

Checklist of Points to be Covered for Complete Answers
FSM Bar Examination – August 5, 2021

[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. (5 points) 9-year-old daughter's testimony
 - 1. first objection – competency
 - a. is the 9-year old's competent to testify?
 - b. objection would likely be overruled because general rule is that every person is competent to be a witness [FSM Evid. R. 601]
 - 2. second objection – hearsay
 - a. witness will be testifying about an out-of-court statement offered for the truth of the matter stated
 - b. objection would be overruled because the out-of-court statement is the admission of a party-opponent (Bob) which is defined as not hearsay [FSM Evid. R. 801(d)(2)]
 - 3. third objection – relevance
 - a. doesn't appear that witness's testimony is relevant to any of the negligence allegations
 - b. therefore objection likely sustained
 - 4. fourth objection – character and habit evidence
 - a. not admissible as character evidence because evidence of a persons'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)]
 - b. admissible as habit evidence because evidence of a person's habit is relevant to prove that the person's conduct on a particular occasion was in conformity with the habit {FSM Evid. R. 406]
 - 5. privilege – if the state this occurs in recognizes a child-parent privilege, then daughter could not testify against Bob, her

- father [see FSM Evid. R. 501]
- B. (4 points) retired officer's testimony
1. if officer observed the speeding vehicle just before the crash, he could testify as a layman about the car's speed [FSM Evid. R. 701]
 2. otherwise officer's opinion would have to be proceeded by qualifying him as an expert qualified through knowledge, skill, experience, training, or education [FSM Evid. R. 702]
 - a. since officer has investigated many accidents, is likely he would be qualified as expert to give opinion about the car's speed when the crash occurred
 - b. not likely he'd qualify as an expert about road design and engineering
- C. (4 points) neighbor Joe's testimony
1. objection - relevance
 - a. no evidence that Bob drank a six-pack on this particular night
 - b. remoteness would be an issue because accident took place
 2. if evidence passed muster as habit evidence [FSM Evid. R. 406], it would then be subject to challenge of unfairly prejudicial - whether it should be excluded because its probative value is substantially outweighed by the danger of unfair prejudice [FSM Evid. R. 403]
- D. (3 points) trained alcohol treatment counselor's testimony
1. would a privilege objection apply for a trained alcohol treatment counselor?
 2. relevance objection
 - a. how relevant is this testimony about whether Bob was actually intoxicated at 8:30 p.m. when the crash occurred?
 - b. likely sustained
- E. (4 points) repair work shop order & Wally's testimony
1. repair work shop order
 - a. initial objection - hearsay
 - (1) if work shop order is offered to prove that Bob's brakes were bad then offered to prove truth of matter therein
 - (2) could be admissible as proof notice to Bob of brakes' condition

- (3) hearsay exception for business records if kept in the course of a regularly conducted business activity [FSM Evid. R. 803(6)]
 - (a) business owner Wally can authenticate &
 - (b) can provide foundation for business records exception
- b. best evidence objection - that a copy, not an original is offered - would be overruled because a copy is as admissible as an original [FSM Evid. R. 1003]
2. Wally's testimony - if offered in the nature of an opinion about the brakes' condition, there could be an objection to his expertise, likely overruled

ETHICS

(10 points)

II. (10 points)

A. (3 points)

1. one partner's knowledge may be imputed to the other partner, creating a conflict of interest in the partner without actual knowledge;
 - a. Smith is thus in a conflict of interest situation preventing him from representing Couch [FSM MRPC R. 1.7(a); R. 1.13(e)]
 - b. because when lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so [FSM MRPC R. 1.10(a)]
2. when attorney represents a corporation,
 - a. the corporation is the client [FSM MRPC R. 1.13(a)] & has a legal existence separate and apart from its officers, directors, & shareholders and may have interests separate from the other parties named
 - b. an attorney may not represent a corporation and individuals such as officers, directors, & shareholders in matters where such conflicts exist [FSM MRPC R. 1.13(e); see also Nix v.

