

Checklist of Points to be Covered for Complete Answers FSM Bar Examination, August 3, 2023

[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 recite them so long as the legal principles involved are discussed]

EVIDENCE

(20 points)

- I. (20 points)
 - A. (4 points) objection – hearsay
 1. Wife may use diary entry to refresh her memory for the purpose of testifying [FSM Evid. R. 612(1)]
 2. but Wife wants to offer diary entry into evidence; diary entry itself is hearsay
 - a. hearsay is 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. hearsay exception for recorded recollection may apply [FSM Evid. R. 803(5)]
 - (1) memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable her to testify fully and accurately
 - (2) shown to have been made or adopted by the witness when the matter was fresh in her memory and to reflect that knowledge correctly
 - d. might also be admissible under the present sense impression [FSM Evid. R. 803(1)] or then existing mental condition ("state of mind") [FSM Evid. R. 803(3)] exceptions
 - B. (3 points) objection – hearsay; relevance
 1. Husband's statement to his best friend that he has secret bank accounts is an admission of party opponent
 2. admission of party opponent is defined as non-hearsay [FSM Evid. R. 801(d)(2)]
 3. in divorce case where property division is at issue, bank accounts' existence is highly relevant
 - C. (4 points) objection – hearsay
 1. general rule hearsay inadmissible unless falls within one of the exceptions to the hearsay rule [FSM Evid. R. 802];
 2. 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
 3. Neighbor's statement in the police report is hearsay within hearsay
 - a. 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]
 - b. while rest of police report can come in, no hearsay exception allows Neighbor's statement; it's inadmissible
 - D. (3 points) objection – hearsay
 1. *The Handbook of Business Appraisals* qualifies as a learned treatise
 - a. to the extent called to an expert witness's attention upon cross-examination or relied upon by him in direct

- examination,
 - b. statements, contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice may be admitted
 - 2. admissible under hearsay rule exception for learned treatises [FSM Evid. R. 803(128)]
 - a. if admitted, the statements may be read into evidence
 - b. but may not be received as an exhibit
 - E. (3 points) objection – opinion testimony
 - 1. Husband's lay opinion testimony admissible only if
 - a. rationally based on the Husband's perception [FSM Evid. R. 701(a)] and
 - b. helpful to a clear understanding of his testimony or the determination of a fact in issue [FSM Evid. R. 701(b)]
 - 2. opinion testimony generally barred, and since Husband's testimony about condominium's value doesn't fit in either exception should be inadmissible
 - F. (3 points) objection – hearsay; relevance
 - 1. Wife's employer's wage records are business records; admissible [FSM Evid. R. 803(6)]
 - a. if kept in the course of a regularly conducted business activity
 - b. if it was the regular practice of that business activity to make the record (likely is required by law)
 - c. and is shown by the record custodian's testimony or other qualified witness's
 - 2. Wife's wage history is relevant since in divorce a property division is at issue

ETHICS

(10 points)

- II. (10 points)
 - A. even though only Medico is paying Attorney's fee and although Medico hired Attorney, Attorney seems to be representing both Physician and Medico
 - 1. Attorney may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the Attorney's duty of loyalty to the client [FSM MRPC R. 1.7 cmt.]
 - a. since Medico's legal obligation to defend Physician was created by contract
 - b. but Attorney must consider interests of both Physician and Medico
 - 2. representation of multiple clients in a single matter is permissible if clients consent and
 - 3. the consultation includes an explanation of the common representation's implications and the advantages and risks involved [FSM MRPC R. 1.7(b)(2)]
 - a. this is common representation because Physician and Medico are aligned in interest
 - b. if Attorney believes at any stage of the proceedings that the insured and insurer are in direct conflict, Attorney must

inform both parties and suggest insured (Physician) retain independent counsel

4. representation of Physician and Medico may be limited in scope only to matters related to the insurance coverage [FSM MRPC R. 1.2 cmt.]

