

Checklist of Points to be Covered for Complete Answers  
FSM Bar Examination, March 7, 2024

[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)
1. in order to introduce writing into evidence, writing must be
    - a. relevant [FSM Evid. R. 402]
    - b. authentic [FSM Evid. R. 901]
    - c. an original [FSM Evid. R. 1002] or, if authenticity not in dispute, a copy [FSM Evid. R. 1003]
  2. under facts given, letter is
    - a. apparently an original & is
    - b. not hearsay because the statement is offered against a party and is the party's own statement [FSM Evid. R. 801(d)(2)(A)]
    - c. hasn't been authenticated (assuming BigShot hasn't stipulated to authenticity)
  3. but is letter
    - a. relevant? [FSM Evid. R. 402] &
    - b. if relevant, is its relevance substantially outweighed by the danger of unfair prejudice, confusion of the issues [FSM Evid. R. 403] & therefore excludable?
- B. (4 points)
1. objection – hearsay
    - a. 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)];
    - b. general rule hearsay inadmissible unless falls within one of the exceptions to the hearsay rule [FSM Evid. R. 802]
    - c. no hearsay exception applies thus inadmissible
    - d. if more facts were present that recording was made shortly after a sexual harassment incident by victim might fall within present sense impression exception [FSM Evid. R. 803(1)]
  2. objection – not original recording
    - a. an original required [FSM Evid. R. 1002]
    - b. unless authenticity not in dispute [FSM Evid. R. 1003]
  3. objection – is not complete & therefore misleading
    - a. when a part of a recorded statement is introduced by a party, an adverse party may require him at that time to introduce any other part of the recorded statement which ought in fairness to be considered contemporaneously with it [FSM Evid. R. 106]
    - b. BigShot may have other relevant parts of recording admitted to show context or explain
- C. (2 points) objection – improper character evidence
1. generally, evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion [FSM Evid. R. 404(a)]

2. although evidence of other wrongs, or acts is not admissible to provide a person's character in order to show that he acted in conformity therewith, 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 [FSM Evid. R. 404(b)]
  3. relevance may be substantially outweighed by the danger of unfair prejudice [FSM Evid. R. 403]
- D. (2 points)
1. scientific, technical, or other specialized knowledge may be presented through a witness qualified as an expert by knowledge, skill, experience, training, or education, who may testify in the form of an opinion or otherwise [FSM Evid. R. 703]
  2. but as this is a new scientific theory it might not be admissible since it is not yet generally accepted in the scientific community
- E. (4 points)
1. objection – hearsay
    - a. general rule hearsay inadmissible unless falls within one of the exceptions to the hearsay rule [FSM Evid. R. 802];
    - b. 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
  2. objection – any relevance substantially outweighed by the danger of unfair prejudice [FSM Evid. R. 403]
  3. objection – beyond the scope of direct examination & is a collateral matter
    - a. can use for impeachment
    - b. but appears to be collateral matter
    - c. also, appears to matter not usable for impeachment since it may be beyond 10 years after conviction or release from imprisonment (unclear) [FSM Evid. R. 609(b)]
- F. (2 points) Carroll will assert attorney-client privilege
1. Carroll hasn't waived attorney-client privilege [see FSM MRPC R. 1.6(a)]
  2. BigShot may argue the exception to attorney-client privilege where attorney can reveal client confidence to prevent client from committing criminal act [FSM MRPC R. 1.6(b)(1)]
    - a. but that exception only applies when the attorney believes that the future criminal act is likely to result in imminent death or substantial bodily harm
    - b. taping phone call might not be criminal
    - c. if criminal, not reasonable to believe it is likely to result in imminent death or substantial bodily harm
- G. (2 points) objection – impermissible lay witness testimony
1. not proper lay opinion testimony since not rationally based on the witness's perception [FSM Evid. R. 701(a)]
  2. is improper character evidence since character evidence since character evidence can refer only to character for truthfulness or untruthfulness, and is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise [FSM Evid. R. 608(a)]

## **ETHICS**

(10 points)

