

**Checklist of Points to be Covered for Complete Answers
FSM Bar Examination, March 7, 2019**

[Bracketed citations to statutes, rules, and cases are an aid to those reviewing the test. Test takers are not expected to memorize and repeat them as long as the legal principles are cited and discussed]

ETHICS
(10 points)

- I. (10 points) discuss
 - A. Jay
 1. competence
 - a. is Jay competent to handle what seems like a complex and novel criminal case
 - b. lawyer must provide competent representation to a client, which includes legal knowledge, skill, thoroughness, & preparation reasonably necessary for the representation [FSM MRPC R. 1.1]
 - c. a newly admitted lawyer can be as competent as a practitioner with long experience [FSM MRPC R. 1.1 cmt.]
 - d. is competent if by the preparation and study Jay is able to give the matter [FSM MRPC R. 1.1 cmt.]
 - e. and whether it is feasible to associate or consult with, a lawyer of established competence in the field in question (is Bey competent in criminal matters?) [FSM MRPC R. 1.1 cmt.]
 2. is Jay's fee arrangement proper?
 - a. \$2,000 in advance plus \$1,500 if defense verdict returned
 - (1) \$1,500 extra payment if a defense verdict is returned is a fee contingent on a particular outcome; contingent fee arrangement must be in writing [FSM MRPC R. 1.5(c)]; this wasn't
 - (2) contingency fees are prohibited in criminal cases [FSM MRPC R. 1.5(d)(2)]
 - (3) the cash fee arrangement is therefore improper
 - b. right to author a book at the case
 - (1) before the conclusion of a client's representation, a lawyer cannot make or negotiate an agreement giving the lawyer literary rights to a portrayal or account based in substantial part on information relating to the representation [FSM MRPC R. 1.8(d)]
 - (2) Jay's agreement to author book about the case's "true facts" is improper

- B. Bey
1. lawyer must not reveal information relating to representation of a client unless the client consents after consultation [FSM MRPC R. 1.6(a)]
 2. lawyer who has formerly represented a client in a matter cannot:
 - a. represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the former client's interests unless the former client consents after consultation [FSM MRPC R. 1.9(a)]; or
 - b. use information relating to the representation to the former client's disadvantage [FSM MRPC R. 1.9(b)]
 3. Day's attempted murder prosecution isn't the same or substantially related matter to Ms. Fitt's malpractice case; if malpractice case was filed in court(s), then Jay could consult the public record; also unclear how use of information about the malpractice suit would be to the Ms. Fitt's disadvantage; perhaps it would be to Ms. Fitt's disadvantage if Day had actually tried to kill her and knowledge of her malpractice case got him acquitted
 4. but lawyer shall not reveal information relating to a client's representation unless the client consents after consultation [FSM MRPC R. 1.6(a)] & file likely includes information not in public record & Ms. Fitt hasn't been consulted nor has she consented; improper for Bey to offer the file to Jay
 5. if Bey is disqualified is Jay?
 - a. when lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so [FSM MRPC R. 1.10(a)]
 - b. thus, if Bey would be disqualified then Jay must withdraw from representing Day, but unclear here if that's the case

EVIDENCE
(20 points)

- II. (20 points)
- A. (3 points) objections would be relevance, character evidence;
1. evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the action's determination more probable or less

- probable than it would be without the evidence [FSM Evid. R. 401];
2. the evidence seems to be about Rex's character as a "wild man"
 3. evidence of a persons's character or a trait of his character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion [FSM Evid. R. 404(a)]
- B. (2 points) objection would be that it's an inadmissible prior bad act
1. evidence of other acts is not admissible to prove a person's character in order to show that he acted in conformity therewith; it may, however, 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)]
 2. Quantum could argue that it is admissible as Rex's habit; evidence of a person's habit, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the person's conduct on a particular occasion was in conformity with the habit [FSM Evid. R. 406] but having acted that way twice before is likely not enough to prove habit
- C. (3 points) objection - hearsay
1. hearsay is an out-of-court statement that is being offered to prove the truth of the matter asserted therein [FSM Evid. R. 801(c)];
 2. general rule: hearsay inadmissible unless falls within one of the exceptions to the hearsay rule [FSM Evid. R. 802]
 3. Quantum will argue it is not hearsay because Rex's statement is an admission of a party-opponent
 4. Rex's statement is offered against a party (Island Golf) and is a statement by Island Golf's servant concerning a matter within the scope of his employment made during the existence of that relationship [FSM Evid. R. 801(d)(2)(D)]
 5. admissions of a party-opponent are defined as not hearsay [FSM Evid. R. 801(d)]
- D. (2 points) objection offer to settle or compromise
1. evidence of furnishing or offering or promising to furnish a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability [FSM Evid. R. 408]
 2. exclusion not required when the evidence is offered