B. Attorney's ethical behavior

1. Attorney has duty to clients of
 - a. diligence [FSM MRPC R. 1.3],
 - b. loyalty [see FSM MRPC R. 1.7 cmt.],
 - c. to keep client informed [FSM MRPC R. 1.4], and
 - d. confidentiality [FSM MRPC R. 1.6]
2. Attorney was diligent in reviewing record, conducting discovery, and obtaining expert opinion
3. Attorney must see to it that neither client is disadvantaged by common representation
 - a. insurance contract's settlement clause may unfairly disadvantage Physician in Attorney's representation
 - b. could be unethical to enter common representation if Attorney knew of contract's settlement clause before he entered representation (although facts indicate that Attorney recommended settlement, not proof he knew of clause in insurance contract between Physician and Medico)
 - c. but when Medico approved settlement idea, Attorney immediately began negotiating with Admin;
 - (1) this was breach of loyalty and duty to keep Physician informed
 - (2) was in Medico's best interest, but not Physician's
 - d. when Medico wanted to settle for \$70,000, avoid trial & other costs (including higher settlement) & Physician doesn't want to settle, a real and present conflict arose
 - (1) Attorney had ethical obligation of loyalty to disclose conflict to Physician
 - (2) to recommend Physician obtain separate counsel, and
 - (3) to cease to represent Physician from that point on
 - (4) therefore duty of loyalty to Physician violated
 - e. Attorney failed to keep Physician informed of
 - (1) contract's settlement clause
 - (2) of her conclusions after discovery and expert opinion
 - (3) settlement negotiations
 - (a) usually both parties must agree as to what Attorney does next, or
 - (b) real & present conflict exists
 - (4) since Attorney, through her secretary, only informed Physician of proposed settlement after it was negotiated; duty to communicate violated
 - f. unclear if Physician's confidentiality violated because unknown if source of any information disclosed to Medico in settlement recommendation was from information that flowed between Physician and Attorney

C. settlement

1. Medico wants to settle; Physician doesn't
2. Attorney's clients have conflict
3. Attorney can't settle case for Physician (Attorney breached her ethical

4. obligations to Physician); only client can decide to settle case would need Physician's consent to continue to represent Medico [FSM MRPC R. 1.7(a)]
5. Attorney can't settle case for Medico because would violate Physician's right to defend himself
 - a. settling for Medico would end Physician's right to defend self
 - b. both clients' interests must continue to be represented
 - c. both clients will need (new) separate counsel

GENERAL

(70 points)

III. (6 points)

- A. Physician could sue Attorney for legal malpractice; legal malpractice is a generic term for at least three distinct causes of action available to clients who suffer damages because of their lawyers' misbehavior; clients wronged by their lawyers may sue for damages based on breach of contract, breach of fiduciary duty, or negligence [Heirs of Tulenkun v. Simon, 16 FSM R. 636, 644 (Kos. S. Ct. Tr. 2009)]
- B. negligence – elements of actionable negligence are the breach of a duty on the part of one person to protect another from injury, and that breach is the proximate cause of an injury to the person to whom the duty is owed, which may be summarized as: a duty of care, a breach of that duty, which breach proximately causes damages [Fabian v. Ting Hong Oceanic Enterprises, 8 FSM R. 63, 65 (Chk. 1997)]
- C. breach of contract – Physician might be intended third-party beneficiary of contract between Medico and Attorney – a beneficiary whose rights are conferred as a part of the original contract between the contracting parties [see Mailo v. Penta Ocean Inc., 8 FSM R. 139, 141 (Chk. 1997)] since Physician is likely named in contract
- D. damages – all of the above causes of action require proof of damages;
 1. at this stage of litigation, nothing has happened & Physician hasn't suffered any damages;
 2. thus none of the actions above are possible until case against Physician has been resolved & some damages actually occurred

