

**Checklist of Points to be Covered for Complete Answers**  
**FSM Bar Examination, August 4, 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. (3 points) judge probably would not admit because
- 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. Doctor's testimony is being offered for the truth of the matter asserted so therefore is hearsay;
  - C. general rule: hearsay inadmissible unless falls within one of the exceptions to the hearsay rule [FSM Evid. R. 802];
  - D. statements made for purposes of medical diagnosis or treatment are exceptions to the hearsay rule insofar as reasonably pertinent to diagnosis or treatment [FSM Evid. R. 803(4)]
    - 1. "I ran into a tree." may be pertinent for purpose FSM Evid. R. of medical diagnosis and treatment
    - 2. but rest of Panda's statement doesn't appear to be
  - E. excited utterance exception [FSM Evid. R. 803(2)] for
    - 1. statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition
    - 2. if Panda considered still under the stress of excitement caused by the accident when she was in emergency room (she was weeping & had trouble speaking) then could be admissible as excited utterance [argue either way]
- II. (7 points)
- A. trial court correct to allow Officer Semes to read the license plate number from his notebook because
    - 1. out-of-court statement in notebook is hearsay because offered for truth of statement
    - 2. is admissible under recorded recollection exception [FSM Evid. R. 803(5)] since is
      - a. memorandum or record concerning a matter about which a witness once had knowledge
      - b. but now has insufficient recollection to enable him to testify fully and accurately,
      - c. & is shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly
      - d. accuracy of license plate number in notebook was adopted by Will when, after Officer Semes wrote the number down, Will confirmed that it was correct while the matter was fresh in Will's mind
    - 3. best evidence rule doesn't apply since
      - a. prosecutor did not offer the notebook into evidence & it wasn't received as exhibit
      - b. absence of napkin with writing (the original writing) was explained [FSM Evid. R. 1004(1)] because
        - (1) original is not required, and other evidence of the contents of a writing, is admissible if
        - (2) original is lost or has been destroyed
  - B. trial court shouldn't have excluded the CD because

1. CD considered either as a writing [FSM Evid. R. 1001(1)] or a photograph [FSM Evid. R. 1001(2)] (which includes video tapes & motion pictures) if FSM rule is interpreted broadly, or
2. CD considered like data stored in a computer or similar device, thus any print-out or other output readable by sight, shown to reflect the data accurately, is an "original" [FSM Evid. R. 1001(3)]
3. CD is thus either an original or a duplicate (because is a counterpart produced by mechanical or electronic re-recording) [FSM Evid. R. 1001(4)] of original
4. & duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original [FSM Evid. R. 1003]
5. [bonus] requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims [FSM Evid. R. 901(a)]

III. (10 points)

- A. Seldom Seimens's "Oh no, not again!" statement will raise hearsay objection but should be admissible either
  1. as admission of party-opponent because
    - a. defined as non-hearsay [FSM Evid. R. 801(d)(2)]
    - b. & is a statement made by party-opponent Katau Agency's agent or servant a matter within the scope of his agency or employment, made during the existence of the relationship [FSM Evid. R. 801(d)(2)(D)]
  2. OR as hearsay exception of excited utterance [FSM Evid. R. 803(2)] as
    - a. statement relating to a startling event or condition
    - b. made while the declarant was under the stress of excitement caused by the event or condition
  3. fact that there was earlier accident is probably relevant & all relevant evidence is generally admissible [FSM Evid. R. 402] unless its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues [FSM Evid. R. 403]
- B. Watt's statement that for three years he had been telling the agency employees to do something about the stairway
  1. is inadmissible hearsay
  2. can be overcome by calling Watt as witness to testify at trial about his earlier attempts to put agency on notice of hazardous condition of stairs
- C. Ohm's pretrial deposition testimony
  1. would be admissible if he's unable to attend trial if the Katau Agency (party against whom the testimony is now offered) had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination [FSM Evid. R. 804(b)(1)]
  2. but Ohm's testimony that he repaired stairs is inadmissible to prove negligence or culpable conduct in connection with the event but may be admitted if offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment [FSM Evid. R. 407]

ETHICS

(10 points)

