

Checklist of Points to be Covered for Complete Answers
FSM Bar Examination, March 3, 2011

[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 repeat these numbers so long as the legal principles are cited and discussed]

EVIDENCE
(20 points)

- I. (11 points)
- A. (3 points) theories of admissibility
1. 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)]
 2. general rule: hearsay inadmissible unless falls within one of the exceptions to the hearsay rule [FSM Evid. R. 802]
 3. Ken's statement is hearsay if offered for truth of matter asserted therein
 4. "present sense impression" exception for statement made contemporaneous to or immediately following an event is admissible [FSM Evid. R. 803(1)]
 - a. Ken's statement may qualify as present sense impression;
 - b. boat speed should be acceptable as lay opinion testimony [FSM Evid. R. 701] because it is an opinion which is
 - (1) rationally based on the perception of the witness and
 - (2) helpful to the determination of a fact in issue
 5. "excited utterance" exception to hearsay if statement relating to a startling event made while Ken was under the stress of excitement caused by the event [FSM Evid. R. 803(2)]
- B. (3 points) probable hearsay objection likely overruled
1. nodding head & grinning is out-of-court statement
 - a. non-verbal conduct intended as assertion is a statement [FSM Evid. R. 801(a)(2)]
 - b. offered for the truth of the matter asserted [FSM Evid. R. 801(c)]
 2. but is admission of party opponent which is defined as non-hearsay [FSM Evid. R. 801(d)(2)] since
 - a. statement is offered against Dan &
 - b. is his own statement in his individual capacity
- C. (2 points) Ken's testimony should be allowed
1. evidence of furnishing or offering or promising to pay medical or hospital expenses occasioned by an injury is not admissible to prove liability for the injury [FSM Evid. R. 409]
 2. but isn't offered to prove Dan's liability for Ken's injury; is offered to show that Ken's testimony may be biased in Dan's favor because Dan paid Ken's medical bills
- D. (3 points) Dan's cross-examination about his conviction likely allowed
1. evidence that the witness has been convicted of a crime will be admitted for the purpose of attacking the witness's credibility [FSM Evid. R. 609(a)]
 - a. if elicited from the witness
 - b. or established by public record during cross-examination
 - c. only if the crime
 - (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or
 - (2) involved dishonesty or false statement, regardless of the

- b. deposition was taken in compliance with law in the course of the same proceeding if Delano had an opportunity and similar motive to develop the witness's testimony by direct, cross, or redirect examination [FSM Evid. R. 804(b)(1)]

ETHICS

(10 points)

III. (6 points)

A. Jim

- 1. Jim's abandonment of Zenobia constituted a de facto (improper) withdrawal from representing her
 - a. a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the client's interests [FSM MRPC R. 1.16(b)]
 - b. upon termination of representation, a lawyer must take steps to the extent reasonably practicable to protect a client's interests [FSM MRPC R. 1.16(d)] such as
 - (1) giving reasonable notice to the client,
 - (2) allowing time for employment of other counsel,
 - (3) surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned
 - c. Jim's "withdrawal" was improper
 - (1) didn't give reasonable notice to Zenobia, which
 - (2) didn't allow enough time to hire new counsel, and
 - (3) didn't take steps to protect her interest
 - (4) didn't obtain court permission to withdraw
 - d. Jim failed to appear at trial & perform the legal services for which he had been retained
- 2. Jim didn't provide competent representation of Zenobia
 - a. lawyer must act with reasonable diligence and promptness in representing a client [FSM MRPC R. 1.3]
 - b. Jim wasn't diligent or prompt when he failed to appear at Zenobia's trial
 - c. Jim, although he believed that the judge was biased against him didn't take appropriate legal steps, therefore didn't provide competent representation [FSM MRPC R. 1.1]
 - (1) he could've moved to disqualify judge for personal bias or prejudice concerning a party or the party's counsel [4 F.S.M.C. 124(2)(a)], and if recusal denied
 - (2) sought writ of prohibition for judge's failure to recuse, or
 - (3) used as a basis for appeal if trial's outcome is unfavorable
 - d. Jim didn't make effort to determine whether Henry had taken case & didn't appear for trial; Jim should be disciplined

