

Checklist of Points to be Covered for Complete Answers
FSM Bar Examination, March 6, 2025

[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) probable hearsay objection overruled because
 1. is admission of party opponent which is defined as non-hearsay [FSM Evid. R. 801(d)(2)] &
 2. Dan's statement is an admission and is made by a party (Ceres) since Dan was Ceres's agent or servant & statement concerned matter within scope of his employment [FSM Evid. R. 802(d)(2)(D)]
- B. (4 points)
 1. an expert may testify if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue [FSM Evid. R. 702]
 2. in order for Victor to be allowed to testify as an expert witness he must be qualified as an expert by knowledge, skill, experience, training, or education, [*id.*] so further foundation must be laid before Victor can testify
 3. Victor's testimony must be based on facts perceived or made known to the expert [FSM Evid. R. 703]; because Victor examined the tire skid marks, he may base his opinion on what he saw
 4. expert should hold opinion to a reasonable certainty; Victor's opinion that Dan *might* have been driving faster than the speed limit, while admissible, may not be sufficient evidence on that point
- C. (4 points)
 1. objection will be 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. best evidence rule [FSM Evid. R. 1002] requires an original or a duplicate [FSM Evid. R. 1003] of a writing be used to prove its contents
 3. other evidence of the contents of a writing, recording, or photographs is admissible if 1) originals lost or destroyed unless the proponent lost or destroyed them in bad faith) or 2) original not obtainable by any available judicial process or procedure; or 3) original in opponent's possession [FSM Evid. R. 1004(1)-(3)]
 4. but driver's license is a public record & public records may be proved by copy, certified as correct in accordance or testified to be correct by a witness who has compared it with the original & only if a copy cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given; not likely Phoebe, by exercise of reasonable diligence, couldn't have obtained a certified copy from the state

- D. (3 points)
1. Amanda's prior (inconsistent) statement is hearsay & inadmissible to prove truth of the matter asserted, unless it was given under oath [FSM Evid. R. 801(d)(1)(A)]
 2. may be used for impeachment purposes; but if it is used that way, it is extrinsic evidence of a prior inconsistent statement & not admissible unless Amanda is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate her thereon, or the interests of justice otherwise require it [FSM Evid. R. 613(b)]
- E. (3 points)
1. 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 "often" probably not regular enough to qualify as habit
 2. when conduct short of being habit; is generally considered character evidence, generally inadmissible in order to show that he acted in conformity therewith [FSM Evid. R. 404(b)]
- F. (2 points)
1. not hearsay because is admission of party-opponent [FSM Evid. R. 801(d)(2)]
 2. BUT statements made in compromise or settlement negotiations are generally inadmissible [FSM Evid. R.408]

ETHICS (10 points)

- II. (7 points)
- A. (5 points) likely not
1. a lawyer usually may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated.; however, there are circumstances in which a lawyer may act as advocate against a client [FSM MRPC R. 1.7(a) cmt.]
 2. lawyer cannot represent a client if the representation of that client will be directly adverse to another client [FSM MRPC R. 1.7(a)], unless:
 - a. the lawyer reasonably believes the representation will not adversely affect the relationship with the other client [FSM MRPC R. 1.7(a)(1)]; and
 - b. each client consents after consultation [FSM MRPC R. 1.7(a)(2)]; consent should be confirmed in writing by both clients
- B. (2 points) no! lawyer admitted to practice before the FSM Supreme Court is subject to the court's disciplinary authority although engaged practice elsewhere [FSM MRPC R. 8.5; see In re Buckingham, 19 FSM R. 582, 583-84 (Pon. 2014)]
- III. (3 points) the advertisement is proper because
- A. a lawyer may advertise [FSM MRPC R. 7.2] &
 - B. the information is truthful and not misleading [FSM MRPC R. 7.1] {because the question states that all the information is truthful}

GENERAL
(70 points)

