

Checklist of Points to be Covered for Complete Answers

FSM Bar Examination, March 5, 2015

[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. (3 points)
1. records must be established keeping track of client's funds; there must be a ledger that shows every deposit and every withdrawal from the account because lawyer must keep "complete records" of client funds [FSM MRPC R. 1.15(a)]
 2. you can put client's funds in Megabank, but not in your account; must open separate savings account
 - a. commingling lawyer's and client's funds is not allowed [FSM MRPC R. 1.15(a)]
 - b. you can deposit client funds in a Guam bank (Megabank) account since the client has agreed to the deposit in an out-of-state bank; otherwise client funds must be kept in bank in the same state [FSM MRPC R. 1.15(a)]
- B. (3 points) you can't just transfer the amount of your monthly bill from to client trust account to your own account; you must keep that money separate until there has been an accounting an severance of interest [FSM MRPC R. 1.15(c)]
1. should be an agreement between you & client about whether client's affirmative assent to bill is required before transfer or whether client's silence after a stated time period is considered assent
 2. without client agreement, sufficient time must pass to allow client to object to bill; or client agreement is needed to pay the bill
- C. (4 points) you must
1. pay the client without delay because
 - a. lawyer must promptly deliver to the client the funds – the remainder of \$6,325 – that the client is entitled to receive [FSM MRPC R. 1.15(b)] & upon the client's request must promptly render a full accounting regarding such property [FSM MRPC R. 1.15(b)]
 - b. you are responsible for another lawyer's violation of the rules of professional conduct if the lawyer is a partner law firm [FSM MRPC R. 5.1(c)(2)]
 2. even if the client suffers no loss (you pay him the \$6,325), you must file disciplinary report against your law partner because
 - a. client funds cannot be used for a lawyer's own use since lawyer must hold clients' property that is in lawyer's possession in connection with a representation separate from the lawyer's own property [FSM MRPC R. 1.15(a)]
 - b. you know that your partner violated the ethical rules
 - c. lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty,

trustworthiness or fitness as a lawyer in other respects, must inform the appropriate professional authority [FSM MRPC R. 8.3(a)]

EVIDENCE
(20 points)

- II. (11 points)
- A. (4 points) Warren's testimony about Vann's character as an aggressor
1. generally evidence of a persons's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion [FSM Evid. R. 404(a)]
 2. BUT evidence of of a pertinent trait of character of the victim of the crime offered by an accused is admissible [FSM Evid. R. 404(a)(2)]
 3. so Diggs can offer evidence of Van's character to support his claim that Vann was the first aggressor and therefore Diggs acted in self-defense
 4. Diggs can elicit character evidence from Warren in the form of an opinion or testimony about Vann's reputation [FSM Evid. R. 405(a)]
 5. Diggs cannot elicit testimony form Warren about the fight he saw Warren pick because evidence of other specific crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith [FSM Evid. R. 404(b)]
- B. (4 points) defense may call Charlie to testify that Diggs has a peaceful character
1. evidence is relevant to rebut prosecution's claim that Diggs was the initial aggressor
 2. proper method to prove character is through reputation or opinion evidence [FSM Evid. R. 405(a); *see above*]
 3. on cross-examination, the prosecution may explore the specific basis for Charlie's opinion including specific instances of Diggs's conduct [FSM Evid. R. 405(a)]
- C. (3 points) judge should sustain the prosecution's objection
1. Diggs's statement is hearsay
 2. hearsay is out of court statement that is being offered to prove the truth of the matter asserted therein [FSM Evid. R. 801(c)]
 3. general rule: hearsay is inadmissible unless it falls within one of the exceptions to the hearsay rule [FSM Evid. R. 802]
 4. Diggs's out-of-court statement is NOT non-hearsay admission of a party opponent [*see* FSM Evid. R. 801(d)(2)] because it is Diggs, not the prosecution, that is offering it
 5. even if Diggs took the witness stand to testify about what happened at Low Tide bar he would not be allowed to testify about his statement
 6. as hearsay not within any exception to the general rule, it is inadmissible
- III. (4 points) objection overruled
- A. subsequent remedial measures not admissible to prove negligence or

culpable conduct, but admissible when offered for other purpose, such as ownership, control or feasibility, if controverted; therefore since Kasio disputes ownership is admissible for that purpose [FSM Evid. R. 407]

