

Checklist of Points to be Covered for Complete Answers

FSM Bar Examination, August 3, 2017

[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. generally, while lawyers are associated in a firm, none of them can knowingly represent a client when any one of them practicing alone would be prohibited from doing so by the ethical rules on conflicts [FSM MRPC R. 1.10(a)] (note: a "Chinese wall" to screen attorney may be used only when successive government and private employment is involved [FSM MRPC R. 1.11(b)])
 - B. current client (hospital)
 - 1. a lawyer cannot represent a client if the representation of that client will be directly adverse to another client, unless
 - a. the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
 - b. each client consents after consultation
 - 2. unless Maurice's estate has a medical malpractice claim against the hospital concerning the treatment Maurice received for which the hospital is billing him, the interests don't appear to be directly adverse
 - 3. thus Trump & Sanders could, especially if the hospital bill amounts are undisputed, reasonably believe that its representation would not affect its relationship with the two clients – the hospital and the estate
 - 4. assuming that Maurice's estate doesn't have a malpractice claim against the hospital for his treatment before his death, then the conflict appears to be of a character such that Trump & Sanders could represent both clients, if after consultation, both clients agreed
 - C. former client (Erine)
 - 1. lawyer who has formerly represented a client in a matter must not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation [FSM MRPC R. 1.9(a)]
 - 2. Erine's current claim may be substantially related to previous matter because her breach of contract claim seems to arise from her purchase of Maurice's construction company & that was the matter in which Trump & Sanders represented; the interests are materially adverse
 - 3. it's possible, but you can't tell from the facts (so maybe it's unlikely), that confidential information provided by Erine could've been provided to Trump & Sanders in the former representation and that that information could now be used to her disadvantage
 - 4. Erine might waive conflict after consultation but this may be conflict that an attorney cannot reasonably ask the former client for consent
 - D. Maurice's will prepared by Jared, Trump & Sanders lawyer

1. a lawyer cannot prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except when the client is related to the donee [FSM MRPC R. 1.8(c)]
2. Maurice, the client was related to donee, Jared (father-son) so it should be acceptable for Jared to draft Maurice's will & be a beneficiary
3. BUT his being a beneficiary might make him adverse to Craig's function as the estate's personal representative since the estate may need to dip into the insurance proceeds that Jared is expecting to inherit

EVIDENCE
(20 points)

II. (20 points)

A. (11 points)

1. Dale's anti-alcohol lobbying isn't relevant therefore inadmissible
 - 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. evidence that is not relevant is inadmissible [FSM Evid. R. 402]
2. Dale's assault at hearing is (alleged) prior bad act & is inadmissible
 - a. evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith, but 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)], none of which apply here
 - b. also doesn't appear to be relevant to traffic accident
3. Parsnip's negative urinalysis tests
 - a. are the urinalysis tests relevant when last one was four days before accident?
 - b. possibly, if needed to counter evidence, based on his previous convictions, that Parsnip habitually drives drunk
4. Parsnip's statement to officer
 - a. is hearsay
 - b. hearsay is an out-of-court statement that is being offered to prove the truth of the matter asserted therein [FSM Evid. R. 801(c)]
 - c. general rule hearsay inadmissible unless falls within one of the exceptions to the hearsay rule [FSM Evid. R. 802]
 - d. Parsnip's statement fits into "excited utterance" exception because was statement relating to a startling event made while Parsnip was under the stress of excitement caused by the event [FSM Evid. R. 803(2)]
 - e. arguably also a present sense impression exception [FSM Evid. R. 803(1)]

