

Checklist of Points to be Covered for Complete Answers
FSM Bar Examination, August 7, 2008

[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.]

GENERAL
(70 points)

- I. (12 points)
 - A. (7 Points)
 - 1. Dave's motion for judgment
 - a. FSM Supreme Court requires notice pleading, not fact pleading
 - b. complaint should contain
 - (1) short statement of grounds of court's jurisdiction [FSM Civ. R. 8(a)(1)],
 - (2) short statement of claim showing that pleader is entitled to relief [FSM Civ. R. 8(a)(2)], and
 - (3) demand for judgment [FSM Civ. R. 8(a)(3)]
 - c. Paul's complaint states
 - (1) basis for diversity jurisdiction – Paul is citizen of State X and Dave is citizen of State Y
 - (2) short statement of facts giving rise to the claim, showing that he is entitled to relief
 - (3) prays for judgment of \$20,000
 - (4) therefore, all elements of proper complaint are included; Paul has set forth a valid claim
 - d. Dave's motion to dismiss should therefore be denied
 - 2. Paul's motion for judgment
 - a. answer must contain [FSM Civ. R. 8(b)]
 - (1) specific denial or admission of each averment in the complaint; or
 - (2) general denial with specific admissions of the averments; or
 - (3) if defendant lacks sufficient information to admit or deny, a statement to that effect constitutes a denial
 - b. a failure to deny an averment constitutes an admission of that averment
 - c. Dave's answer contained neither an admission nor a denial, but instead demanded proof
 - d. since Dave failed to deny the complaint's averments, he, in effect, admitted them; thus

- e. he admitted that he drove his car negligently since Dave's answer did not set forth any valid defense (because he admitted everything), Paul's motion for judgment on the pleadings should've been granted
 - f. BUT a defendant has the right to amend his answer once within 20 days of serving the answer [FSM Civ. R. 15(a)],
 - (1) in interests of justice, it may be better to let Dave amend his answer
 - (2) if Dave doesn't do so within 20 days, Paul's motion for judgment on the pleadings should be granted
- B. (5 points) Dave's motion to compel
- 1. discovery serves three basic purposes
 - a. preservation of testimony for trial
 - b. elimination of undisputed factual matters, &
 - c. ascertainment of facts
 - 2. all materials discoverable [FSM Civ. R. 26(b)(1)]
 - a. unless privileged
 - b. if relevant – reasonably calculated to lead to admissible evidence
 - 3. thus, only privilege may lead to denial of Dave's motion
 - 4. interrogatories
 - a. question whether Paul obtained any witness statements is proper & Paul must answer, since is certainly relevant & would lead to admissible evidence
 - b. Paul claims privilege – work product
 - (1) work product is material generated in anticipation of litigation by lawyers or anyone involved in matter
 - (a) mental impressions, opinions, conclusions etc. are absolutely privileged
 - (b) other material discoverable if Dave has substantial need and 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)]
 - (2) Wilma, Paul's wife, obtained the two statements right after the accident, apparently in contemplation of litigation, and which are therefore work product
 - (3) Dave has substantial need, because doesn't even have witnesses' names; therefore undue hardship to obtain by other means

- (4) order to compel thus properly granted
- (5) BUT Lex's handwritten notes are probably mental impressions, opinions, conclusions & thus absolutely privileged & may be excluded

EVIDENCE

(20 points)

II. (14 points)

- A. (3 points) Dave 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. the witness's statement is inadmissible & objection should be sustained because no exception to hearsay rule covers it
- B. (3 points) Dave will object on ground of hearsay
 - 1. deposition & attached exhibit are out-of-court statements offered for the truth of the matter
 - 2. deponent is unavailable
 - 3. a witness's deposition may be used by any party for any purpose if the court finds that the witness is off of the island at which the trial or hearing is being held, unless it appears that the absence of the witness was procured by the party offering the deposition [FSM Civ. R. 32(a)(3)(B)]
 - 4. testimony given as a witness in a deposition taken in compliance with law in the course of the same or another proceeding, if the 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)]
 - 5. objection should be overruled and deposition admitted
- C. (3 points) Dave will object on ground of hearsay
 - 1. statement is out-of-court statements offered for the truth of the matter
 - 2. statements made for purpose of medical diagnosis are hearsay exception [FSM Evid. R. 803(4)],
 - 3. since how Paul was injured may help in diagnosis, being rear-ended may cause whiplash injuries a victim might not get in other auto collisions, the manner of the collision may be necessary for diagnosis & thus admissible

