

Checklist of Points to be Covered for Complete Answers
FSM Bar Examination, August 4, 2005

[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.]

ETHICS

(10 points)

I. (8 points)

- A. a lawyer is entitled to be paid a fee for his professional services that is not illegal or clearly excessive [FSM MRPC R. 1.5(a)]
- B. contingent fee arrangement for a domestic relations matter or in a criminal case violates the ethic rules [FSM MRPC R. 1.5(d)]
- C. Lloyd may argue that the declaratory judgment wasn't domestic relations matter
 - 1. but since the declaratory judgment was for a property division following a divorce, Lloyd's 30% contingency fee will be disallowed
 - 2. Lloyd entitled to reasonable fee – could get \$7,500 (75 hours x \$100, his usual fee) BUT NOT \$420,000
 - 3. Lloyd also entitled to an allowance for costs for depositions, experts, etc.
- D. Lloyd is entitled to fee for defending Rose against criminal charge
 - 1. Lloyd can keep the \$15,000 advance payment as long as not clearly excessive
 - 2. any portion of the advance payment not actually earned under the written fee agreement's terms must be returned to Rose; if Rose owes anything above the \$15,000 advance payment she must pay him
- E. Rose can prevent Lloyd from writing and publishing a book & articles about Dan & Rose because a lawyer is barred from acquiring literary or media rights to a portrayal or account based in substantial part on information relating to the representation before the representation has ended [FSM MRPC R. 1.8(d)]
- F. Rose's disciplinary complaint against Lloyd should be upheld on the issues of
 - 1. contingency fee
 - 2. literary rights

II. (2 points) Huygens's immediate withdrawal may be improper because

- A. although lawyer must withdraw when the representation will result in violation of the Rules of Professional Conduct or other law [FSM MRPC R. 1.16(a)(1)] & continued private employment for pay barred by state statute
- B. when withdrawing, lawyer must take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned [FSM MRPC R. 1.16(d)]
- C. does not appear Huygens gave reasonable notice or allowed time for

employment of other counsel; unknown whether any unused fee for Huygens to return or whether Huygens returned Cassini's papers

EVIDENCE
(20 points)

III.

A. (4 points)

1. in order to introduce writing into evidence, writing must be
 - a. relevant [FSM Evid. R. 402]
 - b. authentic [FSM Evid. R. 901]
 - c. an original [FSM Evid. R. 1002] or, if authenticity not in dispute, a copy [FSM Evid. R. 1003]
2. under facts given, letter is
 - a. apparently an original & is
 - b. not hearsay because the statement is offered against a party and is the party's own statement [FSM Evid. R. 801(d)(2)(A)]
 - c. hasn't been authenticated (assuming Tycoon hasn't stipulated to authenticity)
3. but is letter
 - a. relevant? [FSM Crim. R. 402] &
 - b. if relevant, is its relevance substantially outweighed by the danger of unfair prejudice, confusion of the issues [FSM Evid. R. 403] & therefore excludable?

B. (4 points)

1. objection - hearsay
 - a. 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)];
 - b. general rule hearsay inadmissible unless falls within one of the exceptions to the hearsay rule [FSM Evid. R. 802]
 - c. no hearsay exception applies thus inadmissible
2. objection - not original recording
 - a. an original required [FSM Evid. R. 1002]
 - b. unless authenticity not in dispute [FSM Evid. R. 1003]
3. objection - is not complete & therefore misleading
 - a. when a part of a recorded statement is introduced by a party, an adverse party may require him at that time to introduce any other part of the recorded statement which ought in fairness to be considered contemporaneously with it [FSM Evid. R. 106]
 - b. Tycoon may have other relevant parts of recording admitted to show context or explain

C. (2 points) objection - improper character evidence

1. generally, evidence of a person'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. although evidence of other wrongs, or acts is not admissible to provide a person's character in order to show that he acted in conformity therewith, but it may be admissible

for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident [FSM Evid. R. 404(b)]

3.relevance may be substantially outweighed by the danger of unfair prejudice [FSM Evid. R. 403]

D.(2 points)

1.scientific, technical, or other specialized knowledge may be presented through a witness qualified as an expert by knowledge, skill, experience, training, or education, who may testify in the form of an opinion or otherwise [FSM Evid. R. 703]

