

Checklist of Points to be Covered for Complete Answers

FSM Bar Examination, March 1, 2018

[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. (5 points)

1. if Soapco is Law Firm A's current client then cannot represent Newco unless Law Firm A reasonably believes the representation will not adversely affect the relationship with Soapco and Soapco & Newco each consents after consultation [FSM MRPC R. 1.7(a)]
2. if Soapco is Law Firm A's former client then Law Firm A cannot represent Newco in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client [FSM MRPC R. 1.9(a)] or if Law Firm A would use Soapco's secrets & confidences to its disadvantage [FSM MRPC R. 1.9(b)]
3. since the new litigation is not the same or a substantially related matter to a matter that Law Firm A previously represented Soapco, Law Firm A can represent Newco if Soapco is a former client, BUT not if it is a current client
4. Law Firm A hasn't returned files to Soapco which it must do if Soapco is former client unless permitted to retain as security for fee [FSM MRPC R. 1.16(d)] but Soapco doesn't owe Law Firm A any fees & has not consulted with Soapco about how to proceed on Soapco's case after unfavorable remand decision, Soapco therefore remains Law Firm A's client in that case [McVey v. Etschreit, 14 FSM R. 207, 212 (Pon. 2006)]
5. since Soapco is Law Firm A's current client, court must grant motion to disqualify Law Firm A because Newco is adverse to Soapco & Soapco hasn't consented

B. (5 points)

1. while generally a party can't raise another party's rights; disqualification motion here is to maintain integrity of judicial process [McVey v. Etschreit, 14 FSM R. 207, 214 (Pon. 2006)]
2. Equator, Inc. hasn't consented to adverse

- representation
3. for purposes of conflict of interest, if two firms share a common lawyer, they will be treated as one firm for the purpose of disqualification or imputed disqualification [McVey v. Etschreit, 14 FSM R. 207, 215 (Pon. 2006)]
 4. Law Firm B can't drop current client who is the source of the conflict just to represent a more remunerative client [McVey v. Etschreit, 14 FSM R. 207, 214 & n.10 (Pon. 2006)]
 5. court should therefore grant motion to disqualify Law Firm B [FSM MRPC R. 1.7(a); McVey v. Etschreit, 14 FSM R. 207, 215 (Pon. 2006)]

EVIDENCE

(20 points)

II. (3 points)

- A. prosecution must show:
 1. when robbery occurred & that the photographs were taken at that time
 2. that the photographs are a fair & accurate representation of the scene
- B. then prosecution must establish that the person in the photographs is David
 1. prosecution could present witness who knows David & ask whether the photographs are pictures of David [FSM Evid. R. 901(b)(1) - testimony of a person with knowledge]
 - a. although this is lay opinion (not expert opinion) testimony
 - b. it's permissible since it is rationally based on the witness's perception and is helpful to a clear understanding of his testimony or the determination of a fact in issue [FSM Evid. R. 701]
 2. or prosecution could ask the judge as the trier of fact to compare the photographs with the way David looks in court [FSM Evid. R. 901(b)(3)]

III. (13 points)

- A. (5 points) bartender's testimony about Wayne's consumption of alcohol before fight
 1. Yeti's objection on basis of "improper evidence of character" is not a proper objection
 - a. it's not being offered to prove Wayne's character
 - b. Wayne's consumption of alcohol is being

offered to impeach his testimony

2. relevancy

- a. evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence [FSM Evid. R. 401]
- b. Sam's testimony about Wayne's alcohol use is offered to show Wayne's ability to accurately perceive & recall events was likely affected by his alcohol use
- c. thus, this evidence has potential to influence determination of crucial fact (who started fight) in trial

3. impeachment

- a. not presented as evidence of Wayne's character but of his ability to actually observe the events Wayne testified about in court
- b. therefore, objection overruled Sam allowed to testify

B. (5 points) Wayne's chronic alcohol abuse has two parts - character & habit

1. chronic alcohol abuse during marriage is evidence that goes to Wayne's character