- D. (3 points)
 - 1. although not on witness list, Malus might be permitted to testify if testifying on matter that was not expected to be an issue – result of surprise
 - 2. BUT extrinsic evidence to prove collateral matter generally inadmissible because not relevant;
 - 3. but here evidence of Dave's shirt color is collateral matter
 - 4. may be admissible as habit of person [FSM Evid. R. 406] that Dave acted in conformity with; thus may be relevant as to whether Paul correctly identified Dave, who he did not know,
 - 5. but Dave's identification as other driver doesn't appear to be at issue
 - 6. objection likely sustained
 - E. (2 points) objection should be sustained because evidence of conduct or statements made in compromise negotiations or in proposing or participating in a customary apology or customary settlement is generally not admissible [FSM Evid. R. 408]
- III. (4 points) defendant has a constitutional right not to testify against himself [FSM Const. art. IV, § 7]
- A. judge should've sustained the defendant's objections because an accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case [FSM Evid. R. 104(d)]
 - B. judge should not permit the prosecution to call the defendant as a witness since defendant has not waived his right to silence
- IV. (2 points) objection overruled; Evidence Rules do not apply to bail hearings; hearsay is admissible [FSM Evid. R. 1101(d)(3)]; evidence is relevant since judge must assess whether Falan is a flight risk in deciding whether to and under what conditions to grant pre-trial release

GENERAL
(continued)

- V. (9 points)
 - A. (5 points) Bill's liability
 - 1. assault with a deadly weapon
 - a. assault is either
 - (1) intentional creation of imminent bodily harm, or
 - (2) attempted battery

- b. Bill intended to "shake [Carl] up a little"; he pulled gun on Carl; gun is deadly weapon
- c. therefore, battery occurred, as Carl hit by bullet
- d. Bill guilty of assault with deadly weapon
- 2. attempted murder
 - a. a criminal attempt is an act, although done with intent of committing a crime, for some reason falls short of completing the crime; attempt requires
 - (1) intent to perform act & obtain result that, if achieved would be a crime
 - (2) an act beyond mere preparation for the offense
 - b. Bill intended to "shake [Carl] up a little" not kill him, therefore specific intent is missing
 - c. arguably, intent could be shown through Bill's wanton & reckless use of gun, showing disregard for human life, but if Bill honestly believed gun not loaded then couldn't have requisite intent to commit murder (no malice aforethought)
 - d. Bill not guilty of attempted murder
- B. (4 points) Art's liability
 - 1. Art didn't have the intent (mens rea) to commit any crime; he thought they were going to ask Carl for betel nut
 - 2. accomplice liability also seems unlikely, no evidence that Art aided & abetted or encouraged Bill in his actions, or that there was any agreement to commit a crime
 - 3. Art, therefore, not guilty of any crime

ETHICS

(10 points)

VI. (10 points)

- A. (5 points) giving gun to prosecutor
 - 1. Nix has
 - a. duty under both attorney-client privilege and duty of confidentiality [FSM MRPC R. 1.6] not to disclose or use information obtained from his clients
 - (1) attorney-client privilege is evidentiary & governs disclosure of information to a tribunal
 - (2) ethical duty of confidentiality covers all the same information plus all other information obtained in representing a

- client if to reveal it would harm the client or if client asked attorney to keep it in confidence
 - b. gun is material evidence since Bill is charged with assault with deadly weapon & attempted murder & it would assist prosecution in proving its case against Bill
 - c. if Nix simply saw gun or knew it whereabouts, duty of confidentiality would prevent him from disclosing information
 - d. BUT since Nix has possession of gun, his ethical duty as officer of the court comes into play
 - 2. Nix also has
 - a. duty to be honest & candid with the court [FSM MRPC R. 3.3]
 - b. duty would be breached if he actively concealed the gun
 - c. Nix turned gun over to prosecution, as required by his ethical duty
 - d. Nix didn't give any explanation of how the come came into his possession, thus protecting his client's confidential information
 - 3. Nix thus properly balanced his conflicting duties to this client & to the tribunal
- B. (5 points) dual representation
 - 1. if Nix represents both Art & Bill, criminal co-defendants, there is possibility of conflict of interest arising
 - 2. lawyer must not represent a client if the representation of that client will be directly adverse to another client, unless:
 - a. the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
 - b. each client consents after consultation [FSM MRPC R. 1.7(a)]
 - c. in criminal cases the potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant [Ting Hong Oceanic Enterprises v. FSM, 7 FSM Intrm. 471, 479-80 (App. 1996)]; BUT common representation of persons having similar interests may be proper if the risk of adverse effect is minimal and FSM MRPC R. 1.6(b)'s requirements are met [Nena v. Kosrae, 14 FSM Intrm. 73, 79 (App. 2006)]
 - d. Nix properly interviewed each defendant

