin Attorney did not because
    1. Clem Client was never consulted but should've been
    2. Alvin Attorney merely informed Clem that case was settled & would be dismissed
  - B. lawyers must keep clients reasonably informed about status of case [FSM MRPC R. 1.4(a)] but Alvin Attorney never informed Clem Client that
    1. Dora Driver sued (counterclaimed) Clem
    2. (apparently some discovery was conducted during which) Dora Driver recanted her admission of full liability that she had made in Clem's presence
  - C. contingency fee agreements must be in writing and must state the method by which the fee is to be determined, the litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated [FSM MRPC R. 1.5(c)]
    1. Clem only received letter from the insurance company saying that Alvin Attorney would be representing him for  $\frac{1}{3}$  of deductible
    2. Alvin Attorney never provided written fee agreement with all of its terms
  - D. a lawyer must not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests unless the lawyer reasonably believes the representation will not be adversely affected; and the client consents after consultation [FSM MRPC R. 1.7(b)]
    1. Alvin Attorney seems not to have any concern about Clem Client's interests so long as insurance company is adequately represented and consulted
    2. Clem didn't consent after consultation
  - E. lawyers cannot permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services [FSM MRPC R. 5.4(c)]
    1. insurance company seems to be in control of the litigation
    2. Alvin Attorney's statement that Clem is not his client is false
  - F. a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the client's interests [FSM MRPC R. 1.16(b)]
    1. Alvin Attorney will probably need court approval to withdraw as counsel [*see Lee v. FSM*, 18 FSM R. 558, 562 (Pon. 2013)]
    2. court approval not likely when trial is imminent since Linda Lawyer has asked for trial within 30 days [*see Beal Bank S.S.B. v. Salvador*, 11 FSM R. 349, 350 (Pon. 2003)]

EVIDENCE  
(20 points)

- II. (13 points)
- A. (4 points)
1. exclusion or admission of photographs
    - a. photographs must be authenticated [FSM Evid. R. 901(a)]; both Terry & teacher can testify that photos show injuries the day after the alleged incident
    - b. Terry would then testify that injuries were caused by Defendant's sexual abuse; photos are thus probative
    - c. BUT photographs' admission may be denied if their probative value is substantially outweighed by the danger of unfair prejudice [FSM Evid. R. 403]
  2. exclusion or admission of prior incidents
    - a. evidence of prior bad acts is not admissible to prove a person's character in order to show that he acted in conformity therewith [FSM Evid. R. 404(b)]
    - b. evidence of prior bad acts may be admissible to prove a common plan, or scheme, or method of operation [FSM Evid. R. 404(b)]
    - c. alleged sexual abuse incidents all started with a "spanking"; probably not enough of common method of operation to make prior incidents admissible; also unfair prejudice may outweigh probative value
- B. (4 points) teacher's testimony would be allowed
1. objection will be on ground of hearsay
    - a. hearsay is an out-of-court statement made by someone other than the witness & that is being offered to prove the truth of the matter asserted therein [FSM Evid. R. 801(c)]
    - b. BUT a prior statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with his testimony [FSM Evid. R. 801(d)(1)(A)]
    - c. HOWEVER, extrinsic evidence of a witness's prior inconsistent statement is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon [FSM Evid. R. 613(b)] & it's unclear whether this was done when Terry testified
- III. (12 points)
- A. (4 points) Alpha's president's acceptance letter
1. all evidence to be admissible must be relevant & relevant evidence is generally admissible [FSM Evid. R. 402]; "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence [FSM Evid. R. 401]
  2. letter from Alpha's president is relevant to outcome of action