IV. (8 points)

- A. lawyer Alcibides can't split fee with non-lawyer [FSM MRPC R. 5.4(a)] Pericles is a non-lawyer since he's a paralegal, exception for retirement plan for employees doesn't seem to apply because this isn't retirement plan & although signed "employment contract" Pericles doesn't seem to be an employee
- B. Alcibides can't form partnership with non-lawyer if any of the activities of the partnership consist of the practice of law [FSM MRPC R. 5.4(b)]; splitting proceeds implies that Alcibides & Pericles have formed partnership
- C. Alcibides can't practice in association with a non-lawyer who has the right to control his professional judgment [FSM MRPC R. 5.4(d)], Pericles seems to have complete discretion thus controlling Alcibides's professional judgment
- D. Alcibides is required to ensure that the conduct of a nonlawyer employed or retained by or associated with him is compatible with the professional obligations of the lawyer [FSM MRPC R. 5.3(a)]
  - 1. Alcibides's lack of any meaningful presence indicates rule may have been violated
  - 2. Alcibides must keep his clients informed [FSM MRPC R. 1.4] but he doesn't communicate with his clients
- E. Alcibides can't assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law [FSM MRPC R. 5.5(b)]
  - 1. Pericles does not appear to be licensed in any court (although facts don't specifically say so)
  - 2. Alcibides's actions assist Pericles & thus violate rule
- F. Alcibides can't make false or misleading representation about his services [FSM MRPC R. 7.1]; the ad suggests that divorce can be had for \$125, but some divorces will cost more
- G. Alcibides can't give anything of value to a person for recommending his services [FSM MRPC R. 7.2(c)]; Pericles's commission might violate this
- H. any advertising must include the name of at least one lawyer responsible for its content [FSM MRPC R. 7.2(d)]; Alcibides's cable TV ads don't seem to include his name
- I. Pericles appears to be engaging in practice of law without a license & misleading courts by having clients appear pro se while "ghostwriting" their pleadings

**GENERAL**

(70 points)

V. (5 points) Paul's motion to compel should be granted

- A. Daniel's argument is without merit
- B. all relevant evidence is discoverable [FSM Civ. R. 26(b)(1)] Wendy's statement is certainly relevant
- C. work product rule [FSM Civ. R. 26(b)(3)] only ground that might prevent discovery
  - 1. work product rule applies if materials prepared in anticipation of litigation
  - 2. but was insurance investigator's report two days after accident prepared in anticipation of litigation or just prepared in ordinary course of business?
    - a. claims investigation is ordinary business of insurer but statement immediately sent to lawyer
    - b. unclear whether lawyer directed investigation
    - c. are insurance investigations of accidents always in anticipation of

- litigation?
3. "work product" still discoverable if
    - a. Paul shows has substantial need of the materials in the preparation his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means [FSM Civ. R. 26(b)(3)]
    - b. Wendy was only witness & disappeared before Paul could take her statement or depose her
    - c. therefore Paul ought to be able to discover Wendy's statement even if "work product" BUT can't discover Alex's impressions of her
  4. Daniel didn't raise "work product" issue as defense so may have waived it

**ETHICS**

(continued)

- VI. (2 points) Lawyer should be sanctioned
- A. Lawyer's argument was meritless
  - B. Lawyer's discovery response was not warranted by existing law or good faith argument for change so court may impose sanction [FSM Civ. R. 26(g)(1)]
  - C. likely sanction would include opposing party's reasonable attorney's fees & expenses incurred [FSM Civ. R. 26(g)]

**GENERAL**

(continued)

- VII. (12 points)
- A. (6 points)
    1. to prevail on defamation claim Carl must establish for each alleged defamatory statement that it was
    2. a false and unprivileged publication which exposes him to hatred, contempt, ridicule, or obloquy or which cause him to be shunned or avoided or which has a tendency to injure him in his occupation [*see Pohl v. Chuuk Public Utility Corp.*, 13 FSM Intrm. 550, 557 (Chk. 2005)]
    3. statement to police that Carl was violent person; discuss
      - a. whether statement was false statement of fact or Pat's statement of opinion
      - b. whether statement was privileged because Pat asked for police assistance to protect safety of his employees
      - c. whether statement was negligent because Pat never directly saw Carl acting violently
      - d. Carl might (although more likely not) prevail on this claim
    4. statement to Axco employees that Carl was fired
      - a. statement defamatory because injures Carl but
      - b. is not false
      - c. is probably privileged because employees have interest in what goes on where they work
      - d. Carl probably won't prevail on this claim
  - B. (6 points)
    1. invasion of privacy
      - a. privacy law comprises four distinct kinds of invasion of four different interests of the plaintiff – unreasonable intrusion upon the seclusion of another, appropriation of another's name or likeness, unreasonable publicity given to the other's private life, and

publicity that unreasonably places the other in false light before the public [Nethon v. Mobil Oil Micronesia, Inc., 6 FSM Intrm. 451, 455-56 (Chk. 1994)]; each represents an interference with the right of the plaintiff "to be let alone"

