

Checklist of Points to be Covered for Complete Answers
FSM Bar Examination, August 4, 2022

[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 them so long as the legal principles are cited and discussed]

ETHICS

(10 points)

I. (10 points)

A. (6 points)

1. Scott and Willard are partners in same law firm & so are both deemed to represent Mr. Mild [*see* FSM MRPC R. 1.10 cmt.] & Mr. Mild asked to speak to Scott about his case; so Scott may act as Mr. Mild's attorney
2. generally, a lawyer must not reveal information relating to representation of a client unless the client consents after consultation [FSM MRPC R. 1.6(a)]
3. but a lawyer may reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm [FSM MRPC R. 1.6(b)(1)]
4. thus, a lawyer has professional discretion to reveal information in order to prevent such consequences and may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer reasonably believes is intended by a client, but it is often very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind [FSM MRPC R. 1.6 cmt.]
5. discretion is solely within lawyer's own judgment & Scott should consider magnitude, proximity, & likelihood of contemplated wrong, and those who may be injured
6. argue either
 - a. since Mr. Mild said "if she tries to take that car" & Mrs. Mild only asked that she be awarded the car (presumably by the court) Scott may conclude that the threatened act is very unlikely & not disclose the threat to Mrs. Mild's attorney;
 - b. or, the threat may seem imminent because Mr. Mild threatened that "she'll be dead before the weekend is over!"

B. (4 points)

1. a lawyer must not seek to influence a judge, juror, prospective juror or other official by means prohibited by law or communicate ex parte with such a person except as permitted by law [FSM MRPC R. 3.5]
2. Trey should inform Slick that it would be a violation of professional conduct for him to communicate with the judge or cause another to communicate with the judge about Slick's merits or discuss his pending case without the prosecution being represented in the conversation [FSM MRPC R. 3.5(b)]

EVIDENCE

(20 points)

II. (10 points)

- A. (3 points) 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] – it fits into "excited utterance" exception because was statement relating to a startling event made while Montpelier was under the stress of excitement caused by the event [FSM Evid. R. 803(2)]; arguably also a present sense impression exception [FSM Evid. R. 803(1)]
- B. (4 points) in order for Concord's opinion to be admissible
1. objection relevance [FSM Evid. R. 402]; evidence is relevant because Boston was being criminally prosecuted for arson and intent is an element of the offense so prosecution must prove Boston intended to start fire so if he was merely using it to clean and it accidentally caught fire it could support a state-of-mind defense, to that extent it's relevant
 2. objection to Concord as expert – if Concord is to testify as to his opinion of scientific or technical knowledge he must be qualified as an expert – a person whose knowledge, skill, experience, training, or education will assist the trier of fact to understand the evidence or to determine a fact in issue [FSM Evid. R. 702]; because Concord is a math teacher he may be unable to qualify as an expert; if he qualifies he will be able to testify on his experiments if they are of a type reasonably relied upon by experts in the field [FSM Evid. R. 703], may also testify to the contents of the learned treatise as this is a hearsay exception [FSM Evid. R. 803(18)]
- C. (3 points) Augusta's testimony objections
1. doesn't appear relevant, therefore inadmissible [FSM Evid. R. 402]
 2. evidence of other bad acts not admissible to prove character, but may be admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident [FSM Evid. R. 404(b)], none appear to be here, so inadmissible, and even if admissible would prejudice outweigh any (slight?) probative value? [FSM Evid. R. 403]
 3. as it occurred during her marriage to Boston it might be inadmissible under the spousal privilege; judge would apply the privilege law of the state where the civil action takes place [FSM Evid. R. 501] to see if there is private marital communication privilege or other marital privilege, act of Congress barring spouses from testifying against each other in a criminal proceeding [6 F.S.M.C. 1301] presumably wouldn't apply because Augusta no longer married to Boston
- III. (7 points)
- A. (3 points) will object on ground of hearsay,
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. statements made for purpose of medical diagnosis are hearsay exception [FSM Evid. R. 803(4)], so "Fracture of hip; apparently sustained in fall" should be admissible

4. but statement concerning cause of fall not necessary for medical diagnosis & is hearsay within hearsay [FSM Evid. R. 805] for which no exception exists & is inadmissible
 5. if Detor claims that Pandanus's story of slipping on liquid on floor of Detor's theater was one of recent fabrication it will be admissible as nonhearsay prior statement by witness, consistent with Pandanus's testimony, to rebut charge of recent fabrication [FSM Evid. R. 801(d)(1)(B)] (bonus); authentication of document?
- B. (4 points)
1. Walter's testimony that Pandanus had been drinking that day is admissible if of Walter's personal knowledge & relevant to defense (assume defense is Pandanus fell because he was drunk)
 2. Walter's testimony that Pandanus drinks every day – question relevance [FSM Evid. R. 402]; can it qualify as admissible evidence of habit to show that he acted in conformity therewith? [FSM Evid. R. 406], argue; probably not
 3. if relevant, Walter's testimony that Pandanus is well-known drunk is character evidence which is generally not admissible to prove conduct [FSM Evid. R. 404] but if admissible must be proven by reputation or opinion [FSM Evid. R. 405(a) (method of proving character)]; therefore probably not admissible
- IV. (3 points)
- A. no contest (nolo contendere) plea not admissible in any civil or criminal proceeding against defendant who made it [FSM Evid. R. 410(b)]
 - B. but evidence of conviction of crime may be used for the purpose of attacking witness's credibility if elicited during cross-examination but only if the crime was punishable by death or imprisonment for over one year under the law under which he was convicted, and court determines that the probative value of admitting evidence outweighs its prejudicial effect to the defendant, or the crime involved dishonesty or false statement [FSM Evid. R. 609(a)]
 - C. objection probably sustained

