

Checklist of Points to be Covered for Complete Answers

FSM Bar Examination, March 2, 2017

[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)

- A. (3 points) Jim'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 Jim'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)]; Jim's is oral
- B. (7 points)
1. Jim 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. Jim approved (although reluctantly) of his secretary's actions; he ratified her actions
 2. it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation [FSM MRPC R. 8.4(c)]
 - a. deceit was used to gain access to Dr. Shepard's girlfriend's facebook page
 - b. unlikely the adulterous photos would've been found if it hadn't been for Jim's secretary's phony facebook page

EVIDENCE

(20 points)

II. (20 points)

- A. (4 points)
1. evidence is relevant
 2. evidence is hearsay because
 - a. out-of-court statement that is being offered to prove the truth of the matter asserted therein [FSM Evid. R. 801(c)]
 - b. general rule is hearsay inadmissible unless falls within one of the exceptions to the hearsay rule [FSM Evid. R. 802]
 - c. hospital records generally qualify as admissible under business records exception [FSM Evid. R. 803(6)] as records of regularly conducted activity and it was the hospital's regular practice to keep such records; but statements within report are hearsay within hearsay

- d. hearsay included within hearsay is admissible under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule [FSM Evid. R. 805]
 - 3. Sal's statement made in response to Dr. Caldera's question
 - a. elicited for the purpose of treating Sal therefore admissible (at least in part) as statement made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof or insofar as reasonably pertinent to diagnosis or treatment [FSM Evid. R. 803(4)] but part of statement that pickup was "new" and "green" not directly related to diagnosis
 - b. admissible because Sal's statements to Dr. Caldera appear to fall within the dying declaration exception [FSM Evid. R. 804(b)(2)]
 - (1) they were a statement made by a declarant (Sal) while apparently believing that his death was imminent ("I'm fading fast"), about the cause or circumstances of what he believed to be his impending death – "saw a man coming at me in a brand new green pickup"
 - (2) Sal is unavailable – he's dead
 - c. possibly "excited utterance" exception because was statement relating to a startling event made while Sal was still under the stress of excitement caused by the event [FSM Evid. R. 803(2)]
- B. (3 points) David's reckless driving convictions are inadmissible because
 - 1. evidence of other crimes, wrongs, or acts is not admissible to prove a person's character in order to show that he acted in conformity therewith (but may 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. for the purpose of attacking a witness's credibility (if David testifies), evidence that he has been convicted of a crime will be admitted if established by public record during cross-examination [FSM Evid. R. 609(a)]
 - a. but only if the crime was punishable by imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or involved dishonesty or false statement, regardless of the punishment
 - b. reckless driving is a misdemeanor & therefore not punishable by imprisonment in excess of one year
- C. (3 points) David's letter & enclosed check for medical expenses is not admissible because evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury [FSM Evid. R. 409]

- D. (4 points) police report containing Emiliana's statement about what David said to her
 - 1. police report is admissible in civil cases under exception to hearsay rule [FSM Evid. R. 803(8)] (inadmissible in a criminal case BUT this is a civil case NOT a criminal case)
 - 2. David's statement within police report is an out-of-court statement offered for the truth of the matter asserted therein but is defined as non-hearsay because it is an admission of a party-opponent [FSM Evid. R. 801(d)(2)]
 - 3. BUT court follows common law principles as they may be interpreted by FSM courts in the light of reason and experience, including local custom and tradition under common law so might be excluded under a spousal confidential communication privilege [see FSM Evid. R. 501]
- E. (3 points) David may be able to assert a spousal communication privilege to prevent his wife from testifying against him, but arguably privilege might not apply since Emiliana has already breached the confidentiality by relating it to a third person, the police officer
- III. (3 points) Donald's objection will be on ground that evidence of prior acts not admissible to show that person acted in conformity with, but prosecutor should argue not seeking admission for that purpose, instead seeks admission to show opportunity, preparation, or plan [FSM Evid. R. 404(b)] since there is only one David Ortiz baseball bat on island it was unlikely someone else had opportunity to use it for a similar act; judge likely to rule in favor of admission

GENERAL

(70 points)

- IV. (10 points)
 - A. motion to suppress statement
 - 1. confession must be voluntary [*e.g.*, FSM v. Ezra, 19 FSM R. 497, 510 (Pon. 2014); FSM v. Phillip, 17 FSM R. 413, 425 (Pon. 2011); FSM v. Suzuki, 17 FSM R. 70, 74-75 (Chk. 2010); FSM v. Sam, 14 FSM R. 328, 335 (Chk. 2006)]
 - 2. was confession voluntary when it was induced through an implied offer of immunity from prosecution (Officer Otto's statement: "You did us a favor. I'm not interested in prosecuting you for murder.")
 - B. motion to dismiss information
 - 1. since information's probable cause was based (at least in part) on Craven's (allegedly) unlawfully obtained confession, Craven should move to dismiss the information
 - 2. if motion granted, prosecution might then file an new (superseding) information if it can show probable cause
 - C. motion to change venue or to recuse judge
 - 1. Craven might move to change venue of prosecution because of all the publicity where he is might have influenced the judge
 - 2. or to recuse judge to bring in judge from another state who has not been exposed to publicity
- V. (12 points)