- for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay or proving an effort to obstruct a criminal investigation or prosecution [*id.*]
3. offered to prove liability, therefore inadmissible
- E. (2 points) objections would be relevance;
1. evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the action's determination more probable or less probable than it would be without the evidence [FSM Evid. R. 401];
 2. not likely Quantum's prior drunkenness has any tendency to make anything about the accident more or less likely - Rex was driving
- F. (3 points) objections would be relevance, character evidence;
1. assuming that quantum has already testified on his own behalf, then
 2. a witness's credibility may be attacked or supported by evidence in the form of opinion or reputation, but the evidence may refer only to character for truthfulness or untruthfulness [FSM Evid. R. 608(a)(1)]
 3. that they all in Yap said that Quantum "was a liar" is reputation testimony
- G. (2 points) objection inadmissible remedial measure
1. when, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event [FSM Evid. R. 407]
 2. if Rex had been fired earlier, accident would have been less likely to have happened
 3. exclusion of evidence of subsequent measures not required when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment [FSM Evid. R. 407] but that's not the case here
- H. (3 points) objection is relevance & hearsay
1. 2005 graduating list is hearsay - offered for the truth of the matter asserted
 2. hearsay is an out-of-court statement that is being offered to prove the truth of the matter asserted therein [FSM Evid. R. 801(c)];
 3. hearsay inadmissible unless falls within one of the exceptions to the hearsay rule [FSM Evid. R. 802]
 4. probably admissible as a regularly kept business record [FSM Evid. R. 803(6)]

5. it is extrinsic evidence being used to impeach witness Fred
6. specific instances of a witness's conduct, for the purpose of attacking or supporting his credibility may not be proved by extrinsic evidence [FSM Evid. R. 608(b)]
7. they may, however, in the court's discretion, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness if it concerned the witness's character for truthfulness or untruthfulness [*id.*]
8. Quantum should have inquired into this when cross-examining Fred; he didn't, so inadmissible

GENERAL

(70 points)

- III. (3 points) impleader; Island Golf should serve a third-party complaint and summons on Better Than The Rest, Inc.
- A. any time after commencement of the action a defending party, like Island Golf, may, as a third-party plaintiff, cause a summons and complaint to be served on a non-party, such as Better Than The Rest, Inc., who is or may be liable to the third party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff [FSM Civ. R. 14(a)]
 - B. Island Golf can do it without leave of court if filed not later than 10 days after serving the original answer; otherwise Island Golf must obtain leave on motion upon notice to all parties to the action [*id.*]
- IV. (12 points)
- A. analyze four factors for injunctive relief - likelihood of success on the merits, irreparable harm (lack of adequate legal remedy), relative harms to the parties, and the public interest
 1. likelihood of success on the merits -
 - a. poor because it doesn't appear to be an ex post facto law; ban on ex post facto law applies to criminal acts only; retroactive noncriminal laws may be valid; [Robert v. Mori, 6 FSM R. 394, 400 (App. 1994) (ex post facto laws limited to legislation which does any of the following: 1) makes criminal and punishable an act innocent when done; 2) aggravates a crime, or makes it greater than it was when committed; 3) increases the punishment for a crime and applies the increase to crimes committed before the enactment of the laws; or 4) alters the legal rules of evidence so that testimony

insufficient to convict for the offense when committed would be sufficient as to that particular offense and accused person)]; strongly favors FSM