IV. (16 points)

- A. (12 points)
 1. (4 points) law and equity
 - a. law refers to decisions made in conformance to the rules of common law, statutes, or the Constitution while
 - b. equity refers to courts and decisions made based on what is fair and right
 2. (4 points) interpleader and intervention
 - a. interpleader occurs when a plaintiff joins as defendants and requires them to interplead because the defendants' claims are such that the plaintiff is or may be exposed to double or multiple liability [FSM Civ. R. 22; Bank of the FSM v. Aisek, 13 FSM R. 162, 165 (Chk. 2005)]
 - b. intervention occurs when a non-party seeks to join existing litigation
 - (1) such joinder is of right when either an FSM statute confers an unconditional right to or when the applicant claims an interest relating to the property or

transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest and the applicant's interest is not adequately represented by existing parties [FSM Civ. R. 24(a); Moses v. Oyang Corp., 10 FSM R. 210, 212 (Chk. 2001)] or

- (2) such joinder is permissive when either an FSM statute confers a conditional right to or when the applicant's claim or defense and the main action have a question of law or fact in common [FSM Civ. R. 24(b); UNK Wholesale, Inc. v. Robinson, 11 FSM R. 361, 366 (Chk. 2003)]

3. (4 points) third party complaint and affirmative defense

- a. third party complaint is a complaint filed by a defendant to be served on someone not a party to the action who is or may be liable to the defendant-third party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff [FSM Civ. R. 14(a)]
- b. affirmative defense is the defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's claim, even if all the complaint's allegations are true, and which defense a defendant must affirmatively plead in the defendant's answer to the plaintiff's complaint or it is waived [FSM Civ. R. 8(c); Estate of Gallen v. Governor, 21 FSM R. 477, 482-83 & n.2 (Pon. 2018)]

B. (4 points)

1. the FSM Supreme Court appellate division may hear appeals from state courts if the case requires interpretation of the FSM Constitution, national law, or a treaty [FSM Const. art. XI, § 7] and
2. if a state constitution permits, FSM Supreme Court appellate division may hear other cases on appeal from the highest state court in which a decision may be had [FSM Const. art. XI, § 7] [BONUS: only the constitutions of Chuuk and Kosrae permit such appeals]

V. (9 points)

A. arguments for defense counsel – Statement should be suppressed under "fruit of poisonous tree" doctrine as illegally obtained because

1. statement not given after knowing, intelligent, voluntary waiver because Attila not informed of what he would be questioned about before he agreed to answer questions – cannot knowingly, intelligently, voluntarily waive a right unless know what are waiving
2. right to remain silent may have been waived, but right to have attorney present was not waived, therefore statement taken illegally
3. Attila, probably not free to leave, therefore under arrest, not accorded other, statutory rights of arrested person, *e.g.*, to call a family member, etc.

B. arguments for prosecution

1. right to have attorney present was waived by implication, because Attila knew and understood had that right and voluntarily started answering questions anyway;
2. Attila, not under arrest – came to station voluntarily, in response to request, and was free to leave at any time

3. even if Attila was not informed what would be questioned about he knew as soon as questions were asked and he knew he did not have to answer so could have stopped there, but continued voluntarily
 - C. court's ruling – argue either way (but, defense's arguments may be more convincing)
- VI. (7 points) since Juliet's business is not a separate corporation which cannot be held liable for Juliet's debts
- A. clerk will issue writ of execution upon Romeo's request [6 F.S.M.C. 1407], which the police may use to seize (levy) \$16,500 from Juliet's bank account [6 F.S.M.C. 1408(1)]
 - B. BUT writ of execution cannot issue or is stayed until 10 days after entry of judgment [FSM Civ. R. 62(a)]
 - C. any party may apply for order in aid of judgment [6 F.S.M.C. 1409]
 - D. no writ of execution can be issued while an application for an order in aid of judgment is pending [6 F.S.M.C. 1413(1)]
 - E. therefore, if application for order in aid of judgment is filed within ten days after entry of judgment, no writ of execution can issue unless made part of an order in aid of judgment
 - F. parties can then negotiate an agreeable order in aid of judgment to present to judge, or Juliet can present evidence and argue before judge that considering her abilities to pay time payments would be the fastest way to reasonably pay the judgment [6 F.S.M.C. 1409, 1410(1)]
 - G. other possible steps – none advisable [shouldn't be in answer]
 1. appeal not advisable because
 - a. Juliet doesn't want
 - b. supersedeas bond required for stay of money judgment on appeal [FSM Civ. R. 62(d)] would likely disrupt business as much as writ of execution on bank account
 2. motion for new trial or judgment not advisable because
 - a. stay while motion pending is discretionary
 - b. unlikely to prevail
- VII. (9 points)
- A. (3 points) motion to remand denied
 1. case is between two different state gov'ts – Pohnpei & Chuuk
 2. FSM Supreme Court has exclusive jurisdiction over disputes between states [FSM Const. art. XI, § 6(a)]
 - B. (3 points) motion to remand granted
 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 R. 40, 44 (App. 1995)]
 3. so construction company is Japanese citizen & 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 R. 147, 148 (Chk. 1995)]
 - C. (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 R. 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 plead as only a violation of the Pohnpei Constitution or Pohnpei civil rights law then not a case arising under national law and FSM court doesn't have jurisdiction & will remand the case