- A. (9 points) motion to dismiss
 1. jurisdiction
 - a. most crimes are state jurisdiction crimes and prosecution must be brought in state court because FSM Supreme Court does not have no major crimes jurisdiction anymore; but
 - b. Congress has constitutional power to regulate banking and commercial paper [FSM Const. art. IX, § 2(g)] (argue whether this is proper exercise of Congressional power);
 - (1) if statute is proper exercise of Congress's power to regulate banking, Congress can make bouncing checks a crime, and
 - (2) put jurisdiction in FSM Supreme Court
 2. venue – in criminal case, venue is proper only in state where crime committed [11 F.S.M.C.
 - a. gov't might argue crime was committed in Pohnpei because that's where check was presented
 - b. most likely crime was committed in Kosrae where check was written, presented, and passed
 - c. wrong venue doesn't necessarily mean dismissal, court could transfer case to proper venue instead
 - B. (3 points) Hornblower's other defenses – statute requires that act be intentional and writer must know that there are insufficient funds in account; can defend by arguing unaware that only \$95.76 in account (maybe expected deposit wasn't made, or deposited funds hadn't cleared, or perhaps even expected to deposit sufficient funds into account before check presented for payment) and thus was not written "knowing" check would bounce
- VI. (8 points)
- A. (4 points) leave to amend may be granted
 1. leave to amend must be freely granted when justice so requires [FSM Civ. R. 15(a)]
 2. but statute of limitations on claim is two years [6 F.S.M.C. 803(4)] & it's now three years later
 3. claim asserted against Buildco in the amended pleading arose out of the same transaction or occurrence set forth in the original pleading
 4. Buildco has received such notice of the institution of the action that Buildco will not be prejudiced in maintaining his defense on the merits because
 - a. Buildco's truck and employee were involved in the accident & so was necessarily aware of the accident
 - b. & Buildco's insurer hired the attorney representing Draco
 5. Buildco probably knew or should have known that, but for a mistake concerning the identity of the truck's owners, the action would also have been brought against them
 6. the amendment therefore relates back to the date of the original pleading [FSM Civ. R. 15(c)]
 7. BUT does justice so require amendment in this case when Phoebe was just "too busy" to investigate who was the truck's real owner?
 - B. (4 points) summary judgment will probably be denied

1. court, viewing the facts and inferences drawn therefrom in the light most favorable to the nonmoving party, must grant summary judgment only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue about any material fact and that the moving party is entitled to a judgment as a matter of law [George v. Palsis, 19 FSM R. 558, 566 (Kos. 2014)]
2. employer has duty to exercise due care in the hiring and supervision of its employees, thus whether Buildco knew of Draco's license suspensions is a question of fact
3. Buildco's personnel director's affidavit that he was unaware of Draco's previous three license suspensions for driving offenses contradicts Draco's deposition testimony that he thinks he might have mentioned the license suspensions to Buildco's personnel director right after he interviewed for the Buildco job;
 - a. whether Buildco's personnel director was informed of Draco's license suspensions is a material fact in the negligent hiring cause of action
 - b. although Draco's testimony is somewhat vague, it may be enough to show a dispute of material fact thus barring summary judgment

VII. (10 points)

A. (7 points) Delta's defenses

1. Alpha materially breached the contract thereby excusing Delta from an obligation to pay because any non-performance when there is a duty to perform is a breach
 - a. Alpha hired unqualified subcontractor & when Alpha realized that it should've hired another subcontractor & taken what steps possible to complete survey
 - b. Alpha didn't complete survey
 - c. Alpha failed to simultaneously provide data to Delta when it provided data to Beta and also used the data itself
2. failure of consideration
 - a. Delta agreed to pay \$5 million for the simultaneous delivery of data from a completed survey & implicitly to receive data about its leased sector
 - b. survey wasn't finished; Delta didn't receive any data (both Alpha & Beta received some data for their sectors; Delta received none for its sector)
 - c. Delta didn't receive the benefit of its bargain
3. failure to satisfy condition precedent by Alpha materially breached the contract thereby excusing Delta from an obligation to pay
 - a. Delta will argue that completion of survey and delivery of data was a condition precedent that had to be satisfied before its duty to pay ripened
 - b. Delta may also argue that Alpha's belated offer to cure was no real cure because the value was in receiving the data simultaneously
 - c. but conditions precedent to contractual obligations are not favored in the law and courts will not construe terms to be

such unless required to do so by plain and unambiguous language or by necessary implication [Nanpei v. Kihara, 7 FSM R. 319, 324 (App. 1995)]