Etscheit, 10 FSM R. 391, 398 (Pon. 2001)]

- B. (7 points)
1. criminal co-defendants frequently have adverse interests, which prevent common representation by the same attorney or law firm
 - a. joint representation of criminal defendants is rarely proper because the potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to represent more than one co-defendant [Ting Hong Oceanic Enterprises v. FSM, 7 FSM R. 471, 479-80 (App. 1996)]
 - b. some conflicts can be waived by joint disclosure [see FSM Crim. R. 44(c); FSM MRPC R. 1.7 cmt.] but where one defendant is planning to testify against the other, common representation by partners in a law firm is an irreconcilable conflict
 2. Jones & Smith must consult with each other (without disclosing client confidences) and decide who could represent one of the co-defendants; both cannot
 3. counsel must exercise extreme caution when someone other than the client is paying the attorney's fees
 - a. attorney-client privilege exists between the attorney & his client, not the person paying the fee {see FSM MRPC R. 1.7 cmt.}
 - b. client must be one exercising control over the management of his case
 4. attorney cannot undertake a criminal defense on a contingent fee basis [FSM MRPC R. 1.5(d)(2)] & the "bonus" being offered by Hare's father-in-law, Slouch, creates a contingency situation
 5. attorney cannot disclose a client's confidences to another unless the client is informed of that fact and consents [FSM MRPC R. 1.6(a)]; lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client [FSM MRPC R. 1.6 cmt.]

GENERAL
(70 points)

III. (12 points)

- A. Semis may first seek administrative relief (request hearing before, or reconsideration by Director of Education); (following Administrative Procedures Act)
1. Argue absence wasn't without explanation; because principal knew Semis would return; no intent to abandon job
 2. Argue absence didn't affect job because knew Semis would return before school started
- B. Assuming reconsideration is denied, Semis may file suit in court as he has exhausted his administrative remedies (or, if he goes to court first he will argue that further attempts at administrative relief would be futile)
1. Argue administrative decision was arbitrary and capricious and should thus be overturned, or if that fails
 2. Argue that termination was unconstitutional (without due process of law) taking of Semis's property (his expectation of continued government employment); could claim under both state and FSM Constitutions, and if claim under FSM Constitution could sue in FSM Supreme Court, otherwise sue in state court

IV. (11 points)

- A. (15 points) Officer Abe's entrance to Winsome Heights Apartments property and Abe's search (shining light into garage) was lawful because
1. Abe had reasonable suspicion that criminal activity had just occurred
 - a. an officer can make an investigatory "stop" when the officer has "reasonable suspicion" that criminal activity is occurring or has just occurred [FSM v. Phillip, 17 FSM R. 413, 419 (Pon. 2011)]
 - b. "reasonable suspicion" requires police officers to identify "specific and articulable facts" justifying the stop, rather than a mere hunch & it must exist before the investigatory stop occurs for the stop to be valid [FSM v. Phillip, 17 FSM R. 595, 598 (Pon. 2011)]
 - c. an anonymous tip received regarding the

defendant's possible actions combined with sufficient specific and articulable corroborating facts will support reasonable suspicion that a crime had occurred or was about to occur. [FSM v. Phillip, 17 FSM R. 595, 598 (Pon. 2011)]

- (1) here, the tip was not anonymous – Joe Citizen was identified informant
 - (2) who reported his personal observations
 - (3) whose report of vehicle differed in three minor respects
 - (a) vehicle was black, not green
 - (b) license plate had "B" not a "P" (& p's & b's are often inadvertently interchanged in FSM) &
 - (c) driver turned out to be female, not male
2. totality of circumstances was enough to support Abe's reasonable suspicion that a person at Winsome Heights Apartments had been driving under the influence
 - a. Citizen's report was enough to positively identify vehicle
 - b. when first received, the information was about crime in progress
 - c. although minor discrepancies in vehicle's description, Officer Abe was not acting on a hunch; had reasonable suspicion
 3. the attached garage is a part of home covered by constitutional protection against unreasonable search & seizure [see Alexander v. Pohnpei, 18 FSM R. 392, 398 & n.5 (Pon. 2012)]
 4. merely entering a person's property is often not enough to violate a person's right to be secure in her house, so walking up the driveway was lawful [Alexander v. Pohnpei, 18 FSM R. 392, 398 (Pon. 2012)] &
 5. when Abe shined light into garage, Abe was in legal vantage point from which Abe could observe rain-spattered vehicle that mostly fit vehicle description
- B. (3 points) Doris Driver's statements are admissible [FSM v. Phillip, 17 FSM R. 413, 420 (Pon. 2011)]
1. an officer conducting an investigatory stop of