2.but as this is a new scientific theory it might not be admissible since it is not yet generally accepted in the scientific community

E.(4 points)

1.objection – hearsay

a.general rule hearsay inadmissible unless falls within one of the exceptions to the hearsay rule [FSM Evid. R. 802];

b.public records exception doesn't allow police reports to be used in criminal case [FSM Evid. R. 803(8) (B)] -- but this isn't criminal case

2.objection – any relevance substantially outweighed by the danger of unfair prejudice [FSM Evid. R. 403]

3.objection – beyond the scope of direct examination & is a collateral matter

a.can use for impeachment

b.but appears to be collateral

F.(2 points) Linda will assert attorney-client privilege

1.Linda hasn't waived attorney-client privilege [see FSM MRPC R. 1.6(a)]

2.Tycoon may argue the exception to attorney-client privilege where attorney can reveal client confidence to prevent client from committing criminal act [FSM MRPC R. 1.6(b) (1)]

a.but that exception only applies when the attorney believes that the future criminal act is likely to result in imminent death or substantial bodily harm

b.taping phone call might not be criminal

c.if criminal, not reasonable to believe it is likely to result in imminent death or substantial bodily harm

G.(2 points) objection – impermissible lay witness testimony

1.not proper lay opinion testimony since not rationally based on the witness's perception [FSM Evid. R. 701(a)]

2.is improper character evidence since character evidence since character evidence can refer only to character for truthfulness or untruthfulness, and is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise [FSM Evid. R. 608(a)]

GENERAL

(70 points)

IV.(16 points)

A. Ajax's suit against Cygnus

1. Cygnus's defenses

- a. all contract terms contained within four corners of written contract
- b. contract was on preprinted form supplied by Ajax so any ambiguities are construed against drafter – Ajax
- c. Ajax's signature is presumed since it was his preprinted form
- d. contract contained term that work must be done to customer's (Cygnus's) satisfaction & Cygnus is not satisfied
- e. if glazing was part of the three-step process mentioned in contract then Ajax is in breach of contract
- f. Cygnus can argue price increase was unconscionable & thus void

2. Ajax's rebuttal

- a. Ajax can claim he is entitled to compensation for work done otherwise Cygnus would be unjustly enriched if contract terminated
- b. Ajax can try to prove that glazing was never part of three-step process
- c. due to mistake in estimating costs Ajax would not have been able to finish performance under contract without price increase & was therefore a legitimate contract modification by the parties

3. court's probable decision –

- a. Cygnus need not pay the \$5,500
- b. but must pay some reasonable compensation to Ajax to avoid unjust enrichment

B. Thor's suit against Cygnus

1. Cygnus's defenses

- a. if Thor can terminate agreement at any time on 21 days notice, the Cygnus can also terminate Thor with 21 days notice upon discovery of the shoddy work
- b. when Thor refused to work on garage, Thor terminated agreement without notice, so is entitled to be paid only for work up to that point

2. Thor's rebuttal

- a. Cygnus did not give him 21 days' notice
- b. Cygnus terminated him without notice & garage work was new contract offer he did not have to accept so Cygnus liable on old contract

3. court's probable decision –

- a. Cygnus owes for work performed &
- b. for the 21 days afterward since he should've given notice (\$1200)

V. (8 points)

A. (3 points) basis upon which FSM Supreme Court can hear appeal – regardless of state constitution anything involving national constitution, law, or treaty may be appealed to FSM Supreme Court; state constitution can't override national constitution

B. (5 points) issues considered by FSM Supreme Court on appeal – because was state crime tried in state court FSM Supreme Court, based on facts as presented, will only consider issues raised by accused's rights under the FSM Constitution

- 1. was confession obtained in violation of Attila's FSM Constitutional rights against self-incrimination and to counsel?

