

Checklist of Points to be Covered for Complete Answers
FSM Bar Examination, March 5, 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. (14 points)

A. (4 points) is admissible because

1. to attack a witness's credibility, evidence that she has been convicted of a crime is admissible if elicited from the witness or established by public record during cross-examination
2. only if the crime was punishable by imprisonment in excess of one year under the law under which she was convicted [FSM Evid. R. 609(a)(1)]
3. misdemeanor convictions are thus generally not admissible because misdemeanors are punishable by one year imprisonment or less [11 F.S.M.C. 104(3)&(6)]
4. but evidence of conviction for any crime involving dishonesty or false statement, is admissible regardless of the punishment [FSM Evid. R. 609(a)(2)]

B. (3 points) should be inadmissible under work product doctrine [FSM Civ. R. 26(b)(4)(B)]

1. if accountant was retained or specially employed by plaintiff in anticipation of litigation or preparation for trial and
2. if the accountant was not expected to be called as a witness at trial
3. unless exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means is shown (not likely here where defendant could hire own accountant)

C. (4 points) bookkeeper would qualify as an expert and be permitted to testify because

1. to qualify as an expert witness, the witness must have skill and knowledge superior to the trier of fact, but expert opinion testimony is not restricted to the person best qualified to give an opinion [Pohnpei v. Ponape Constr. Co., 7 FSM R. 613, 622 (App. 1996)]
 - a. that a certified public accountant (CPA) or a public accountant would be a better witness
 - b. won't prevent her from testifying about accounting procedures as long as
2. she has technical or other specialized knowledge (of generally accepted accounting practices) [FSM Evid. R. 702]

- a. that will assist the trier of fact to understand the evidence or to determine a fact in issue
 - b. bookkeeper may testify in the form of an opinion or otherwise
 - 3. NOTE: bookkeeper would NOT be a lay witness because her testimony will be based on her specialized, technical knowledge of "generally accepted accounting principles"
 - D. (3 points) probably inadmissible because
 - 1. evidence of other wrongs or acts [FSM Evid. R. 404(b)]
 - a. is not admissible to prove a person's character in order to show that he acted in conformity therewith
 - b. but it may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident
 - 2. evidence that defendant is a frequent litigator may be inadmissible [FSM Evid. R. 403] because
 - a. although relevant
 - b. evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice
- II. (6 points)
- A. (3 points) photograph is admissible if
 - 1. it correctly and accurately portrays the accident scene
 - 2. witness who lays foundation need not be Clark nor does the witness need to know when the photo was taken or by whom
 - 3. key issue is whether the photo correctly and accurately portrays the accident scene as it existed March 17, 2019
 - 4. if evidence is that scene has changed substantially, photo may be discredited;
 - 5. if photo correctly and accurately portrays the accident scene, then photo is admissible
 - B. (3 points) pedestrian's statement
 - 1. statement is hearsay
 - 2. 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)];
 - 3. general rule is that hearsay inadmissible unless falls within one of the exceptions to the hearsay rule [FSM Evid. R. 802];
 - 4. statement appears to be an excited utterance
 - 5. an excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition

6. an excited utterance is recognized exception to the hearsay rule [FSM Evid. R. 803(2)] & is thus admissible (present sense impression also a usable recognized hearsay exception [FSM Evid. R. 803(1)])

ETHICS

(10 points)

III (6 points) potential ethical issues:

A. (2 points)

1. lawyer in private practice may use a trade name so long as it is not false & misleading & if it does not imply a connection with a government agency or with a public or charitable legal services organization [FSM MRPC R. 7.5(a); see also FSM MRPC R. 7.1];
2. "The Governmental Justice Center" seems misleading as it may imply that Fogger is connected with the government; he must use another name

B. (4 points)

1. the fee appears to be unreasonable for the time, labor, and skill involved [FSM MRPC 1.5(a)]
2. Clint's ownership should be easy to prove because his dad had a certificate of title presumptively good against the world;
3. lawyer has a duty to keep client reasonably informed [FSM MRPC R. 1.4(a)]; thus shouldn't he inform Clint of the certificate of title he discovered?
4. lawyer cannot acquire a proprietary interest in cause of action or subject matter of litigation [FSM MRPC 1.8(j)] (Fogger could instead opt for lien to secure his fees)