- II. (10 points)
- A. (5 points) attorney is subject to discipline because
1. all attorney's fees must be reasonable [FSM MRPC R. 1.5(a)]
  2. although an attorney may charge a fee contingent on the outcome of the case [FSM MRPC R. 1.5(c)]
    - a. the usual rationale is that the lawyer is taking a gamble on a contingency fee case – the plaintiff (& attorney) might recover nothing – here there is no gamble, recovery is assured
    - b. passenger wanted hourly rate for what essentially was contract interpretation (of the settlement documents) & advice on the amount's fairness
  3. 30% of the \$125,000 (\$37,500) for that is an unreasonable fee subjecting attorney to discipline
- B. (5 points) the attorney is subject to discipline because
1. cannot make an agreement prospectively limiting the lawyer's liability to a client for malpractice [FSM MRPC R. 1.8(h)] unless
    - a. permitted by law and
    - b. the client is independently represented in making the agreement, or
    - c. settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith
  2. client didn't formally claim malpractice, the client did assert the attorney's services were defective, which is enough for FSM MRPC R. 1.8(h) to come into play
  3. the attorney did not advise the client to seek outside counsel

## **GENERAL**

(70 points)

- III. (9 points)
- A. (3 points)
1. Civil Procedure Rule 41(b) allows the defendant, after the plaintiff has completed the presentation of plaintiff's evidence, to move, without waiving the defendant's right to offer evidence if the motion is not granted, for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief
  2. motion to dismiss based on the defense of failure to state a claim upon which relief can be granted, may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits [FSM Civ. R. 12(h)(2)] so motion to dismiss is timely
  3. as the trier of the facts, the court may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence [FSM Civ. R. 41(b)]
  4. since defense counsel did not elaborate on the Rule 41(b) motion to dismiss, the judge probably has no basis to render judgment against the plaintiff & should therefore decline to render judgment until the close of all evidence; if no basis shown by then, the judge will deny the

- motion
- B. (4 points)
1. objection would be that the defense's novel new theory defense has been waived because not raised in the pleadings or allowed in the pretrial order [FSM Civ. R. 12(h)]
  2. BUT when issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated in all respects as if they had been raised in the pleadings; such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time [FSM Civ. R. 15(b)]
  3. court may therefore allow the pleadings to be amended and the defense to put on its new novel defense; this is discretionary with the court
    - a. plaintiff would argue that this new surprise evidence will prejudice the plaintiff
    - b. court can either deny amending the pleadings or allow and should do so freely [FSM Civ. R. 15(b)] when
      - (1) the presentation of the action's merits will be subserved thereby and
      - (2) the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits
    - c. court may grant a trial continuance to enable the plaintiff to meet the new, novel evidence [FSM Civ. R. 15(b)]
  4. plaintiff could also object on ground
    - a. that defense failed to provide this evidence in discovery and should be sanctioned by the court refusing defense to put on evidence of its novel theory [FSM Civ. R. 37(b)(2)(B)] or
    - b. that defense violated pretrial court order that controls the subsequent course of the action [see FSM Civ. R. 16]
  5. court would either deny presentation of new theory and thus deny amending the pleadings or grant continuance to allow the plaintiff to meet the new theory
- C. (2 points)
1. motion should be denied
  2. motion filed too late
  3. motion for new trial must be served within 10 days of entry of judgment [FSM Civ. R. 59(b)]
  4. motion to alter or amend judgment must be served within 10 days of entry of judgment [FSM Civ. R. 59(e)]
  5. filing and service on February 21, 2024 was over 10 days after February 8, 2024 judgment
    - a. February 18 was a Sunday so could have filed and served motion on Monday the 19<sup>th</sup>, but the 21<sup>st</sup> is too late
    - b. motions denied as untimely
- IV. (12 points) test-taker should discuss
- A. whether Wrench breached the lease or whether he simply exercised his right to terminate the lease
1. what were the conditions precedent to termination?
    - a. whether the oral agreements contained additional conditions

that had to be fulfilled before Wrench could terminate the lease

- b. whether the oral agreement contradicted the written lease
- c. whether the oral agreements were binding
  - (1) is this an integrated agreement?
  - (2) what is the effect of the merger clause/
  - (3) should any ambiguity be resolved against the drafter of the lease? remember
    - (a) Slither drafted the lease
    - (b) Wrench drafted the “amendment” allowing termination

