

Checklist of Points to be Covered for Complete Answers

FSM Bar Examination, April 7, 2022

[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. competence [FSM MRPC R. 1.1]
  - 1. is Wiley competent to practice corporate law because he focused on criminal law & just opened his practice?
  - 2. probably, since lawyer can provide adequate representation in a wholly novel field through necessary study [FSM MRPC R. 1.1 cmt.] & Wiley can probably rather quickly learn what's needed to draft articles of corporation and bylaws for a small business
- B. conflict of interest in entering into a business relationship with a client [FSM MRPC R. 1.8(a)]
  - 1. Wiley cannot enter into a business transaction with a client or knowingly acquire an interest adverse to a client unless
    - a. the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client
    - b. are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
    - c. the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; &
    - d. the client consents in writing thereto
  - 2. Wiley did not give Trix a reasonable opportunity to seek the advice of independent counsel in the transaction (Wiley acquiring  $\frac{1}{3}$  interest in Trix's business) & terms were not fully disclosed and transmitted in writing to Trix & Trix did not consent in writing thereto
  - 3. Wiley has violated the conflict ethical rules even if the transaction (acquiring  $\frac{1}{3}$  interest in Trix's business) was fair & reasonable
- C. excessive fee [FSM MRPC R. 1.5]
  - 1. a lawyer's fee must be reasonable [FSM MRPC R. 1.5(a)]
  - 2. if  $\frac{1}{3}$  interest in Trix's business is much greater than the fee customarily charged in the locality for similar legal services [FSM MRPC R. 1.5(a)(3)], then

3. not only would the fee be excessive, but it would also show that the transaction and term on which Wiley acquired the  $\frac{1}{3}$  interest were not fair and reasonable to Trix [FSM MRPC R. 1.8(a)(1)]
- D. neglecting a matter entrusted to the lawyer [FSM MRPC R. 1.3]
  1. a lawyer must act with reasonable diligence and promptness in representing a client
  2. Wiley left the Articles of Incorporation and Bylaws in his lower left desk drawer where they were forgotten for the next six weeks
  3. this does not show reasonable diligence
- E. contingent fee
  1. Cheetam retained Wiley to sue Trix for a fee of  $\frac{1}{3}$  of the recovery; this is a contingency fee
  2. a fee may be contingent on the outcome of the matter for which the service is rendered, except [FSM MRPC R. 1.5(c)]
    - a. but a contingent fee agreement must be in writing &
    - b. must state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated
  3. does not appear that the contingent fee agreement with Cheetam was in writing or that it contained all of the necessary terms
- F. Wiley filing suit against Trix over the sale of parts of the corporation to Wiley & Cheetam appears unethical
  1. because Wiley cannot represent Cheetam if the representation of Cheetam will be directly adverse to another Trix unless Wiley reasonably believes the representation will not adversely affect the relationship with Trix & both Trix & Cheetam consent after consultation [FSM MRPC R. 1.7(a) even if Trix is a former client [FSM MRPC R. 1.9(a)]; Trix did not ocnsent
  2. because in the suit Wiley appears to rely on, or will rely on, information relating to his previous representation of Trix to Trix's disadvantage [FSM MRPC R. 1.9(b)]

3. because Wiley might be a necessary witness in the case & a lawyer cannot act as advocate at a trial in which the lawyer is likely to be a necessary witness [FSM MRPC R. 3.7(a)]
- G. Wiley's settlement with Trix was unethical
  1. because, if Trix is still Wiley's client,
    - a. a lawyer who represents two or more clients cannot participate in making an aggregate settlement of the claims of or against the clients, unless each client consents after consultation, including disclosure of the existence and nature of all the claims involved and of the participation of each person in the settlement [FSM MRPC R. 1.8(g)] since
      - (1) Cheetam didn't participate in settlement &
      - (2) all required disclosures weren't made
    - b. conflict of interest in entering into a business transaction (sale of corporate stock for \$1,000) with a client (Trix) without giving Trix a reasonable opportunity to seek the advice of independent counsel in the transaction [FSM MRPC R. 1.8(a)(2)]
  2. because, if Trix is a former client, Wiley, in dealing on client's (Cheetam's) behalf with a person (Trix) who is not represented by counsel, Wiley cannot state or imply that he is disinterested [FSM MRPC R. 4.3]

### EVIDENCE

(20 points)

#### II. (20 points)

- A. (2 points)
  1. objection - leading on direct examination
  2. ordinarily, leading questions not permitted on direct [FSM Evid. R. 611(c)]
  3. leading questions may be allowed on direct for preliminary questions as may be necessary to develop his testimony
  4. question where Phobos lived is preliminary question so is okay; objection overruled
- B. (3 points)
  1. objection - 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)];
  2. general rule: hearsay inadmissible unless

