

Checklist of Points to be Covered for Complete Answers
FSM Bar Examination, March 6, 2003

[Citations to statutes, rules, and the like are included in brackets as 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. (20 points)
- A. (3 points)
1. objection would assert spousal privilege — wife can't testify against husband can't reveal confidential marital conversations during marriage, even if no longer married; if confidential, judge won't allow Lucy's testimony
 2. but was it confidential? — Fred & Ethel in same car & if could hear it then communication not confidential, then admissible
 3. act of Congress [6 F.S.M.C. 1301] & similar TT Code derived statutes in the states which bar spouses from testifying against each other apply to criminal cases [not hearsay because is admission of party-opponent [FSM Evid. R. 801(d)(2)]]
- B. (3 points)
1. objection would be improper lay opinion testimony [FSM Evid. R. 701]
 2. court will allow because rationally based on witness's perception (Ricky passed him just before Ricky was stopped) & is helpful to determine fact at issue (whether Ricky was speeding)
- C. (3 points)
1. objection would be hearsay because nodding head is out-of-court statement (non-verbal conduct intended as assertion is a statement [FSM Evid. R. 801(a)(2)]) offered for the truth of the matter asserted [FSM Evid. R. 801(c)]
 2. but court will allow because not hearsay because is admission of party-opponent [FSM Evid. R. 801(d)(2)]]
- D. (3 points)
1. will object 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]
 2. prosecution will claim falls within exception for public records, but court will sustain objection because rule bars admission of police reports in criminal cases [FSM Evid. R. 803(8)(B)]
 3. might be admissible if cover sheet not considered police report & if considered a recorded recollection — something recorded while fresh in witness's mind and about which he now has insufficient recollection to testify accurately & fully [FSM Evid. R. 803(5)] as writing used to refresh witness's memory [see FSM Evid. R. 612]; not too likely
- E. (3 points)
1. Fred's out-of-court statement is hearsay (see definition above)
 2. isn't excited utterance exception [FSM Evid. R. 803(2)] since was made a day after stop

3. isn't existing condition exception [FSM Evid. R. 803(3)] since, although was about Sam's condition (his being scared) it wasn't made about his then existing condition because made day after
 4. no other exceptions possible, therefore court will not admit as hearsay not within any exception
- F. (2 points)
1. evidence of witness's character may be attacked or supported by opinion evidence [FSM Evid. R. 608], but evidence of truthfulness admissible only after witness's credibility attacked
 2. Ricky won't be allowed to call pastor first, since Ricky hasn't been a witness yet (and might never be since criminal defendant not required to testify) his credibility as a witness can't possibly have been called into question yet
- G. (3 points)
1. 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)]
 2. since offense doesn't involve dishonesty or false statement, if taking trochus out-of-season doesn't have maximum sentence of over one year then evidence will not be admitted

ETHICS
(10 points)

- II. (3 points)
- A. Contingent fee appears okay — attorney's fees should be reasonable [FSM MRPC 1.5(a)], reflect the time and labor required and difficulty of questions involved; contingent fee agreement okay, if in writing & states method of determination [FSM MRPC 1.5(c)]; Bonaire has kept Curacao reasonably informed [FSM MRPC R. 1.4(a)] because is urging Bonaire to accept
 - B. Bonaire cannot agree to or make an agreement as part of a settlement between private parties that would restrict his right to represent other plaintiffs against the defendant company [FSM MRPC R. 5.6(b)]; can be subject to discipline if accepts [FSM Dis. R. 2(a) (can be disciplined for violating FSM Model Rules of Professional Conduct)], must decline regardless of his client Curacao's desire to accept settlement & must inform Curacao that the Rules of Professional Conduct limit his conduct so that he cannot agree to term limiting his practice [FSM MRPC R. 1.2(e) (lawyer must consult with client regarding limitations on lawyer's conduct)]
 - C. Aruba cannot participate in offering a agreement which places a restriction on Bonaire's right to practice as part of a settlement between private parties [FSM MRPC R. 5.6(b)]; is subject to discipline for proposing such a settlement [FSM Dis. R. 2(a) (can be disciplined for violating FSM Model Rules of Professional conduct)]
- III. (2 points)
- A. lawyer must keep client reasonably informed & promptly comply with reasonable requests for information [FSM MRPC R. 1.4(a)], to the extent needed for client to make informed decision about representation
 - B. but lawyer must obey court's rule not to disclose documents' contents to anyone, including client [FSM MRPC R. 3.4(c); *see also* FSM MRPC R. 1.4 cmt.]
- IV. (5 points)
- A. lawyer cannot reveal information relating to representation of client Sauron (unless Sauron agrees) [FSM MRPC