- b. is there a substantive due process claim that would favor Acme Auto?; better than ex post facto but arguable; with substantive due process, the court looks at the rationale or legitimacy of the governmental interest because in subjecting a statute or court rule to the requirement of substantive due process, the court asks [FSM Dev. Bank v. Adams, 14 FSM R. 234, 248 n.6 (App. 2006)]:
 - (1) does the government have power to regulate the subject matter? If the statute or rule is not within the power of the government, such statute or rule will be struck down
 - (2) if the government has the power to regulate, the court next asks if what the statute or rule proposes to do bears a rational relationship to the implementation of the legislative goal
 - (3) & where the statute or rule involved arguably infringes upon individuals' fundamental rights, the court must ask how important is the legislative objective & court must ask if there is a compelling governmental interest to justify holding the statute or rule valid, even though the statute might limit fundamental rights
 - (4) higher tax on right-hand drive vehicle has rational relationship to an important gov't interest - greater safety for motorists on the roads; but how does a retroactive tax advance that interest?
2. irreparable harm (lack of adequate legal remedy) - Acme Auto could sue for refund of tax so has legal remedy of a money judgment whether it is adequate might depend on how difficult it is to get refund once has judgment, Acme Auto has already received vehicles so not irreparably harmed by being unable to get its goods until tax paid, but Acme Auto now liable for more than ten times the duty it expected (and can't add it to selling price for any vehicles it has already sold); argue if favors FSM or Acme Auto
3. relative harms to the parties - FSM would get tax money later than expected but probably hadn't

relied on it in its original budget because fiscal year 2000 budget prepared long before tax law passed fiscal year started before law passed and before time period for tax started, Acme Auto would be forced to make substantial unexpected payment that could get back only with difficulty; probably favors Acme Auto

4. public interest - not clear
 - B. might order Acme Auto to pay disputed tax into court for deposit in interest-bearing account to be turned over to the FSM gov't if it should win or to Acme Auto if it should
- V. (12 points)
- A. criminal defendant entitled to effective assistance of counsel [FSM Const. art. IV, § 6]
 1. to be ineffective assistance of counsel [Ting Hong Oceanic Enterprises v. FSM, 7 FSM R. 471, 478 (App. 1996)] defense counsel's performance must be both
 - a. deficient (proper standard for attorney performance is that of reasonably effective assistance) and
 - b. prejudicial to the defendant
 - (1) even if professionally unreasonable
 - (2) does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment
 - B. counsel's failure to make pretrial or trial motions appears professionally unreasonable
 - C. therefore was counsel's failure present pretrial or trial motions or object to evidence at trial prejudicial?
 1. counsel had viable challenge to search of hotel room
 - a. search was warrantless, therefore burden on prosecution to show it was reasonable
 - b. police entry into Bonnie's room was with hotel's consent,
 - c. BUT if entry was before check-out time that day (since manager charged Bonnie for six days' occupancy that morning, Bonnie's right to occupancy hadn't expired and she had expectation of privacy in her hotel room
 - d. police warrantless search appears far beyond what is permissible in circumstances
 - (1) wasn't search incident to arrest because no indication Clyde or Bonnie had committed crime before search turned up shotgun, mask, and cash
 - (2) no contraband (or evidence) in plain view
 - (3) no exigent circumstances so police could've secured room & obtained search

- warrant (if had probable cause)
 - 2. counsel had viable pretrial motion in limine to suppress
 - a. Clyde's hearsay statements use against Bonnie, right to confront accuser [FSM Const. art. IV, § 6]
 - b. Bonnie's silence (silence can be a statement when person expected to speak up to deny Clyde's accusation, by implication, that he didn't know anything about the seized items so they must be Bonnie's) in response to Clyde's denial
 - c. both Clyde's & Bonnie's "statements" appear to have been made without either of them being informed of their rights
 - 3. failure to move for judgment of acquittal after presentation of prosecution case
 - a. since no direct identification of robber
 - b. & reasonable inferences didn't necessarily lead to conclusion Bonnie was the robber or accomplice
 - c. finding that prosecution didn't prove its case was possible
- D. counsel's failure to make pretrial motions to suppress the hotel room search and the "statements" in the hotel room was
 - 1. prejudicial to Bonnie since without that evidence she couldn't have been convicted
 - 2. was deficient performance since effective counsel should've made those motions
- E. appellate court should rule that trial court should've granted new trial motion on the ground of ineffective assistance of counsel