IV. (10 points)

- A. mandamus – a peremptory writ directed for a higher court to a lower tribunal commanding it to perform a ministerial, non-discretionary duty
- B. writ of prohibition – virtually the same as a writ of mandamus except that it commands a lower tribunal not to do something that is in excess of its jurisdiction
- C. clearly erroneous – appellate standard of review of a trial court's factual findings
- D. pendent jurisdiction – power of national court to decide matters over which it ordinarily would not have subject matter jurisdiction but because it is a part of a larger case over which it does have subject matter it has jurisdiction to decide it as well; the rule of decision will be state law
- E. exclusionary rule – excludes government's use of illegally obtained evidence in criminal prosecution
- F. personal jurisdiction – power of court to exercise jurisdiction over the parties to the case, usually based on consent, citizenship, person's presence in jurisdiction, or long-arm statute allowing jurisdiction for tortious act in jurisdiction, etc. if sufficient minimum contacts for due process

V. (5 points)

A. (3 points)

- 1. Driver A should file suit in the FSM Supreme Court venues in either Chuuk or Pohnpei because that is where the defendants reside because
- 2. a civil action in which one of the defendants lives in the FSM must be brought in a court within whose jurisdiction the defendant or the largest number of defendants live or have their usual places of business or employment [6 F.S.M.C. 301(1)]

- B. (2 points) the FSM Supreme Court will make its negligence determination based on the law of the place where the accident occurred – State of Hawaii

VI. (20 points)

A. Karl's appeal in criminal case

- 1. Karl's objection at trial to admission of marijuana properly preserved issue for appellate review; appellate court will determine improperly admitted
- 2. where person has reasonable expectation of privacy in place to be searched, gov't needs search warrant or proceed under recognized exception to warrant requirement; otherwise exclusionary rule applies & evidence inadmissible
 - a. was gov't involved in search? discuss
 - (1) board of trustees who searched Karl's office included a local police officer;
 - (2) although also a trustee, court may consider police officer "on duty" & thus a state actor (are or aren't police always "on duty"?)
 - b. did Karl have reasonable expectation of privacy in his desk drawers? argue

- (1) usually no reasonable expectation in person's place of employment
 - (2) but probably reasonable expectation of privacy in personal areas, such as desk drawers, etc.
 - (3) therefore, court would likely hold reasonable expectation of privacy covered desk drawers
- c. would consent exception to search warrant apply?
 - (1) employer has general authority to consent to a search of its workplace
 - (2) employer can't consent to search of personal areas where reasonable expectation of privacy applies (assuming Karl's employment contract doesn't authorize it)
- d. termination from employment shouldn't immediately deprive person of right to be free from unlawful search; if Karl hadn't cleaned out his desk as soon as notified of his termination he could've been considered to have abandoned his property; but that's not the case here; trustees searched his desk immediately after firing him
- e. warrant not obtained & no exception applies; search violated Karl's right to be free from unreasonable searches; court should've suppressed marijuana [*see, e.g., FSM v. Inek*, 10 FSM R. 263, 265 (Chk. 2001)] (when no search warrant issued or sought and the defendant moves to suppress the evidence seized, although it is the defendant's suppression motion, it is the gov't's burden to prove that the searches were reasonable and therefore lawful under section 5 of article IV of the FSM Constitution; evidence obtained pursuant to an unlawful search may be suppressed)]

B. Redemption Church's appeal in Karl's civil case

- 1. may appeal from interlocutory order entering injunction without waiting for final judgment in case [FSM App. R. 4(a)(1)(B)]
- 2. enforcement of contract doesn't violate constitutional prohibition regarding freedom of or establishment of religion [FSM Const. art. IV, § 2], enforcement of contract church freely made doesn't constitute interference in church affairs
- 3. no constitutional right to due process involved; due process right for continued expectation in employment only applies against the gov't [The and those acting under them, established or recognized by the Constitution. *Semwen v. Seaward Holdings, Micronesia*, 7 FSM R. 111, 113 (Chk. 1995) (constitutional due process guarantee only protects persons from the governments; plaintiff's firing by a private employer does not state a cause of action for unconstitutional deprivation of due process because no governmental entity or official is a defendant)]
- 4. if church defends on ground that Karl's use of drugs constitutes a breach of his employment contract on the ground that every contract carries an implied term that employee will render reasonably satisfactory service for length of contract, it will claim that drug use was incompatible with this implied term
 - a. but drug use wasn't a factor in church's decision to fire Karl, which was solely based on idea that Xen was better candidate

