

Checklist of Points to be Covered for Complete Answers

FSM Bar Examination, August 1, 2013

[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. (5 points) ethical obligations to the insurance co.

1. when rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation [FSM MRPC R. 2.1]
2. here, you should contact insurance company & inform it about meeting with plaintiff's lawyer [see FSM MRPC R. 1.4 cmt. (must promptly inform client of settlement offer)]
 - a. insurance co. could decide to accept settlement offer
 - b. you should also advise insurance co. of other considerations
 - (1) settlement might be invalid on basis of unconscionability or mistake or other reason making it invalid
 - (2) you should ask insurance co. if it really wants to accept a grossly unfair settlement
 - (3) possible bad publicity for insurance co. if court later finds settlement invalid or if grossly unfair settlement becomes known
3. if insurance co. decides to accept settlement
 - a. you may continue represent insurance co. because a lawyer must abide by a client's decision whether to accept an offer of settlement of a matter [FSM MRPC R. 1.2(a)]
 - b. if you feel strongly that settlement is unconscionable, you may ask to withdraw but since a lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities {FSM MRPC R. 1.2(b)}

B. (5 points) plaintiff's counsel's conduct

1. a 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)]
2. plaintiff's lawyer appears to be acting incompetently because competent representation requires the legal knowledge, skill,

- thoroughness and preparation reasonably necessary for the representation [FSM MRPC R. 1.1] and he was not prepared for the representation
3. discuss
 - a. whether plaintiff's lawyer's conduct is clear enough to be a violation of the Model Rules
 - b. whether your duty to your client takes priority over the duty to disclose if the disclosure would be harmful to your client (the ins. co.) if your client decided to accept the settlement offer
 4. you should disclose plaintiff's lawyer's misconduct if your client consents after consultation because a lawyer must not reveal information relating to representation of a client unless the client consents after consultation except for disclosures that are impliedly authorized in order to carry out the representation [FSM MRPC R. 1.6(a)]

EVIDENCE
(20 points)

II. (17 points)

A. (5 points) Fred's testimony

1. defense counsel could try to expose Fred's strange beliefs, but given nature of beliefs it would probably not be allowed because evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced [FSM Evid. R. 610]
2. BUT inquiry into Fred's beliefs is not precluded to show interest or bias; here Fred's public disagreement with defendant Jack could be admitted to show Fred may carry a bias against Jack
3. defense counsel can attack Fred's credibility based on his criminal conviction since
 - a. crime was punishable by more than one year in jail [FSM Evid. R. 609(a)(1)] and
 - b. conviction was within the last ten years [FSM Evid. R. 609(b)]
 - c. but only if court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant [FSM Evid. R. 609(a)(1)]
 - d. & if conviction was not as a juvenile [FSM Evid. R. 609(d)]
 - (1) unless the offense's conviction would be admissible

- to attack an adult's credibility &
- (2) court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence

B. (5 points) police officer's testimony

1. Officer's testimony about what Sally said is hearsay
 - a. hearsay is 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: hearsay is inadmissible unless it falls within one of the exceptions to the hearsay rule [FSM Evid. R. 802]
2. Officer's testimony that relates to Sally's statement that she saw Jack carrying the pig away likely is admissible since it falls within the exception of
 - a. excited utterance since Sally made statement right after the theft and the theft was a startling event and Sally was under the stress of seeing the theft [FSM Evid. R. 803(2)] or
 - b. present sense impression since Sally made statement immediately after the theft [FSM Evid. R. 803(1)]
3. Officer's testimony that Sally said that Jack said he stole the pig probably not admissible
 - a. although Jack's statement was not hearsay since it was the admission of a party-opponent [FSM Evid. R. 801(d)(2)]
 - b. Sally's repetition of Jack's statement is hearsay & unlikely to be considered an excited utterance by Sally or her present sense impression & thus not within any hearsay exception
 - c. Jack has constitutional right to confront witness against him [FSM Const. art. IV, § 6]

C. (4 points) impeaching Thelma's deposition testimony

1. Thelma's post-deposition statements
 - a. extrinsic evidence of a witness's prior inconsistent statement is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require [FSM Evid. R. 613(b)]
 - b. if the interests of justice otherwise require, how can the inconsistent statements be put in evidence?
 - (1) lawyer can't testify [FSM MRPC R. 3.7(a)]
 - (2) lawyer's paralegal may be able to testify since paralegal won't be representing Jack at trial [*see*