VI. (12 points)

- A. (5 points) theories of liability
 - 1. negligence
 - a. duty of reasonable care - Dufus had a duty of reasonable care towards Teri not to damage her property
 - b. breach of that duty - Dufus breached that duty by failure to turn off blowtorch when he left for lunch
 - c. causation - but for Dufus's failure to turn off the blowtorch, Teri's house would not have burned down
 - d. damages - the value of the house that was destroyed, possibly the cost to rebuild it
 - 2. breach of contract
 - a. may sue for breach of contract if there was a

- valid contract and there was a material breach of that contract [Helgenberger v. Bank of Hawaii, 19 FSM R. 139, 144 (App. 2013)]
- b. most contracts of this type have a clause that the job will be done in a good workmanlike manner or something like that
 - c. burning the house down was not doing the work in a good workmanlike manner
3. strict liability might also be argued
 - a. arises where the activity performed is not merely dangerous, but abnormally dangerous
 - b. one who 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 v. Akinaga, Pangelinan & Saita Co., 8 FSM R. 528, 535 (Pon. 1998)]
 - c. BUT was use of blowtorch to solder pipes abnormally dangerous? probably not
- B. (4 points) since Carl was not himself negligent in causing the fire, he will be liable only if Teri can establish that Hot Designs or Carl is vicariously liable for the losses
1. Dufus said he was in partnership with Carl
 2. partnerships don't have to be in writing [In re Estate of Setik, 12 FSM R. 423, 429-30 & n.16 (Chk. S. Ct. Tr. 2004)]
 3. under partnership law, partners share profits and liability
 4. Hot Designs had share of profits & it's owned by Carl
- C. (3 points) other legal theory if Carl was principal shareholder of Real McCoy Builders, Inc.
1. piercing the corporate veil or
 2. alter ego theory
 3. alter ego doctrine treats two entities that are nominally separate as the same when one corporation has acted unjustly or fraudulently [Smith v. Nimea, 19 FSM R. 163, 174 (App. 2013)]
 4. specific factors which are determinative on this point include substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership [*id.*]
- VII. (6 points)
- A. (3 points) state law probably unconstitutional
1. appears to set up classification based on ancestry or national origin or social status
 2. sets up two classes of state citizens, one less equal than the other

3. since 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], state law violates FSM Constitution equal protection clause
- B. (3 points) state law probably unconstitutional
1. only nat'l gov't has power to impose taxes based on imports [FSM Const. art. IX, § 2(d); FSM Const. art. VIII, § 1]
 2. "inventory tax" appears to be import tax because is percentage of import price (wholesale price plus shipping to state)
 3. states are prohibited from imposing taxes which restrict interstate commerce [FSM Const. art. VIII, § 3]
 4. taxing inventory imported from other states and inventory held to be exported from state constitutes restriction of interstate commerce)
 5. best argument for law to not be unconstitutional is that the tax would also apply to goods produced inside the state and held in inventory for sale (but that's probably a small percentage of goods)
- VIII. (9 points)
- A. (3 points) motion to remand denied
1. FSM Supreme Court has diversity jurisdiction [FSM Const. art. XI, § 6(b)] because
 2. Ioanis is a Pohnpei citizen
 3. Sadaluer Corp. since it is a corporation, its citizenship is determined by the citizenship of its owners [Luzama v. Ponape Enterprises Co., 7 FSM R. 40, 44 (App. 1995)] - & since it has some foreign ownership, it is a foreign citizen
- B. (3 points) motion to remand denied
1. FSM Supreme Court has exclusive jurisdiction over admiralty and maritime cases [FSM Const. art. XI, § 6(a)]
 2. claims for seaman's wages is an admiralty case [e.g., Robert v. Sonis, 11 FSM R. 31, 33 (Chk. S. Ct. Tr. 2002); Zion v. Nakayama, 13 FSM R. 310, 312 (Chk. 2005)]
 3. hazardous duty differential pay for crewing ship during typhoon is a seamen's wages claim
- C. (3 points) FSM Supreme Court should remand case to state court because was improvidently removed because no FSM Supreme Court jurisdiction present when case removed
1. no diversity jurisdiction because diverse "party" was not party at time of removal; must be party before can be removed [Enlet v. Bruton, 10 FSM R. 36, 40 (Chk. 2001)] (in determining jurisdiction based on the parties' citizenship, the FSM Supreme

