

Checklist of Points to be Covered for Complete Answers

FSM Bar Examination, ~~August 6, 2020~~ October 1, 2020

[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]

EVIDENCE

(20 points)

- I. (20 points)
- A. (3 points)
1. objection would assert spousal privilege - wife can't testify against husband can't reveal confidential marital conversations during marriage, even if no longer married; if confidential, judge won't allow Lucy's testimony
 2. but was it confidential? - Fred & Ethel in same car & if could hear it then communication not confidential, then admissible
 3. act of Congress [6 F.S.M.C. 1301] & similar TT Code derived statutes in the states which bar spouses from testifying against each other apply to criminal cases [not hearsay because is admission of party-opponent [FSM Evid. R. 801(d)(2)]]
- B. (3 points)
1. objection would be improper lay opinion testimony [FSM Evid. R. 701]
 2. court will allow because rationally based on witness's perception (Ricky passed him just before Ricky was stopped) & is helpful to determine fact at issue (whether Ricky was speeding)
- C. (3 points)
1. objection would be hearsay because nodding head is out-of-court statement (non-verbal conduct intended as assertion is a statement [FSM Evid. R. 801(a)(2)]) offered for the truth of the matter asserted [FSM Evid. R. 801(c)]
 2. but court will allow because not hearsay because is admission of party-opponent [FSM Evid. R. 801(d)(2)]]
- D. (3 points)
1. will object on ground of 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)]; general rule hearsay inadmissible unless falls within one of the exceptions to the hearsay rule [FSM Evid. R. 802]
 2. prosecution will claim falls within exception for public records, but court will sustain objection because rule bars admission of police reports in criminal cases [FSM Evid. R. 803(8)(B)]
 3. might be admissible if cover sheet not considered police report & if considered a recorded

recollection - something recorded while fresh in witness's mind and about which he now has insufficient recollection to testify accurately & fully [FSM Evid. R. 803(5)] as writing used to refresh witness's memory [see FSM Evid. R. 612]; not too likely

- E. (3 points)
1. Fred's out-of-court statement is hearsay (see definition above)
 2. isn't excited utterance exception [FSM Evid. R. 803(2)] since was made a day after stop
 3. isn't existing condition exception [FSM Evid. R. 803(3)] since, although was about Sam's condition (his being scared) it wasn't made about his then existing condition because made day after
 4. no other exceptions possible, therefore court will not admit as hearsay not within any exception
- F. (2 points)
1. evidence of witness's character may be attacked or supported by opinion evidence [FSM Evid. R. 608], but evidence of truthfulness admissible only after witness's credibility attacked
 2. Ricky won't be allowed to call pastor first, since Ricky hasn't been a witness yet (and might never be since criminal defendant not required to testify) his credibility as a witness can't possibly have been called into question yet
- G. (3 points)
1. to impeach witness with evidence of criminal conviction, crime must carry a maximum sentence of over one year imprisonment or death [FSM Evid. R. 609(a)(1)] or involve dishonesty or false statement regardless of maximum sentence [FSM Evid. R. 609(a)(2)]
 2. since offense doesn't involve dishonesty or false statement, if taking trochus out-of-season doesn't have maximum sentence of over one year then evidence will not be admitted

ETHICS

(10 points)

II. (8 points)

- A. any sums paid to Astatine on account of work to be performed by her in the future and that are not yet earned, or costs and expenses to be incurred in the future, must be placed in her trust account [see FSM MRPC R. 1.15(c)] unless her fee agreement with Boron clearly stated that the \$5,000 paid in advance was a non-refundable retainer, earned on receipt

1. since it appears that the \$5,000 probably wasn't a non-refundable retainer since she said she would bill her time at \$120 per hour, use of \$3,650 to pay her rent was improper; payment of the investigator may have been proper as an expense once it was incurred
 2. Astatine must return any unearned portion of fee when her representation of Boron ends [FSM MRPC R. 1.16(d)]
 3. also, lawyers are barred from engaging in conduct involving deceit or dishonesty
- B. lawyer can't represent someone in same or substantially related matter when position is materially adverse to former client unless former client consents after consultation [FSM MRPC R. 1.9(a)], should've maintained client list to check for conflicts; can't use information relating to representation to former client's disadvantage unless info generally known [FSM MRPC R. 1.9(b)]; argue whether
1. since Radon's drinking was involved both times, is this a "a substantially related matter"? If so, Astatine needs Radon's consent
 2. Astatine may have learned confidences or secrets about Radon's drinking habits which could harm him in case, Astatine may be able to attack his credibility as a witness from what she learned in the earlier case concerning his drinking habits or ability to function under the influence

III. (2 points)

- A. lawyer must keep client reasonably informed & promptly comply with reasonable requests for information [FSM MRPC R. 1.4(a)], to the extent needed for client to make informed decision about representation
- B. but lawyer must obey court's rule not to disclose documents' contents to anyone, including client [FSM MRPC R. 3.4(c); see also FSM MRPC R. 1.4 cmt.]