- a. Attila may waive right if done so knowingly, voluntarily and intelligently
 - b. argue whether waiver voluntary if done in sleep-deprived state and police would not let Attila sleep until he confessed [also was it done intelligently?]
 - c. argue whether waiver done knowingly [and intelligently] if done while drunk
2. likely result – conviction reversed, confession suppressed, remanded for new trial in state court

VI. (4 points)

- A. plaintiff Zero may amend his complaint once as a matter of course at any time before a responsive pleading is served [FSM Civ. R. 15(a)]
- B. motion to dismiss is not a responsive pleading [see FSM Civ. R. 7(a)]
- C. amended complaint is therefore properly filed
- D. if motion to dismiss doesn't address amended complaint then can be denied as moot

VII. (18 points)

A. (3 points)

- 1. \$50 annual tax doesn't violate FSM Constitution
- 2. 5% tax on room rental is

- a. unconstitutional tax on income if imposed on hotel and paid by it from its receipts since income tax reserved to nat'l gov't [FSM Const. art. IX, § 2(e)]
- b. constitutional if paid by the hotel guest and added to bill because then its a sales tax

B. (3 points)

- 1. state may constitutionally regulate fishing within 12 miles of baselines around its shores
- 2. unconstitutional for state to regulate beyond 12 miles; nat'l gov't has exclusive right to regulate in EEZ beyond 12 miles [FSM Const. art. IX, § 2(m)]

C. (3 points)

- 1. a legislative act finding a named person guilty of something and purporting to punish him is a bill of attainder
- 2. bills of attainder are banned by Constitution [FSM Const. art. IV, § 11]

D. (3 points) unconstitutional

- 1. state governor can pardon only those *convicted* under state law [FSM Const. art. X, § 2(c)]
- 2. FSM President is person with power to pardon those convicted under nat'l law
- 3. irrelevant that nat'l law person was convicted under not nat'l law any longer but is punishable offense under state law – wasn't convicted under state law

E. (3 points) doesn't violate FSM Constitution since this type of tax isn't reserved to nat'l gov't & isn't banned by any other provision (such as ban on tax restricting interstate commerce [FSM Const. art. VIII, § 3])

F. (3 points)

- 1. state legislature may make classifications based on age so long

as it has a rational basis for doing so; appears constitutional

2. however, the exemption for out-of-state persons may violate the equal protection clause [FSM Const. art. IV, § 3] because appears to be discrimination based on race, ancestry, national origin, or language & thus violative of the FSM Constitution

VIII. (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 Protogoras's favor and order Euarthlus to pay
- D. unjust enrichment is alternative theory for recovery

IX. (20 points)

- A. (3 points) grounds for dismissal: lack of subject matter jurisdiction (when all parties foreigners no diversity jurisdiction); failure to state a claim upon which relief may be granted (argue George is not Phil's employer (is the company the employer?) and not the owner of the premises where Phil worked)
- B. (3 points) either Chuuk State Supreme Court (state law case) or FSM Supreme Court (Chuuk) [because diversity jurisdiction exists, *but* if Lagoon Truking Co. is also foreign citizen so maybe no diversity jurisdiction if all parties foreign citizens]
- C. (4 points) causes of action: negligence (in keeping unsafe workplace) against Lagoon Truking Co.; wrongful discharge (being fired for exercising lawful right to file suit) against Lagoon Truking Co. and George; possibly breach of contract depending on terms of contract with Lagoon Truking Co.
- D. (4 points)
1. defenses – negligence:
- a. statute of limitations – two years for personal injury; injury took place on Apr. 15, 2003, and suit filed June 14, 2005 (*but if* June 14, 1996 filing can be related back to the original Apr. 10, 2005 filing this defense might be avoided [see FSM Civ. R. 15(c)])
- b. Phil was negligent therefore all his fault or if partly his fault then liability reduced by comparative negligence
- c. injury due to intervening cause (Chuuk Hospital) won't work because
- (1) facts say he was treated properly there,
- (2) medical malpractice is not an intervening cause since it is always within the risk of any injury
2. defenses – wrongful termination

- a.employment at will, could be fired for any reason or no reason
- b.fired for good cause (some reason other than law suit) (facts as given don't tell whether other cause for firing or not)

3.likely outcome

a.dismissal of negligence count on statute of limitations grounds

b.no precedent in FSM if retaliatory firing is actionable – argue

E. (3 points) contributory negligence, a complete defense to negligence, not in keeping with Micronesian custom and tradition therefore is not a defense in FSM to negligence; comparative negligence, a partial defense based on each's degree of fault, compatible with Micronesian custom and tradition, should be applied instead.

F.(3 points) failure to include points and authorities with motion is deemed a waiver of the motion, FSM Civ. R. 6(d); therefore motion denied.