IV. (4 points)

- A. denying withdrawal of counsel in the middle of a criminal trial is within court's discretion (as long as counsel is providing effective assistance a criminal defendant has the choice of either continuing with that counsel or representing himself pro se)
- B. when ordered to by a tribunal, defense counsel is ethically obligated to continue representation even if good cause to withdraw is present [FSM MRPC R. 1.16(c)] (Bailey will have to delay his departure to Palau)

GENERAL

(70 points)

V. (20 points)

- A. Ned's causes of action
 1. against Sea Quest Corp.
 - a. negligence

- (1) 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)]
 - (2) Ned should assert negligence cause of action against Sea Quest related to its use of an interior coating that becomes hazardous
 - (3) Ned must show Sea Quest had a duty of care towards the users of its products, that it breached that duty by using an interior coating that became hazardous, and that that breach (the coating) proximately caused Ned damages by making him light-headed
- b. warranty
- (1) Ned would allege that Sea Quest breached its implied warranty
 - (2) that by placing its dive tanks on the market, it impliedly represented to the public that its tanks were suitable and safe for their intended use &
 - (3) Sea Quest expected that its tanks would be bought and used with this assumption of safety
- c. strict (product) liability
- (1) when product defect is found, causes of action based on strict product liability and on breach of warranty is applicable [see Lebehn v. Mobil Oil Micronesia, Inc., 10 FSM R. 348, 353 (Pon. 2001)]
 - (2) strict liability arises where the activity performed is not merely dangerous, but abnormally dangerous [Nakamura v. Mori, 16 FSM R. 262, 269 (Chk. 2009)]
 - (3) may be applicable because Sea Quest knew of the defect & gave no warning of its existence
- d. gross negligence
- (1) requires willful, wanton, or reckless misconduct, or such utter lack of care as will be evidence thereof [Hauk v. Lokopwe, 14 FSM R. 61, 65 (Chk. 2006)]; or the intentional failure to perform a

manifest duty in reckless disregard of the consequences as affecting the life or property of another. [Nakamura v. FSM Telecomm. Corp., 17 FSM R. 41, 49 (Chk. 2010)]

- (2) allows punitive damages to be levied [Fuji Enterprises v. Jacob, 21 FSM R. 355, 363 n.8 (App. 2017)]
- (3) will depend on level of Sea Quest's knowledge of its product's hazardousness & its delay in recalling product or notifying users

2. against DIPS

a. negligence

- (1) Max Imum's actions in letting Ned stray from the group could be considered negligence on DIPS's part under respondeat superior doctrine
- (2) since dive tank lining caused Ned's injuries, it could be argued that allowing Ned to stray had no causal effect regardless of how many instructors present or what depth Ned was at
- (3) but, if Ned had been with group, the toxic effect may have been noticed sooner & allowed Max to help sooner & prevent serious injury
 - (a) argument cuts both ways -Ned for leaving group
 - (b) Max & DIPS for allowing Ned to leave group
- (4) DIPS also liable for its employees' negligence in not removing defective depth gauge from its inventory

b. gross negligence

- (1) depending on facts found in discovery
- (2) could make gross negligence claim if DIPS's employees' misconduct depending on level of management's knowledge of their misconduct

c. warranty & strict liability

- (1) as DIPS was in the distribution chain to Ned, Ned should include DIPS as a defendant in the warranty & strict (product) liability action for the dive tank
- (2) could possibly bring warranty & strict (product) liability action against DIPS for the depth gauge it made locally

3. against Max Imum

a. negligence

- (1) for failure to go after Ned when he left

is determined from the complaint's allegations not from the defenses raised [e.g., Enlet v. Bruton, 10 FSM R. 36, 40 (Chk. 2001)]