- a. generally, evidence of a witness's character may only be used to establish the witness's character for truthfulness or untruthfulness [FSM Evid. R. 608(a)]
- b. Wayne's propensity to drink (esp. during his marriage) is prohibited character evidence about a witness
- c. Wayne's can't be proved by evidence that he had a character trait to drink excessively; therefore character evidence should be barred

2. Wayne's customary consumption of five whiskey shots at Piers [habit]

- a. is this relevant? it is clearly offered to show that Wayne was likely under the influence of alcohol when he saw the fight, thus discrediting his observations
- b. is it a habit of Wayne's?
- c. Wayne's habit is relevant to prove that his conduct on a particular occasion was in conformity with the habit [FSM Evid. R. 406]
- d. Wayne's "habit" may thus be admissible unless its probative value is

- substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence [FSM Evid. R. 403]
- e. timing problem - when did Wayne consume his shots relative to when fight occurred will probably lead judge to exclude evidence
- f. **[warning]** spousal privilege doesn't apply; Javier is ex-wife & her testimony doesn't involve spousal communication or secrets
- C. (3 points) medical testimony on Wayne's alcoholism & brain damage
1. usually a witness can't make objections to another witness's testimony
 2. but Wayne may seek to block Doctor's testimony by asserting a physician-patient privilege [see FSM Evid. R. 501]
- IV. (4 points) 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)] because since there is only one Sammy Sosa 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)

- V. (11 points)
- A. (6 points)
1. probably constitutional since
 - a. tax is paid by seller out of the money (income) he receives from the land sale; thus looks like an income tax
 - b. only nat'l gov't has power to tax income [FSM Const. art. IX, § 2(e)]
 2. unconstitutional
 - a. tax added to the sale price & paid by buyer is a sales tax
 - b. nat'l gov't doesn't have authority to impose sales taxes; it can only tax income [FSM Const. art. IX, § 2(e)] & imports [FSM Const. art. IX, § 2(d)]
- B. (5 points) business license fees may be considered

taxes

1. 5% of attorney fees part is most likely unconstitutional
 - a. 5% of fees earned from suing municipal or state governments is a tax on a certain type of income
 - b. only nat'l gov't can tax income [FSM Const. art. IX, § 2(e)]
2. larger tax aimed solely travel agencies is unconstitutional restriction on interstate and foreign commerce [Stinnett v. Weno, 6 FSM Intrm. 312, 313-14 (Chk. 1994)]
3. tax on solar power systems business appears constitutional;
 - a. argument could be made that all solar power units are imported and thus singling out solar power business interferes with foreign commerce
 - b. but the business license fee does not appear to be based on import value and tax is imposed on business that does more than just import systems, it also sets them up

VI. (6 points)

A. (3 points)

1. breach of contract is state law claim
2. citizenship of business entities is citizenship of shareholders [see Luzama v. Ponape Enterprises Co., 7 FSM Intrm. 40, 44 (App. 1995)]
3. so construction company is Japanese citizen regardless of where it's incorporated & employee is Philippines citizen
4. FSM Supreme Court doesn't have diversity jurisdiction when all parties are foreign citizens even though they are citizens of different foreign nations [Trance v. Penta Ocean Constr. Co., 7 FSM Intrm. 147, 148 (Chk. 1995)]

B. (3 points) motion to remand probably denied

1. although all parties are foreign citizens so the FSM Supreme Court doesn't have diversity jurisdiction [Trance v. Penta Ocean Constr. Co., 7 FSM Intrm. 147, 148 (Chk. 1995)]
2. the case is a civil rights claim - racial discrimination - which if brought under 11 F.S.M.C. 701(3) or as a case that the defendant company violated the FSM Constitution equal protection clause is a case arising under national law or Constitution

over which the FSM Supreme Court has concurrent jurisdiction [FSM Const. art. XI, § 6(b)]

3. BUT if case was pled as only a violation of the state constitution or state civil rights law then not a case arising under national law and FSM court doesn't have jurisdiction & will remand the case