FSM MRPC R. 3.7(b)]

2. unless waived in some way nurse could probably assert patient privilege
 - a. relevant evidence may be excluded if protected by privilege
 - b. a person's privilege is governed by the principles of the common law as they may be interpreted by FSM courts in the light of reason and experience, including local custom and tradition [FSM Evid. R. 501]
 - c. Thelma reasonably believed nurse to be mental health care person even though nurse's license expired & not renewed
 3. Thelma's hearing transcripts probably not privileged could probably be used to impeach Thelma's deposition testimony
- D. (3 points) unsigned note
1. note is admissible as admission of party-opponent [FSM Evid. R. 801(d)(2)(A)] ONLY
 2. IF the note can be authenticated or identified (condition precedent to admissibility) [FSM Evid. R. 901(a)]
 3. Jack's card-playing pal 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. card-player's familiarity with Jack's handwriting was based on his or her seeing Jack writing out scores, checks, and IOUs

III. (4 points)

- A. objection
1. conduct or statements made during participation in traditional apology ceremony are inadmissible [FSM Evid. R. 408] &
 2. is hearsay (Dan's wife is not a party; so is not admissible non-hearsay as admission of part-opponent) not within any exception
- B. judge should sustain objection and not allow question
- C. NOTE: examinees shouldn't discuss spousal privilege because wife is not the witness testifying; discussion shows failure to understand the question

GENERAL

(70 points)

- IV. (6 points) Paula has two primary options [FSM Civ. R. 33(a) ("party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory")]
- A. motion to compel answers

1. may move to compel answers by Don, but if court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion for a protective order [FSM Civ. R. 37(a)(2)]
2. may obtain an award of reasonable expenses incurred in making motion, including attorney's fees unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust [FSM Civ. R. 37(a)(4)]

B. motion for sanctions

1. since Don failed to serve answers or objections to interrogatories party serving interrogatories (Paula) may move for sanctions of [FSM Civ. R. 37(d)(2)] either
 - a. an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order [FSM Civ. R. 37(b)(2)(A)] or
 - b. an order refusing to allow the disobedient party to support or oppose designated claims or defense, or prohibiting that party from introducing designated matters in evidence [FSM Civ. R. 37(0)(2)(B)] or
 - c. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed or rendering a judgment by default against the disobedient party [FSM Civ. R. 37(b)(2)(C)]
2. court will require Don or his attorney or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless it finds that the failure was substantially justified or that other circumstances make an award of expenses unjust [FSM Civ. R. 37(d)]

V. (7 points)

- A. (4 points) the statute concerns classifications based on gender and ancestry thus implicating the equal protection clause in FSM Const. art. IV, § 4 ("Equal protection of the laws may not be denied or impaired on account of sex, race, ancestry, national origin, language, or social status.")
1. FSM courts apply strict scrutiny in sex discrimination cases since sex is an enumerated class in the FSM Constitution's equal protection clause [Berman v. College of Micronesia-FSM, 15 FSM Intrm. 582, 591 n.2 (App. 2008)]
 2. the same is true for ancestry from a different island [*see* Buruta v. Walter, 12 FSM Intrm. 289, 295 (Chk. 2004)]

3. statute is thus subject to a strict scrutiny review, under which it will be upheld only if the state can demonstrate that the classification upon which that law is based bears a close rational relationship to some compelling governmental interest [Berman v. College of Micronesia-FSM, 15 FSM Intrm. 582, 591 (App. 2008)]
 4. these classifications are probably unconstitutional; unlikely statute would survive strict scrutiny because it discriminates on the basis of sex and ancestry and don't appear to be closely related to a compelling governmental interest
 - B. (3 points) appears to be an unconstitutional prior restraint on freedom of expression [FSM Const. art. IV, § 1; *see also* FSM v. Moses, 9 FSM Intrm. 139, 146 (Pon. 1999)], prior restraint on speech is generally unconstitutional absent a clear and present danger, which is not apparent here
- VI. (6 points)
- A. (3 points) motion to remand denied
 1. case is about a maritime contract – contract for the shipment of goods on an ocean-going vessel &
 2. is therefore a maritime case & FSM Supreme Court has exclusive jurisdiction over admiralty and maritime cases [FSM Const. art. XI, § 6(a)]
 - B. (3 points) motion to remand granted
 1. no diversity jurisdiction when case is only between foreigners [Geoffrey Hughes (Export) Pty, Ltd. v. America Ducksan Co., 12 FSM Intrm. 413, 415 (Chk. 2004)] &
 2. a case in which a party raises a national law defense is not a case "arising under national law" [David v. San Nicolas, 8 FSM Intrm. 597, 598 (Pon. 1998)]
 3. therefore no FSM Supreme Court jurisdiction
- VII. (11 points)
- A. Jerry's motions
 1. DVD player
 - a. Jerry can't suppress DVD player because it was seized in Tom's house
 - b. Jerry has no reasonable expectation of privacy in someone else's home; nothing in the facts suggests that Jerry also lives with Tom's mother
 2. Jerry's shirt
 - a. even though the shirt belong's to Jerry the likely answer is that Jerry lacks standing to challenge its seizure
 - b. Jerry lacks expectation of privacy in the contents of Tom's bedroom – the area searched