GENERAL
(70 points)

- V. (14 points) search and seizure [FSM Const. art. IV, § 5] Don's statement
- A. Don has standing to contest search
 1. person must have reasonable expectation of privacy in place to be searched or the item to be seized
 2. Don has reasonable expectation of privacy in the hotel room he rented
 - B. warrant must be issued by a neutral and detached magistrate and be based on probable cause
 1. probable cause is reasonable ground for suspicion, sufficiently strong to warrant a cautious person to believe that a crime has been committed and that the item to be seized has been used in the crime [Ishizawa v. Pohnpei, 2 FSM R. 67, 76 (Pon. 1985)]
 2. probable cause can be based upon the totality of the circumstances whether the information is trustworthy
 3. informant did not state basis of information

- a. but had supplied reliable information in the past
- b. although information was corroborated by Don's renting a room at the Palms Hotel; there was no corroboration at time warrant was issued; therefore doubtful probable cause existed at time warrant was issued
- c. does warrant lack specificity?; warrant must state place and person to be searched
 - (1) person named
 - (2) hotel named
 - (3) (BUT) time is uncertain (search warrants are usually valid for up to 10 days [12 F.S.M.C. 306(4)])
- 4. warrant probably issued with probable cause
- C. if warrant issued without probable cause, then
 - 1. evidence seized is inadmissible under exclusionary rule
 - 2. under fruit of poisonous tree doctrine, any evidence from unlawful search plus any evidence as direct or indirect result of search is inadmissible, BUT
- D. exceptions to requirement of valid warrant
 - 1. exigent circumstances –
 - a. Tram overheard sounds of argument & struggle while outside door of hotel room which is a public place
 - b. Tram therefore in place he has legal right to be when he overhears argument & struggle
 - c. Tram knew serious injury or destruction of evidence about to occur & he had to enter room to prevent a crime
 - d. if Tram's entry is lawful for this purpose, once Trace entered room legally then any evidence in "plain view" may be seized
 - 2. consent
 - a. Don opened door for Tram
 - b. BUT Don opened door in response to announcement Don had search warrant; consent not present
 - 3. good faith – police believed had valid search warrant; search warrant valid on its face (???)
- E. Don's statement [FSM Const. art. IV, § 7]
 - 1. was Don interrogated in custody without being warned of his rights?
 - a. person in custody if not free to leave
 - b. Don was held at gunpoint (Tram drew weapon) therefore not free to leave
 - c. Don in custody; not given rights before asked what happened here?
 - 2. Don's statement therefore will be suppressed because
 - a. given in custody as result of questioning
 - b. not excited utterance because in response to question
- VI. (& points)
 - A. motions to dismiss
 - 1. interpleader [FSM Civ. R. 22]
 - a. since Hospitality may be exposed to double or multiple liability
 - b. Hospitality can join the two vendors as defendants and require them to interplead

- c. vendors' grounds to dismiss that the claims do not have a common origin or are not for the same goods is not a proper ground to dismiss the action [FSM Civ. R. 22(1)]
 - 2. defective summonses
 - a. summonses were defective since stated that the defendants must answer within 10 days, but the rules allow 20 days for a defendant to answer [FSM Civ. R. 12(a)]
 - b. but defendants' motions to dismiss didn't raise insufficiency of process [FSM Civ. R. 12(b)(4)] defense
 - c. insufficiency of process defense was waived when defendants made general appearance and filed their motions to dismiss on other grounds because, with exception that doesn't apply to insufficiency of process defense, all grounds for dismissal must be consolidated in one Rule 12(b) motion [FSM Civ. R. 12(g)]
- B. defendant vendors' answers
 - 1. vendors' general allegations of affirmative defenses of fraud and mistake are defective
 - 2. allegations of fraud or mistake must be pled with particularity, not generally [FSM Civ. R. 9(b)]
 - 3. Hospitality should move to strike the affirmative defenses of fraud and mistake for not being pled with particularity because "the court may order stricken from any pleading any insufficient defense" [FSM Civ. R. 12(f)]
 - 4. if Hospitality doesn't make proper objection to the fraud and mistake defenses then it runs the risk that defendants, after trial, will be able to move to have the affirmative defense pleadings conform to the evidence actually presented at trial [FSM Civ. R. 15(b)]
- C. deceased vendor
 - 1. Hospitality, the other vendor, or the deceased vendors' heirs should have made a suggestion of death on the record since deceased vendor's claims were not extinguished by his death [FSM Civ. R. 25(a)(1)]
 - 2. if no motion to substitute for the deceased vendor is made within 90 days of suggestion of death, court should dismiss deceased vendor [FSM Civ. R. 25(a)(1)]
 - 3. court may have not had proper parties before since no motion to substitute appears to have been made
- D. new trial motion
 - 1. new trial may be granted to all or any of the parties for newly discovered evidence [FSM Civ. R. 59(a)] but only if that evidence was newly discovered which by due diligence could not have been discovered earlier [George v. Palsis, 20 FSM R. 174, 176-77 (Kos. 2015)]
 - 2. new trial motion for newly discovered evidence must be served within 10 days of entry of judgment [FSM Civ. R. 59(c)] ; deceased vendor's heirs' filing of motion 20 days after judgment was too late because it is untimely since a Rule 59 motion served after the ten days has expired court may consider it a Rule 60(b) motion for relief from judgment [George v. Palsis, 20 FSM R. 174, 176 (Kos. 2015)]
 - 3.