- falls within one of the exceptions to the hearsay rule [FSM Evid. R. 802]
3. but if Bonnie Bell's statement is offered to show the effect it had on Phobos and not for the truth of the matter asserted, then it's not hearsay
  4. "excited utterance" exception to hearsay if statement relating to a startling event made while Bonnie Bell was under the stress of excitement caused by the event [FSM Evid. R. 803(2)] but no facts that the situation was startling or exciting at this point in time
  5. "present sense impression" exception for statement made contemporaneous to or immediately following an event is admissible [FSM Evid. R. 803(1)]
  6. Objection overruled - if Bonnie Bell's statement is offered to show the effect it had on Phobos is admissible as non-hearsay, if offered for hearsay purposes is admissible as a present sense impression
- C. (2 points)
1. objection - assumes fact not in evidence (that Deimos was waving a knife); also misstates the record (that is, Phobos's testimony)
  2. therefore objection sustained
- D. (2 points)
1. objection - leading on direct examination
  2. leading questions not permitted on direct [FSM Evid. R. 611(c)] & isn't preliminary question
  3. objection - compound question (asked in same question what he said to Deimos & if he had provoked Deimos)
  4. therefore objection to form of question sustained
- E. (2 points)
1. objection - hearsay
  2. Phobos may claim that it's not offered for the truth of the matter but to bolster his credibility
    - a. ordinarily cannot show a prior consistent statement
    - b. but when testimony is impeached through express or implied charge that testimony is of recent fabrication it is defined as non-hearsay and admissible [FSM Evid. R. 801(d)(1)(B)]
    - c. but since Phobos not yet been cross-examined, so there's no charge to rebut
  3. therefore objection sustained

- F. (2 points)
1. objection - the attorney is testifying - attorney provided Phobos with amount of medical bill, which was the substance of question asked Phobos
  2. only witness, not attorney may testify
  3. improper past recollection recorded - witness must be afforded opportunity to remember event on his own before attempt to refresh his memory can occur - attorney should've tried to refresh Phobos's memory by showing him the bill and letting Phobos remember the amount on his own
  4. objection sustained
- G. (3 points)
1. objection - non-responsive answer
    - a. Phobos asked if he remembers
    - b. Phobos testifies that the bill says . . .
    - c. therefore that portion of answer should be stricken
  2. objection - hearsay
    - a. because Phobos is reading from hospital records it is hearsay
    - b. any writing made as a memorandum or record of any act, transaction, occurrence or event is admissible if made in the regular course of business [FSM Evid. R. 803(6)]
    - c. BUT no foundation has been laid to enter the hospital billing record into evidence as business record
    - d. therefore inadmissible from Phobos's testimony
    - e. 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
    - f. other evidence of the contents of a writing is admissible if 1) original is 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)] but Phobos has no recollection of contents of bill
    - g. objection sustained, bill should come in after proper authentication
- H. (2 points)
1. objection - compound question (asked in same

- question if he expelled three students & if he changed lock to Deimos's office
2. therefore objection sustained
- I. (2 points)
1. objection - non-responsive answer
    - a. question asked about Phobos's differences with Deimos
    - b. therefore part of answer about lethal weapon was non-responsive & inadmissible
  2. objection - lay opinion testimony
    - a. description of weapon as "lethal" is opinion
    - b. lay opinion okay if 1) rationally based on the perception of the witness and 2) helpful to a clear understanding of his testimony or the determination of a fact in issue
    - c. describing a knife as lethal is within a lay witness's knowledge

### **GENERAL**

(70 points)

- III. (4 points) you should recommend that the insurance company file an interpleader action [FSM Civ. R. 22(1)] naming as defendants all the claimants who seek Henry's insurance policy benefits and deposit the benefits with the court, letting the defendants prove to the court which ones are entitled to the benefits; this way the insurance company avoids the possibility of defending multiple lawsuits and the possibility it might end up paying twice
- IV. (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 R. 13, 23 (App. 1991)]
- V. (16 points)
- A. Constitution protects persons, their houses, papers, and other possessions from unreasonable search, seizure, or invasion of privacy [FSM Const. art. IV, § 5]
  - B. search & seizure without a warrant is unreasonable
    1. unless
      - a. probable cause exists

