

Checklist of Points to be Covered for Complete Answers

FSM Bar Examination, August 7, 2014

[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. Newby shouldn't have mentioned his belief that the Assistant Attorney General "owed him one"; it is misconduct for an attorney to state or imply that he has the ability to improperly influence gov't official [FSM MRPC R. 8.4(e)]
 - B. Newby should've consulted with Lowman before accepting settlement
 1. settlement is the client's decision [FSM MRPC R. 1.2(a)]
 2. Lowman's statement "Just get it done" wasn't settlement authority since it didn't address essential terms of the settlement
 3. Newby wasn't authorized to accept on Lowman's behalf
 - a. the financial obligations
 - b. the admission of wrongdoing or
 - c. the cease and desist order
 - C. Newby should've tried to persuade Lowman not to continue to commit acts of consumer fraud [FSM MRPC R. 1.6 cmt.]
 1. although it was Lowman's decision whether to accept settlement [FSM MRPC R. 1.2(a)]
 2. it was Newby's responsibility to make sure Lowman understood that his continuing conduct was in violation of the law & that Newby couldn't help Lowman to continue to violate the law [FSM MRPC R. 1.2(e)]
 3. Newby should've
 - a. advised Lowman not to sign the settlement if he didn't intend to honor it
 - b. not mislead the attorney general's office into thinking it was settled by forwarding the signed settlement papers

EVIDENCE

(20 points)

- II. (5 points)
- A. the document contains hearsay (what Joan said about Ned) within hearsay (Mary Bates's note or memo)
 1. define 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]

- B. 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]
 - C. written memo may be considered a business record; under business record exception
 - 1. a memorandum, report in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time of, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record . . . all as shown by the testimony of the custodian or other qualified witness is admissible [FSM Evid. R. 803(6)]
 - 2. personal knowledge by the record keeper of the transactions recorded is not necessary
 - a. if it was made in the routine course of business based on information reported by another employee who did have personal knowledge
 - b. arguably, this element isn't met since Joan, the caller was not an XYZ employee
 - 3. memo should be inadmissible because Bates, the administrative assistant, had no personal knowledge of Ned's intentions
 - a. she merely repeated what Joan said about Ned & not being an XYZ employee she would have no duty to report
 - b. ALSO, no hearsay exception applicable to Joan's statement
 - D. Memo is hearsay containing inadmissible hearsay & thus inadmissible
- III. (4 points)
- A. test to be applied in admitting photos is whether they are relevant to any material issue in the case
 - 1. relevant evidence generally admissible [FSM Evid. R. 402]
 - B. photos must be true and accurate depiction of the accident scene & the witness who identifies the photos
 - C. photographer doesn't need to be called to identify or authenticate the photos, but witness (presumably plaintiff Fred) must be familiar with the scene and be able to testify that the photos accurately depict the scene at the time of the accident
 - D. that photos were taken 6 months after the accident will not affect admissibility because any discrepancies or changes in the accident scene at the time of the accident can be explained by witness
- IV. (4 points)
- A. objection should be sustained
 - B. prosecutor was wrong in saying that defendant's two witnesses shouldn't have been allowed to testify

1. prosecutor did not make timely objection stating ground for the objection as contemplated by evidence rules [FSM Evid. R. 103(a)(1)]
2. if prosecutor had objected, he'd have been overruled because
 - a. although character evidence generally can't be used to prove act in conformity therewith [FSM Evid. R. 404(a)]
 - b. a pertinent trait of his character can be offered by an accused [FSM Evid. R. 404(a)(1)]
 - c. character evidence when offered must be in the form of testimony as to reputation or by testimony in form of opinion [FSM Evid. R. 405(a)]
3. prosecutor could have asked the Dan's character witnesses on cross-examination if they knew about the prior specific instances of a bar fight and shoplifting [FSM Evid. R. 405(a)] BUT he didn't
4. prosecutor, if wants to use other witness or even Dan himself, to rebut testimony of character witness that evidence still must come in the for of reputation or opinion testimony [FSM Evid. R. 405(a)]

V. (7 points)

A. (4 points) inadmissible

1. usually a defendant's out-of-court statement is admissible as an admission of a party-opponent [FSM Evid. R. 801(d)(2)]
2. BUT since it was made during plea discussions that did not result in a guilty plea, it is inadmissible [FSM Evid. R. 410(d)]