R. 1.6(a)];

- B. however, if lawyer reasonably believes that Sauron's statement means that he intends to commit a criminal act against Orc that is likely to result in imminent death or substantial bodily harm lawyer must consult with Sauron and try to deter such conduct; but if facts true, then may reveal such information to the extent necessary to prevent imminent death or substantial bodily [FSM MRPC R. 1.6(b)(1)];
- C. does Sauron's being charged with five violent felonies including three attempted murders indicate that his statement that he was going to make sure that Orc doesn't testify against mean that he intends to harm or kill Orc in the immediate future? If so, then may reveal

GENERAL
(70 points)

V. (19 points)

A. (15 points)

1. Amundsen's tort claims

a. negligence against Cook

- (1) duty of reasonable care
- (2) breach of that duty by failure to keep reasonable lookout, failure to maintain brakes
- (3) causation — but for test — but for Cook's failure to keep lookout (but Cook didn't see Amundsen to last second), or failure to maintain brakes no injury to Amundsen
- (4) damages — tortfeasor takes victim as he finds him, not necessary to foresee extent of harm — that Amundsen has rare ailment that increased extent of injuries & damages does not absolve Cook of liability for those damages
- (5) defense — comparative negligence (contributory negligence contrary to Micronesian custom & therefore not available as defense [*see, e.g., Alfons v. Edwin*, 5 FSM Intrm. 238, 242-43 (Pon. 1991)]) for reduction of damages by amount attributable to Ellsworth's & Amundsen's negligence (if any); supervening cause (if any)

b. against Peary's Pizza

- (1) negligent hiring, training or supervision of Cook (manager DeLong knew of Cook's bad temper)
- (2) respondeat superior — employer liable for employee's negligence committed within scope of employment

c. against Ellsworth — negligence for parking so as to block crosswalk forcing Amundsen to walk outside of crosswalk where Cook couldn't see him until last second (but Amundsen's comparative negligence for walking outside crosswalk?)

d. joint & several liability of Cook, Peary's Pizza, & Ellsworth

2. Nansen's tort claims

a. against Cook

- (1) assault (apprehension of immediate battery)
- (2) battery (offensive or harmful or unpermitted contact, not necessary to intend injury)
- (3) causes damages

b. against Peary's Pizza

- (1) negligent hiring of Cook (manager DeLong knew of Cook's bad temper)
- (2) respondeat superior (manager DeLong knew of Cook's bad temper therefore may be liable for Cook's intentional tort; otherwise defense that employer not responsible for employee's intentional torts)

c. joint & several liability of Cook & Peary's Pizza

3. Byrd's tort claims

a. assuming that Amundsen has valid tort claim against Cook, Byrd's claims against Cook

b. loss of consortium, derivative of Amundsen's claim, reduced by amount of Amundsen's comparative negligence, if any [*Epiti v. Chuuk*, 5 FSM Intrm. 162, 170 (Chk. S. Ct. Tr. 1991)]