3. Tom's confession
 - a. Jerry lacks standing to suppress Tom's confession
 - b. BUT if it implicates Jerry and the prosecution cannot use it against Jerry unless Tom is called as a witness and testifies so that Jerry may cross-examine Tom about his statements [*see FSM v. Suzuki*, 17 FSM Intrm. 70, 75 & n.1 (Chk. 2010); *Chuuk v. Suzuki*, 16 FSM Intrm. 625, 631 (Chk. S. Ct. Tr. 2009); *FSM v. Sam*, 14 FSM Intrm. 328, 335 (Chk. 2006)]
- B. Tom's motions
 1. DVD player
 - a. Declaration of Rights protections against unreasonable search and seizure can be waived by a valid consent to the search
 - b. Tom's mother had the authority to consent to search of the house
 - c. DVD player was found in the common room an area where both Tom and his mother might exercise control
 - d. Tom's mother's consent to search is thus valid
 2. Jerry's shirt
 - a. questions to discuss
 - (1) does Tom have standing to contest search of his bedroom?
 - (2) does Tom's mother have authority to consent to search of Tom's bedroom?
 - b. Tom's standing
 - (1) Tom has expectation of privacy in his own bedroom
 - (2) although shirt belonged to Jerry, Jerry did not abandon it and Tom has definite privacy interest in his own bedroom
 - (3) Tom has standing
 - c. Tom's mother's consent
 - (1) its her house and
 - (2) she should be considered to have authority over all of her house; if not actual authority, the she had apparent authority & it was reasonable for police to believe her consent was effective unless Tom's room was closed off from rest of house or that Tom's mother was otherwise prohibited from entering his room
 3. Tom's confession
 - a. Tom was given his warnings and his rights after being

- taken into custody
 - b. Tom volunteered statement, was questioned, and confessed
 - c. volunteered statement – "I guess it's all over for me now." Probably admissible
 - d. Tom's re-initiation of conversation about the crime may be deemed a waiver of right to silence, etc.
 - e. BUT waiver must, looking at the totality of the circumstances, be knowingly and voluntarily made [Chuuk v. Suzuki, 16 FSM Intrm. 625, 629-30 (Chk. S. Ct. Tr. 2009)]
 - f. Tom likely but not certainly waived his rights when he confessed, but arguably didn't

VIII. (12 points)

- A. (3 points) motion doesn't have to be transferred to another judge – statute doesn't require it; not constitutionally mandated due process [Skilling v. FSM, 2 FSM Intrm. 209, 213 (App. 1986)]; judge could transfer it in his own discretion
- B. (8 points) motion probably should be denied
 - 1. judge has no personal knowledge of disputed evidentiary facts concerning the proceeding
 - 2. judge hasn't shown any personal bias toward Astatine or Astatine's attorney
 - 3. can judge's impartiality be reasonably questioned?; probably not; argue
 - a. judge not required to recuse self merely because case or issue is similar to case or issue judge decided earlier
 - b. Astatine's motion doesn't accurately state judge's reasoning in Quicksilver case
 - c. statement "presumption that the maximum sentence authorized by statute could be imposed" only states principle, doesn't decide the case before it's heard

IX. (8 points)

- A. material breach of a contract justifies the injured party's halt of performance under the contract [FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 570 (Pon. 2011)]
- B. so if Contractor's use of composite instead of pressure-treated wood was a material breach then Ben may be justified in halting payment but if it isn't, then Ben has breached the contract by not paying Contractor (although Ben might still be subject to a non-contract quantum meruit claim for benefits conferred)
- C. not every departure from a contract's literal terms is sufficient to be deemed a material breach of a contract requirement, thereby allowing the

non-breaching party to cease its performance and seek appropriate remedy; the standard of materiality for the purposes of deciding whether a contract was breached is necessarily imprecise and flexible; a breach is material when it relates to a matter of vital importance, or goes to the essence of the contract [FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 570 (Pon. 2011)]