- b. is certainly reasonable for Pat to pack Carl's personal belongings & thus sort through to see what is Axco's property & what's Carl's
- c. facts don't provide enough information to determine if Carl had reasonable expectation of privacy in his Axco work space

2. conversion

- a. elements of conversion are the plaintiffs' ownership and right to possession of the personalty, the defendant's wrongful or unauthorized act of dominion over the plaintiff's property inconsistent with or hostile to the owner's right, and resulting damages [Bank of Hawaii v. Air Nauru, 7 FSM Intrm. 651, 653 (Chk. 1996)]

b. \$50

- (1) if Carl can establish that the \$50 was his [Pat unable to testify otherwise] conversion shown
- (2) no evidence Pat made effort to confirm \$50 was Axco money & not Pat's even though \$50 was in Carl's desk
- (3) Pat interfered with Carl's possession of the \$50

c. medical exam

- (1) dispositive issue is who had right to keep it
- (2) it was paid for by Axco
- (3) so Axco probably had right to keep in their files; Axco's insurer might even require it

VIII. (6 points)

A. (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 Intrm. 367, 376 (App. 1990)]
- 3. FSM Supreme Court has exclusive jurisdiction

B. (3 points) case remanded

- 1. breach of contract is state law claim
- 2. citizenship of business entities is citizenship of shareholders [*see* Luzama v. Ponape Enterprises Co., 7 FSM Intrm. 40, 44 (App. 1995)]
- 3. so plaintiff is Philippines citizen & defendant is U.S. citizen
- 4. FSM Supreme Court doesn't have diversity jurisdiction when all parties are foreign citizens even though they are citizens of different foreign nations [Trance v. Penta Ocean Constr. Co., 7 FSM Intrm. 147, 148 (Chk. 1995)]

IX. (15 points) Betty's motion to suppress on grounds searches & seizures were unreasonable & thus violate FSM Const. art. IV, § 5

A. stolen jewelry

- 1. issue whether police entered Betty's apartment legally because once inside jewelry was in plain view & police had right to seize evidence that was in plain view [FSM v. Sato, 16 FSM Intrm. 26, 29-30 (Chk. 2008)]
- 2. prosecution will argue that Betty didn't have reasonable expectation of privacy when she left her door ajar so that it opened when the police

- knocked
3. Betty will argue that she had reasonable expectation of privacy & she didn't expect police or anyone else to enter while she was gone
  4. although police had probable cause to believe that there was meth in Betty's apartment based on information by reliable informant with first-hand information, police did not have a warrant when they entered Betty's apartment
  5. warrant would've permitted police to enter & search Betty's apartment
  6. no exigent circumstances present
  7. no warrant & no exigent circumstances police were not in a place where they had a right to be so entry therefore unlawful & jewelry should be suppressed because not in plain view when police were in a place where they had a right to be
- B. crystal meth
1. search of person reasonable when
    - a. police have warrant, or
    - b. is incident to valid arrest,
    - c. or if is limited search as a "frisk" when person temporarily stopped for questioning without probable cause but with reasonable suspicion of illegal conduct
  2. police didn't have warrant
  3. search is valid if police had probable cause to arrest Betty; argue
    - a. police had probable cause based on information from reliable informant
    - b. police lawfully in hallway so arrest is in public & warrant not needed
      - (1) police might be in hallway as result of illegal search of Betty's apartment
      - (2) but their original intent was to go to Betty's apartment to see if she was home & talk to her so they would've been in the hallway anyway
    - c. search is valid as part of investigative stop if
      - (1) stop of Betty to gather more information is probably okay
      - (2) but subsequent search then okay only if police had articulable grounds to believe Betty armed & dangerous
      - (3) could then pat her down to look for weapons & box might've felt like a weapon
      - (4) but no evidence to indicate police had any reason to believe Betty was armed
      - (5) & being surrounded by three officers showing guns gives rise to argument that this wasn't temporary detention for investigation but a serious intrusion on Betty's liberty
    - d. motion to suppress meth probably granted
- X. (7 points)
- A. (4 points)
1. 10% tax is unconstitutional income tax if imposed on and paid by business & is constitutional state sales tax is paid by the customer buying the interent service [Truk Continental Hotel, Inc. v. Chuuk, 7 FSM Intrm. 117, 120 (App. 1995)]
  2. \$400 flat fee is constitutional since is not an income tax nor an import tax, the only two types of tax national gov't & not state gov't can impose