B. Henry

- 1. Henry only agreed to review the case
- 2. Henry was diligent in trying to consult with Zenobia but was unable through no fault of his own
- 3. Henry not obligated to take case (& didn't take case)
- 4. Henry gave Zenobia her file when he didn't take case
- 5. [since Henry didn't take case here is no issue about fee he might have (but

6. didn't) charge]
but, should Henry have also informed Jim he wasn't taking Zenobia's case so Jim knew he was still attorney of record? if so, might be disciplined for that; otherwise discipline very unlikely
- IV. (4 points) you must
1. pay the client the net proceeds without delay because
 - a. lawyer must promptly deliver to the client any funds that the client is entitled to receive [FSM MRPC R. 1.15(b)] &
 - b. upon the client's request must promptly render a full accounting regarding such property [FSM MRPC R. 1.15(b)]
 - c. lawyer is responsible for another lawyer's violation of the rules of professional conduct if the lawyer is a partner in the law firm in which the other lawyer practices [FSM MRPC R. 5.1(c)(2)]
 2. even if the client suffers no loss, must file disciplinary report against Ben because
 - a. funds in client trust account cannot be used for own because lawyer must hold property of clients or third persons that is in lawyer's possession in connection with a representation separate from the lawyer's own property [FSM MRPC R. 1.15(a)]
 - b. you know that Ben violated the ethical rules
 - c. lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, must inform the appropriate professional authority [FSM MRPC R. 8.3(a)]

GENERAL

(70 points)

- V. (16 points)
- A. (6 points) Jk will claim admission policy violates equal protection; College of Micronesia is instrumentality of national government so Declaration of Rights that protects persons from government action applies to it
1. Constitution's Declaration of Rights has two equal protection guarantees:
 - a. one provides that a person may not be denied the equal protection of the laws [FSM Const. art. IV, § 3]
 - b. other provides that equal protection of the laws may not be denied or impaired on account of sex, race, ancestry, national origin, language, or social status [FSM Const. art. IV, § 4]
 2. if the discrimination is based on the individual's membership in one of the Article IV, section 4 enumerated classes, or if the discrimination affects a "fundamental right," the law or regulation is subject to strict scrutiny review
 - a. Jk may argue that the outer-islander preference discriminates on the basis of ancestry or language
 - b. if Jk can show that outer-islander preference is discrimination on the basis of ancestry or language, his equal protection claim will be subject to strict scrutiny review
 - c. under strict scrutiny review
 - (1) any governmental action that classifies according to sex, race, ancestry, national origin, language, or social status

a reasonable justification for permitting a regulation that discriminates against main islanders?

6. if rational relationship test is applicable, Jk unlikely to prevail; if strict scrutiny applies, Jk will prevail unless College can show that the increased likelihood of qualified teachers remaining on the outer islands is a compelling governmental interest

B. (10 points) Jk's suspension, Jk will claim violates his constitutional rights to freedom of expression and procedural due process

1. freedom of expression [FSM Const. art. IV, § 1]
 - a. Jk will argue that radio station is a public forum since it's open to community volunteers as well as students
 - b. College will argue that it has maintained control over radio station's content & finances so can regulate Jk's speech
 - c. Jk will also argue that he is being punished for exercising his freedom of expression & that he is like gov't employee who can't be fired [Damarlane v. Pohnpei Legislature, 15 FSM Intrm. 301, 313-14 (App. 2007)] for making
 - (1) speech in the context of a public citizen making statements about genuine issues of public importance,
 - (2) but can be fired as an employee making statements about matters of personal interest
 - (3) court thus must begin by considering whether the expressions in question were made by the speaker as a public citizen
 - (4) thus speech that concerns genuine public issues would be protected, but speech that relates to items of personal importance to the employee would not necessarily be protected
2. procedural due process [FSM Const. art. IV, § 3]
 - a. Jk will argue that he was suspended without notice & an opportunity to be heard
 - b. College is gov't instrumentality
 - c. notice & an opportunity to be heard is essence of procedural due process