3. Chuuk Chronicle's defense may be a national law defense but Hal's causes of action are only state law claims so no FSM Supreme Court trial division jurisdiction
- B. (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 - sex discrimination - which if brought under 11 F.S.M.C. 701(3) or as a case that the defendant company violated the FSM Constitution's equal protection clause [FSM Const. art. IV, § 4] 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 Yap Constitution or Yap civil rights law then not a case arising under national law and FSM court doesn't have jurisdiction & will remand the case
- C. (3 points) motion to remand denied
1. FSM Supreme Court has exclusive jurisdiction over admiralty and maritime cases [FSM Const. art. XI, § 6(a)]
 2. claims for seaman's wages is an admiralty case [e.g., Robert v. Sonis, 11 FSM R. 31, 33 (Chk. S. Ct. Tr. 2002); Zion v. Nakayama, 13 FSM R. 310, 312 (Chk. 2005)]
 3. hazardous duty differential pay during typhoon is a seamen's wages claim
- VII (5 points) Wasabi's conviction affirmed
- A. standard of review applied to sufficiency of the evidence challenges in a criminal case [Cholymay v. FSM, 17 FSM R. 11, 23 (App. 2010)] is whether
1. in reviewing the evidence in the light most favorable to the trial court's determinations of fact
 2. there is sufficient evidence to convince a reasonable trier of fact, relying on evidence which it had the right to believe and accept as true, that the defendant is guilty beyond a reasonable doubt
- B. since you, after reviewing the record carefully, can see how some judges could feel certain that Wasabi is guilty, then you have determined that a reasonable trier of fact, relying on evidence which it had the right to believe and accept as true, could have found Wasabi guilty beyond a

reasonable doubt
(9 points)

VIII.

- A. Prince can move for relief from a judgment [FSM Civ. R. 60(b)] that was mistakenly and unlawfully entered (usually, for relief from a default judgment a meritorious defense is needed [UNK Wholesale, Inc. v. Robinson, 11 FSM R. 118, 123 (Chk. 2002)] BUT Prince doesn't appear to have one
- B. entry of a default judgment is a two step process – there must first be an entry of default before a default judgment can be entered [Poll v. Paul, 6 FSM R. 324, 325 (Pon. 1994)]
 - 1. facts don't say whether the clerk had issued entry of default before, or with, default judgment, but
 - 2. if no entry of default first, then no default judgment can be entered
- C. clerk's office has authority to grant default judgments ONLY for a sum certain or for a sum which can by computation be made certain [FSM Civ. R. 55(b)(1)];
 - 1. bank loans and promissory notes are classic examples of a sum certain because the parties have agreed to the loan's terms and, when the loan remains unpaid, the amount due can be made certain by computation according to the loan's agreed terms [Setik v. FSM Dev. Bank, 21 FSM R. 505, 515 (App. 2018)]
 - 2. BUT any attorney's fees award must be based upon a judicial finding and thus is not for a sum certain and cannot be granted by the clerk [Bank of the FSM v. Bartolome, 4 FSM R. 182, 184 (Pon. 1990)]
 - 3. thus, clerk's office should not have entered default judgment for Bank of Rota
- D. since default judgment including attorney's fees can only be issued by the court, clerk did not have power to enter the default judgment against Prince
- E. also, the attorney's fees awarded were unreasonable
 - 1. under FSM Supreme Court case law, 15% is the usual maximum allowed for attorney's fees in a collection case [FSM Dev. Bank v. Adams, 14 FSM R. 234, 244 n.4 (App. 2006)]
 - 2. \$80.63 should be the attorney fee award, based on 15% of amount due (\$537.50) [Bank of the FSM v. Bartolome, 4 FSM R. 182, 184 (Pon. 1990)]

IX. (20 points)

- A. Argon's appeal in criminal case
 - 1. Argon'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 Argon'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 Argon 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 Argon'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 Argon 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 Argon'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. Shiloh Church's appeal in Argon'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 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 Argon'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 Argon, which was solely based on idea that Radon 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 Argon's sending letter to entire congregation was breach of contract, unlikely to prevail
 - a. church allegedly breached contract first by not promoting Argon
 - b. Argon'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. Argon's being made head minister by trial court s 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.?)
(3) the court's injunction ordering church to hire Argon as minister is a mandatory injunction & courts rarely grant mandatory injunctions because courts are ill-equipped to involve themselves in day-to-day administration and because of the difficulty of enforcing such injunctions [Berman v. Pohnpei, 18 FSM R. 418, 421 (App. 2012)]

b. money damages may be awarded for breach of personal services contract, but not specific performance

X. (6 points)

A. (2 points) unconstitutional

1. out-of-state betelnut would be betelnut either imported from another country or betelnut brought in from a different FSM state
2. state & local gov'ts are barred from imposing taxes that restrict interstate commerce [FSM Const. art. VIII, § 3]
3. only nat'l gov't can levy import tax [FSM Const. art. IX, § 2(e)]
4. would be okay if state levied same sales tax on all betelnut sales regardless of where grown, but can't single out out-of-state betelnut for higher tax

B. (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. bills of attainder are banned by Constitution [FSM Const. art. IV, § 11]

C. (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 [*id.*]
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