- f. BUT note it is not an admission of a party-opponent because the out-of-court statement is being offered by the party who made it
- B. (9 points)
1. Parsnip's criminal record
 - a. evidence of other crimes, wrongs, or acts is not admissible to prove a person's character in order to show that he acted in conformity therewith, but 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)]
 - b. possibly (but not likely) could be admissible as habit evidence – evidence of a person's habit, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the person's conduct on a particular occasion was in conformity with the habit [FSM Evid. R. 406], but does drunk driving rise to level of habit?
 - c. may be excluded if probative value outweighed by prejudice [FSM Evid. R. 403 (although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice)]
 - d. if Parsnip testifies on his own behalf, his prior felony conviction may be used to impeach him on cross-examination [FSM Evid. R. 609(a)] since it was recent enough that he is still on probation for it [FSM Evid. R. 609(b) (within last ten years)]
 2. officer's photographs
 - a. photos are relevant
 - b. will need to be authenticated by the officer or someone else who can testify that they are true & accurate depiction of the scene right after the accident [*see* FSM Evid. R. 901(b)(1)]
 3. emergency room physician's statement that Parsnip was "obviously pickled"
 - a. is relevant
 - b. is opinion testimony
 - c. a person's drunkenness is something a lay witness may testify to in the form of an opinion when it's rationally based on the witness's perception [FSM Evid. R. 701]; (unclear, here whether doctor will testify as an expert or lay witness; if qualified as an expert he may render an opinion [FSM Evid. R. 702])
 - d. can this be used to impeach Parsnip's testimony since alcohol may affect a witness's ability to perceive & recollect events?

GENERAL

(70 points)

III. (15 points)

- A. (5 points)
1. summary judgment must be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law [FSM Civ. R. 56(c)]
 2. a party against whom a claim is asserted is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof [FSM Civ. R. 56(b)]
 3. a party against whom a claim is asserted may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof [FSM Civ. R. 56(b)]
 4. court must view the facts presented and inferences made in the light most favorable to the non-moving party, burden of showing a lack of triable issues of fact belongs to the moving party [Adams v. Etscheid, 6 FSM R. 580, 582 (App. 1994)]
 5. moving party is entitled to summary judgment when it has demonstrated that there are no genuine issues of material fact remaining, and that it is entitled to judgment as a matter of law [Iriarte v. Etscheid, 8 FSM R. 231, 236 (App. 1998)]
 6. if moving party has presented a *prima facie* case of entitlement to summary judgment, the burden then shifts to the non-moving party to produce evidence showing a genuine issue of material fact [Nanpei v. Kihara, 7 FSM R. 319, 325 (App. 1995)]
 7. affidavits must be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein [FSM Civ. R. 56(e)]
 8. original summary judgment motion supported only by Datum's affidavit
 - a. Datum states Palmer was terminated for disloyalty; statement was based on personal knowledge since Datum was the one who fired her & he had authority to do so
 - b. but Datum also said he "had reason to believe" Palmer secretly transferred company information but does not explain any of the reasons or the basis for his belief, without foundation these are inadmissible evidence
 - c. statements made by others to Datum are hearsay & inadmissible evidence
 - d. Datum should've presented admissible evidence that his belief has a basis
 9. reasonable conclusion is that defendants, in their initial motion, have not made a prima facie showing of entitlement to summary judgment
- B. (4 points)
1. Palmer's affidavit also contains much inadmissible hearsay
 2. but her personal observation of Datum's "odd behavior" (asked to keep phone log, etc.) is admissible
 3. & she affirmatively denies any communication with "outside entities"

4. Palmer's affidavit is enough to controvert Datum's claim she was fired for good cause
 5. Palmer has thus shown the existence of a genuine dispute over a material fact precluding summary judgment
- C. (3 points) Datum's reply
1. logical to assume that embezzlement or theft would be good cause for Palmer's termination
 2. BUT this was raised for first time in the reply not the summary judgment motion
 3. court should either deny or consider this a new summary judgment motion with Palmer given the opportunity to oppose
- D. (3 points)
1. court can deny or continue the summary judgment motion
 2. if it appears from the affidavits of a party opposing the summary judgment motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or 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. Palmer clearly showed in her affidavit that she was unable to obtain affidavits from her former co-workers or to depose them
 4. Palmer's interrogatories haven't been answered yet
 5. Palmer thus entitled to relief under Rule 56(f)
- IV. (9 points)
- A. when a lease limits a tenant to a particular use and that use is invalid because of local law, the tenant may terminate the lease; the tenant might argue mutual mistake
1. a mutual mistake occurs when both parties are under substantially the same erroneous belief as to the facts; in a mutual mistake case, the party adversely affected must show that: 1) the mistake goes to a basic assumption on which the contract was made; 2) the mistake has a material effect on the agreed exchange of performances; and 3) the mistake is not one of which he bears the risk [FSM Dev. Bank v. Arthur, 13 FSM R. 1, 9 (Pon. 2004)]
 2. BUT the restricted use is not invalid; the lease restricts Tom to a restaurant & he may lawfully operate a restaurant there, the previous tenant did; just not a type of restaurant, a drive-thru, that he was hoping to run
 3. the lease is therefore valid
- B. Lola has a duty to mitigate her damages [*see Individual Assurance Co. v. Iriarte*, 16 FSM R. 423, 445 (Pon. 2009)]
1. Lola did mitigate damages by immediately leasing out premises
 2. Tom is liable for the difference in rent but since there is no acceleration clause, he is liable for the difference when it becomes due
 - a. Lola may sue for the rental installments after they become due [*see Bank of Hawaii v. Susaia*, 19 FSM R. 66, 70 (Pon. 2013)]
 - b. only entitled to the entire difference after the end of the lease period