- b. thus even if drug use were a material contract term, contract was breached before drug use known
- 5. if church defends on ground that Karl's sending letter to entire congregation was breach of contract, unlikely to prevail
 - a. church allegedly breached contract first by not promoting Karl
 - b. Karl's breach not severe, although may have caused disruption in the congregation
 - c. but sending letter was lawful activity, so not likely to excuse trustees' performance
- 6. Karl's being made head minister by trial court ordering specific performance of contract as the damage remedy; appellate court will reverse on appeal
 - a. specific performance not ordered for contracts for personal services because
 - (1) could be considered violation of constitutional ban on involuntary servitude
 - (2) too difficult for court to supervise such specific performance (how can court judge if job performance acceptable, etc.)
 - b. money damages may be awarded for breach of personal services contract, but not specific performance

VII. (14 points)

- A. (12 points) besides usual discovery motions you should file a motion for suppression of evidence on ground that searches were unreasonable because 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 Tos 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
- B. (2 points) Tos should make motion for return of property [FSM Crim. R. 41(e)]; car likely returned (in absence of civil forfeiture statute), because Tos

entitled to lawful possession, but marijuana, and probably dynamite, not returned because are contraband & no right to return of contraband

VIII. (9 points)

A. (3 points) motion to remand denied

1. diversity jurisdiction exists [FSM Const. art. XI, § 6(b)] because
2. defendant corporation is considered foreign citizen since it has some foreign shareholders [Luzama v. Ponape Enterprises Co., 7 FSM R. 40, 44 (App. 1995)] &
3. plaintiff is Pohnpei citizen

B. (3 points) motion to remand denied

1. case involves a maritime contract – a contract to ship goods over the ocean [*see* 19 F.S.M.C. 1001(1)]
2. case is thus a maritime case
3. FSM Supreme Court has exclusive jurisdiction over admiralty & maritime case [FSM Const. art. XI, § 6(a); 19 F.S.M.C. 1004(2)]; remand to Kosrae State Court thus impossible since that court has no jurisdiction [*see Kelly v. Lee*, 11 FSM R. 116, 117 (Chk. 2002)]

C. (3 points) motion to remand granted

1. wrongful discharge is state law cause of action
2. all parties are foreign citizens
3. no diversity jurisdiction when all parties are foreign citizens {International Trading Co. v. Hitec Corp., 4 FSM R. 1, 2 (Truk 1989)}

IX. (9 points)

1. actionable negligence is [Hauk v. Lokopwe, 14 FSM R. 61, 65 (Chk. 2006)]

- a. a duty on the part of one person to protect another from injury
- b. the breach of that duty, and
- c. that breach is the proximate cause of
- d. an injury to the person to whom the duty is owed

2. duty

- a. Dow owes duty as landowner to persons on his land to act as reasonable landowner
- b. Dow would assert that there's nothing unreasonable about him climbing a ladder in his own backyard

3. breach of duty

- a. Dow would argue that he did not owe Pat a duty not to climb a ladder in his backyard
- b. not foreseeable that his climbing a ladder could cause harm to Pat
- c. therefore he didn't breach a duty to Pat

4. causation

- a. Dow would argue that his climbing the ladder, even if it was negligent, wasn't the [legal] cause of Pat's broken ankle
- b. Pat could not establish that her slip & fall wouldn't have happened if Dow hadn't climbed his tree or that it was a substantial factor
- c. Dow would argue that Pat's fall was caused by a supervening factor – Pat's unreasonable reaction by running across his yard

5. damages

- a. that Pat suffered injury is undisputed
- b. Dow can argue that comparative negligence principles should

be applied

- B. (3 points) impact on Pat's claims if Pat's fall is over hidden drainage pipe
1. Dow's duty as reasonable landowner is implicated
 2. hidden drainage pipe is hazard that Pat couldn't have appreciated without warning
 3. depending on how hidden pipe was, Dow should've either warned Pat of danger or taken steps to eliminate the danger (remove pipe? put barriers around it?)
 4. Pat's claim that her broken ankle was due to Dow's negligence is much stronger here than under IX.A