4. because it is untimely for Rule 59 motion, deceased vendor's heirs can only pursue
 - a. a Rule 60(b) motion for relief from judgment
 - b. timely appeal within 42 days after judgment [FSM App. R. 4(a)(1)]
- VII. (11 points)
- A. (3 points) unconstitutional
 1. higher state sales tax on betelnut from outside state is unconstitutional because state & local gov'ts are barred from imposing taxes that restrict interstate commerce [FSM Const. art. VIII, § 3];
 2. 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. (3 points) constitutional
 1. doesn't violate FSM Constitution since
 2. this type of tax isn't reserved to nat'l gov't &
 3. isn't banned by any other provision (such as ban on tax restricting interstate commerce [FSM Const. art. VIII, § 3])
 - C. (3 points)
 1. state may constitutionally regulate fishing within 12 miles of baselines around its shores
 2. unconstitutional for state to regulate beyond 12 miles; nat'l gov't has exclusive right to regulate in EEZ beyond 12 miles [FSM Const. art. IX, § 2(m)]
- VIII. (7 points)
- A. essential contract terms (amount & time of further payments) omitted or too vague or uncertain for court to determine who breached contract
 - B. but when an agreement does not specify when the payment was to be made by the defendant to the plaintiff, it suggests that the parties did not regard any specific point in time as essential; accordingly, the court will reform the contract & adopt a "reasonable time" as the time for performance of the contract. [George v. Alik, 13 FSM R. 12, 14-15 (Kos. S. Ct. Tr. 2004)]
 - C. BUT can't reform contract to include those terms & order specific performance because van already resold
 - D. when no contract existed for lack of definite terms, court may use its inherent equity power to fashion a remedy under the doctrine of restitution [Jim v. Alik, 4 FSM R. 199, 200 (Kos. S. Ct. Tr. 1989)]
 - E. damages calculation – Tony's restitution damages equal
 1. Tony's payments
 - a. \$1,000 down, and
 - b. \$285 in improvements
 2. minus fair market value of the van's rental value for four months (what Tony would've had to pay to rent it, or what Julio could've rented it for during that time)
- IX. (11 points)
- A. (3 points) motion doesn't have to be transferred to another judge – statute doesn't require it; not constitutionally mandated due process [Skilling v. FSM, 2 FSM R. 209, 213 (App. 1986)]; judge could transfer it in his own discretion

- B. (8 points) motion probably should be denied
1. judge has no personal knowledge of disputed evidentiary facts concerning the proceeding
 2. judge hasn't shown any personal bias toward Arsenic or Arsenic's attorney
 3. can judge's impartiality be reasonably questioned?; probably not; argue
 - a. judge not required to recuse self merely because case or issue is similar to case or issue judge decided earlier [FSM v. Skilling, 1 FSM R. 464, 473 (Kos. 1984) (recusal motion ordinarily may not be predicated on the judge's rulings in the same case or in related cases, nor on a demonstrated tendency to rule any particular way, nor on a particular judicial leaning or attitude derived from his experience on the bench)]
 - b. Arsenic's motion doesn't accurately state judge's reasoning in Mercury case
 - c. statement "presumption that the maximum sentence authorized by statute could be imposed" only states principle of how sentencing might be approached, doesn't decide case before it is heard
- X. (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 R. 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

XI. (6 points)

- A. (3 points) motion to remand denied
 1. although breach of contract is a state law cause of action
 2. FSM Supreme Court has diversity jurisdiction [FSM Const. art. XI, § 6(b)] because
 3. defendant is a Chuukese citizen
 4. plaintiff corporation's 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. although all parties are foreigners (and thus no diversity jurisdiction) [Geoffrey Hughes (Export) Pty, Ltd. v. America Ducksan Co., 12 FSM R. 413, 415 (Chk. 2004)]
 2. seaman's wages and "cure & maintenance" are claims under maritime law and jurisdiction [*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. FSM Supreme Court has exclusive jurisdiction in admiralty and maritime cases [FSM Const. art. XI, § 6(a)]