- D. Contractor substantially performed the contract and the breach doesn't seem material because the Contractor finished completing the dock replacement & deviated from the contract's requirements in only a minor way since the composite material had the same properties and strengths as the required pressure-treated wood
 - E. Ben will be entitled to the difference in value between the service the contract required – pressure-treated wood and the service actually rendered – the composite material, if any
 - F. Contractor will be able to enforce the contract less the decrease in value as a result of the minor breach, if any
- X. (13 points)
- A. (9 points)
 - 1. George
 - a. battery
 - (1) battery is the harmful or offensive contact with a person, resulting from an act intended to cause that contact
 - (2) governmental entity is liable for battery by its police officers when the entity ratified the battery by failing to charge the officers and by the lack of any internal discipline whatsoever [Conrad v. Kolonia Town, 8 FSM Intrm. 183, 195 (Pon. 1997); Estate of Mori v. Chuuk, 10 FSM Intrm. 6, 14 (Chk. 2001)]
 - b. negligence
 - (1) failure to train properly; negligent hiring and training
 - (2) governmental entity that employs untrained police officers and permits their use of excessive force will be held responsible for the officers' unlawful acts [Alaphen v. Municipality of Moen, 2 FSM Intrm. 279, 280 (Truk 1986); Moses v. Municipality of Polle, 2 FSM Intrm. 270, 271 (Truk 1986)]
 - c. civil rights
 - (1) commission of the intentional tort of battery by police officers in the scope of their employment is a denial of due process of law [Davis v. Kutta, 7 FSM

Intrm. 536, 548 (Chk. 1996); Conrad v. Kolonia Town, 8 FSM Intrm. 183, 195 (Pon. 1997)]

- (2) further due process violations occurred when Mr. Eagle was detained and arrested without being told the reason as required by statute [12 F.S.M.C. 214(1)], and when he was held in police custody for six hours without cause
- (3) since due process is a right secured by the FSM Constitution [FSM Const. art. IV, § 3] denial of due process civil rights creates a cause of action under the civil rights statute [11 F.S.M.C. 701(3)] as does failure to inform George of reason for arrest since that is a right secured by law

2. Inca

- a. battery (same as for George except Inca was battered by only one officer)
- b. civil rights commission of the intentional tort of battery by police officers in the scope of their employment is a denial of due process of law [Davis v. Kutta, 7 FSM Intrm. 536, 548 (Chk. 1996); Conrad v. Kolonia Town, 8 FSM Intrm. 183, 195 (Pon. 1997)]
 - (1) commission of the intentional tort of battery by police officers in the scope of their employment is a denial of due process of law [Davis v. Kutta, 7 FSM Intrm. 536, 548 (Chk. 1996); Conrad v. Kolonia Town, 8 FSM Intrm. 183, 195 (Pon. 1997)]
 - (2) since due process is a right secured by the FSM Constitution [FSM Const. art. IV, § 3] denial of due process civil rights creates a cause of action under the civil rights statute [11 F.S.M.C. 701(3)]
- c. loss of consortium
 - (1) possible loss of consortium claim contemplates something more than loss of general overall happiness, and includes components of love and affection, society and companionship, sexual relations, right of performance of material services, right of support, aid and assistance, and felicity [Amayo v. MJ Co., 10 FSM Intrm. 244, 253 (Pon. 2001)]
 - (2) a loss of consortium claim is derivative from a spouse's claim

B. (4 points) damages

1. George
 - a. medical bills; amounts spent for medical treatment
 - b. pain & suffering
 - c. compensation for time spent unlawfully imprisoned
 - d. lost income, if any, from week of bed rest
 - e. reasonable attorney's fees and expenses since this is a civil rights case [11 F.S.M.C. 701(3)]
2. Inca
 - a. medical bills; amounts spent for medical treatment
 - b. pain & suffering
 - c. lost income from week off work
 - d. reasonable attorney's fees and expenses since this is a civil rights case [11 F.S.M.C. 701(3)]
 - e. damages for non-economic loss of consortium because husband was injured

XI. (7 points)

- A. (3 points) 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. (2 points) 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 movant will suffer irreparable harm if not granted
- C. (2 points) 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 [FSM Const. art. XI, § 11]