

Checklist of Points to be Covered for Complete Answers

FSM Bar Examination, August 2, 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. suspension from the bar in California is grounds for a disciplinary action [FSM Dis. R. 2(f)]; Zelda didn't inform Chief Justice of her California suspension
 - 1. all FSM attorneys must, upon being subjected to professional disciplinary action in another jurisdiction, promptly inform the Chief Justice in writing of such action [FSM Dis. R. 11(a)]
 - 2. Chief Justice then gives attorney 30 days from to assert any claim that the imposition of the identical discipline by the Supreme Court would be unwarranted and the reasons therefor [FSM Dis. R. 11(b)(2)] & if no explanation then imposes the identical discipline, unless the attorney requests a hearing [FSM Dis. R. 11(c)]
- B. she should be subject to reciprocal discipline (suspension) in the FSM [FSM Dis. R. 11] unless Zelda requests hearing (she has) & Zelda argues mitigation – that lesser discipline than suspension be imposed because
 - 1. the conduct disciplined in the other jurisdiction does not constitute misconduct in this jurisdiction [FSM Dis. R. 11(c)(4)] because
 - 2. there are no bar dues in the FSM
- C. may recommend lesser sanction as appropriate, especially if Zelda had no disciplinary infractions during the time she has been in the FSM, possible sanctions:
 - 1. public reprimand or censure [FSM Dis. R. 3(c)] or
 - 2. private reprimand or censure [FSM Dis. R. 3(d)] or
 - 3. a fine [FSM Dis. R. 3(f)] or
 - 4. probation under conditions for a fixed period not to exceed five years [FSM Dis. R. (h)]
 - 5. and assessment of costs of the proceedings [FSM Dis. R. 3(i)]

II. (6 points)

- A. Lex charged Alexis Smith \$250
 - 1. lawyer cannot make a false or misleading communication about the lawyer or the lawyer's services [FSM MRPC R. 7.1]
 - 2. a communication is false or misleading if it contains a material misrepresentation of fact or omits a fact necessary to make the statement considered as a whole not materially misleading [FSM MRPC R. 7.1(a)]
 - 3. Lex advertised "No charge for initial consultation." but charged Alexis Smith \$250 for her first consultation; if Lex intends to offer

only a first ½ hour consultation free he must specify that in is advertisement

- B. Lex charges Luke Adams \$5,000
 - 1. FSM MRPC R. 1.5(a) prohibits lawyer from entering into an agreement for a fee that is clearly excessive
 - 2. whether a fee is excessive depends on eight factors: 1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; 2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; 3) the fee customarily charged in the locality for similar legal services; 4) the amount involved and the results obtained; 5) the time limitations imposed by the client or by the circumstances; 6) the nature and length of the professional relationship with the client; 7) the experience, reputation, and ability of the lawyer performing the services; and 8) whether the fee is fixed or contingent [People of Rull ex rel. Ruepong v. M/V Kyowa Violet, 15 FSM Intrm. 53, 65 (Yap 2007)] but Lex appears to have only considered one factor – the difficulty of the matter
- C. Lex puts the \$5,000 in his operations account
 - 1. Lex must hold property of clients or third persons that is in his possession in connection with a representation separate from his own property [FSM MRPC R. 1.15(a)]
 - 2. Luke Adams' funds must be kept in a separate account maintained in the state where Lex's office is situated [FSM MRPC R. 1.15(a)]; can't commingled fee he hasn't earned yet with his own "operations account"
- D. Lex can't represent both Alexis Smith & Luke Adams
 - 1. lawyer can't represent a client if the representation of that client will be directly adverse to another client, unless the lawyer reasonably believes the representation will not adversely affect the relationship with the other client and each client consents after consultation [FSM MRPC R. 1.7(a)]
 - 2. it's obvious the two are adverse & wouldn't consent; Lex can't reasonably believe representation will not adversely affect other client's relationship
- E. Lex should refund fees to both
 - 1. Alexis Smith because she was charged contrary to advertisement
 - 2. Luke Adams because Lex can't represent him; can't drop Alexis Smith as client to accept better-paying client, Luke Adams [McVey v. Etscheit, 14 FSM Intrm. 268, 272 (Pon. 2006)]
- F. probably can't represent either because Lex appears to have represented

both in the same matter & if declines to represent Luke Adams; lawyer who has formerly represented a client in a matter

