

Checklist of Points to be Covered for Complete Answers
FSM Bar Examination, August 5, 2004

[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. (17 points)

A. (3 points)

1. 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. any party may impeach any witness, even its own [FSM Evid. R. 607]; to impeach witness with evidence of criminal conviction, crime must carry a maximum sentence of over one year imprisonment or death [FSM Evid. R. 609(a)(1)] or involve dishonesty or false statement regardless of maximum sentence [FSM Evid. R. 609(a)(2)]; but
3. under FSM may only impeach by means of prior criminal conviction only on cross-examination [FSM Evid. R. 609(a)]; since Dorado is hostile witness court might treat Pictor's direct examination of him as cross

B. (4 points) objection overruled

1. question is leading, but leading questions permissible on direct examination when the witness is adverse; Dorado is adverse witness since he is defendant [FSM Evid. R. 611(c)]
2. evidence of beer drinking is material and relevant since it tends to make the existence of a fact (Dorado's negligence while driving) that is of consequence to the action's determination more probable or less probable than it would be without the evidence [FSM Evid. R. 401] and therefore admissible [FSM Evid. R. 402]

C. (3 points) might be inadmissible under the spousal privilege as long as statement not made in the presence of a third party, which appears to be the case here; 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; if no marital privilege then admissible as admission of party-opponent [FSM Evid. R. 802(d)(2)(D)]

D. (4 points) objection to the conversation between Dorado and police officer 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]

1. Dorado's statement is an admission made by a party & is therefore admissible as non-hearsay [FSM Evid. R. 802(d)(2)(D)]; objection overruled
2. police officer's part of conversation is hearsay and does not appear to fall within any of the recognized exceptions; therefore inadmissible; objection sustained

E. (3 points) hearsay objection should be overruled; it fits into "excited utterance" exception to hearsay because was statement relating to a startling event made while Pictor 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)]

- II. (3 points) objection overruled; evidence of subsequent remedial measures taken after the event that would have made the event less likely to occur are not admissible to prove negligence or culpable conduct in connection with the event, but are admissible when offered for another purpose such as proving ownership, if controverted [FSM Evid. R. 407] and ownership is denied

ETHICS

(10 points)

- III. (5 points) recommend that Lear be disciplined because
- A. a lawyer is subject to discipline by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation [FSM Dis. R. 2(c)] since it is professional misconduct for a lawyer to engage in any conduct involving dishonesty, fraud, deceit or misrepresentation [FSM MRPC R. 8.4(c)]
 - B. both of Lear's requests for duplicate certificates of title, his loan application, his affidavit, and his deed to bank were all dishonest, deceitful, or misrepresentations
 - C. also it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice [FSM MRPC R. 8.4(d)] and since his acts caused the issuance of two conflicting certificates of title ((1) to his kids and (2) to Minerva) and ensuing litigation, this is prejudicial to administration of justice
- IV. (5 points) Faust should be disciplined for
- A. failing to act with reasonable diligence and promptness in representing a client [FSM MRPC R. 1.3] because he did nothing on the cases after filing them;
 - B. failing to keep his client reasonably informed about the matters' status [FSM MRPC R. 1.4(a)]; and
 - C. since by moving to Guam and neglecting his FSM cases, Faust effectively withdrew from his FSM cases; he failed to take proper steps to terminate his representation of the bank because he didn't take steps to the extent reasonably practicable to protect a client's interests, such as giving it reasonable notice, allowing time for employment of other counsel, surrendering papers and property to which the bank was entitled and refunding any advance payment of fee that has not been earned [FSM MRPC R. 1.16(d)]

GENERAL

(70 points)

