

Checklist of Points to be Covered for Complete Answers
FSM Bar Examination, March 4, 2004

[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 these numbers so long as the legal principles are cited and discussed.]

EVIDENCE

(20 points)

I. (20 points)

- A. (4 points) probable hearsay objection overruled because is admission of party opponent which is defined as nonhearsay [FSM Evid. R. 801(d)(2)], Deimos's statement is an admission and is made by a party (Ceres) since Deimos was Ceres's agent or servant & statement concerned matter within scope of his employment [FSM Evid. R. 802(d)(2)(D)]
- B. (4 points)
 - 1. an expert may testify if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue [FSM Evid. R. 702]; in order for Vesta to be allowed to testify as an expert witness she must be qualified as an expert by knowledge, skill, experience, training, or education, [id.] so further foundation must be laid before Vesta can testify
 - 2. Vesta's testimony must be based on facts perceived or made known to the expert [FSM Evid. R. 703]; because Vesta examined the tire skid marks, she may base her opinion on what she saw
 - 3. expert should hold opinion to a reasonable certainty; Vesta's opinion that Deimos *might* have been driving faster than the speed limit, while admissible, may not be sufficient evidence on that point
- C. (4 points)
 - 1. objection will be on ground of hearsay — define hearsay as out of court statement that is being offered to prove the truth of the matter asserted therein [FSM Evid. R. 801(c)]; general rule hearsay inadmissible unless falls within one of the exceptions to the hearsay rule [FSM Evid. R. 802]
 - 2. best evidence rule [FSM Evid. R. 1002] requires an original or a duplicate [FSM Evid. R. 1003] of a writing be used to prove its contents
 - 3. other evidence of the contents of a writing, recording, or photographs is admissible if 1) originals lost or destroyed unless the proponent lost or destroyed them in bad faith) or 2) original not obtainable by any available judicial process or procedure; or 3) original in opponent's possession [FSM Evid. R. 1004(1)-(3)]
 - 4. but driver's license is a public record & public records may be proved by copy, certified as correct in accordance or testified to be correct by a witness who has compared it with the original & only if a copy cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given; not likely Phobos, by exercise of reasonable diligence, couldn't have obtained a certified copy from the state
- D. (3 points)
 - 1. Adrastea's prior (inconsistent) statement is hearsay & inadmissible to prove truth of the matter asserted, unless it was given under oath [FSM Evid. R. 801(d)(1)(A)]

2. may be used for impeachment purposes; but if it is it is extrinsic evidence of a prior inconsistent statement & not admissible unless Adrastea is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate her thereon, or the interests of justice otherwise require [FSM Evid. R. 613(b)]
- E. (3 points)
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], but "often" probably not regular enough to qualify as habit
 2. when conduct short of being habit; is generally considered character evidence, generally inadmissible in order to show that he acted in conformity therewith [FSM Evid. R. 404(b)]
- F. (2 points)
1. not hearsay because is admission of party-opponent [FSM Evid. R. 801(d)(2)]
 2. BUT statements made in compromise or settlement negotiations are generally inadmissible [FSM Evid. R.408]

ETHICS (10 points)

- II. (5 points)
- A. a lawyer can reveal information relating to representation of a client unless the client consents after consultation, (except disclosures that are impliedly authorized in order to carry out the representation) [FSM MRPC R. 1.6]
 - B. but a lawyer may reveal such information to the extent he reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm [FSM MRPC R. 1.6(b)(1)]; however no facts apparent to indicate the these circumstances exist; therefore Portia cannot tell police of Oberon's whereabouts
- III. (5 points)
- A. since Ladrone must not represent a client in pending litigation and simultaneously oppose that client in different litigation [FSM MRPC R. 1.7(a); cmt.], he correctly declined Patria as a client
 - B. Ladrone has duty of loyalty to current client (Dr. Doolittle); otherwise might have been ethically bound to caution Patria about looming statute of limitations deadline because owes a duty to prospective client; Ladrone did tell Patria to consult another lawyer & if she'd taken his advice promptly presumably other lawyer would've told her of statute of limitations

GENERAL (70 points)

- IV. (20 points)
- A. Krypton's appeal in criminal case
 1. Krypton's objection at trial to admission of marijuana properly preserved issue for appellate review; appellate court will determine improperly admitted
 2. where person has reasonable expectation of privacy in place to be searched, gov't needs search warrant

or proceed under recognized exception to warrant requirement; otherwise exclusionary rule applies & evidence inadmissible