- IV. (5 points)
- B. evidence admitted for purpose of showing ownership
- A. Frank's statement to doctor is hearsay within hearsay
1. 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]
 2. Frank's statements to doctor appear to fall within the dying declaration exception [FSM Evid. R. 804(b)(2)]
 - a. they were a statement made by a declarant (Frank) while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death – Bob had poisoned him because he knew Bob had poisoned Ann & Bob was afraid Frank would talk
 - b. Frank is unavailable – he's dead
 3. might also be hearsay exception as statement made for medical diagnosis [FSM Evid. R. 803(4)] – Frank saying he'd thought he'd been poisoned with arsenic & this is why
- B. Bob's statement that he killed Ann with arsenic
1. appears to be privileged attorney-client communication & thus inadmissible unless it involved the planning of the commission of a crime [see FSM MRPC R. 1.6(b)(1)]
 - a. Bob asked Frank about what he should do
 - b. Bob is only person who can waive the privilege
 - c. BUT Frank helped Bob plan a crime – disposing of the evidence, the poison & Ann's body
 2. but could it be considered admissible as hearsay exception for statement against interest because it would tend to subject Bob to criminal liability [FSM Evid. R. 804(b)(3)]?
 - a. Bob is "unavailable" since he would invoke his right not to testify [FSM Evid. R. 804(a)(1)]
 - b. a statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement [FSM Evid. R. 804(b)(3)]
 - c. Ann's disappearance would be corroborating evidence
 3. might also be considered propensity or modus operandi evidence exception to the prior misconduct bar [FSM Evid. R. 404(b)]
 - a. evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith
 - b. but may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge

GENERAL
(70 points)

- V. (13 points)
- A. (5 points) contract's existence
1. basic contract requirements are: there must be an offer, acceptance, consideration, and definite terms [Livaie v. Weilbacher, 13 FSM R. 139, 143 (App. 2005)]
 2. must be a meeting of the minds when all essential terms are described
 - a. mutual assent (offer & acceptance) apparent from the facts
 - b. consideration = \$250,000 check for fishing boat *Umwes*
 - (1) consideration not yet exchanged on January 1, 2015
 - (2) in which case, mutual exchange of promises might be deemed consideration
 - c. the written note has the price, date of performance, and an adequate description of the object (the boat) sold
 - d. there is no written record of Borax's assent to terms, but oral contracts are enforceable & the parties' intent & Borax's assent are stated in the question
 - e. if there is a statute of frauds in the state where the parties are, the written note is signed by the party to be charged (Azor) and thus passes the test [Pohnpei v. Ponape Constr. Co., 7 FSM R. 613, 620 (App. 1996)]
- B. (4 points) Azor's breach
1. Azor's failure to perform duties in contract (January 1, 2015 delivery of boat) constitutes breach of contract
 - a. when time not of the essence, court will not consider a due date to be a condition indicating forfeiture or material breach [Panuelo v. Pepsi Cola Bottling Co. of Guam, 5 FSM Intrm. 123, 127 (Pon. 1991); *see also* Nanpei v. Kihara, 7 FSM Intrm. 319, 324 (App. 1995)] as long as contract performed within a reasonable time
 - b. BUT although no specific contractual provision required Azor to keep boat in condition it was when he agreed to contract, but
 - c. reasonable terms may be implied when contract is silent; Azor may thus be reasonably required to maintain the boat's seaworthiness & deliver it in the condition it was when they agreed to the sale
 2. Azor's defenses
 - a. impossibility of performance is a defense [*see, e.g.*, FSM Dev. Bank v. Mudong, 10 FSM R. 67, 76 (Pon. 2001)]
 - (1) when *Umwes* was severely damaged performance may have become an impossibility
 - (2) not a defense if result was foreseeable, but question has insufficient facts to determine whether *Umwes*'s sinking was foreseeable
 - b. inability to perform can also excuse performance
 - (1) if Azor not responsible for his inability to perform

- (2) since Azor put his ability to perform at risk by taking the *Umwes* to sea in December, court is unlikely to excuse his performance on this ground