1. can't represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation [FSM MRPC R. 1.9(a)] & unlikely Luke (the former client) will consent
 2. can't use information relating to the representation to the disadvantage of the former client [FSM MRPC R. 1.9(b)] and Luke Adams appears to have told
- G. FSM MRPC R. 1.5(b) strongly urges that fee agreements be in writing, Lex's apparently aren't; while not a direct violation of the rule, could lead to disputes with clients later

EVIDENCE

(20 points)

III. (12 points)

A. (3 points) admissible

1. 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]
2. Josepha can testify that Druid was in habit of leaving Wally's Wintergreen chewing gum wrappers on the floor

B. (3 points) admissible

1. the note must be authenticated or identified as a condition precedent to admissibility [FSM Evid. R. 901(a)]
2. Carolyn is a non-expert
 - a. non-expert opinion about the genuineness of handwriting must based upon familiarity not acquired for purpose of the litigation [FSM Evid. R. 901(b)(2)]
 - b. Carolyn's familiarity with Druid's handwriting was based on her employment as Druid's administrative assistant at the Church of the Flying Saucers

C. (3 points)

1. note is admissible as admission of party-opponent [FSM Evid. R. 801(d)(2)(A)]
2. BUT defense counsel can seek admission of entire note because
 - a. when part of a writing is introduced by a party, an adverse party may require him at that time to introduce any other part of the writing ought in fairness to be considered

- contemporaneously with it [FSM Evid. R. 106]
 - b. & second part of statement – "I only did this because I needed beer." is favorable to Druid because it makes it less likely that Druid was the burglar since the motive for the crime was to obtain beer & Druid's strict religious beliefs prohibit him from drinking alcohol
 - D. (3 points) inadmissible
 - 1. evidence of a witness's religious beliefs is not admissible for the purpose of showing that by reason of their nature the witness's credibility is impaired [FSM Evid. R. 610]
 - 2. Dr. Hubert Hubris therefore can't testify
- IV. (7 points)
 - A. following evidence is not admissible to show liability
 - 1. offer to pay medical bills [FSM Evid. R. 409]
 - 2. evidence of liability insurance [FSM Evid. R. 411]
 - 3. Acme Fabric Shop's replacement of door molding since it was a subsequent remedial measure [FSM Evid. R. 407]
 - B. BUT since the Acme Fabric Shop claims it had no control over and wasn't responsible for the door molding's condition
 - 1. the offer to pay medical bills, evidence of liability insurance, & the replacement of door molding would be admissible to show
 - 2. that the Acme Fabric Shop had control over or was responsible for the door molding's condition [FSM Evid. R. 409, 411, 407]
 - C. settlement discussions not admissible [FSM Evid. R. 408]

GENERAL

(70 points)

- V. (15 points)
 - A. Parker v. Daisy
 - 1. battery is the harmful or offensive contact with a person, resulting from an act intended to cause that contact [Conrad v. Kolonia Town, 8 FSM Intrm. 183, 191 (Pon. 1997)]
 - 2. Daisy took lid off of her drink and intentionally threw it in Parker's face
 - 3. Daisy knew with substantial certainty that contents off her cup would come into contact with Daisy's face
 - 4. Daisy therefore liable to parker for battery
 - B. Sara v. Movie theater
 - 1. negligence has four essential elements [Lebehn v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 348, 352-53 (Pon. 2001)]
 - a. a legal duty owed to the plaintiff by the defendant