- c. negligent infliction of emotional distress — Byrd is close relative (wife), in zone of danger, her emotional upset foreseeable
 - B. (4 points) Peary's Pizza's claims against Cook
 - 1. contribution (if held jointly & severally liable) [*see Senda v. Semes*, 8 FSM Intrm. 484, 495 (Pon. 1998)]
shifts some of burden to Cook
 - 2. indemnity (seeks repayment from Cook for all claims except negligent hiring)
- VI. (6 points)
- A. third party defendant — occurs when the defendant in a civil action believes that if he is liable to the plaintiff then some non-party would be liable to him, in whole or in part, so the defendant, as a third party plaintiff, files a third-party complaint (impleads) against that non-party who then becomes the third party defendant [*see* FSM Civ. R. 14(a)]
 - B. admiralty and maritime — cases involving vessels, contracts to be performed at sea [*Lonno v. Trust Territory (I)*, 1 FSM Intrm. 53, 68-71 (Kos. 1982)] including supplying necessities [*Maruwa Shokai (Guam), Inc. v. Pyung Hwa* 31, 6 FSM Intrm. 1, 3 (Chk. 1993)], ship mortgages, torts occurring at sea [*Federal Bus. Dev. Bank v. S.S. Thorfinn*, 4 FSM Intrm. 367, 374 (App. 1990)], vessel forfeitures [*M/V Hai Hsiang #36 v. Pohnpei*, 7 FSM Intrm. 456, 463 (App. 1996)], offenses at sea, etc.; exclusive jurisdiction in FSM Supreme Court [FSM Const. art. XI, § 6(a)]
 - C. nolo contendere — a no contest plea — criminal defendant, with court's consent [FSM Crim. R. 11(b)], enters a plea not contesting the charges but also not admitting guilt, has effect of pleading guilty; generally not admissible evidence against person making plea [FSM Evid. R. 410(b)]
- VII. (16 points)
- A. (3 points)
 - 1. was looking in car trunk a search?
 - 2. if so, did Patsy have authority to consent to search?
 - a. anyone with equal right to use car may consent to search
 - b. Patsy's apparent authority is enough
 - 3. Patsy's consent was voluntary
 - a. voluntary & intelligent
 - b. knowledge of right to withhold consent not required
 - 4. Patsy not in custody at time Wyatt asked to look in trunk — she was free to go, thus not custodial search
 - 5. therefore was valid consent search
 - B. (4 points)
 - 1. description of place to be searched
 - a. warrant must describe with reasonable certainty place to be searched & items to be seized; constitution requires warrant to particularly describe the place to be searched and the persons or things to be seized [FSM Const. art. IV, § 5] description should be sufficient if person executing warrant would know where to search & what to seize even if he had no prior involvement with the case; also unclear whether was supported by affidavit as required

- b. address on warrant wrong — Shandy Street instead of Shady Road; misdescription not fatal if it is accurate enough to lead police to correct premises (is there only one road with name like Shandy or Shady? Only one Roy's?), but fact officer went to correct house doesn't excuse incorrect description
 - 2. warrant must be issued by neutral & detached magistrate [*see* FSM Social Sec. Admin. v. Weilbacher, 7 FSM Intrm. 137, 143 (Pon. 1995)]; judge paid twice as much for issuing warrants as denying them isn't neutral & detached
 - 3. conclusion — warrant defective
- C. (5 points)
 - 1. should Wyatt have knocked on door first & announced his presence before stepping inside open door? Does not doing so violate Roy's right to privacy? Wyatt did announce he was police officer & that he had warrant to search
 - 2. no exigent circumstances (hot pursuit, immediate danger of bodily harm, destruction of evidence) present to allow entry unannounced
 - 3. items to be seized must be particularly described in warrant; bullet hole and bloody clothing found after Wyatt given the gun described in warrant; possible argument that they were plain view (especially the bullet hole in wall?) [*see, e.g.,* FSM v. Mark, 1 FSM Intrm. 284, 294 (Pon. 1983) (warrant not needed for items in plain view when officer is where he has right to be)]
 - 4. argue if search good or bad; if bad, exclusionary rule applies [*e.g.* FSM v. Tipen, 1 FSM Intrm. 79, 92 (Pon. 1982)] & evidence inadmissible
- D. (4 points)
 - 1. was Roy in custody? — yes, if freedom of movement limited by police — not free to go
 - 2. if so, must inform Roy of right to remain silent and right to an attorney (plus other rights found in 12 F.S.M.C. 218) first & Roy must waive rights before Wyatt can question him; but was first statement "I suppose you are looking for this." a spontaneous outburst made before Wyatt could inform Roy of his rights?
 - 3. no indication that Wyatt informed Roy of rights first
 - 4. failure to advise of rights will render confession inadmissible [*see* FSM v. George, 6 FSM Intrm. 626, 629 (Kos. 1994)] even if otherwise voluntary if was result of interrogation (questioning while in custody); statement must be in response to interrogation
 - 5. once Roy asked if should have lawyer, questioning should stop [*see* FSM v. Edward, 3 FSM Intrm. 224, 235 (Pon. 1987)] until either Roy voluntarily & knowingly relinquishes right to counsel, or Roy voluntarily reinitiates the discussion
 - 6. confession will be suppressed because Roy didn't waive rights before confessed [*see* Moses v. FSM, 5 FSM Intrm. 156, 159 (App. 1991)] violates right not to be compelled to incriminate self [FSM Const. art. IV, § 7]