- 2. whether the conditions precedent to termination were fulfilled
  - a. was the adjustable dock unsafe? is this a subjective or objective evaluation?
  - b. was use of the other dock burdensome? is this a subjective or objective evaluation?
- 3. whether Wrench had to allow Slither to try to fix the dock before Wrench could terminate the lease

B. assuming Wrench is liable to Slither for damages, what is the proper measure of damages?

- 1. whether Slither is entitled to recover the entire rental amount due under the lease
- 2. whether Slither took reasonable steps to relet the premises (to mitigate damages)
- 3. whether Slither is entitled to recover the money he spent to build the adjustable loading dock (reliance or restitution damages)

V. (9 points)

A. (3 points) motion to remand denied

- 1. FSM Supreme Court has diversity jurisdiction [FSM Const. art. XI, § 6(b)] because
- 2. Ioanis is a Pohnpei citizen
- 3. Sadaluer Corp. 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

B. (3 points) motion to remand denied

- 1. Director is sued in official capacity as College campus head & so it is really the College that is sued [Herman v. Bisalen, 16 FSM R. 293, 295-96 (Chk. 2009) (claim against a government officer in his official capacity is, and should be treated as, a claim against the entity that employs the officer)]
- 2. College is an instrumentality of the nat'l gov't; suit is therefore against the nat'l gov't
- 3. FSM Supreme Court has exclusive jurisdiction over cases where the nat'l gov't is a party (except, which is inapplicable here, where an interest in land is at issue) [FSM Const. art. XI, §6(a)]

C. (3 points) remand denied

- 1. case involves a ship mortgage
- 2. enforceability of ship mortgages is a matter that falls within the FSM Supreme Court's maritime jurisdiction under article XI, section 6(a) of the Constitution [Federal Business Dev. Bank v. S.S. Thorfinn, 4 FSM R. 367, 376 (App. 1990)]

3. FSM Supreme Court has exclusive jurisdiction
- VI. (6 points)
- A. unconstitutional
1. appears to be tax on income, a power reserved exclusively to nat'l gov't [FSM Const. art. XI, § 2(e)]
  2. if is regulation of insurance industry, that is also power reserved to nat'l gov't [FSM Const. art. XI, § 2(g)]
- B. unconstitutional
1. Constitution allows importation of radioactive materials only with nat'l gov't permission [FSM Const. art. XIII, § 2]
  2. Constitution therefore reserves regulation of radioactive material to nat'l gov't
  3. Constitution also requires nat'l gov't to promote health [FSM Const. art. IX, § 2(r)]
- C. unconstitutional
1. national taxes must be imposed uniformly [FSM Const. art. IX, § 5]
  2. income in some state(s) is exempt from the surcharge
  3. is surcharge unconstitutional or just the exemption unconstitutional?
    - a. if exemption provision can be severed from surcharge
    - b. then only exemption is unconstitutional
- VII. (4 points)
- A. Baker's statement was unconstitutionally obtained, and could not be used against him
- B. but statement is not being used against Baker – Baker is testifying personally; also
- C. right to object to unconstitutional evidence is personal only Baker could have objected to use of his statement, not Able and Charlie
- D. (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);
- E. therefore motion denied
- VIII. (16 points)
- A. damages – Quincy's medical costs, pain and suffering, any long-term disability (includes future medical costs), punitive damages from any defendant grossly negligent or reckless (unlikely on these facts); possible loss of consortium or society claim by Quincy's family [suit would be brought on Quincy's behalf by parent or guardian as next friend]
- B. possible defendants and grounds and defenses
1. Forklift operator – negligent in stacking boxes in unsafe manner (higher than markings on boxes said was safe) and on ground that was not level
  2. SNX Corp. – employer of forklift operator liable for employee's negligence when employee working within scope of employment [*respondeat superior*]
  3. Nagumo – possible liability for his or his laborers' negligent failure to properly supervise unloading and storage of tiles by forklift operator, creating attractive nuisance [in dangerous condition for children, but such that it would naturally and foreseeably attract child's interest and curiosity] on property; possible defense – was Nagumo an independent contractor or was he merely foreman hired to hire and supervise George's other construction workers?
  4. George – possible liability for Nagumo's or his laborer's to properly

supervise unloading if George retained substantial control and supervision over the construction project so that actions of construction workers attributable to him on respondeat superior theory, maintaining attractive nuisance; possible defense – Nagumo was independent contractor over which he had little control over than to make payments when due