VIII. (9 points)

A. unconstitutional because

1. person can't be forced to relinquish constitutional rights to obtain gov't benefits
2. constitutional protection against self-incrimination [FSM Const. art. IV, § 7]
3. may be permissible if contract also included an immunity provision barring use of any information obtained against the person
4. but no such provision included in the bill [suggest amendment to add?] so, if enacted as is, would be unconstitutional

B. unconstitutional because

1. although gov't may regulate speech in governmental work place [*see Damarlane v. Pohnpei Legislature*, 15 FSM R. 301, 314 (App. 2007)]
2. bill appears to include anyplace under gov't contractor's control, including other job sites, private homes, etc.
3. thus would violate protection of freedom of expression [FSM Const. art. IV, § 1]
4. even if amended to restrict statute to just governmental work place, bill is too vague and overbroad
5. statute must not be so vague and indefinite as to fail to give fair notice of what acts will be prohibited [*Laion v. FSM*, 1 FSM R. 503, 507 (App. 1984)] (what is patently offensive to one may not be patently offensive to another)
6. or so broad that it regulates protected speech

C. unconstitutional because

1. would violate protection of freedom of expression [FSM Const. art. IV, § 1]
2. no clear present danger of unlawful act (such as violence to achieve secession)

IX. (7 points) state utility corporation will not prevail on either the assumption of the risk and contributory negligence defense

A. assumption of the risk defense is contrary to the traditional Micronesian concepts of responsibility and is generally not available in FSM [*Kileto v. Chuuk*, 15 FSM R. 16, 18 (Chk. S. Ct. App. 2007)]

B. comparative fault or comparative negligence is the rule in the FSM; absolute defense of contributory negligence is contrary to Micronesian custom [*see id.*; *Koike v. Ponape Rock Products, Inc.*, 3 FSM R. 57, 67-68 (Pon. S. Ct. Tr. 1986)]

C. court may use comparative negligence defense to reduce recovery by Cassandra if it determines she was partly at fault

1. under "pure" comparative negligence defendant is entitled to a proportional reduction in any damage award upon proof that the plaintiff's negligence was in part the cause of the plaintiff's injuries
2. under other comparative negligence version the plaintiff must be less at fault than the defendants in order to recover anything

3. Chuuk uses the "pure" version [Epiti v. Chuuk, 5 FSM R. 162, 168 (Chk. S. Ct. Tr. 1991)]

X. (7 points)

- A. contract was formed — offer, acceptance, consideration, & definite terms
- B. Comino is "running the business" so has assumed Malta's end of the lease
- C. court should order reformation of contract [FSM Dev. Bank v. Arthur, 13 FSM R. 1, 9 (Pon. 2004)]
 1. reformation is available in the case of the omission of a term agreed on, the inclusion of a term not agreed on, or the incorrect reduction of a term to writing
 2. it is the mechanism for the correction of typographical and other similar inadvertent errors in reducing an agreement to writing (scrivener's errors)
 3. where, because of mistake, a writing fails to accurately state the parties' agreement, reformation is the exclusive remedy [*id.*]
- D. once contract reformed term of \$1,000 a month rent would be enforced
- E. Gozo has paid his three month's rent in full; should be entitled to return of \$500 security deposit if security deposit conditions were met