VI. (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 Intrm. 40, 44 (App. 1995)] – & since it has some foreign ownership, it is a foreign citizen

B. (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 Intrm. 31, 33 (Chk. S. Ct. Tr. 2002); Zion v. Nakayama, 13 FSM Intrm. 310, 312 (Chk. 2005)]
3. hazardous duty differential pay during typhoon is a seamen's wages claim

C. (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 Intrm. 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)]

VII. (12 points)

- A. motion to dismiss for failure to state a claim properly denied by judge because
 1. on motion to dismiss for failure to state claim [FSM Civ. R. 12(b)(6)]
 2. if matters outside the pleading are presented to and not excluded by the court
 - a. motion shall be treated as one for summary judgment
 - b. disposed of as provided in Rule 56
 - c. all parties given reasonable opportunity to present all material made pertinent to a Rule 56 motion
 - d. judge correctly allowed Boss chance to submit opposing affidavits
 3. Worker's unopposed affidavit tries to show that no dispute that Worker's motive was proper
 4. if improper motive were only ground for malicious interference tort Worker's affidavit might be enough to show no genuine dispute at to that material fact (although motive or intent issues usually not appropriate for summary judgment) because didn't come forward with opposing affidavit
 5. BUT under law as given in question, the tort occurs either
 - a. with improper motive, OR
 - b. by improper means – that is, by means that are civilly actionable or criminally unlawful
 6. Boss's complaint alleges that Worker lied about Boss's drinking habits; called Boss a drunk
 7. Worker's affidavit doesn't contradict these allegations to establish that they aren't in dispute
 8. if Worker were proven to have made slanderous statements about Boss being drunken bum, this would be the "civilly actionable" conduct needed to show malice
 - a. there would be material facts in dispute
 - b. & motion should be denied
 9. but if Worker had supported his motion with evidence that proving the statements Boss attributed to Worker had not been made or that they were true then Boss couldn't rest on his pleadings to show that there was a genuine issue of material fact but would have to come forward with evidence [*see, e.g., Berman v. Rosario*, 15 FSM Intrm. 429, 431 (Pon. 2007) (party responding to a summary judgment motion may not rely on a mere denial to stave off summary judgment in the movant's favor)]
- B. insufficiency of service of process dismissal shouldn't have been granted
 1. service was improper because
 - a. service of process may be made by leaving a copy of the summons and of the complaint [FSM Civ. R. 4(d)(1)]
 - (1) at the individual's dwelling house or usual place of abode

- (2) with some person of suitable age and discretion then residing therein
- b. sliding complaint & summons under not okay
- 2. ALTHOUGH service of process was improper, (second) motion to dismiss should've been denied because
 - a. motion to dismiss for insufficiency of service of process is a Rule 12(b)(5) motion
 - b. previous motion – motion to dismiss for failure to state a claim – is a Rule 12(b)(6) motion
 - c. defendants are allowed to file only one Rule 12(b) motion to dismiss [FSM Civ. R. 12(g)] and any ground not included in that one motion (with certain exceptions not relevant here) but which was available when the motion was made is waived [FSM Civ. R. 12(h)]
 - d. [perceptive test-takers might argue that since trial judge treated Worker's first Rule 12 motion as a summary judgment motion under Rule 56, the first motion didn't really arise under Rule 12 so the waiver rule is inapplicable; this would show ingenuity and analysis & merit extra credit, but only if test-taker demonstrates an understanding of the Rule 12 waiver issue]