4. failure to mitigate damages
 - a. a plaintiff has a duty to mitigate his damages – plaintiff must take reasonable steps to minimize those damages [Individual Assurance Co. v. Iriarte, 16 FSM R. 423, 445 (Pon. 2009)]
 - b. Alpha could've avoided losses by
 - (1) letting Cousteau Corp. to continue to survey to Oct. 1 so that more of survey (& maybe even some of Delta's sector) would be surveyed
 - (2) or if Cousteau Corp. wasn't competent to complete survey, by hiring another surveyor
 5. breach of covenant of good faith (maybe, but questionable whether the covenant is recognized in other than insurance contracts [*see* FSM v. GMP Hawaii, Inc., 16 FSM R. 601, 605 (Pon. 2009)])
- B. (3 points) arbitration clause
1. FSM Supreme Court will specifically enforce the parties' contract to arbitrate. [E.M. Chen & Assocs. (FSM), Inc. v. Pohnpei Port Auth., 10 FSM R. 400, 409 (Pon. 2001)]
 2. clause "Any disputes between the parties regarding the formation, execution, or interpretation of this Agreement shall be submitted to binding arbitration." would seem to cover all claims arising from the exploration contract, even including torts
 3. court will therefore likely compel arbitration (although Delta might argue there was no contract because of failure of consideration)

VIII. (9 points)

- A. (3 points) higher state sales tax on betelnut from outside state is unconstitutional because
1. state & local gov'ts are barred from imposing taxes that restrict interstate commerce [FSM Const. art. VIII, § 3] (if betelnut is from another FSM state)
 2. operates as an import tax (f betelnut from another country) & Congress has sole authority to levy import taxes [FSM Const. art. IX, § 2(d)]
 3. would be okay if state levied same sales tax on all betelnut sales regardless of where grown, but can't single out out-of-state betelnut for higher tax
- B. (6 points)
1. (3 points) motion to remand denied
 - a. "shipping articles" is a maritime contract [*see, 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)]
 - b. FSM Supreme Court has exclusive jurisdiction over admiralty and maritime cases [FSM Const. art. XI, § 6(a)]
 2. (3 points) motion to remand granted
 - a. FSM Supreme court has no jurisdiction over case
 - b. whether case is one arising under national law (a case over which FSM court would have jurisdiction) is determined

from the complaint's allegations not from the defenses raised [*e.g.*, Enlet v. Bruton, 10 FSM R. 36, 40 (Chk. 2001)]

- c. *Chuuk Chronicle's* defense may be a national law defense (state court is competent to adjudicate national law defense) but Anne's causes of action are only state law claims so no FSM Supreme Court trial division jurisdiction

IX. (15 points)

A. (11 points)

1. Cook's tort claims

a. negligence against Henson

- (1) duty of reasonable care
- (2) breach of that duty by failure to keep reasonable lookout, failure to maintain brakes
- (3) causation – but for test – but for Henson's failure to keep lookout (but Henson didn't see Cook to last second), or failure to maintain brakes no injury to Cook
- (4) damages – tortfeasor takes victim as he finds him, not necessary to foresee extent of harm – that Cook has rare ailment that increased extent of injuries & damages does not absolve Henson of liability for those damages
- (5) defense – comparative negligence (contributory negligence contrary to Micronesian custom & therefore not available as defense [*see, e.g.*, Alfons v. Edwin, 5 FSM R. 238, 242-43 (Pon. 1991)]) for reduction of damages by amount attributable to Ellsworth's & Cook's negligence (if any); supervening cause (if any)

b. against Peary's Pizza

- (1) negligent hiring, training or supervision of Henson (manager DeLong knew of Henson's bad temper)
- (2) respondeat superior – employer liable for employee's negligence committed within scope of employment

c. against Ellsworth

- (1) negligence for parking so as to block crosswalk forcing Cook to walk outside of crosswalk where Henson couldn't see him until last second
- (2) but Cook's comparative negligence for walking outside crosswalk?

d. joint & several liability of Henson, Peary's Pizza, & Ellsworth

2. Frances's tort claims

- a. assuming that Cook has valid tort claim against Henson, Frances's claims against Henson
- b. loss of consortium, derivative of Cook's claim, reduced by amount of Cook's comparative negligence, if any [Epiti v. Chuuk, 5 FSM R. 162, 170 (Chk. S. Ct. Tr. 1991)]

- c. negligent infliction of emotional distress – Frances is close relative (wife), in zone of danger, her emotional upset foreseeable
 - B. (4 points) Peary's Pizza's claims against Henson
 - 1. contribution (if held jointly & severally liable) [*see Senda v. Semes*, 8 FSM R. 484, 495 (Pon. 1998)] shifts some of burden to Henson
 - 2. indemnity (seeks repayment from Henson for all claims except negligent hiring)
- X. (6 points)
 - A. (2 points) deny it; too late, deadline passed without motion for enlargement, not court's responsibility to assist Flash in his fee arrangements by delaying its settings
 - B. (2 points) none; the appellate court's decision will be based upon the record below and the briefs and arguments before it; appellant does not win by default if appellee fails to oppose
 - C. (2 points) probably not; an appellee's failure to file brief is usually considered waiver of right to oral argument, but the court may allow it & if it does it should permit Ming the appellant to file a reply because the appellant should have the last word