- a suspect may question the suspect about suspicious circumstances
- 2. that questioning does not constitute an arrest
- 3. thus the officer is not required to advise the suspect of the right to remain silent when first asking questions
- 4. therefore no reason to suppress statements
- C. (3 points) lawful to ask Driver to step out of vehicle because
 - 1. Abe had reasonable suspicion that Driver had committed a crime - driving under the influence - & was about to do so again
 - 2. Abe noticed the smell of alcohol and that Driver's speech was slurred
 - 3. therefore Abe's request that Driver step out of the vehicle & perform field sobriety test was not unreasonable
- V. (15 points)
 - A. procedural & jurisdictional issue
 - 1. question whether Chuuk State Supreme Court can assert personal jurisdiction over Palmer since he's never been there and alleged transaction which suit is over didn't take place there & the property (the *Sirius*) which the suit is over is not located in Chuuk
 - 2. question whether Chuuk State Supreme Court has subject matter jurisdiction - isn't the sale of (and title to) a ship an admiralty & maritime case over which FSM Supreme Court would have exclusive jurisdiction?
 - 3. steps to take
 - a. can enter special appearance in Chuuk State Supreme Court to assert lack of personal jurisdiction and/or subject matter jurisdiction and move for dismissal; or
 - b. can remove case to FSM Supreme Court, Chuuk, because of diversity of citizenship [see FSM Const. art. XI, § 6(b); FSM GCO 1992-2] or because of exclusive admiralty & maritime jurisdiction and then seek change of venue to Kosrae [6 F.S.M.C. 304(2)] since that's where defendant Palmer resides [6 F.S.M.C. 301(1)]
 - 4. either 3a or 3b above should be successful depending on which step taken; because of

automatic nature of removal could be better course if it seems that upon dismissal Keske would refile in another court with jurisdiction

- B. substantive issues
 - 1. whether binding agreement made
 - a. was there offer and acceptance? Palmer will argue that
 - (1) reply "Sure, sure, whatever you want." is not agreement or acceptance; under circumstances was a polite rebuff
 - (2) parties too inebriated to make valid offer or acceptance
 - b. was there a meeting of the minds? Palmer will argue that
 - (1) same reasons as a(1) & a(2)
 - (2) may argue lack of sakau or turtle meat means Palmer never believed was accepting offer & therefore no meeting of minds
 - (3) but since Keske comes from place that custom evidently not followed maybe not (e.g., did Palmer drink sakau or eat turtle meat when he bought M/V *Sirius*? not likely because likely ship was bought from someone unfamiliar with that custom)
 - c. was writing necessary?
 - (1) would oral contract be valid under law of place where made? or where sought to be enforced? or
 - (2) would writing be necessary to transfer ownership on the FSM ship registry?
 - 2. steps to take
 - a. if parties don't have genuine dispute that the facts are as set out in the question then Palmer should move for summary judgment that his acts and words did not, as a matter of law, create a binding contract
 - b. if factual findings necessary then motion denied and matter proceed to trial
 - c. Palmer would expect to prevail at trial, if not on summary judgment
 - 3. results - Palmer prevails (likely); if Keske

prevails discuss specific performance v. damages

VI. (12 points)

A. (4 points)

1. Able's failure to respond to the requests for admission within the time allowed by Rule 36 would mean that the request was deemed admitted and conclusively established [FSM Civ. R. 36(b)]
2. Able could move to be allowed to withdraw the admission, which the court may grant to allow resolution of the case on its merits unless Safe Homes can show it would be prejudiced by a withdrawal [see Mailo v. Bae Fa Fishing Co., 7 FSM R. 83, 85-86 (Chk. 1995)]
3. Safe Homes could move to compel answers to its interrogatories and that the documents it requested be produced [FSM Civ. R. 37(a)(2)] &
4. Safe Homes could ask for an award of its reasonable expenses, including reasonable attorney's fees, in bringing the motion to compel to be paid by Able or, if Able's attorney advised Able not to respond, paid by Able's attorney [FSM Civ. R. 37(a)(4)]