- b. a breach of that duty
 - c. injury to the plaintiff (damages), and
 - d. a showing that the breach was the proximate cause of the injury
 - 2. Movie theater had duty to exercise reasonable care to protect its customers from unreasonable risk of harm caused by dangerous condition on its premises, especially if condition not obvious
 - 3. Johnny, the theater employee was aware of danger & even put wet floor sign near one wet spot but hadn't got around to putting wet floor sign or mopping up other wet spot when Sara came barreling in
 - 4. Movie theater can be held vicariously liable for employee's negligence when employee was acting in scope of employment [Ludwig v. Mailo, 5 FSM Intrm. 256, 259 (Chk. S. Ct. Tr. 1992)]
 - 5. since Sara came barreling through entrance; would she have seen the wet floor & avoided it if she hadn't been in such a hurry? was the dangerous condition open and obvious or hidden?
 - 6. or did Johnny have time to correct danger? he had time to put up wet floor sign at one spill but was distracted before he could put up wet floor sign at entrance
 - C. Parker v. Fred
 - 1. Fred liable because he was negligently operated motor vehicle because Fred wasn't paying attention to roadway, only to finding a parking spot as close to entrance as possible
 - 2. Parker's damages might include the scar
- VI. (6 points)
- A. (3 points)
 - 1. constitutional as far as it regulates shark fishing within 12 miles of outer reef baselines
 - 2. unconstitutional as a regulation of shark fishing from 12 to 50 miles out from reef baselines because only nat'l gov't can regulate from 12 to 200 miles out of FSM maritime space [FSM Const. art. IX, § 2(m)]
 - 3. might be constitutional as regulation of activity of state's own citizens in space up to 50 miles out, but not against anyone else
 - B. (3 points) unconstitutional
 - 1. a percentage tax levied on business is an income tax [Truk Continental Hotel, Inc. v. Chuuk, 7 FSM Intrm. 117, 120 (App. 1995)]
 - 2. national gov't has sole power to levy income taxes [FSM Const. art. IX, § 2(e)]
 - C. (3 points) unconstitutional

1. nat'l gov't's power to appropriate funds (concurrent with states) [FSM Const. art. IX, § 3]
2. nat'l constitution is supreme law of land [FSM Const. art. II]
3. municipal gov't can't tell FSM nat'l gov't how to spend nat'l gov't's money

VII. (15 points)

- A. would advise Architex that it may safely retain the money it has already been paid for the preliminary design, BUT since it breached the contract by submitting a non-compliant revised plan, the most it can recover in addition is the amount owed (\$1,200) under the second invoice covering the budget estimate it prepared for the preliminary design
- B. Architex agreed in the contract that it would comply with the cost limitations, if any, imposed on it by MxStores. Since there was no cost limitation when Architex supplied the preliminary design, Architex was contractually entitled to keep the \$75 an hour (\$17,175) payment it received for this work
- C. Architex also contractually entitled to payment at the \$75 rate for providing the estimated cost of the preliminary design because budgeting was within the scope of the original request & cost limitation hadn't been imposed yet; therefore should recover the \$1,200 on second invoice
- D. Once MxStores imposed cost limitation as condition precedent, Architex contractually required to present only designs that complied with the cost limitation
 1. any design that didn't comply was a breach of contract by Architex
 2. MxStores gave Architex an opportunity to cure (which MxStores not required to do) which Architex refused to take advantage of
- E. was Architex's breach a substantial or material breach?
 1. material breach needed to relieve MxStores of obligation to preform [FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 570 (Pon. 2011)]
 2. MxStores expected to receive design that could be implemented within its cost limitation but did not receive benefit it reasonably expected, the breach was material
- F. Architex can't recover under quantum meruit
 1. quantum meruit's elements are 1) valuable goods or services are provided 2) to someone against whom recovery is sought 3) when the goods or services are enjoyed or used by the one against whom recovery is sought 4) under such circumstances that notified the person that the one performing the services or providing the goods expected payment [Actouka Executive Ins. Underwriters v. Simina, 15 FSM Intrm. 642, 654 (Pon. 2008)]
 2. Architex's plan was unusable & new firm had to be hired & new