- [FSM Const. art. IX, §§ 2(d), 2(e)]
- B. (3 points) probably constitutional
1. tax is paid by seller out of the money (income) he receives from the land sale; thus looks like an income tax
  2. only nat'l gov't has power to tax income [FSM Const. art. IX, § 2(e)]
- XI. (10 points)
- A. (4 points) motions probably denied
1. employment contract for work at sea is admiralty matter – exclusive jurisdiction in FSM Supreme Court [abstention not possible]
  2. if not an admiralty matter
    - a. Cap'n Kelly did exhaust administrative remedies by sending letter, receiving no answer, and being told something would be done thereby making any further attempts at administrative relief futile
    - b. Pohnpei state law cannot divest FSM Supreme Court of jurisdiction granted by FSM Constitution (either admiralty or diversity of citizenship) [abstention possible]
- B. (6 points)
1. steps to take by Cap'n Kelly's attorney
    - a. move for enlargement of time to investigate (by discovery) relationship between the parties
    - b. move to amend complaint
      - (1) to join (using court's long-arm jurisdiction) Rock Enterprises, Inc. as an indispensable party (analyze requirements)
      - (2) to add cause of action against state for tortious interference with contractual relationship
  2. court's ruling
    - a. will allow enlargement of time
    - b. allow motion to add party-defendants
    - c. will be considered a summary judgment motion if matters outside pleadings considered
  3. likely result if only step is to oppose motion – judgment for State
- XII. (15 points) April's rights v. Rains & Shines
- A. Rains & Shines first offer (by letter)
1. terms were reasonably certain
  2. April didn't respond
  3. offer said reply must be within one week, therefore no acceptance
  4. thus, no contract
- B. Rains & Shines second offer (by telephone)
1. 10 days after first (by now expired) offer, Rains makes second offer, orally
  2. April accepted in writing, Rains didn't specify how April was to accept so any reasonable method of acceptance should be okay
  - 3.
- C. Pohnpei statute of frauds
1. terms of second contract offer guaranteed employment for two years
  2. Pohnpei requires that for contract to be enforceable it must be in writing if it cannot be performed within one year
  3. April's employment contract can't be performed within one year (it requires two) so Pohnpei statute of frauds applies
  4. April may try to avoid the statute making her contract unenforceable by
    - a. using writing from first offer &

- b. arguing second offer was oral modification of contract
  - c. but no written evidence of certain material terms (higher pay & two years' guaranteed)
  - d. chances of success not too good
- D. promissory estoppel may be used where there's no enforceable contract (April will use to counter statute of frauds defense)
  - 1. to claim promissory estoppel a party must prove that 1) a promise was made; 2) the promisor should reasonably have expected the promise to induce actions of a definite and substantial character; 3) the promise did in fact induce such action; and 4) the circumstances require the enforcement of the promise to avoid injustice; elements 3 and 4 are sometimes referred to collectively as "detrimental reliance" [AHPW, Inc. v. Pohnpei, 14 FSM Intrm. 188, 191-92 (Pon. 2006)]
  - 2. April quit her job in Oregon; moved to Pohnpei; signed a two-year lease for an apartment at \$800 a month; & paid the FSM Supreme Court \$950 for study materials
  - 3. April will have to show that the circumstances require the enforcement of the promise to avoid injustice
- E. anticipatory breach
  - 1. assuming April can enforce promise through promissory estoppel
  - 2. when Rains told her Aug. 25, 2010 that they wouldn't hire her on Oct. 1, 2010 as agreed, it was anticipatory breach – a clear statement of intent not to perform the contract before performance was due
- F. mitigation of damages
  - 1. when contract breached April required to mitigate damages by looking for other suitable work
  - 2. April tried to find other employment
  - 3. mitigation might not require that April accept lesser employment (but she did except for three months)
- G. damages
  - 1. under contract (if contract found enforceable)
    - a. lost salary subject to mitigation
    - b. employment contracts usually terminable at will so expectancy damages unlikely (unless 2 year guarantee enforceable)
    - c. reliance damages – money spent moving to Pohnpei & renting apartment
  - 2. under promissory estoppel – detrimental reliance:
    - a. out-of-pocket expenses in reliance on promise cost of move to Pohnpei, maybe Kolonia apartment rental
    - b. maybe difference of lost income
- H. Rains & Shines possible defenses
  - 1. frustration of purpose
    - a. did Rains & Shines loss of clients justify anticipatory breach of contract?
    - b. April probably didn't know she was being hired for fisheries clients
    - c. loss of clients is foreseeable so might not qualify as frustration of purpose
  - 2. commercial impracticability
    - a. requires failure of presupposed condition
    - b. must be unforeseeable & not merely onerous but unjust to require

3. performance  
these defenses unlikely to prevail although they may be raised