VIII. (18 points)

- A. Jesse's public defender's motions (& arguments)
 - 1. motion to suppress all evidence gathered by police at campfire site
 - a. argue that the state police's approach & questioning of Jesse at campfire site because
 - b. police didn't have reasonable suspicion that Jesse had been involved in burglary of the mayor's wife's neighbor house
 - c. no articulable facts that Jesse might've been involved because
 - d. mayor's wife's description was
 - (1) young male seen leaving house; no other height, weight, etc. description
 - (2) no indication that young male had gone in direction of campfire site
 - e. if Jesse's detention was illegal, then, under "fruit of the poisonous tree" doctrine, any evidence seized from him as a result of the stop would be inadmissible
 - (1) jewelry from beer can
 - (2) jewelry from search of Jesse's person, &
 - (3) Sal's statement
 - 2. motion to suppress Sal's statement
 - a. Sal was in custody (not free to leave) when questioned by police
 - b. Sal not informed of his right to remain silent
 - c. since Sal not informed of right to silence, he couldn't have validly waived that right
 - d. Sal was minor (under 18) so might not be capable of knowingly & intelligently waiving right
 - 3. motion to suppress earrings produced by Sal
 - a. seizure of earrings was direct product of "illegal" interrogation of Sal
 - b. are therefore "fruits of the poisonous tree" & should be suppressed
 - 4. motion to suppress jewelry found in beer can

- a. Jesse had reasonable expectation of privacy in beer can since
 - (1) Jesse was clearly using campfire site
 - (2) beer cans were easily within Jesse's reach
- b. examination of can, therefore, constituted a warrantless search
- c. beer can search doesn't fall within any recognized exceptions to search warrant requirement
- d. police officer had time to obtain warrant but failed to do so
- 5. motion to suppress jewelry found on Jesse's person
 - a. although police can "pat down" or frisk a suspect, such a search is limited to a search for weapons
 - b. police would have needed reason to believe Jesse was armed & dangerous – carrying weapon(s) to search
 - c. police thus exceeded scope of frisk, making seizure of jewelry an illegal search & seizure
 - d. Jesse hadn't been put under arrest so search wasn't one under the incident-to-an-arrest exception
- 6. motion to dismiss, IF
 - a. all jewelry seized & Sal's statements are suppressed, then
 - b. no evidence to support charges against Jesse, so
 - c. move to dismiss for lack of a prima facie case
- B. prosecutor's responsive arguments & opposition
 - 1. police approach to Jesse & Sal at campfire site didn't constitute a "stop"
 - a. Sal & Jesse already there & police approached to ask them questions
 - b. police have right to ask a person to identify self & to provide some basic information
 - c. even if police didn't suspect either Sal or Jesse of involvement in burglary
 - (1) they had right to approach & question boys because of
 - (2) the presence of alcohol
 - (3) Sal's age
 - 2. Jesse lacks standing to move to suppress Sal's statement to police [*see, e.g., FSM v. Skico, Ltd. (I)*, 7 FSM Intrm. 550, 553 (Chk. 1996) (person can only complain of an unlawful search or seizure if it is his own rights which have been violated)] because
 - a. Jesse's constitutional rights weren't involved (Sal's right to silence was)
 - b. since Jesse can't suppress Sal's statement, earrings seized from Sal can be used against Jesse
 - 3. seizure of jewelry in beer can okay because
 - a. Jesse didn't have reasonable expectation of privacy in beer can since
 - (1) empty can was lying on ground
 - (2) it had been thrown away
 - (3) could've been left by previous visitor to campfire site
 - (4) no indication beer can belonged to Jesse
 - b. beer can's contents were inadvertently discovered by police
 - c. beer can was in officer's plain view [*FSM v. Mark*, 1 FSM Intrm. 284, 294 (Pon. 1983) (warrant is not necessary to authorize seizure when object is in plain view of police officer who has a right to be in the position to have that view)]