B. (3 points)

1. whether Judge Fred's testimony is admissible depends on whether it is Judge Fred who is presiding over the trial
2. if he is, then he cannot testify because judge presiding at the trial may not testify in that trial as a witness & no objection need be made to preserve for appeal [FSM Evid. R. 605]
3. if he is not, then Judge Fred can testify
 - a. evidence is relevant
 - b. is defined as not hearsay since is admission of party-opponent [FSM Evid. R. 801(d)(2)]

GENERAL

(70 points)

VI. (15 points)

A. (5 points) statement over telephone

1. statement voluntarily made
2. statement would be inadmissible if Harry was in custody and

- jurisdiction as ground to dismiss), or
- 2. citizenship, person's presence in jurisdiction, or long-arm statute allowing jurisdiction for tortious act etc. in jurisdiction if sufficient minimum contacts for due process
- 3. court acquires personal jurisdiction over defendant once the plaintiff has properly served complaint and summons on defendant [Nakamura v. Mori, 16 FSM Intrm. 262, 269 (Chk. 2009)]

VIII. (3 points)

- A. 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

IX. (12 points)

- A. (4 points) whether contract enforceable
 - 1. a contract is a promise between two parties for the future performance of mutual obligations, which the law will enforce in some way
 - 2. for the promise to be enforceable, there must be an offer and an acceptance, definite terms, and consideration for the promise (that which the performance is exchanged for)[Goyo Corp. v. Christian, 12 FSM Intrm. 140, 146 (Pon. 2003)]
 - a. Bob made offer to buy spring rolls
 - b. Sam accepted by promising to perform
 - c. terms were definite, quantity of spring rolls, price, and delivery date & place
 - d. consideration = \$800
 - 3. if the state in which the contract was made has a statute of frauds requiring a writing, the terms written on paper bag are sufficiently definite & Bob put his name on it; although arguable whether he "signed" it, but he admitted the existence of the contract in his pleadings by his counterclaim

4. doesn't appear to be unenforceable due to impossibility, illegality, mutual mistake, or fraud
- B. (5 points) assuming that contract was valid & that Bob was justified in rejecting the spring rolls Sam is liable for incidental and consequential damages
1. incidental damages would be the cost of cover if commercially reasonable – the extra cost to order the spring rolls from the local restaurant = \$400
 2. consequential damages 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 Intrm. 234, 256 (App. 2006)]
 - a. Sam couldn't reasonably have known that Bob's position as church president was at stake
 - b. Sam thus not liable for Bob's lost compensation as church president
- C. (3 points) unlikely that spring rolls violated any warranty
1. unlikely they violated warranty of merchantability since objection was that they didn't meet Bob's special purpose
 2. warranty of fitness for a particular purpose would arise only if Sam had reason to know of the particular purpose that spring rolls were intended for
 3. Bob's argument would be that Sam was on notice that the spring rolls were required for the Revelations Church banquet when he said he would provide
- X. (14 points)
- A. to prove premises liability claim against Debra, Pete will have to show she 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. duty
1. Debra's duty depends on Pete's status
 2. Pete was an invitee on a business premises & was lawfully present there
 3. Debra may argue that he was a trespasser & therefore someone to

whom she did not owe a duty because she had told him to leave & he refused

4. BUT Pete entry into Gifts Galore was lawful & although he delayed he was in the process of leaving, at a minimum Pete should be entitled to exit the premises once he was no longer welcome; Debra's argument Pete was trespasser unlikely to succeed

D. breach

1. considering the loose and too narrow treads & the lack of a bannister, Pete should be able to show that the stairs, described as "rickety" were unnecessarily & unreasonably dangerous
2. if condition of stairs violated a local safety code Pete could argue that as evidence of negligence; violation of a statute creates a rebuttable presumption of negligence [Glocke v. Pohnpei, 8 FSM Intrm. 60, 61 (Pon. 1997)]