- because whether a contract was formed is an issue
3. is direct evidence that acceptance letter was prepared; no direct evidence that it was mailed
  4. if possible, Alpha's counsel should establish Alpha's office custom, habit, or routine practice about mailing letters to lay foundation for letter's admission
- B. (4 points) deposition testimony of Alpha's deceased vice-president
1. objection would be hearsay
    - a. hearsay is an out-of-court statement made by someone other than the witness & that is being offered to prove the truth of the matter asserted therein [FSM Evid. R. 801(c)]
    - b. hearsay generally inadmissible unless it falls within one of the exceptions recognized by the Rules of Evidence [FSM Evid. R. 802]
  2. defined as non-hearsay & admissible as admission of party opponent by an agent about a matter within the scope of his agency or employment, made during the existence of the relationship [FSM Evid. R. 801(d)(2)(D)]
  3. former testimony is a recognized exception to hearsay rule [FSM Evid. R. 804(b)(1)]
    - a. if given as a witness in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination and
    - b. if the witness is unavailable
    - c. **[bonus points]** if deposition was taken of vice-president as an officer designated by Alpha [FSM Civ. R. 30(b)(6)] & court finds witness is dead (& he is) deposition may be used at trial so far as is admissible under Rules of Evidence [FSM Civ. R. 32(a)(3)(A)]
  4. may also be admissible under the statement-against-interest exception [FSM Evid. R. 804(b)(3)]
- C. (4 points) Alpha's chart is admissible because
1. contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation are admissible [FSM Evid. R. 1006]
  2. if the originals, or duplicates, were made available for examination or copying, or both, by other parties at reasonable time and place [FSM Evid. R. 1006]

### **GENERAL**

(70 points)

- IV. (11 points)
- A. legal theories and possible defendants
    1. against Marcus
      - 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) Marcus 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) Marcus 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 Jonas should be able to show that Marcus'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 Marcus 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 Marcus's parents
- a. each cause of action against Marcus may apply to his parents because
    - (1) of their legal responsibility for Marcus since he is a minor &
    - (2) they furnished him with the motorcycle
  - b. & as a practical matter Marcus's parents might have insurance that covers Marcus & his motorcycle or at least greater financial resources than Marcus
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 Jonas must show that the Parade Committee failed to reasonable precautions to prevent the occurrence of this or similar incidents
    - e. Officer Jonas might not recover since
      - (1) Parade Committee apparently arranged for state police to patrol route &
      - (2) Officer Jonas was assigned the duty of preventing unauthorized vehicles from participating in parade &
      - (3) Marcus's motorcycle was an unauthorized vehicle that Officer Jonas 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 through competent expert testimony the evidence 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 Jonas's injuries, Officer Jonas can recover on this allegation
    - c. if through competent expert testimony it can be shown that Dr. Cutter was in complete control of the situation & that Officer Jonas was in no way negligent himself at the hospital, he may rely on the *res ipsa loquitur* doctrine to establish negligence
  - 5. state hospital (& state)
    - 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 Jonas was negligent when he breached his duty to keep unauthorized vehicles out of the parade
    - b. Officer Jonas's recovery will be reduced by whatever percentage of his damages his negligence was liable for
  3. Dr. Cutter's medical malpractice is not a defense that can be raised by the other defendants because medical malpractice by hospital staff does not relieve a tortfeasor of his responsibility for damages, because any injuries that might have been caused by the staff flowed naturally from his own acts [Primo v. Refalopei, 7 FSM R. 423, 429 (Pon. 1996)]

V. (11 points)

- A. Constitution prohibits unreasonable searches & search warrants may issue only on probable cause [FSM Const. art. IV, § 5]
- B. since there was no warrant the burden is on the prosecution to show that the search was reasonable [FSM v. Tipen, 1 FSM R. 79, 87 (Pon. 1982)]
- C. suppression of the meth – arguments pro & con
  1. threshold question whether Dixie had expectation of privacy in the meth or in the trash can in which she threw it
  2. Dixie had expectation of privacy in meth which she had on her person when the police knocked on the door
  3. but once she fled and threw (or abandoned) her meth in trash can it's unlikely she had an expectation of privacy in apparently what is someone else's trash can
  4. Dixie's discard of meth in trash can was done in plain view of plainclothesman
  5. a warrant is not necessary to authorize seizure when item to be seized is in plain view of a police officer who has a right to be in the position to have that view [FSM v. Sato, 16 FSM R. 26, 29-30 (Chk. 2008); FSM v. Mark, 1 FSM R. 284, 294 (Pon. 1983)]
  6. no expectation of privacy in trash can especially when Dixie claims what was found in there wasn't hers
  7. also, seizure of abandoned property doesn't require warrant or probable cause [argue whether Dixie's throwing meth in trash can was an abandonment]
- D. suppression of the marijuana – arguments pro & con
  1. Dixie had expectation of privacy in her home
  2. prosecution will argue that Rob Lee gave its police consent to search
  3. Dixie will counter that Rob Lee did not have the authority to consent to search
    - a. it was not his home
    - b. Rob Lee did not have even apparent authority to grant consent since he was undercover police agent
    - c. Rob Lee had no status or standing to be anywhere in the house except the living room for two minutes to make his pitch
- E. therefore marijuana probably suppressed even though prosecution could

argue that police would have inevitably discovered the marijuana if, after the arrest for the meth, the police, with probable cause that there might be more meth in the house, had obtained a search warrant and searched Dixie's home