a. was gov't involved in search? discuss

- (1) board of trustees who searched Krypton's office included a local police officer;
 - (2) although also a trustee, court may consider police officer "on duty" & thus a state actor (are or aren't police always "on duty"?)
- b. did Krypton have reasonable expectation of privacy in his desk drawers? argue
- (1) usually no reasonable expectation in person's place of employment
 - (2) but probably reasonable expectation of privacy in personal areas, such as desk drawers, etc.
 - (3) therefore, court would likely hold reasonable expectation of privacy covered desk drawers
- c. would consent exception to search warrant apply?
- (1) employer has general authority to consent to a search of its workplace
 - (2) employer can't consent to search of personal areas where reasonable expectation of privacy applies (assuming Krypton's employment contract doesn't authorize it)
- d. termination from employment shouldn't immediately deprive person of right to be free from unlawful search; if Krypton hadn't cleaned out his desk as soon as notified of his termination he could've been considered to have abandoned his property; but that's not the case here; trustees searched his desk immediately after firing him
- e. warrant not obtained & no exception applies; search violated Krypton's right to be free from unreasonable searches; court should've suppressed marijuana [*see, e.g., FSM v. Inek*, 10 FSM Intrm. 263, 265 (Chk. 2001)(when no search warrant issued or sought and the defendant moves to suppress the evidence seized, although it is the defendant's suppression motion, it is the gov't's burden to prove that the searches were reasonable and therefore lawful under section 5 of article IV of the FSM Constitution; evidence obtained pursuant to an unlawful search may be suppressed)]

B. Redemption Church's appeal in Krypton's civil case

1. may appeal from interlocutory order entering injunction without waiting for final judgment in case [FSM App. R. 4(a)(1)(B)]
2. enforcement of contract doesn't violate constitutional prohibition regarding freedom of or establishment of religion [FSM Const. art. IV, § 2], enforcement of contract church freely made doesn't constitute interference in church affairs
3. no constitutional right to due process involved; due process right for continued expectation in employment only applies against the gov't [The and those acting under them, established or recognized by the Constitution. *Semwen v. Seaward Holdings, Micronesia*, 7 FSM Intrm. 111, 113 (Chk. 1995) (constitutional due process guarantee only protects persons from the governments; plaintiff's firing by a private employer does not state a cause of action for unconstitutional deprivation of due process because no governmental entity or official is a defendant)]
4. if church defends on ground that Krypton's use of drugs constitutes a breach of his employment contract on the ground that every contract carries an implied term that employee will render reasonably satisfactory service for length of contract, it will claim that drug use was incompatible with this implied

term

- a. but drug use wasn't a factor in church's decision to fire Krypton, which was solely based on idea that Xenon was better candidate
 - b. thus even if drug use were a material contract term, contract was breached before drug use known
5. if church defends on ground that Krypton's sending letter to entire congregation was breach of contract, unlikely to prevail
- a. church allegedly breached contract first by not promoting Krypton
 - b. Krypton's breach not severe, although may have caused disruption in the congregation
 - c. but sending letter was lawful activity, so not likely to excuse trustees' performance
6. Krypton's being made head minister by trial court's trial court ordering specific performance of contract as the damage remedy; appellate court will reverse on appeal
- a. specific performance not ordered for contracts for personal services because
 - (1) could be considered violation of constitutional ban on involuntary servitude
 - (2) too difficult for court to supervise such specific performance (how can court judge if job performance acceptable, etc.)
 - b. money damages may be awarded for breach of personal services contract, but not specific performance

V. (16 points)

A. (4 points)

1. nat'l gov't ought to be able to determine what it spends its own money on under its power to appropriate money [FSM Const. art. IX, § 3(a)]
 2. nat'l gov't can probably also restrict any funds it appropriates to a state or municipality from spending on
 3. but can this include funds that the nat'l gov't is constitutionally required to pass on to the states — ½ of all nat'l gov't taxes collected in that state [FSM Const. art. XI, § 5]?
- B. (3 points) if the FSM has power to do this it'll be through its power to regulate foreign commerce [FSM Const. art. IX, § 2(g)], but can it single out just four (the states) potential buyers of Rurutanian goods to prohibit? does this violate equal protection [FSM Const. art. IV, § 4], but equal protection concerns "sex, race, ancestry, national origin, language, or social status" which would seem not to apply, or does it interfere with the states' concurrent power to appropriate money [FSM Const. art. IX, § 3(a)] and the essential nature of federalism & shared sovereignty? discuss
- C. (3 points) constitutional exercise of power to regulate foreign commerce [FSM Const. art. IX, § 2(g)] can probably ban all imports from a country (unless a treaty prohibits) and under the government's power to conduct foreign affairs [FSM Const. art. X, § 2(b)]
- D. (3 points) may be constitutional exercise of state's concurrent power to appropriate its own public funds [FSM Const. art. IX, § 3(a)], can spend its money on what it wants (but probably can't tell private parties it contracts with not to buy Rurutanian goods) *unless* it is considered an attempt to conduct foreign policy, a power expressly delegated to nat'l gov't [FSM Const. art. X, § 2(b)]
- E. (3 points) probably unconstitutional since it interferes with nat'l gov't's power to regulate foreign commerce [FSM Const. art. IX, § 2(g)] and to conduct foreign affairs [FSM Const. art. X, § 2(b)]; powers expressly delegated

to the nat'l gov't [FSM Const. art. VIII, § 1]