- separately to establish whether their positions would conflict; only afterwards could he decide whether conflict existed
- e. although Art & Bill not in direct conflict with each other, Art's testimony is potentially damaging to Bill's case & Art may seek to avoid criminal liability by testifying against Bill
 - f. Nix should recommend separate counsel &/or separate trials for each defendant & inform court of conflict [FSM Crim. R. 44(c)]; court likely to order Nix defend one & another public defender defend the other
 - g. Nix is barred from capitalizing on any information he obtained from the other defendant {maybe Nix should defend Bill}; if this creates an ineffective defense for Nix's client, client may appeal on grounds of ineffective assistance of counsel

GENERAL
(continued)

VII. (12 points)

- A. a contract is
 - 1. promise between two parties for the future performance of mutual obligations which the law will enforce in some way
 - 2. for the promise to be enforceable, there must be
 - a. an offer
 - b. an acceptance
 - c. definite terms, and
 - d. consideration for the promise (that which the performance is exchanged for) [Ponape Constr. Co. v. Pohnpei, 6 FSM Intrm. 114, 123 (Pon. 1993)]
 - e. mutual assent by both parties also needed [James v. Lelu Town, 11 FSM Intrm. 337, 339 (Kos. S. Ct. Tr. 2003)]
- B. contract was formed when
 - 1. Loki offered
 - 2. Pixie accepted
 - 3. definite terms agreed (written agreement)
 - 4. consideration (promise to pay, & payment tendered)
- C. was there mutual assent? a meeting of the minds?
 - 1. Loki may claim there was no "meeting of the minds" & thus no contract because, in his mind, he never agreed to sell the *Pride of Walvis Bay*
 - 2. BUT contracts are not interpreted on the basis of

- one party's subjective uncommunicated views, or secret hopes, but on an objective basis, according to the parties' reasonable expectations or understanding based upon circumstances known to the parties and their words and actions, when the agreement was entered into [e.g. Kihara v. Nanpei, 5 FSM Intrm. 342, 345 (Pon. 1992)]
3. by written contract's terms, there was, objectively mutual assent to the sale of the vessel
- D. contract therefore enforceable
- E. remedies
1. possible money damages (money damages preferred legal remedy)
 - a. first measure of damages is expectancy; but too speculative to calculate with reasonable certainty (or might not have made profit on contract since not known what *Pride of Walvis Bay* was to be used for)
 - b. reliance damages may be awarded = amount expended by plaintiff in reliance on the contract, but none known
 - c. price to obtain substitute, but *Pride of Walvis Bay* only vessel of its kind in FSM
 2. specific performance is one where the court orders a breaching party to do that which he has agreed to do, thereby rendering the non-breaching party the exact benefit expected
 - a. remedy is available when
 - b. money damages are inadequate compensation for the plaintiff
 - (1) when damages cannot be computed or
 - (2) when a substitute cannot be purchased [Ponape Constr. Co. v. Pohnpei, 6 FSM Intrm. 114, 126 (Pon. 1993)]
 3. *Pride of Walvis Bay* was only boat of its kind in FSM; therefore specific performance should be ordered

VIII. (12 points) Falan

- A. was Falan under arrest?
- B. if Falan was under arrest then
 1. should've been advised of his rights to remain silent and to have counsel present
 2. if under arrest & not advised of his rights, any statement taken would be suppressed [12 F.S.M.C. 218]
- C. one is considered "arrested," for the purposes of the right to be advised of his rights to remain silent when one's freedom of movement is substantially restricted or controlled by a police officer exercising official

authority based upon the officer's suspicion that the detained persons may be, or may have been, involved in commission of a crime [FSM v. Edward, 3 FSM Intrm. 224, 232 (Pon. 1987)]

- D. but since when Falan questioned, the police did not know that a crime had been committed
 - 1. prosecutor would argue that
 - a. Falan was not detained based on police suspicion he was involved in crime, therefore Falan not under arrest
 - b. police have right to question persons in the course of an investigation
 - 2. Falan would contend that since none of the crew were free to go and the police were questioning all of them first, the had a suspicion that a crime might've been committed & therefore he (& other crew) were all under arrest & he should've been informed of his rights
 - 3. pick either side & make your argument based upon the points above

IX. (13 points)

- A. (6 points) grant of Jak's summary judgment motion may be error
 - 1. summary judgment motion goes behind pleadings to determine if there are any triable issues of fact; if none, then suit may be decided as a matter of law
 - 2. facts indicate that parties stipulated to the acts of everyone involved
 - a. therefore no one may litigate those issues
 - b. not stipulated to is how these facts relate to Pax's allegations
 - (1) that Pax hit head on windshield can't be litigated, BUT
 - (2) what may be litigated is whether Pax's injury resulted from Jak's negligence
 - 3. stipulated facts leave open factual dispute whether Jak's (stipulated-to) behavior could support a finding of negligence
 - 4. if Pax can make prima facie showing that Jak negligently caused Pax's injury, then issue is triable
 - 5. motion improperly granted if Pax makes such a showing
 - 6. elements of negligence are the breach of a duty on the part of one person to protect another from injury, and that breach is the proximate cause of an injury to the person to whom the duty is owed, which may be summarized as: a duty of care, a breach of that

duty, which breach proximately causes damages [Fabian v. Ting Hong Oceanic Enterprises, 8 FSM Intrm. 63, 65 (Chk. 1997)]