VII. (21 points)

A. (3 points) attempted arrest was valid

1. Lt. Ware was aware of felony warrant for Danger Man's arrest; arresting officer need not have physical possession of warrant when arrest made [12 F.S.M.C. 214(2)]
2. {bonus} even if there was no warrant, an arrest can be made when a criminal offense has been committed, and a policeman has reasonable ground to believe that the person to be arrested has committed it, such policeman may arrest the person without a warrant; or, even in cases where it is not certain that a criminal offense has been committed, may, without a warrant, arrest and detain for examination, persons who may be found under such circumstances as justify a reasonable suspicion that they have committed or intend to commit a felony [see 12 F.S.M.C. 211(3) & (4)]

B. (3 points) Officer Imonthejob made a legal stop of Danger Man

1. Officer Imonthejob was acting based on valid probable cause
2. Probable cause is present when there is evidence and information sufficiently persuasive to warrant a cautious person to believe it is more likely than not that a violation of the law has occurred and that the accused committed that violation [FSM v. Wainit, 12 FSM R. 105, 108 (Chk. 2003)]
3. Officer Imonthejob knew
 - a. description of vehicle
 - b. Danger Man by sight, &
 - c. was aware of outstanding felony arrest warrant for Danger Man
 - d. Officer Imonthejob thus had probable cause to make the stop & arrest

C. (3 points) whether Insurance Guy's statements admissible

1. threshold issue: was search of car trunk legal?

- a. search of trunk was without a search warrant but permissible as it was done under exigent circumstances
 - b. exigent circumstances may make it necessary or constitutionally reasonable to proceed with a search without first obtaining a warrant; exigent circumstances are present when a police officer has heard sounds that indicate people's lives could be in immediate danger if officer doesn't investigate [FSM v. Sapusi, 16 FSM R. 315, 318 (Chk. 2009)]
 - c. inventory exception to search warrant requirement may also be applicable
 - d. an inventory search is reasonable when police follow standardized procedures and are not acting in bad faith or for the sole purpose of investigation [FSM v. Joseph, 9 FSM R. 66, 72 (Chk. 1999)]
 - e. searches incidental to a lawful arrest and inventory searches are exceptions to the Constitution's warrant requirement, and do not violate the Constitution's prohibition of unreasonable searches [FSM v. Menisio, 14 FSM R. 316, 319 (Chk. 2006)]
2. Insurance Guy's statements, although hearsay, are admissible against Danger Man without violating the FSM Constitution's requirement [FSM Const. art. IV, § 6] that an accused be able to confront the witnesses against him
 3. the confrontation clause does not always require a physical confrontation before the fact-finder; there are certain well-established exceptions to the rule barring hearsay that, because of their indicia of reliability or trustworthiness, allow the introduction of evidence from witnesses a defendant will be unable to confront [FSM v. Tipingeni, 19 FSM R. 439, 449 (Chk. 2014)]
 4. Insurance Guy's statements to Officer Imonthejob appear to fall within the dying declaration exception [FSM Evid. R. 804(b)(2)] if
 - a. they were a statement made by a declarant while believing that his death was imminent, about the cause or circumstances of what he believed to be his impending death - Danger Man had

attacked him

b. Insurance Guy is unavailable - he's dead also, may be admissible under excited utterance exception because was statement relating to a startling event made while Insurance Guy was under the stress of excitement caused by the event [FSM Evid. R. 803(2)]

D. (3 points) audio/videotape recording of Danger Man admissible because

1. Danger Man had no reasonable expectation of privacy in Officer Imonthejob's patrol car
2. Danger Man's statements were made to himself & NOT in response to any custodial interrogation; therefore doesn't matter that Danger Man hadn't been informed of his rights yet

E. (3 points) Officer Imonthejob could not continue questioning Danger Man said that he "ain't saying nothing till he gets a lawyer."