- V. (17 points)
- A. (4 points) Charon may implead the insurance company; impleader is allowed when a third-party defendant stands in some relationship to the original defendant that requires the third-party defendant to answer to the defendant for any or all of the defendant's liability [FSM Civ. R. 14(a)]; the insurance co. is properly joined by filing and serving a summons, third-party complaint & all original pleadings
 - B. (4 points) Styx should file a motion to intervene
 1. intervention is allowed as a matter of right upon timely application when applicant claims an interest relating to the property or transaction that is the litigation's subject matter, if disposition of the action may as a practical matter impair or impede applicant's ability to protect its interest [FSM Civ. R. 24(a)]

2. intervention may also be permitted when an applicant's claim or defense and the main action have a question of law or fact in common; court must consider whether intervention is timely & whether it would whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties [FSM Civ. R. 24(b)]
- C. (5 points) Charon should file a counterclaim against Hadean
1. counterclaim is compulsory if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction [FSM Civ. R. 13(a)]
 2. although both Hadean's claim & Charon's counterclaim arise out her employment contract at Hadean, it might not be considered same transaction or occurrence; therefore Charon can bring permissive counterclaim [FSM Civ. R. 13(b)]
 3. [bonus] Charon might seek a prejudgment attachment of Hadean's local assets to ensure that her claim can be satisfied [*see* FSM Civ. R. 64]
- D. (4 points) Charon should move for summary judgment on Hadean's claim against her; she must show that there is no genuine issue as to any material fact and she is entitled to judgment as a matter of law; court must view the facts presented and inferences made in the light most favorable to Hadean, burden of showing a lack of triable issues of fact belongs to the moving party (Charon)[Adams v. Etscheit, 6 FSM Intrm. 580, 582 (App. 1994)]; she should support her motion with affidavit(s)
- VI. (15 points)
- A. arguments for defense counsel – statement should be suppressed under “fruit of poisonous tree” doctrine as illegally obtained because
1. statement not given after knowing, intelligent, voluntary waiver because Alaric not informed of what he would be questioned about before he agreed to answer questions – cannot knowingly, intelligently, voluntarily waive a right unless know what are waiving
 2. right to remain silent may have been waived, but right to have attorney present was not waived, therefore statement taken illegally
 3. Alaric, probably not free to leave, therefore under arrest, not accorded other, statutory rights of arrested person, *e.g.*, to call a family member, etc. []
- B. arguments for prosecution
1. right to have attorney present was waived by implication, because Alaric knew and understood had that right and voluntarily started answering questions anyway;
 2. Alaric, not under arrest – came to station voluntarily, in response to request, and was free to leave at any time
 3. even if Alaric was not informed what would be questioned about he knew as soon as questions were asked and he knew he did not have to answer so could have stopped there, but continued voluntarily
- C. court's ruling – argue either way (but, defense's arguments may be more convincing)
- VII. (4 points) you should recommend that the insurance company file an interpleader action [FSM Civ. R. 22(1)] naming as defendants all the claimants who seek Horatio's insurance policy benefits and deposit the benefits with the court, letting the defendants prove to the court which ones are entitled to the benefits; this way the insurance company avoids the possibility of defending multiple lawsuits and the possibility it might end up paying twice

VIII. (14 points)

- A. (7 points) Clyde's status under contract — Clyde is intended third-party beneficiary — a beneficiary whose rights are conferred as a part of the original contract between the contracting parties [*see Mailo v. Penta Ocean Inc.*, 8 FSM Intrm. 139, 141 (Chk. 1997)] since
1. Clyde is named in contract
 2. Roxanne is to make the payment directly to Clyde, indicating both parties intended Clyde to be beneficiary
 3. John owed Clyde money, supporting inference that John would be willing to sell his books & have money go directly to Clyde
- B. (4 points) Clyde's rights against Roxanne — Clyde can sue Roxanne because
1. Clyde's rights as intended third-party beneficiary vested when he changed his position in reliance on the contract — when Clyde bought TV & VCR in justifiable expectation he would have contract proceeds to make his last payment, his rights vested, but
 2. can't sue until July because Clyde aware that books weren't going to be available until then
 3. Clyde's rights are derivative of John's, so Roxanne could use against Clyde any defenses she might have against John, but
 4. promise to pay Clyde was absolute promise to pay \$450, not promise to pay whatever John owed Clyde; no defenses apparent
- C. (3 points) Clyde's rights against John — Clyde can sue John
1. on the underlying debt or on contract for sale of books
 2. contract between John and Roxanne doesn't relieve John of debt to Clyde
 3. Clyde can sue John, or Roxanne, or both, but he can only recover once