- Court must look only to the parties of record)]
2. that defendant's defense will be based in part on national law is not ground upon which arising under national law jurisdiction of FSM Supreme Court can be based; must be based on plaintiff's claim [Saimon v. Nena, 19 FSM R. 608, 611 (Kos. 2014) (determination of whether a case arises under the Constitution, national law, or a treaty is based on the plaintiff's statement of his cause of action, not on whatever defenses that are or that might be raised); FSM Dev. Bank v. Ehsa, 18 FSM R. 608, 615 (Pon. 2013), *aff'd*, 20 FSM R. 498, 517 (App. 2016)]

IX. (9 points)

- A. was contract formed?
 1. an enforceable contract requires [e.g., Bank of Hawaii v. Helgenberger, 9 FSM R. 260, 262 (Pon. 1999)]
 - a. an offer,
 - b. an acceptance,
 - c. definite terms, &
 - d. consideration
 2. no contract formed when Elvis was shown operation of cement mixer; no definite terms (no price)
 3. meeting at airport
 - a. offer (if you want to keep cement mixer price is \$3,000)
 - b. acceptance (Elvis's promise to pay for mixer)
 - c. definite terms (\$3,000 price for mixer)
 - d. consideration (promise to pay \$3,000 for permission to keep mixer)
 4. therefore contract formed at airport
- B. if no enforceable contract formed, then Dylan could recover
 1. under tort theory - conversion
 - a. elements of an action for conversion [Bank of Hawaii v. Air Nauru, 7 FSM R. 651, 653 (Chk. 1996)]
 - (1) the plaintiffs' ownership & right to possession of the personalty
 - (2) the defendant's wrongful or unauthorized act of dominion over the plaintiff's property inconsistent with or hostile to the owner's right, &
 - (3) resulting damages
 - b. Elvis converted Dylan's cement mixer
 - (1) Dylan owned cement mixer
 - (2) Elvis exercised unauthorized dominion over it by taking it without Dylan's knowledge to use in his business
 - (3) resulting damages Dylan no longer had

- mixer he could sell for \$3,000 & for which he'd paid \$4,000
2. unjust enrichment theory
 - a. doctrine of unjust enrichment generally applies [Etscheid v. Adams, 6 FSM R. 365, 392 (Pon. 1994)] when
 - (1) there is an unenforceable contract due to impossibility, illegality, mistake, fraud, or another reason &
 - (2) requires a party to either
 - (a) return what has been received under the contract
 - (b) or pay the other party for it
 - (3) unjust enrichment doctrine is based on the idea one person should not be permitted unjustly to enrich himself at the expense of another
 - b. Elvis was using mixer for his construction business
 - C. returned checks
 1. plaintiff may join, either as independent or as alternate claims, as many claims as the party has against an opposing party [FSM Civ. R. 18(a)], so may add returned check claim
 2. check amounts recoverable on
 - a. breach of contract theory - checks were payments for goods, thus a sales contract, breached by non-payment
 - b. conversion theory - received goods without paying
 - D. damages
 1. \$3,000 - agreed price of mixer
 2. \$265.58 - amount of bounced checks with penalties
 3. no attorney's fees award
 - a. not part of recoverable costs under common law
 - b. recoverable if contract or statute provides for [FSM Dev. Bank v. Adams, 14 FSM R. 234, 256 (App. 2006)]
 - c. no evidence that attorney's fees was part of contract
 4. costs awarded prevailing party [FSM Civ. R. 54(d)]
 - X. (6 points) standard of review
 - A. proper burden for proof in civil case is preponderance of the evidence - not beyond a reasonable doubt; appellate court will review trial court's findings of fact - that certain words were spoken and acts took place - whether trial court's findings were clearly erroneous
 - B. whether the words and acts constitute legally-binding contract
 1. where the existence of a contract is at issue, the

- trier of fact determines whether the contract did in fact exist
2. standard of review for findings of fact is whether the trial court's findings are clearly erroneous [Pohnpei v. Ponape Constr. Co., 7 FSM Intrm. 613, 620 (App. 1996)]
- C. interpretation of contract terms is question of law which appellate court reviews de novo [see, e.g., Wolphagen v. Ramp, 9 FSM Intrm. 191, 194 (App. 1999)]