C. (4 points) damages

1. money damages
 - a. reliance damages
 - (1) Borax can argue that spent \$150,000 for fishing equipment & permit in reliance of his contract to buy *Umwes* (Azor was not selling his equipment or permit to Borax, that is clear from contract terms)
 - (2) however, Borax still has equipment and permit & there is no evidence they are unusable or have lost value
 - (3) so Borax unlikely to recover costs in buying equipment & permit
 - b. consequential damages
 - (1) can only be awarded if the loss was such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract as the probable result of the breach of it [FSM Dev. Bank v. Adams, 14 FSM R. 234, 256 (App. 2006)]
 - (2) lost profits unlikely to be recovered – too speculative
 - (a) "new business rule," which applies to any business without a history of profits, it has been recognized that evidence of expected profits from a new business is too speculative, uncertain, and remote to be considered and does not meet the legal standard of reasonable certainty [Phillip v. Marianas Ins. Co., 12 FSM R. 464, 472 (Pon. 2004)]
 - (b) don't know how experienced Borax was at catching fish
2. duty to mitigate damages
 - a. those seeking to recover damages have a duty to mitigate damages [Pohl v. Chuuk Public Utility Corp., 13 FSM R. 550, 556 (Chk. 2005); Panuelo v. Pepsi Cola Bottling Co. of Guam, 5 FSM R. 123, 129 (Pon. 1991)]
 - b. Borax could be required to either
 - (1) try to resell the fishing equipment & permit, recovering any difference between what he paid for them and their current fair market value, or
 - (2) buy comparable boat with any extra paid for new boat awarded as damages
 - c. Borax's duty to mitigate might also extend to
 - (1) requiring him to continue with the *Umwes* purchase, pay the repairs' cost, and pay Azor the purchase price minus the cost of repair, or

- (2) requiring him to continue with the *Umwes* purchase at a reduced price
- (3) but since Borax didn't sign the written contract, it might not be likely that the court would enforce the contract against him, especially if there is a statute of frauds

VI. (12 points)

- A. motion to suppress search warrant
1. search warrant must be based on probable cause [In re FSM Nat'l Police Case No. NP 10-04-03, 12 FSM R. 248, 251 (Pon. 2003)]
 2. search warrant was based on hearsay – Joe's recitation of what Bob had told him
 3. finding of probable cause may be based upon hearsay evidence in whole or in part [FSM v. Wainit, 10 FSM R. 618, 621 (Chk. 2002)]
 4. evidence rules (such as hearsay) do not apply to search warrant proceedings [FSM Evid. R. 1101(d)(3)]
 5. to establish probable cause when it's based on hearsay from an informant, the informant's reliability must be established [*see* FSM v. Santa, 8 FSM R. 266, 269 (Chk. 1998)]
 6. prosecution will argue Bob was reliable informant & Joe's testimony was thus enough to establish probable cause for a search warrant because
 - a. Bob's information was based on Bob's personal observation
 - b. Bob's statements were "statements against interest" thereby making them more reliable
 - c. prosecution may also argue that since shack was abandoned Dee didn't have any expectation of privacy there
 7. court will conclude that search warrant was valid if it finds there was probable cause
- B. motion to suppress based on failure to inform Dee of her rights
1. Dee will argue that her confession was obtained in violation of her rights
 - a. Dee was not informed of her right to remain silent & her right to have an attorney present
 - b. statements made while being interrogated while in custody or arrested and without having been informed of the rights to silence & to an attorney will be suppressed
 - (1) Dee was certainly being interrogated by Officer Ed, but he told her she was free to leave at any time when the questioning started so was Dee arrested?
 - (2) Dee will argue that she was
 - (3) one should be should be considered "arrested" when one's freedom of movement is substantially restricted or controlled by a police officer exercising official authority based upon the officer's suspicion that the detained person may be, or may have been, involved in commission of a crime [FSM v. Louis, 15 FSM Intrm. 348, 352 (Pon. 2007)]

- (4) although Dee might not have been in custody when the questioning started when she asked Ed, "Are you going to take me to jail now? Or arrest me?" & Ed refused to answer but said he would have to ask, she would have felt that she was not free to leave & therefore was under arrest and the interrogation became custodial
 - (5) therefore the court should suppress everything she said after that point
2. Dee will also argue that the discovery of Vern's body should also be suppressed as fruit of the poisonous tree because it was found after she told Ed where it was and that was after she had been "arrested"
- a. prosecution will argue that the discovery Vern's body should not be suppressed because
 - (1) Officer Joe had a valid search warrant
 - (2) Joe would have inevitably lawfully discovered Vern's body through Joe's systematic search of the wooded land; that is Joe would have discovered the body even if Dee had said nothing
 - b. if the search warrant was not suppressed, Vern's body likely will not be suppressed either [*see FSM v. Inek*, 10 FSM R. 263, 266 (Chk. 2001)]