VI. (21 points)

A. (6 points) Pallas's possible causes of action against the town council or town gov't

1. breach of contract — breach of the second employment contract, or alternatively if that contract was unenforceable
2. quantum meruit — the value of the work performed from January, if he wasn't paid for it
3. negligence — in losing Pallas's possessions while moving his desk
4. conversion — of Pallas's possessions from his desk
5. civil rights — continued expectation of gov't employment can be property protected under Constitution from taking without due process of law
6. trespass to chattels — intentional use of or interference with personal property which is in another's possession without justification; includes the unlawful taking away of another's personal property [Talley v. Lelu Town Council, 10 FSM Intrm. 226, 234 (Kos. S. Ct. Tr. 2001)]
7. infliction of emotional distress

B. (4 points) town's defenses

1. illegal contract — can't enforce illegal contract, that is one that was never went into force because wasn't ratified by town council
2. no civil rights claim because Pallas had no reasonable expectation of continued employment; old contract expired, new one wasn't in effect
3. Pallas should've removed or not left his property in desk at town hall once first contract expired

C. (11 points)

1. contract claim will be dismissed; second contract not in effect because not ratified by Town Council; therefore no contract to enforce (or illegal contract & unenforceable)
2. Pallas may be able to recover in quantum meruit for benefit conferred on town from January 2003 through March for the work he did at that time [*but see Ponape Constr. Co. v. Pohnpei*, 6 FSM Intrm. 114, 125 (Pon. 1993) (illegal contract not enforceable & no recovery in either expectation damages or quantum meruit may be had)]
3. town may be negligent in allowing too many keys and not controlling access to municipal bldg. when it created foreseeable risk that unauthorized persons would have access or move or remove property; Pallas can recover if can show town or its employees, created a condition where it was reasonably foreseeable risk of the kind of injury which afflicted the plaintiff, and that the injury proximately caused by the condition [Talley v. Lelu Town Council, 10 FSM Intrm. 226, 236 (Kos. S. Ct. Tr. 2001)]
4. since action for conversion requires proof of 1) plaintiff's ownership and right to possession of the property, 2) defendant's wrongful or unauthorized action of dominion over the plaintiff's property inconsistent with or hostile to the owner's right, and 3) damages & since Pallas unable to prove that defendant town was one who converted property, Pallas may be unable to recover on this claim [Talley v. Lelu Town Council, 10 FSM Intrm. 226, 235-36 (Kos. S. Ct. Tr. 2001)]
5. civil rights claim of property right in expectation of continued employment; Pallas was only contract employee & had no expectation beyond length of contract; contract expired & Pallas had no right to expectation rising to property right that it would be renewed; no entitlement to renewal, no entitlement to hearing before ending contract

6. Pallas may not prevail on trespass to chattels claim, same problem as for conversion above; proof that defendant caused or committed the trespass
7. damages on negligence claim — replacement cost or monetary value of missing items; no punitive damages for ordinary negligence
8. no emotional distress damages since no physical manifestations [*see, e.g., Eram v. Masaichy*, 7 FSM Intrm. 223, 227 (Chk. S. Ct. Tr. 1995)]

VII. (5 points) motion to dismiss will be denied

- A. FSM Supreme Court has (concurrent) jurisdiction because of diversity of citizenship (dispute is between state and citizen of another state) under FSM Constitution [FSM Const. art. XI, § 6(b)]
- B. since FSM Constitution is supreme law of the land [FSM Const. art. II] a state law cannot divest FSM Supreme Court of jurisdiction granted it by the Constitution [*Gimnang v. Yap*, 5 FSM Intrm. 13, 23 (App. 1991)]

VIII. (8 points)

- A. pendent jurisdiction — when a case in the national court's jurisdiction also has state or local law claims in it, the national court may exercise pendent jurisdiction over state or local law claims if they derive from the same nucleus of operative fact and are such that the plaintiff would ordinarily be expected to try them all in one judicial proceeding. [*Ponape Chamber of Commerce v. Nett*, 1 FSM Intrm. 389, 396 (Pon. 1984)]
- B. temporary restraining order — court-granted injunctive relief that does not extend more than 14 days (can be renewed once for 14 days) to maintain the status quo or prevent some act until a more formal and orderly hearing on a preliminary injunction can be held [*see* FSM Civ. R. 65(b)] can be granted *ex parte* and without notice under certain circumstances; movant must show irreparable harm if not granted
- C. pro hac vice — admission of counsel who has not been admitted to practice before the court to appear for a particular case only [*see* FSM Adm. R. IV] can be an attorney admitted in another jurisdiction, a trial counselor appearing without attorney supervision, or in some cases a law student under attorney supervision
- D. custom and tradition — a source of law; based on current & past practice; all judicial decisions must be consistent with the Constitution and custom and tradition