- (1) plain view is exception to warrant requirement, as long as
 - (2) police had reasonable basis to be in area;
 - (3) officer accidentally struck can & heard suspicious sound
 - (4) police had already learned from Sal that jewelry had been taken from victims' house
 - (5) therefore reasonable to pick up & investigate unusual or suspicious sound
4. Jesse's "pat down"
 - a. was an appropriate frisk
 - b. police already had enough evidence to believe Jesse was involved in burglary
 - c. police therefore entitled to frisk him as precaution for officers' safety
 - d. when felt something in Jesse's pants, it was reasonable to investigate further to make sure it wasn't a weapon (switchblade or pocket knife can be small but dangerous)
 5. Jesse's motion to dismiss should be denied
 - a. because there is enough evidence to sustain a probable cause finding
 - b. Sal's statements & the physical evidence are enough to support charge against Jesse
- C. likely outcome
1. Jesse's motion to suppress based on initial "stop" probably denied since
 - a. reasonable for police to question the boys given nearness of campfire site to burglarized house
 - b. since two teenagers were drinking alone in woods late at night an offense was being committed in police presence & police probably could've detained boys at that point
 2. motion to suppress Sal's statements & evidence (earrings) seized from him probably denied because Jesse doesn't have standing to assert the violation of Sal's constitutional rights
 3. motion to suppress jewelry found in beer can probably denied because
 - a. Jesse didn't have reasonable expectation of privacy in empty beer can
 - b. police officer's discovery of jewelry was inadvertent
 - c. not enough time to obtain search warrant because of potential loss or destruction of evidence at campfire site
 4. motion to suppress jewelry found in Jesse's pockets probably granted
 - a. nothing to indicate Jesse was carrying weapons
 - b. jewelry wouldn't have felt like dangerous weapon so no ground to investigate further by putting hands in Jesse's pockets
 - c. Jesse wasn't under arrest at time so no search incident to arrest
 5. motion to dismiss for lack of prima facie case would be denied; prosecution has enough evidence with Sal's statement & jewelry he produced & jewelry in beer can to go to trial against Jesse
- IX. (13 points)
- A. whether Dot was actionably negligent toward Peter
 1. negligence is a duty of care, breach of that duty, damage caused by the breach, and determination of the value of the damage
 2. these elements are plainly present
 - a. Dot owed Peter a duty of reasonable care

- b. Peter was in zone of danger; it was foreseeable someone would be aboard the other boat
 - c. Dot breached duty by trying to dock her boat under circumstances where she knew it was likely to strike Peter's boat
 - (1) reasonably prudent person wouldn't have done what Dot did
 - (2) she failed to exercise ordinary care and skill
 - d. causation not in doubt
 - (1) Dot's act in docking boat was cause-in-fact – "but for" her act Peter wouldn't have been injured
 - (2) was also foreseeable proximate cause of Peter's injuries
 - e. Peter suffered injuries & therefore incurred damages
 - f. Dot was therefore actionably negligent & Peter may recover damages
- B. did Theo owe Peter any duty of care?
- 1. actionable negligence arises only where there is a duty to act
 - 2. BUT no legal duty to be a good Samaritan or to volunteer
 - 3. Theo therefore not liable because he didn't have duty to Peter & therefore couldn't have breached duty
- C. did Peter fail to mitigate damages? or was he also negligent so as to reduce recovery under comparative negligence defense?
- 1. Peter wasn't wearing life jacket
 - 2. is this a form of comparative negligence or is it a mitigation of damages issue
 - a. comparative negligence
 - (1) under comparative negligence principles, Dot would only be held liable for the percentage of fault she is found responsible for [Primo v. Semes, 11 FSM Intrm. 324, 330 (Pon. 2003)]
 - (2) Peter would be responsible for part that is his fault
 - (3) BUT would person in FSM be considered negligent for failing to wear life jacket while in a boat, especially a docked boat?
 - b. mitigation of damages – plaintiff has general duty to mitigate damages
 - (1) generally a plaintiff has a duty to take reasonable steps to minimize the amount of his damages
 - (2) mitigation of damages usually comes into play AFTER an injury has occurred so wouldn't afford Dot any relief
 - (3) Peter's failure to wear life jacket exposed him to foreseeable additional injuries but, would this be a reasonable step in the FSM?
 - c. either way, if comparative negligence or mitigation of damages defense allowed it would only reduce, not eliminate, Dot's liability for damages
- X. (2 points) standing is
- A. generally, a party's material interest in an action's outcome
 - B. if a plaintiff does not have a material interest in the outcome or standing then the action is academic, hypothetical, or moot &
 - C. does not constitute a case or dispute, which is a constitutional requirement for the FSM Supreme Court to exercise jurisdiction over the matter [FSM Const. art. XI,

§ 6; FSM v. Udot Municipality, 12 FSM Intrm. 29, 40 (App. 2003)]