5. Victor, Inc. – liability for George's liability on respondeat superior theory for its agent/employee George, also possible liability as leaseholder to land for maintaining attractive nuisance thereon; likely defense – George acted without the authority [*ultra vires*] or knowledge of the board of directors of Victor, Inc. and therefore was acting outside of his scope of employment; *But* was George acting with apparent authority so that principal Victor, Inc. would be held liable for actions of its (apparent) agent George?

6. Losap – possible liability for injury on his land, *e.g.*, allowing attractive nuisance to be maintained on property; probable defense – long-term lease of land transferred any effective control over property to others whose actions he has little or no control over

C. other possible defenses

1. comparative negligence to apportion liability among those who were negligent

2. Quincy was trespasser, therefore comparative liability negligence on his part (*but* attractive nuisance doctrine may apply to 12-year old to absolve Quincy of any negligence)

IX. (14 points)

A. issues to be raised – illegal search & illegal seizure of evidence

B. issues will be raised by defendant's motion for suppression of evidence, which must be made before trial [FSM Crim. R. 12(b)(3)]; exclusionary rule will suppress any illegally seized evidence

C. analyze

1. Constitution bans unreasonable searches and seizures [FSM Const. art. IV, § 5]; searches and seizures pursuant to a judicially-issued warrant are presumed reasonable; warrantless searches & seizures presumed unreasonable & burden is on gov't to show that they are reasonable & thus constitutional

2. entry into warehouse & into office was without warrant; gov't must show was reasonable

a. gov't's position – police had information (report of gunshots & screaming in the area & police discovery of unoccupied car indicating crime may be in progress or injured victim may need help) that potentially lives were in danger or injured persons may need assistance; in exigent circumstances such as these warrant not needed, could search area; also no warrant needed for entry into office as it was by consent, as Castor voluntarily opened the door for them

b. defendant's position – although warehouse had no door there was still expectation of privacy for anything not in plain view (Castor & Pollux in office); Castor's opening door wasn't voluntary but in response to an unjustified order

c. when investigating officers have reason to believe that somebody on private premises may have information pertaining to their investigation, they may enter those private

premises, without a warrant or prior judicial authorization, to make reasonably nonintrusive efforts to determine if anybody is willing to discuss the substance of their investigations [FSM v. Mark, 1 FSM R. 284, 288 (Pon. 1983)] so entry probably okay; but demand, even if courteously expressed, is different from a request, and person's compliance with a police officer's demand, backed by apparent force of law, is perhaps different from voluntary consent to a request [FSM v. George, 1 FSM R. 449, 458 (Kos. 1984)]; motion probably denied

3. warrantless search of desk
  - a. gov't's position – search reasonable to protect safety of officers because they had reason to believe firearms present & thus threat to their safety when evidence (smell of marijuana) of other crime (drug possession) present & weapons possible within Pollux's "wingspan"
  - b. defendants' position – no exigent circumstances, could've taken time to obtain warrant
  - c. most likely motion would be denied

- D. motion to dismiss on ground nat'l gov't doesn't have jurisdiction over firearms & drug possession cases since 1991 constitutional amendment transferring major crimes jurisdiction to states? [*but see* FSM v. Sam, 15 FSM R. 457, 459-60 (Chk. 2007); FSM v. Tosy, 15 FSM R. 238, 239 (Chk. 2007); FSM v. Fal, 8 FSM R. 151 (Yap 1997) (FSM has jurisdiction over firearms as interstate & foreign commerce involved); *see also* FSM v. Joseph, 9 FSM R. 66 (Chk. 1999) (marijuana prosecution although issue not raised)]; no definite appellate ruling on issue, so could raise for purpose of preserving issue for appeal, but will be denied