VII. (11 points)

A. (5 points) Jack's claims against Cheapco

1. Negligence

- a. to prove premises liability claim against Cheapco, Jack will have to show it was negligent
- b. elements of negligence [*Kileto v. Chuuk*, 15 FSM Intrm. 16, 17 (Chk. S. Ct. App. 2007)] are
 - (1) the breach of
 - (2) a duty of care on the part of one person to protect another from injury, and
 - (3) that breach
 - (4) is the proximate cause of
 - (5) an injury (damages) to the person to whom the duty is owed
- c. Cheapco's duty of care
 - (1) is to provide a reasonably safe shopping environment for its customers
 - (2) Jack will argue that by stacking heavy items in such a manner that customer could only get product by pulling it out of a stack of merchandise, Cheapco did not act reasonably & thus breached duty
 - (3) Cheapco could've posted sign warning of danger & telling customers to ask the staff for help if needed
- d. causation – but for Cheapco's stacking the bags so high the accident would not have happened because Jack would not have had to tug at the bottom bag
- e. Jack was severely injured so establishing harm is no

- problem
2. intentional interference with prospective civil action by spoliation of evidence [bonus point if mentioned since this tort has never been mentioned in the FSM before]
- B. (3 points) Cheapco's defenses
1. comparative negligence (contributory negligence is not a defense in the FSM as contrary to custom)
 - a. Jack was tugging at the bottom of pile of rice bags that were higher than his head
 - b. reasonable person would have considered it likely that this might cause tower of bags to fall
 2. superseding cause
 - a. Cheapco may argue that Rufus pushing Jack into metal shelving that breaks the chain of causation
 - b. but doesn't seem to break chain since reasonable person could think Cheapco's act of piling bags so high might result in bags falling on customer thus spurring a bystander to try to help customer
 3. assumption of the risk
 - a. a disfavored defense in the FSM [Kileto v. Chuuk, 15 FSM R. 16, 18 (Chk. S. Ct. App. 2007)]
- C. (3 points) Jack's claims against Rufus
1. Jack could bring a negligence claim against Rufus (or alternatively, battery, claiming the pushing out of way was offensive touching)
 2. generally a person has no duty to come to another person's aid if he is in danger [*see* Ruben v. Chuuk, 18 FSM R. 425, 430 (Chk. 2012)]
 3. BUT once a person has started to rescue someone, that person is required to act without due care
 - a. fact pattern does not indicate that there were other options available to Jack to move Rufus out of harm's way
 - b. it was an emergency situation, so emergency circumstances will be considered in determining whether Jack breached a duty of care
 4. Rufus's actions did cause Jack's injury (but for Rufus's act of pushing Jack into shelving Jack would not have suffered the injury he did)
 5. Jack clearly suffered damages since question stated he was severely injured
- VIII. (9 points)
- A. (3 points) removal of cases – FSM Supreme Court General Court Order 1992-2 sets forth the governing procedures for the removal of state court actions to the FSM Supreme Court; removal is effected upon compliance with these procedures; state court takes no further action following removal unless and until a case is remanded; removal petition must be filed within sixty days after the receipt by any party, through service or otherwise, of a copy of an initial or amended pleading, motion, order or other paper from which it may first be ascertained that the case is removable – a case over which the Constitution gives the FSM Supreme Court either concurrent or exclusive jurisdiction

- B. (3 points) ex post facto laws are unconstitutional [FSM Const. art. IV, § 11] an ex post facto law is legislation which does any of the following [Robert v. Mori, 6 FSM R. 394, 400 (App. 1994)]:
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
- C. (3 points) burden of proof – generally, who has the obligation to convince the court that its case is proven;
1. in civil cases the plaintiff has the burden to prove its case, usually by a preponderance of the evidence, but sometimes by clear and convincing evidence
 2. in a criminal case the prosecution has the burden to prove the defendant guilty beyond a reasonable doubt
- IX. (6 points)
- A. (3 points) likely unconstitutional
1. when applied to soap manufactured in other FSM states it would violate the constitutional prohibition against state and local taxes that restrict interstate commerce {FSM Const. art. VIII, § 3}
 2. when applied to soap manufactured outside the FSM it would it would operate as an import tax – a power reserved exclusively to the national government [FSM Const. art. IX, § 2(d)]
- B. (3 points) motion to remand granted
1. FSM Supreme court has no jurisdiction over case
 2. 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 Intrm. 36, 40 (Chk. 2001)]
 3. *Yap Enterprise’s* defense may be a national law defense but Anne’s causes of action are only state law claims so no FSM Supreme Court trial division jurisdiction
- X. (10 points)
- A. (5 points) venue
1. claim is filed in wrong state (venue), should’ve been filed in Yap
 - a. case should be filed in state where defendant lives or has her usual place of business [6 F.S.M.C. 301(a)], that is, in Yap where Dara lives, or
 - b. case about a wrong not connected with a contract can be filed in the state where the cause of action arose [6 F.S.M.C. 301(b)]; in this case, Yap where Fluffy bit Bensis
 2. dismissal
 - a. Dara could’ve raised defense of improper venue when she filed her answer [FSM Civ. R. 12(b)(3)] and moved for dismissal on that ground
 - b. since she didn’t, she waived improper venue defense as a ground for dismissal unless she moves for & is permitted to