GENERAL
(70 points)

IV. (10 points)

- A. (3 points) state "amusement tax" is unconstitutional
 1. a percentage tax levied on business revenue is an income tax [Truk Continental Hotel, Inc. v. Chuuk, 7 FSM R. 117, 120 (App. 1995)]
 2. national gov't has sole power to levy income taxes [FSM Const. art. IX, § 2(e)]
- B. (3 points) probably constitutional
 1. states can't impose taxes that restrict interstate

commerce [FSM Const. art. VIII, § 3]

2. only nat'l gov't has power to impose taxes based on imports [FSM Const. art. IX, § 2(d); FSM Const. art. VIII, § 1]
3. BUT (argue) not an income tax since tax is not imposed on all imports or on all goods received through interstate commerce & is imposed only on those goods, imported or not, in inventory on February 1st

C. (4 points) constitutional

1. nat'l gov't has exclusive authority to regulate banking, foreign & interstate commerce, insurance [FSM Const. art. IX, § 2(g)]
2. can therefore regulate banks & insurance agencies & make certain acts regarding banks or insurance agencies a crime
3. money wire transfer agencies, although not strictly banks, seem to be in the banking business & are engaged only in foreign & interstate commerce so nat'l gov't ought to be able to regulate those agencies too & criminalize conduct regarding them

V. (15 points)

A. (12 points) besides usual discovery requests, motion for suppression of evidence on ground that searches were unreasonable since done without warrant or probable cause

1. search of car passenger compartment
 - a. gov't will argue warrantless search reasonable because done for officer's safety - dangerous weapons or devices could be hidden there where arrestee might be able to reach and evidence (fruits & instrumentalities of crime); & search was done within reasonable time of arrest
 - b. you will argue that once Karl arrested and taken away, officers were in no danger
 - c. gov't may also argue plain view, if marijuana was in plain view of anyone looking into car (possible - search was cursory) from place they had right to be
 - d. gov't can also argue would have been inevitably discovered by lawful search at police station (see 2b below)
 - e. gov't will succeed if facts fit plain view argument; if not, gov't might (or might not) succeed on other argument
2. search of entire car at police station
 - a. you will argue that police had plenty time to get search warrant if they had probable cause to believe any evidence of crime in car
 - b. if gov't can show search was part of routine inventory done pursuant to regulations in

order to protect police from false claims of missing property and arrestee's property from damage & theft and that search followed guidelines; then motion denied [FSM v. Joseph, 9 FSM R. 66, 72 (Chk. 1999)]

- B. (3 points) Karl should make motion for return of property [FSM Crim. R. 41(e)]; car likely returned (in absence of civil forfeiture statute), because Karl entitled to its lawful possession of it, but marijuana, and dynamite, not returned because are contraband & no right to return of contraband

VI. (4 points) motion denied

- A. Baker's statement was unconstitutionally obtained, and could not be used against him, but his statement is not being used at all - Baker is testifying personally;
- B. also the right to object to unconstitutional evidence is personal, only Baker could have objected to use of his statement, not Able and Charlie
- C. (Able & Charlie could have objected, if Baker had not testified, to admission of those portions of Baker's statement that referred to them on grounds they could not confront witness against them)

VII, (9 points)

- A. President has 20 days to act after decision by Secretary; since decision was submitted to President 25 days ago it is too late to appeal to President to reverse decision on ground that it would adversely affect a compelling national interest relating to foreign affairs or to the general public welfare
- B. Appeal to FSM Supreme Court within 30 days of final decision [decision not final until President acts or his 20 days are up, so Albertino has ample time here to prepare appeal]
 - 1. trial division
 - a. may conduct trial de novo [17 F.S.M.C. 111(2)]
 - b. may set aside Secretary's decision if it was arbitrary, capricious, abuse of discretion, or otherwise unlawful, or unconstitutional; or in excess of authority, denial of rights, without substantial compliance with legal procedure; or unwarranted by the facts?
 - (1) was denial arbitrary, capricious or abuse of discretion or unwarranted by the facts when the two states affected recommended approval, and only one of the hotels and none of the tour companies that might be affected recommended denial
 - (2) was submitting application to only Pohnpei and Kosrae instead of all four states a violation of procedure? and if so, should decision be set aside as

- without substantial compliance with procedures required by law?
- 2. appellate division
 - a. can appeal trial division decision if adverse
 - b. may appeal to directly from Secretary's decision if parties agree on facts, and if issue involved was one of extreme time sensitivity and of national importance that ultimately would have to be decided by the appellate division [unlikely on these facts]
- 3. writ of mandamus (from either division) to issue must involve non-discretionary, ministerial duty and no adequate remedy at law present [unlikely when appeal possible]
- 4. injunctive relief [but does irreparable harm exist? not really different, in this case from pursuing appeal]