B. (4 points) if court grants Safe Homes' motion to compel discovery & Able still does not respond

1. court could treat such failure as a contempt of court [FSM Civ. R. 37(b)(1)] or
2. court could order sanctions [FSM Civ. R. 37(b)(2)] depending on the nature of the violation and the offending party's (Able's) culpableness, such as
 - a. that designated facts be deemed established
 - b. that disobedient party not be allowed to support or oppose designated claims or defenses, or
 - c. that parts of the Able's pleadings be struck out

C. (4 points) Safe Homes' summary judgment motion

1. summary judgment is granted when, viewing the facts and drawing inferences in the non-moving party's favor, no genuine dispute of material fact exists and movant is entitled to judgment as a matter of law [e.g. Ladore v. Panuel, 17 FSM R. 271, 273 (Pon. 2010)];
2. Safe Homes would need to establish a prima

- facie case
3. Safe Homes will submit admissible evidence that the its houses needed remedial work because the sites' drainage was properly prepared or was inadequate
 4. BUT Able's general manager testified in a deposition that the sites were properly prepared (depositions testimony will be considered for summary judgment motions {FSM Civ. R. 56(c)})
 5. since genuine dispute about material fact appears to exist, the summary judgment motion will likely be denied

VII. (7 points)

- A. (2 points) pendent jurisdiction - when a case in the national court's jurisdiction also has state or local law claims in it, the national court may exercise pendent jurisdiction over state or local law claims if they derive from the same nucleus of operative fact and are such that the plaintiff would ordinarily be expected to try them all in one judicial proceeding. [Ponape Chamber of Commerce v. Nett, 1 FSM R. 389, 396 (Pon. 1984)]
- B. (3 points) ex post facto law - legislation which does any of the following: 1) makes criminal and punishable an act innocent when done; 2) aggravates a crime, or makes it greater than it was when committed; 3) increases the punishment for a crime and applies the increase to crimes committed before the enactment of the laws; or 4) alters the legal rules of evidence so that testimony insufficient to convict for the offense when committed would be sufficient as to that particular offense and accused person [Robert v. Mori, 6 FSM R. 394, 400 (App. 1994)]; ex post facto laws are unconstitutional, FSM Const. art. IV, § 11
- C. (2 points) custom and tradition - a source of law; based on current & past practice; all judicial decisions must be consistent with the Constitution and custom and tradition [FSM Const. art. XI, § 11]

VIII. (4 points) argue

- A. unconstitutional
 1. is an income tax, & only nat'l gov't can tax income [FSM Const. art. IX, § 2(e)]
 2. the ability to tax is the ability to regulate & only nat'l gov't can regulate banking [Actouka v. Kolonia Town, 5 FSM R. 121, 122]

(Pon. 1991); FSM Const. art. IX, § 2(g)]

- B. unconstitutional
1. although FSM Constitution prohibits a noncitizen, or a corporation not wholly owned by citizens, may not acquire title to land or waters in Micronesia [FSM Const. art. XIII, § 4],
 2. it also guarantees 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], which the state constitution appears to violate because
 - a. denies FSM citizens who are not state citizens the right to acquire title to land in the state &
 - b. denies state citizens who aren't native-born from acquiring title to land in state thus making them second-class citizens

IX. (9 points)

- A. (3 points) deny remand
1. although trespass is a state law cause of action
 2. FSM Supreme Court has jurisdiction when the citizenship of the parties is diverse [FSM Const. art. XI, § 6(b)]
 3. although incorporated in Kosrae, the corporation is considered a foreign citizen since one of its owners is a foreign citizen [Luzama v. Ponape Enterprises Co., 7 FSM R. 40, 44 (App. 1995)]
 4. and since the plaintiff is Kosrae citizen & defendant corporation is a foreign citizen, diversity jurisdiction exists
- B. (3 points) remand granted
1. negligence is a tort & torts are generally a state law causes of action
 2. no diversity jurisdiction because all parties are foreigners and there is no diversity jurisdiction when all parties are foreigners [Geoffrey Hughes (Export) Pty, Ltd. v. America Ducksan Co., 12 FSM R. 413, 414 (Chk. 2004)]
- C. (3 points) motion to remand denied
1. case is about a maritime contract - contract for the shipment of goods on an ocean-going vessel &

2. is therefore a maritime case & FSM Supreme Court has exclusive jurisdiction over admiralty and maritime cases [FSM Const. art. XI, § 6(a)]