- V. (13 points)
- A. (5 points) intentional interference with contract
1. elements of interference with contract for are: 1) a valid contract; 2) knowledge by the defendant of the contract; 3) intentional interference by the defendant which induces breach of the contract; 4) absence of justification on the defendant's part; and 5) resulting damages [Jano v. Fujita, 16 FSM R. 323, 327 (Pon. 2009)]
 2. Premier shouldn't have valid claim against Deep-Water
 - a. because it is Deep-Water's own contract & parties to a contract cannot, as a matter of law, tortuously interfere with their own contractual relations (although a party can breach its own contract) [Yoruw v. Ira, 16 FSM R. 464, 466 (Yap 2009)]
 - b. because contract says it can make direct sales into Premier's territory, so as matter of law, Deep-Water didn't breach contract
 - c. likely there would've been no sale if Deep-Water hadn't made direct sale because BSC would've bought Lodestone not Deep-Water equipment & there would've been no sale & no commission & thus no damages
- B. (5 points)
1. elements of interference with prospective business advantage cause of action are: 1) plaintiff's existing or reasonable expectation of economic benefit or advantage; 2) defendant's knowledge of that expectancy; 3) defendant's wrongful intentional interference with that expectancy; 4) reasonable probability that the plaintiff would have received anticipated economic benefit in absence of interference; and 5) damages resulting from interference. [Jano v. Fujita, 16 FSM R. 323, 327, 327-28 (Pon. 2009)]
 2. although Deep-Water knew of expectancy & interfered with it, was interference "wrongful"?
 - a. contract allowed Deep-Water to make direct sales & sale was made & Premier was paid commission
 - b. Deep-Water invoked its contractual right to make direct sales
 - c. if Deep-Water hadn't made direct sale, likely that BSC would've not bought Deep-Water equipment & there would've been no sale & no commission, either 5% or 15%
- C. (3 points) Deep-Water claim against Premier
1. possible interference with prospective business advantage cause of action
 - a. prospective business relationship existed – MSM placed order for Deep-Water equipment
 - b. Premier knew of that order because it received it
 - c. Premier wrongfully interfered with that order by knowingly making untruthful comments about Deep-Water's equipment & service
 - d. Deep-Water would've received economic benefit (\$10 million, less commission, etc.) from MSM order if Premier hadn't induced MSM to switch to Lodestone
 - e. Deep-Water damaged by lost sale (& reputation?)