E. causes damages

1. Pete will need to demonstrate that Debra's breach was a cause in fact of his injuries – he'll need to show that the dangerous treads and the lack of a bannister caused or contributed to his fall down the stairs
2. since Pete reached for a bannister when he lost his footing & since the thin and variable treads created a risk of tumbling in the way Pete fell; Pete ought to be able to make a case Debra's breached caused injuries
3. Debra's breach was not only actual cause of Pete's leg injury but was the proximate or legal cause of injury because the injuries Pete suffered were foreseeable consequences of having unsafe stairs
4. connection between fall & blood-borne illness
 - a. if Pete hadn't fallen, he wouldn't have bled, wouldn't have needed transfusion, & wouldn't have contracted blood-borne illness
 - b. Pete must argue that these were all foreseeable consequences of his fall
 - c. Debra will argue that unsafe blood supply was intervening cause so she isn't liable for blood-borne illness
 - d. BUT negligence of third parties, particularly medical negligence, generally foreseeable & don't rise to level of intervening cause; medical actions of a hospital staff do not constitute an efficient intervening cause that would break the causal link between a tortfeasor's attack and the plaintiff's injuries. [Primo v. Refalopei, 7 FSM Intrm. 423, 429 (Pon. 1996)]

- F. Debra's failure to aid
 - 1. Debra is trained paramedic but didn't help injured Pete although she could have without any danger to herself
 - 2. persons generally have no duty to rescue him unless they have a special relationship with him – a special duty towards him [Ruben v. Chuuk, 18 FSM Intrm. 425, 431 (Chk. 2012)]
 - 3. unless there is a statute requiring trained paramedics to assist injured persons, no duty & thus Pete has no negligence claim on this ground
 - G. Debra's other defenses
 - 1. comparative negligence
 - a. Debra will argue that Pete was himself negligent by "bounding down" the stairs
 - b. if Pete also negligent, a damage award against Debra will be reduced by the amount he was negligent
 - 2. contributory negligence
 - a. not a defense in the FSM
 - b. because contrary to Micronesian custom [*e.g.*, Suka v. Truk, 4 FSM Intrm. 123, 127 (Truk S. Ct. Tr. 1989); Koike v. Ponape Rock Products, Inc., 3 FSM Intrm. 57, 67 (Pon. S. Ct. Tr. 1986)]
- XI. (9 points)
- A. (3 points) deny remand
 - 1. although trespass is a state law cause of action
 - 2. FSM Supreme Court has jurisdiction when the citizenship of the parties is diverse [FSM Const. art. XI, § 6(b)]
 - 3. although incorporated in Kosrae, the corporation is considered a foreign citizen since one of its owners is a foreign citizen [Luzama v. Ponape Enterprises Co., 7 FSM Intrm. 40, 44 (App. 1995)]
 - 4. and since the plaintiff is Kosrae citizen & defendant corporation is a foreign citizen, diversity jurisdiction exists
 - B. (3 points) remand granted
 - 1. negligence is a tort & torts are generally a state law causes of action
 - 2. no diversity jurisdiction because all parties are foreigners and there is no diversity jurisdiction when all parties are foreigners [Geoffrey Hughes (Export) Pty, Ltd. v. America Ducksan Co., 12 FSM Intrm. 413, 414 (Chk. 2004)]
 - C. (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)]

XII. (8 points)

- A. Deimos's motions should be denied
- B. Phobos has right to amend complaint once without leave of court so long as a responsive pleading has not been filed [FSM Civ. R. 15(a) ("party may amend the party's pleading once as a matter of course at any time before a responsive pleading")]
- C. Deimos's motion to dismiss for failure to state a claim is not a responsive pleading [Sipos v. Crabtree, 13 FSM Intrm. 355, 360, 367 (Pon. 2005)] (an answer would've been a responsive pleading to a complaint)
- D. since Phobos had right to amend her complaint without leave of court when Deimos filed his motion to dismiss because no answer had yet been filed [Primo v. Pohnpei Transp. Auth., 9 FSM Intrm. 407, 410 (App. 2000); Sorech v. FSM Dev. Bank, 18 FSM Intrm. 151, 155 (Pon. 2012)], Deimos's motion to dismiss must be denied
- E. Deimos's motion to dismiss for failure to state a claim must also be denied since it is moot; it moves to dismiss the original complaint, but Phobos's amended complaint is the operative pleading; Deimos should file and serve an answer to the amended complaint