VIII. (14 points)

A. Buyer v. Seller

- 1. may have entered into contract which Seller refuses to perform
 - a. contract needs mutual assent to contract's essential terms
 - b. \$400,000 price and July 15 delivery date appear to have been agreed to by both parties
 - c. no facts show that Seller rejected these terms
 - d. liquidated damages (\$500 per day) may not have been agreed to
 - e. statute of frauds? does state have a statute of frauds that would apply requiring contract to be in writing?
- 2. modification of contract
 - a. Buyer's memo, by its terms, could only be modified by a writing; nut
 - b. Buyer orally agreed to modify (in response to Seller's written fax) & parties may orally modify a contract
- 3. remedies
 - a. liquidated damages \$500 per day if that term is part of contract, if not
 - b. cost of reasonable substitute
 - c. 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 - if foreseeable [FSM Dev. Bank v. Adams, 14 FSM R. 234, 256 (App. 2006)]
 - d. specific performance
 - (1) since the generator was custom-built to order, Buyer may be unable to obtain adequate substitute generator on the open

market

- (2) therefore unable to obtain adequate legal remedy if specific performance not ordered

B. Buyer v. Trader

1. tortious interference with a contractual relationship – when a party's economic advantages obtained through dealings with others are knowingly jeopardized out of petty or malicious motives or by the improper or unjustified conduct of a third party [Federated Shipping Co. v. Ponape Transfer & Storage Co., 4 FSM R. 3, 14 (Pon. 1989)]
2. injunctive relief (if specific performance is the proper remedy against Seller, injunctive relief would be proper against Trader) if there is no adequate remedy at law

IX. (12 points)

A. (7 points) Sally v. Jack

1. Sally could sue Jack for negligence
 - a. elements of actionable negligence [Fabian v. Ting Hong Oceanic Enterprises, 8 FSM R. 63, 65 (Chk. 1997)] are
 - (1) breach of a duty
 - (2) owed on the part of one person to protect another from injury
 - (3) that breach is the proximate cause of an
 - (a) BUT was absence of life jackets cause of injury?
 - (b) back injury not type of injury life jacket intended to prevent
 - (4) injury to the person to whom the duty is owed
 - (5) may be summarized as: a duty of care, a breach of that duty, which breach proximately causes damages
 - b. negligence per se –
 - (1) violation of a statute creates a rebuttable presumption of negligence; put another way, the unexcused violation of law which defines reasonable conduct is negligence in itself [Glocke v. Pohnpei, 8 FSM R. 60, 61 (Pon. 1997)]
 - (2) Sally was in class of persons the life jacket statute was designed to protect
 - c. defenses
 - (1) assumption of risk or written waiver of responsibility
 - (a) written waiver construed strictly against drafter
 - (b) written waiver only releases Xebec from liability, not Xebec's employees

- (c) does "any injuries" waiver include those from negligence?
 - (2) contributory negligence not available as defense; contrary to custom
 - (3) comparative negligence [Fabian v. Ting Hong Oceanic Enterprises, 8 FSM R. 63, 66 (Chk. 1997)]
 - (a) Sally told Jack she could swim but she couldn't
 - (b) Sally'll argue injury caused by her fall, not her inability to swim
 - (c) "pure" form of comparative negligence, which is a defense available in Chuuk,
 - (d) defendant is entitled to a proportional reduction in any damage award upon proof that the plaintiff's negligence was in part the cause of his injuries
 - (e) but the plaintiff may still recover for all of the harm attributable to the defendant's wrongdoing even if plaintiff's negligence was greater than the defendant's
 - (4) emergency or supervening cause
 - (a) emergency may excuse otherwise negligent act
 - (b) supervening cause of other boat's actions
- B. (2 points) Sally v. Xebec negligence claim
 - 1. respondeat superior
 - a. Xebec owns the boat and employs Jack
 - b. must show Jack was working in the scope of his employment
 - 2. defenses - same as above
- C. (3 points) Ivan v. Jack
 - 1. loss of consortium
 - a. derivative from spouse's claim for damages [Epiti v. Chuuk, 5 FSM R. 162, 170 (Chk. S. Ct. Tr. 1991)]
 - b. if comparative negligence succeeds against Sally any loss of consortium award will be reduced by the percentage of fault attributable to Sally (the spouse) [Id.]
 - 2. negligent infliction of emotional distress
 - a. must show manifestation of physical injury to self [Pau v. Kansou, 8 FSM R. 524, 526 (Chk. 1998)]
 - b. must be nearby accident when it occurred (but was watching through binoculars)
- X. (6 points)
 - A. (3 points) remand denied

1. state law cause of action but diversity of citizenship present
 2. FSM Supreme Court has subject-matter jurisdiction when even minimal diversity is present [Luzama v. Ponape Enterprises Co., 7 FSM R. 40, 48 (App. 1995)]
 3. case may be removed from a municipal court to the FSM Supreme Court when diversity of citizenship exists [Damarlane v. Harden, 8 FSM R. 225, 227 (Pon. 1998)]
- B. (3 points) remand denied
1. although since all parties are foreign citizens, there is no diversity jurisdiction [Trance v. Penta Ocean Constr. Co., 7 FSM R. 147, 148 (Chk. 1995)]
 2. a dispute over the ownership of a sea-going vessel is an admiralty case over which the FSM Supreme Court has exclusive jurisdiction [FSM Const. art. XI, § 6(a)]