- b. circumstances establishing exception to warrant requirement exist
  - 2. possible search warrant exceptions here
    - a. exigent circumstances is warrant exception [FSM v. Sapusi, 16 FSM R. 315, 318 (Chk. 2009)]
      - (1) validity of entry to dwelling in exigent circumstances must be based on facts as perceived by law enforcement at time of entry
      - (2) entire premises may be examined if it relates to the actual emergency
    - b. plain view is a warrant exception [FSM v. Sato, 16 FSM R. 26, 29-30 (Chk. 2008); FSM v. Mark, 1 FSM R. 284, 294 (Pon. 1983)]
      - (1) police officer can seize evidence in the officer's plain view
      - (2) if he has a right to be in the position to have that view
    - c. search by consent is a warrant exception [FSM v. George, 1 FSM R. 449, 458 (Kos. 1984)]
    - d. can also argue that evidence should not be excluded if would have inevitably found the evidence lawfully
- C. prosecution's arguments applied to facts in this question
  - 1. Officer Jack entered curtilage (yard) of home without a warrant
  - 2. police may, without an intention to look for evidence, enter private property and knock on door to ask preliminary questions of occupants [FSM v. Mark, 1 FSM R. 284, 289 (Pon. 1983)]
  - 3. so Officer Jack's knock & talk investigative technique at the front door should be okay & since no answer there good argument can then try the back door & that also okay (after all had reasonably believed someone was inside)
  - 4. since Officer Jack legitimately at back door & looking through window from back door the Bunsen burner with a very high flame burning under a petri dish filled with liquid and solid substances was in plain view
  - 5. Officer Jack then forcibly entered home without a warrant under exigent circumstances
    - a. Jack believed that a crime recently committed on the premises,
    - b. that the premises contained evidence of that illegal activity,

- c. that the evidence was about to be destroyed,
- d. there was specific & objective factual evidence, based on Officer Jack's perceptions, that Jack's immediate action was necessary to prevent imminent destruction of evidence and to protect Officer Jack and persons in nearby homes from danger
- 6. exigent circumstance exception will justify only seizure of Bunsen burner, petri dish filled with liquid and solid substances, and the drugs found in the same room, not the seizure of cash and guns found in closet elsewhere in house
- 7. prosecution will argue that Vladimir's parents at the police station freely & voluntarily gave their consent to the search of their home
- 8. defense will argue that the consent was only given after Jack's search of the home
- 9. prosecution will counter that nevertheless Jack's discovery of the guns & cash was inevitable because the parents were at the police station & if Jack had waited to search the home until after they gave their consent he would inevitably discovered the cash & guns

VI. (\*\* points)

A. (\* points)

- 1. service of complaint & summons
  - a. service by former police officer is okay
    - (1) as long as the former police officer is over 18 & not a party or related to a party, or the plaintiff's attorney because
    - (2) service of a summons and complaint can be made by any person who is not a party and is not less than 18 years of age [FSM Civ. R. 4(c)(1)]
  - b. but personal service on someone under the age of 14 must be done by serving the summons and complaint to a parent or to a guardian, if any [FSM Civ. R. 4(d)(2)] & Brenda is 13
- 2. court jurisdiction
  - a. since is land dispute
  - b. is there a certificate of title for the land?
  - c. should the case first go to the land commission or a Land Court?

B. (\* points) summary judgment motion

1. assuming that any service or jurisdictional defects have been remedied,
  2. if the opposing party's [Brenda's] affidavits state that facts essential to justify the party's opposition cannot be presented, the court may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just [FSM Civ. R. 56(f)]
  3. Brenda will argue that
    - a. she needs discovery in order to be able to adequately oppose the summary judgment motion because she really knew nothing about the rock quarry to start with &
    - b. the plaintiff's documents that were not sworn to or not certified could not provide adequate foundation for the plaintiff's summary judgment motion as required [FSM Civ. R. 56(c)]
  - 4.
- C. (\* points) plaintiff's counsel may obtain relief [FSM Civ. R. 70]
1. if a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified
  2. the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party
- VII. (9 points) causes of action against Sal
- A. strict liability
1. strict liability arises where the activity performed is not merely dangerous, but abnormally dangerous [Nakamura v. Mori, 16 FSM R. 262, 269 (Chk. 2009)]
  2. one who carries on an abnormally dangerous activity is subject to liability for harm to the person or property of another resulting from the activity, although he has exercised the utmost care to prevent the harm [Nelper v. Akinaga, Pangelinan & Saita Co., 8 FSM R. 528, 535 (Pon. 1998)]
  3. the factors to be considered in determining whether an activity is abnormally dangerous are:
    - a. the existence of a high degree of some harm to the person or property of others