design had to be done from scratch; so no benefit conferred on MxStores

- G. impossibility or frustration of purpose defenses unavailable because both parties aware of unfavorable economic climate
- VIII. (10 points)
- A. Max's attorney would move to suppress the initial statement about the gun's location & the gun because
 - 1. it was made before Max was advised of his rights by arresting officer &
 - 2. was therefore fruit of poisonous tree & should be excluded from evidence
 - B. prosecutor would respond that the exclusionary rule doesn't apply
 - 1. when police questions prompted by concern for public safety &
 - 2. gun hidden somewhere in store posed obvious public safety concerns & weren't part of the investigatory process
 - C. court should deny motion because facts show that Max was dangerous person who shortly before had a gun & in all probability had secreted the gun somewhere in the store [*see FSM v. Sapusi*, 16 FSM Intrm. 315, 318 (Chk. 2009)]
- IX. (12 points)
- A. since answer is pleading to which no responsive pleading is required, party filing answer can amend answer without leave of court or consent of other parties at any time within 20 days after it is served [FSM Civ. R. 15(a)]
 - 1. David can file amended answer because it has only been six days since he filed (& presumably served) his answer
 - 2. David can (or must) include the affirmative defenses in his answer since affirmative defenses of lack of personal jurisdiction, lack of subject-matter jurisdiction are defenses which must be asserted either before the answer is filed or in the answer [FSM Civ. R. 12(b)]
 - B. lack of personal jurisdiction defense will fail although David doesn't live in FSM because
 - 1. he was validly served
 - 2. the case arises from his operation of a vessel in the FSM's territorial waters [4 F.S.M.C. 204(1)(c)]
 - 3. FSM court has personal jurisdiction over David only for limited purpose of this case because alleged tort occurred in FSM
 - C. lack of subject-matter jurisdiction defense will fail because
 - 1. if maritime tort, FSM Supreme Court has exclusive jurisdiction over admiralty & maritime case [FSM Const. art. XI, § 6(a)]
 - 2. if not maritime tort, FSM Supreme Court would still have subject-matter jurisdiction under diversity of citizenship (assuming

- Poll is an FSM citizen) [FSM Const. art. XI, § 6(b)]
- D. statute of limitations defense might succeed because
1. since personal injury damages not sought [2-year limitations period – 6 F.S.M.C. 803(4)] the 6-year limitations period applies [6 F.S.M.C. 805] & suit was filed a little over 6 years after the kayaking incident
 2. BUT does 6 F.S.M.C. 808 which tolls (suspends) the running of the statute of limitations while a defendant is outside of the FSM apply to case when jurisdiction over the defendant is asserted through the long-arm statute [4 F.S.M.C. 204]?
 3. if it does, statute of limitations defense will fail
- X. (6 points)
- A. (3 points) motion to remand denied
1. diversity jurisdiction exists [FSM Const. art. XI, § 6(b)] because
 2. defendant corporation is considered foreign citizen since it has some foreign shareholders [Luzama v. Ponape Enterprises Co., 7 FSM Intrm. 40, 44 (App. 1995)] &
 3. plaintiff is Pohnpei citizen
- B. (3 points) motion to remand denied
1. case involves a maritime contract – a contract to ship goods over the ocean [*see* 19 F.S.M.C. 1001(1)]
 2. case is thus a maritime case
 3. FSM Supreme Court has exclusive jurisdiction over admiralty & maritime case [FSM Const. art. XI, § 6(a); 19 F.S.M.C. 1004(2)]; remand to Kosrae State Court thus impossible since that court has no jurisdiction [*see Kelly v. Lee*, 11 FSM Intrm. 116, 117 (Chk. 2002)]
- C. (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 Intrm. 1, 2 (Truk 1989)}