- amend her answer to include that defense [FSM Civ. R. 12(h)(1)]
3. transfer of case from Pohnpei to Yap
 - a. if a case is brought in the wrong venue, the court in which it is brought may, on its own motion or otherwise, transfer it to any court in which the case might properly have been brought [6 F.S.M.C. 304(2)]
 - b. even though she has waived the dismissal for improper venue defense, Dara can move to have the case transferred to Yap, which should be successful either because case was brought in wrong venue [6 F.S.M.C. 304(2)] or because the interests of justice would be served thereby [6 F.S.M.C. 304(3)]
- B. (5 points) Dara's bringing Franco into lawsuit
1. any defendant, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action 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)]
 2. Franco might be liable because
 - a. he owns Fluffy
 - b. knows of Fluffy's propensity to bite joggers
 - c. he failed to warn Dara of Fluffy's propensity
 3. filing third-party complaint
 - a. third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint no later than 10 days after serving the original answer [FSM Civ. R. 14(a)]
 - b. since it's been more than 10 days since Dara filed her answer, she must obtain leave of court
 - c. motion for leave to amend and add third-party complaint not untimely because it's so early in the litigation [*see Lee v. FSM*, 18 FSM R. 106, 108 (Pon. 2011)]
 - d. also, since it's so early in the litigation, joining Franco unlikely to cause delay or unduly complicate the trial issues, or prejudice Bensis; Dara would be prejudiced if she can't add Franco because without Franco it would be difficult for court to allocate fault to Franco & Dara might be forced to bear entire fault even though FSM is a comparative negligence jurisdiction
- XI. (9 points)
- A. President has 20 days to act after decision by Secretary; since decision was submitted to President 25 days ago it is too late to appeal to President to reverse decision on ground that it would adversely affect a compelling national interest relating to foreign affairs or to the general public welfare
 - B. judicial review – Assad can appeal to FSM Supreme Court within 30 days of final decision [decision not final until President acts or his 20 days are up, so A has ample time here to prepare appeal]
 1. FSM Supreme Court trial division
 - a. may conduct trial de novo

- b. may set aside Secretary's decision if it was arbitrary, capricious, abuse of discretion, or otherwise unlawful, or unconstitutional; or in excess of authority, denial of rights, without substantial compliance with legal procedure; or unwarranted by the facts
 - (1) was denial arbitrary, capricious or abuse of discretion or unwarranted by the facts when the two states affected recommended approval, and only one of the hotels and none of the tour companies that might be affected recommended denial
 - (2) was submitting application to only Pohnpei and Kosrae instead of all four states a violation of procedure? and if so, should decision be set aside as without substantial compliance with procedures required by law
- 2. FSM Supreme Court appellate division
 - a. Assad can appeal trial division decision if adverse
 - b. may appeal to directly from Secretary's decision if parties agree on facts, and if issue involved was one of extreme time sensitivity and of national importance that ultimately would have to be decided by the appellate division [unlikely on these facts]
 - c. direct appeal from administrative agency to FSM Supreme Court appellate division very unlikely
 - (1) since the statutory scheme unambiguously requires pursuit of remedies in the trial division first, and the trial division proceeding may resolve the matter. [Moroni v. Secretary of Resources & Dev., 6 FSM R. 137, 139 (App. 1993)]
 - (2) although when an appeal from an administrative agency decision involves an issue of extreme time sensitivity and of national importance that ultimately would have to be decided by the appellate division the court may allow a direct appeal to the appellate division [Robert v. Mori, 6 FSM R. 394, 397 (App. 1994)], that is not the case here
- 3. writ of mandamus
 - a. can be sought from the trial division
 - b. must involve non-discretionary, ministerial duty and no adequate remedy at law present [unlikely when appeal possible]
- 4. injunctive relief [but does irreparable harm exist? not really different, in this case from pursuing appeal]