1. Danger Man had asserted his constitutional right to silence and to an attorney
2. when a defendant has expressed a wish to meet with counsel before further questioning, questioning must cease at once; any attempt by police officers to ignore or override the defendant's wish, or to dissuade him from exercising his rights [12 F.S.M.C. 218; FSM v. Edward, 3 FSM R. 224, 235 (Pon. 1987)] unless the accused himself initiates further communication

F. (3 points) Danger Man's statement to booking officer admissible because

1. was not in response to a custodial interrogation &
2. was voluntary, unsolicited statement made to booking officer

G. (3 points) Insurance Guy's wallet & contents found warrantless search of Danger Man during booking is admissible against Danger Man because searches incidental to a lawful arrest and inventory searches are exceptions to the Constitution's warrant requirement, and, as such, do not violate the Constitution's prohibition of unreasonable searches [FSM v. Menisio, 14 FSM R. 316, 319 (Chk. 2006)]

VIII. (12 points)

A. (2 points) the limitations period for negligence causing injury, and apparently for intentional torts (such as assault) is two years from when

- cause of action accrues [6 F.S.M.C. 803(1) & (4)]
- B. (2 points) complaint & summons should be served within 120 days of when the clerk issues the summons (unless service is to be made in foreign country) [FSM Civ. R. 4(j)]
 - C. (2 points) failure to timely serve the complaint & summons will result in a dismissal of the action without prejudice [FSM Civ. R. 4(j)]
 - D. (2 points) the time to serve the complaint & summons may be extended or enlarged for "good cause" if request is made before service period has expired [FSM Civ. R. (b)(1)] or excusable neglect if the 120 days has passed [see FSM Civ. R. 6(b)(2)]
 - E. (4 points) the running of the statute of limitations is tolled (suspended) when a complaint has been filed in a court of competent jurisdiction [see Dereas v. Eas, 15 FSM R. 135, 139 (Chk. S. Ct. Tr. 2007)]; since the summons was issued when there was twenty days still left for the statute of limitations to run, & since the complaint & summons were served within the 120 days after the summons was issued, the statute of limitations was tolled and had not yet run out if Darlene served 90 days after the summons was issued

IX. (16 points)

- A. (12 points)
 - 1. court will apply tort law as recognized by state law
 - 2. possible cause(s) of action
 - a. invasion of privacy [bonus points if type of invasion of privacy tort identified]
 - (1) Publicity that Unreasonably Places the Other in False Light Before the Public [does not have to rise to the level required for a defamation action]
 - (2) Unauthorized Use of Likeness in Advertising
 - b. defamation
 - c. negligence (of Cycad Airways in failing to require photographer to obtain a signed release)
 - 3. Summary judgment is granted when no genuine dispute of material fact exists and movant is entitled to judgment as a matter of law; dispute whether plaintiff consented to having her picture taken not material because consent to take photo does not give consent to publish photo and is not disputed that consent was not

given for publication; likely outcome - summary judgment for plaintiff on issue of liability for invasion of privacy causes of action [plaintiff's strongest causes]

- B. (4 points) no effect yet
1. summary judgment on issue of liability is not final judgment because amount of damages not yet determined, therefore decision is not yet appealable unless permission sought and granted for an interlocutory appeal under FSM App. 5(a) [not done here]
 2. notice of appeal has no effect at this time, but may once there is entry of final judgment [FSM App. R. 4(a)(2)]; thus next step for plaintiff is to schedule hearing (trial) on damages issue
- X. (4 points)
- A. conditions to contractual obligations are disfavored in the law because they tend to have the effect of creating forfeitures [Kihara v. Nanpei, 5 FSM Intrm. 342, 344 (Pon. 1992)]
 - B. contractual terms that provide that payment is due "when" or "not until" a stated event occurs are generally not considered to be conditions, but merely a means of measuring time, and if the stated event does not occur then the payment is nevertheless due after a reasonable time [Nanpei v. Kihara, 7 FSM Intrm. 319, 324 (App. 1995)]; court would likely consider "as soon as" to be a similar means of measuring time
 - C. court would therefore likely find in Protagoras's favor and order Euarthlus to pay
 - D. unjust enrichment is alternative theory for recovery