- VI. (9 points)
- A. (3 points)
1. \$1,200 surcharge on imported right-hand drive is constitutional tax since nat'l gov't has sole power to levy customs duties [FSM Const. art. IX, § 2(d)]
  2. \$400 nat'l gov't tax on later resale is unconstitutional since sales taxes are not a tax delegated to the nat'l gov't [*see Harper v. Chuuk State Dep't of Admin. Servs.*, 19 FSM R. 147, 154 (Chk. 2013)]
- B. (6 points)
1. \$6,000 instead of \$500 likely unconstitutional since only nat'l gov't has power to regulate banking [FSM Const. art. IX, § 2(g)]
  2. \$1,200 instead of \$500 for travel agency is unconstitutional since it involves regulation of foreign & interstate commerce [FSM Const. art. IX, § 2(g); *Stinnett v. Weno*, 6 FSM R. 312, 313-14 (Chk. 1994)]
  3. \$2,500 instead of \$500 for law office might be constitutional or unconstitutional depending on how the Constitution's Professional Services Clause [FSM Const. art. XIII, § 1] encouraging provision of legal services is interpreted
  4. \$200 instead of \$500 for fast food is constitutional; does not violate any part of FSM Constitution
  5. \$600 instead of \$500 for restaurant is constitutional; does not violate any part of FSM Constitution & difference from \$200 for fast food not likely to violate equal protection provisions
  6. 12½% of hotel room rentals is unconstitutional since it is an income tax & only nat'l gov't can tax incomes [FSM Const. art. IX, § 2(e); *Truk Continental Hotel, Inc. v. Chuuk*, 7 FSM R. 117, 119-20 (App. 1995)]
- VII. (8 points) assuming Marx's business is not a separate corporation which cannot be held liable for Marx's debts
- A. writ of execution cannot issue until 10 days after entry of judgment [FSM Civ. R. 62(a)]
- B. any party may apply for order in aid of judgment [6 F.S.M.C. 1409]
- C. no writ of execution can be issued while an application for an order in aid of judgment is pending [6 F.S.M.C. 1413(1)]
- D. therefore, if application for order in aid of judgment is filed within ten days after entry of judgment, no writ of execution can issue unless made part of an order in aid of judgment
- E. parties can then negotiate an agreeable order in aid of judgment to present to judge, or Marx can present evidence and argue before judge that considering his abilities to pay time payments would be the fastest way to reasonably pay the judgment [6 F.S.M.C. 1409, 1410(1)]
- F. other possible steps – none advisable [shouldn't be in answer]
1. appeal not advisable because
    - a. Marx (client) doesn't want
    - b. supersedeas bond required for stay of money judgment on

- appeal [FSM Civ. R. 62(d)] would likely disrupt business as much as writ of execution on bank account
2. motion for new trial or judgment not advisable because
    - a. stay while motion pending is discretionary
    - b. unlikely to prevail
- VIII. (8 points) Deimos Inc.'s legal and equitable theories
- A. accord and satisfaction (legal theory)
    1. for there to be an accord and satisfaction [Richmond Wholesale Meat Co. v. Kolonia Consumer Coop. Ass'n (I), 7 FSM R. 387, 389 (Pon. 1996)]
      - a. there must be an offer in full satisfaction of a debt accompanied by acts and declarations that amount to a condition that if the offer is accepted, it is in full satisfaction of the obligation
      - b. the condition must be such that the party to whom the offer is made is bound to understand that if it accepts the offer in full satisfaction, it does so subject to the condition imposed
    2. there is a legitimately disputed claim between Phobos & Deimos, Inc.
    3. when Phobos cashed check he knew it was intended as payment for Phobos's release of his claim against Deimos, Inc.
    4. there was thus an accord and satisfaction
  - B. enforceable contract (legal theory)
    1. an enforceable contract requires an offer, an acceptance, definite terms, and consideration [Bank of Hawaii v. Helgenberger, 9 FSM R. 260, 262 (Pon. 1999)]
    2. Deimos, Inc. made an offer with definite terms including \$5,000 consideration by it and forbearance by Phobos
    3. offer deemed accepted when the acceptance is put out of the offeree's possession by being dispatched by an authorized means
    4. mail was presumably an authorized means and under the "mailbox" rule Phobos was deemed to have accepted Deimos, Inc.'s offer when he put the acceptance form in the mail even though he later retrieved that acceptance
  - C. unjust enrichment (equitable theory)
    1. unjust enrichment doctrine generally applies where there is an unenforceable contract due to impossibility, illegality, mistake, fraud, or another reason and is based on the idea one person should not be permitted unjustly to enrich himself at the expense of another; it requires a party to either return what has been received under the contract or pay the other party for it [Etscheit v. Adams, 6 FSM R. 365, 392 (Pon. 1994)]
    2. Phobos would be unjustly enriched if allowed to keep the \$5,000 free of any obligation to waive his claims
    3. alternatively, Phobos could be estopped from denying the existence of the contract or of proceeding with his claim
- IX. (14 points)
- A. (immediate steps)
    1. since Rule 65(b) provides that "[o]n 3 days' notice to the party who obtained the temporary restraining order without notice or on such

shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require"

a. Salamander Club should immediately give the notice and ask for time shorter than 3 days because its first guests are arriving on the 7th

b. Salamander Club will move for dissolution of the TRO on the grounds that Aaron Burr isn't entitled to injunctive relief

c. since court in deciding whether to grant a preliminary injunction, a court considers four factors: 1) the likelihood of success on the merits of the party seeking injunctive relief, 2) the possibility of irreparable injury to the movant, 3) the balance of possible injuries or inconvenience to the parties that would flow from granting or denying the relief, and 4) any impact on the public interest [Mailo v. Chuuk Health Care Plan, 18 FSM R. 501, 505 (Chk. 2013)] Salamander Club will argue that

(1) Aaron Burr is unlikely to prevail on the litigation's merits because

(a) DeWitt Clinton, not Aaron Burr, has a certificate of title to the land Hermitage &

(b) a certificate of title is presumptively good against the world [see Enlet v. Bruton, 12 FSM R. 187, 191 (Chk. 2003)]

(2) Aaron Burr cannot show irreparable harm because any damages he could prove would be compensable by money

(3) & also public interest favors economic development & balance of injuries favors Salamander Club

2. Salamander Club will also demand that if Aaron Burr's TRO continues that Aaron Burr must be required to post an adequate security (bond) to cover its potential losses and expenses if it can't open on time [FSM Civ. R. 65(c); Luen Thai Fishing Venture, Ltd. v. Pohnpei, 18 FSM R. 563, 568 (Pon. 2013)]

B. later steps

1. since TROs only last 14 days, if Aaron Burr's TRO isn't dissolved earlier

2. prepare same arguments & further evidence & further demand for a security bond for presentation at preliminary injunction hearing

3. if preliminary injunction hearing isn't moved forward from the 30th TRO will expire (unless renewed for another 14 days; TRO can be renewed only once for no more than 14 days [FSM Civ. R. 65(b)] unless consented to by the defendant) ask for (insist on) another hearing before the 17th if a renewal is contemplated

4. answer with counterclaim for injunctive relief

X. (9 points)

A. (3 points) remand denied

1. FSM Supreme Court has diversity jurisdiction

2. plaintiff is Yapese citizen
  3. defendant corporation, although incorporated in Yap and having its principal place of business there, is considered foreign citizen when any of its shareholders is a foreign citizen [Luzama v. Ponape Enterprises Co., 7 FSM R. 40, 44 (App. 1995)]
- B. (3 points) remand denied
1. FSM Supreme Court has diversity jurisdiction
  2. plaintiff is Kosrae citizen
  3. defendant partnership is considered a foreign citizen because a partnership is a foreign citizen for diversity purposes when a any ownership interest is held by a foreign citizen [Island Dev. Co. v. Yap, 9 FSM R. 220, 223-24 (Yap 1999)]
- C. (3 points) remand denied
1. FSM Supreme Court has exclusive jurisdiction [FSM Const. art. XI, § 6(a)] over suits
    - a. between states &
    - b. admiralty & maritime cases
  2. this suit is between branches of two different state governments
  3. & over ownership of sea-going vessel