- b. the likelihood that the harm that results from it will be great
      - c. the inability to eliminate the risk by the exercise of reasonable care
      - d. the extent to which the activity is not a matter of common usage
      - e. the inappropriateness of the activity to the place where it is carried on; and
      - f. the extent to which its value to the community is outweighed by its dangerous attributes
    - 4. whether the activity is an abnormally dangerous one is determined by the court [examinee should argue one way or another whether shipment of high explosives on a vessel is abnormally dangerous in this case]
  - B. negligence
    - 1. elements of actionable negligence are [Kileto v. Chuuk, 15 FSM R. 16, 17 (Chk. S. Ct. App. 2007)]
      - a. the breach of a
      - b. duty of care on the part of one person to protect another from injury
      - c. that breach is the proximate cause
      - d. of an injury to the person to whom the duty is owed
    - 2. Sal owed a duty to others not to harm them with his shipping activity
    - 3. Sal breached duty when he neglected to follow Blastco's special instructions on how to care for the cargo it was shipping to the outer island
    - 4. this neglect was likely the proximate cause of the explosion that damaged the *Bison* and the state's port facilities
  - C. gross negligence
    - 1. requires willful, wanton, or reckless misconduct, or such utter lack of care as will be evidence thereof [Hauk v. Lokopwe, 14 FSM R. 61, 65 (Chk. 2006)]
    - 2. does Sal's disregard of Blastco's special instructions constitute wanton, or reckless misconduct, or such utter lack of care as to constitute gross negligence? examinee should argue one way or the other
  - D. breach of contract claim by port operator may be possible depending on what the terms of their agreement allowing the *Auroch* to dock at the port
- VIII.
- A. material breach of a contract justifies the injured

party's halt of performance under the contract [FSM v. GMP Hawaii, Inc., 17 FSM R. 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 R. 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 requirement's 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

IX.

- A. (3 points) motion to remand denied
  - 1. FSM Supreme Court has diversity jurisdiction [FSM Const. art. XI, § 6(b)] because
  - 2. Ioanis is a Pohnpei citizen
  - 3. Sadaluer Corp. since it is a corporation, its citizenship is determined by the citizenship of its owners [Luzama v. Ponape Enterprises Co., 7 FSM R. 40, 44 (App. 1995)] - & since it has some foreign ownership, it is a foreign citizen
- B. (3 points) motion to remand denied
  - 1. FSM Supreme Court has exclusive jurisdiction over admiralty and maritime cases [FSM Const. art. XI, § 6(a)]

2. claims for seaman's wages is an admiralty case [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)]
  3. hazardous duty differential pay during typhoon is a seamen's wages claim
- C. (3 points) motion to remand denied
1. Director is sued in official capacity as College campus head & so it is really the College that is sued [Herman v. Bisalen, 16 FSM R. 293, 295-96 (Chk. 2009) (claim against a government officer in his official capacity is, and should be treated as, a claim against the entity that employs the officer)]
  2. College is an instrumentality of the nat'l gov't; suit is therefore against the nat'l gov't
  3. FSM Supreme Court has exclusive jurisdiction over cases where the nat'l gov't is a party (except, which is inapplicable here, where an interest in land is at issue) [FSM Const. art. XI, §6(a)]
- X. (10 points)
- A. (3 points) may be unconstitutional as violative of a person's due process rights [FSM Const. art. IV, § 3] because it appears to be punishment (36 hours in jail) without being charged or convicted of any offense (being jailed for 36 hours cannot be for the poisoner's own protection because he will be kept for 36 hours regardless of whether he sobers up); must be released or charged & brought before magistrate within reasonable time, not to exceed 24 hours
  - B. (3 points) the constitutional problem is whether the higher charge for persons other than state citizens violates the equal protection clause [FSM Const. art. IV, §§ 3, 4] as discrimination based on race or ancestry; but since state owns & operates airport can it argue that its citizens have already paid their share through their taxes?
  - C. (2 points) nat'l gov't has power to levy only two types of taxes - on imports [FSM Const. art. IX, § 2(d)] and on income [FSM Const. art. IX, § 2(e)]; this appears to be a sales tax which is a state power, but Congress does have authority to regulate foreign and interstate commerce [FSM Const. art. IX, § 2(g)], if this \$5 "tax" can be considered "regulation" of foreign and interstate commerce could be constitutional, otherwise unconstitutional tax

- D. (2 points) state governments are prohibited from imposing taxes which restrict interstate commerce [FSM Const. art. VIII, § 3] and only nat'l gov't can regulate foreign & interstate commerce [FSM Const. art. IX, § 2(g)], also a percentage (2½%) tax appears to be a tax on export income & income taxes are sole power of nat'l gov't [FSM Const. art. IX, § 2(e)]; so export tax may be unconstitutional even though not specifically prohibited by Constitution, as no court has decided this yet you may argue either way