7. duty
 - a. Jak owes duty of care to act as a reasonably prudent driver when operating a motorcycle, whether on his land or on public
 - b. duty owed to foreseeable plaintiffs
 - c. although Jak's race with Dax began on his own land, it was agreed to go across public road and on to another's land; since race would go across public road, Jak would owe duty of care to any motorist on that road
 - d. Pax therefore foreseeable plaintiff to whom Jak owed duty of care
 - e. Jak may argue that not unreasonable to race across "seldom-used" road, but racing motorcycles with 16-year-old is dangerous activity; Jak would have better argument if he remained on his own ; by deciding to use public road, Jak was increasing risk to unaware motorists on road
8. breach
 - a. by racing Dax across public road, Jak breached duty of reasonable care to all motorists in zone of danger they created;
 - b. Pax's injuries wouldn't have occurred if Jak had met his standard of reasonable care;
 - c. Jak breached duty to foreseeable plaintiff
9. cause
 - a. although Jak would argue his actions didn't cause Pax's injuries
 - b. but for Jak racing Dax, Pax's injuries wouldn't have occurred
 - c. Jak's agreement to race was, along with Dax's acts, cause of injury to Pax
 - d. Jak's conduct a proximate cause of Pax's injuries since race was origin of risk to Pax, an unaware motorist
 - e. Pax's injuries thus direct result of Jak's negligence
 - f. Jak's causation not superseded by Dax's decision to enter public road without slowing down because it was foreseeable that in a race the other party wouldn't slow down
 - g. Dax's acts don't break chain of causation, so Jak is a proximate cause of Pax's injuries since foreseeable negligence of another doesn't sever

- from liability negligent party who was cause
of injury
10. personal injury damages are always a question of fact as to amount
 11. Summary judgment for Jak thus improper
- B. (4 points) Dax's summary judgment motion
1. same rules apply
 2. Dax's motion goes to Pax's contributory or comparative negligence
 3. contributory negligence not recognized in FSM since it is contrary to custom [see, e.g., Epiti v. Chuuk, 5 FSM Intrm. 162, 167 (Chk. S. Ct. Tr. 1991); Suka v. Truk, 4 FSM Intrm. 123, 127 (Truk S. Ct. Tr. 1989)]
 4. comparative fault or comparative negligence is the rule in the FSM [Fabian v. Ting Hong Oceanic Enterprises, 8 FSM Intrm. 63, 66 (Chk. 1997)]
 5. Pax's violation of a statute (requirement for driver's license) creates a rebuttable presumption of negligence – the unexcused violation of law which defines reasonable conduct is negligence in itself [Glocke v. Pohnpei, 8 FSM Intrm. 60, 61 (Pon. 1997)]
 6. is not wearing seat belt considered negligent in state where accident occurred? is it violation of a local statute? if so, Pax may be comparatively negligent
 7. since amount, if any, that Dax's liability should be reduced by Pax's own negligence (if proven) is triable issue, Dax's summary judgment motion properly denied
- C. (3 points) trial judge's standard of care for Dax is probably improper
1. child generally held to standard of care of reasonably prudent child of similar age or in similar circumstances
 2. but Dax engaged in adult activity & is 16 so should have appreciation of risk of his behavior
 3. Dax therefore should be judged by objective measure of reasonably prudent adult
- X. (8 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 Intrm. 389, 396 (Pon. 1984)]
- B. (2 points) temporary restraining order – court-granted injunctive relief that does not extend more than 14 days

(can be renewed once for 14 days) to maintain the status quo or prevent some act until a more formal and orderly hearing on a preliminary injunction can be held [see FSM Civ. R. 65(b)] can be granted *ex parte* and without notice under certain circumstances; movant must show irreparable harm if not granted

C. (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 Intrm. 394, 400 (App. 1994)]; ex post facto laws are unconstitutional, FSM Const. art. IV, § 11

D. (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]

XI. (3 points)

A. (2 points) appears to be an unconstitutional prior restraint on freedom of expression [FSM Const. art. IV, § 1; see also FSM v. Moses, 9 FSM Intrm. 139, 146 (Pon. 1999)], prior restraint on speech is generally unconstitutional absent a clear and present danger, which is not apparent here

B. (1 point) provision is unconstitutional to the extent that it purports to allow the state governor to pardon persons who were convicted of national crimes committed with the state, state governor can pardon only for crimes committed under state law [FSM Const. art. X, § 2(c)]