IX. (20 points)

- A. (12 points) Joe v. Tina
1. negligence [*see, e.g., Ludwig v. Mailo*, 5 FSM Intrm. 256, 259 (Chk. S. Ct. Tr. 1992) (when a person elects to operate a vehicle on the public streets he owes a duty to others using the road and adjacent areas to operate the vehicle in a safe and prudent manner & when the breach of this duty by driving in a fast and careless manner is the proximate cause of an injury the driver will be held liable)]
 - a. define negligence — duty of care to others, breach of that duty, causes damages
 - b. Tina violated statute requiring she stop at stop sign; Joe was within class of persons that the statute intended to protect; Tina therefore breached duty to Joe
 - c. Tina liable for property damages to Joe's vehicle & Joe's personal injuries
 - d. Tina's defenses — Joe was negligent in not watching where he was going but instead looking over his shoulder at Bill
 - (1) contributory negligence and assumption of the risk contrary to Micronesian custom and thus not an available defense [*see Koike v. Ponape Rock Products, Inc.*, 3 FSM Intrm. 57, 67 (Pon. S. Ct. Tr. 1986); *Epiti v. Chuuk*, 5 FSM Intrm. 162, 167 (Chk. S. Ct. Tr. 1991) (contributory negligence are contrary to the traditional Chuukese concepts of responsibility and not available in Chuuk)]
 - (2) comparative negligence — the amount recoverable for Joe's damages will be reduced by

the percentage that Joe was at fault [Fabian v. Ting Hong Oceanic Enterprises, 8 FSM Intrm. 63, 66 (Chk. 1997)]

2. defamation (intentional tort) — since made orally — slander
 - a. elements — defamatory language (false statement), concerning plaintiff, publication (who statement was communicated to), causes damages (Tina’s statement to Joe’s employer caused his firing)
 - b. defense — truth
 - c. might also claim for Tina’s same acts (apply Tina’s acts to elements)
 - (1) intentional infliction of emotional distress
 - (a) extreme & outrageous conduct
 - (b) intentional or reckless conduct
 - (c) causes actual damages, but plaintiff must have suffered some physical manifestation of the alleged infliction of emotional distress, and if none suffered, his claim must fail for lack of proof [Hauk v. Board of Dirs., 11 FSM Intrm. 236, 241 (Chk. S. Ct. Tr. 2002)]
 - (2) interference with business relationship — [Federated Shipping Co. v. Ponape Transfer & Storage Co., 4 FSM Intrm. 3, 14 (Pon. 1989)] relief may be granted for a claim of tortious interference with a contractual relationship, when
 - (a) an individual’s economic advantages obtained through dealings with others are
 - (b) knowingly jeopardized out of petty or malicious motives or by the improper or unjustified conduct
 - (c) of a third party

B. (5 points) Joe v. Bill

1. assault
 - a. assault refers to the apprehension of immediate offensive or harmful contact by another
 - b. defendant must intend to bring about contact
 - c. apprehension may be caused directly or indirectly
 - d. assault at bar; may have also continued during chase
2. infliction of emotional distress (follow analysis above)
3. Joe’s discharge from job not foreseeable consequence of assault; Joe can’t recover from Bill for it

C. (3 points) Tina v. Bill — negligence

1. did Bill breach duty of care to others such as Tina by chasing Joe down road, and, if so,
2. did this cause damages to Tina? (Argue Joe could’ve avoided the accident if he hadn’t been looking over his shoulder at Bill chasing him)