2. probable business libel cause of action [*see Smith v. Nimea*, 18 FSM R. 36, 48 (Pon. 2011)]
 - a. Premier made knowingly false statements about Deep-Water's equipment & service
 - b. damages: lost sales
- VI. (9 points)
- A. stop of Ann's pickup
 1. stop of Ann's pickup was an investigatory stop
 2. a valid investigatory stop requires only reasonable suspicion, based on specific and articulable facts, that the suspect has committed or is about to commit a crime [*FSM v. Phillip*, 17 FSM R. 595, 598 (Pon. 2011)]
 3. Ott had reasonable suspicion to believe crime was being committed – driving under the influence – and the public may be in imminent danger
 - a. because police dispatcher's knowledge may be imputed to Officer Ott
 - b. the anonymous telephone report was sufficiently detailed to create reasonable suspicion
 - c. telephone informant had personal knowledge – Ann had just left his residence (although anonymous police would likely have been able to identify because of his admission Ann had just left his residence) & appears reliable because of his report's relative detail
 - B. search of plastic box
 1. search of box was made without warrant but incident to an arrest
 2. the most basic principle underlying a warrantless search incident to a lawful arrest is that the arrest itself must be justified, and when the arrest is invalid, the search is invalid [*Warren v. Pohnpei State Dep't of Public Safety*, 13 FSM R. 483, 496-97 (Pon. 2005)]
 3. Ann's arrest was valid – she failed several field sobriety tests by Officer Ott
 4. search was contemporaneous with arrest and done at place of arrest [*FSM v. Aki*, 9 FSM R. 345, 348 (Chk. 2000) (search that was not done at the place of the arrest and at the time of the arrest or immediately thereafter is not a valid search incident to a lawful arrest)]
 5. even if search was invalid, evidence might be admissible if it would have inevitably been discovered absent the illegality; Officer Ott saw the drug pipe and that probably would've been enough to get search warrant to search plastic box
- VII. (12 points)
- A. (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?
 - B. (2 points) probably unconstitutional
 1. 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

2. but Congress does have authority to regulate foreign and interstate commerce [FSM Const. art. IX, § 2(g)], if this \$10 "tax" can be considered "regulation" of foreign and interstate commerce could be constitutional, otherwise unconstitutional tax
- C. (2 points) unconstitutional, at least for the most part
1. state constitutional provision is a nullity because it requires the state legislature to enact statutory scheme in an area over which the state has no jurisdiction since
 2. copyright and patent are powers expressly delegated to FSM Congress to legislate upon [FSM Const. art. IX, § 2(g)]
 3. powers expressly delegated to nat'l gov't are national, not state powers [FSM Const. art. VIII, § 1]
 4. trademarks regulation would also probably come under regulation of foreign and interstate commerce, a power also expressly delegated to Congress [FSM Const. art. IX, § 2(g)], although state may be able to regulate a trademark used only within the state and protect it from another trademark used only within state
- D. (3 points) unconstitutional
1. nat'l gov't has the expressly delegated powers to control immigration [FSM Const. art. IX, § 2(c)]
 2. this municipal law appears to infringe on nat'l gov't power
 3. also violates guarantee of equal protection by prohibiting female municipal citizens from exercising a fundamental right – marriage to whomever they choose [FSM Const. art. IV, § 4 (sex discrimination barred)]
- E. (2 points) unconstitutional
1. a legislative act finding a named person guilty of something and purporting to punish him is a bill of attainder
 2. Constitution bans bills of attainder [FSM Const. art. IV, § 11]
- F. (2 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
- VIII. (8 points)
- A. (3 points) writ of mandamus – a preemptory writ directed from a higher court to a lower tribunal commanding it to perform a ministerial, non-discretionary duty or commanding the lower tribunal not to do something that is in excess of its jurisdiction (usually then called a writ of prohibition)
- B. (3 points) clearly erroneous – appellate standard of review of a trial court's factual findings – an appellant must show that the trial court's factual finding was clearly erroneous before the appellate court will overturn it
- C. (2 points) nolo contendere – a no contest plea – criminal defendant, with court's consent [FSM Crim. R. 11(b)], enters a plea not contesting the charges but also not admitting guilt, has effect of pleading guilty; generally not admissible evidence against person making plea [FSM Evid. R. 410(b)]

- IX. (4 points)
- A. (2 points) motion to remand granted
1. case is an employment contract case – contract law is generally state law matter
 2. although parties are of diverse citizenship both parties foreigners
 3. FSM Supreme Court doesn't have "diversity" jurisdiction when all parties are foreigners [*see Trance v. Penta Ocean Constr. Co.*, 7 FSM R. 147, 148 (Chk. 1995); *International Trading Co. v. Hitec Corp.*, 4 FSM R. 1, 2 (Truk 1989)]
 4. no other ground for jurisdiction apparent, must remand to Pohnpei Supreme Court, the court with jurisdiction
- B. (2 points) motion to remand denied
1. FSM Supreme Court has diversity jurisdiction [FSM Const. art. XI, § 6(b)] because
 2. Emiliana is a Yap citizen
 3. Divers' Delight 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