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. can't reform contract to include those terms & order specific performance because van already resold
- C. 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 Intrm. 199, 200 (Kos. S. Ct. Tr. 1989)]

- D. 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. (22 points)

A. (3 points)

1. M/V *Dernita's Pride's* officers and crew, the FSM Development Bank, the Bank of Hawaii, & the supplier of groceries and other necessities for the M/V *Dernita's Pride's* last voyage must sue in the FSM Supreme Court because their claims are admiralty claims and FSM Supreme Court has exclusive jurisdiction over admiralty & maritime cases;
2. the Social Security Administration & the FSM Finance Department must sue in the FSM Supreme Court because they are arms of the national gov't & FSM Supreme Court has exclusive jurisdiction over cases where the national gov't is a party (unless, as is not the case here, land is involved)
3. Manx Co.'s office employees may sue in either state or nat'l court if diversity jurisdiction is present (unknown), or in FSM Supreme Court if pendent jurisdiction established as part of larger case against Manx; otherwise must sue individually in state court

B. (5 points) generally only the corporation is liable for its debts and its shareholders are not, but since incorporation papers were untrue in that the incorporators (shareholders) had not each paid in \$20,000 in startup capital (only Welsh paid & he only paid \$5,000) plaintiffs can sue the incorporators in their individual capacity for the corporation's debts [Mid-Pacific Constr. Co. v. Semes, 7 FSM Intrm. 522, 526 (Pon. 1996); Mid-Pac Constr. Co. v. Senda, 4 FSM Intrm. 376, 385 (Pon. 1990)];

C. (5 points)

1. plaintiffs who can name the M/V *Dernita's Pride* as a defendant
 - a. the supplier of groceries and other necessities for the M/V *Dernita's Pride's* last voyage because he has maritime lien on vessel [19 F.S.M.C. 335(1)]
 - b. M/V *Dernita's Pride's* officers and crew because they have maritime lien on vessel [19 F.S.M.C. 326(2)(a)]
 - c. FSM Social Security for social security taxes on pay of M/V *Dernita's Pride's* officers and crew [19 F.S.M.C. 326(2)(a)] (but not for social security taxes due on office workers' pay)
 - d. the FSM Development Bank & the Bank of Hawaii because they have mortgages on the M/V *Dernita's Pride* [*see* 19 F.S.M.C. 327]
2. these plaintiffs will seek the M/V *Dernita's Pride's* arrest on their maritime liens [19 F.S.M.C. 337(1)] and ask the court to set a bond sufficient to cover their claims or the vessel's value if that is less than the amount of claims for the vessel to be released [19 F.S.M.C. 337(3)]; if bond paid plaintiffs will proceed against bond; if bond not paid plaintiffs will seek a court-ordered sale of the M/V *Dernita's Pride* and enforcement of their liens and mortgages [*see* 19 F.S.M.C. 327(3),(6); 19 F.S.M.C. 337(5)]
3. the other plaintiffs would proceed against Manx Co., Welsh & Cornish, including any proceeds (if any)

of the sale of the M/V *Dernita's Pride* left over after paying the costs of sale, the maritime lienholders, and the mortgage holders; the Social Security Administration, the FSM Finance Department, will assert tax liens

- D. (6 points) auction proceeds will go persons in the following order:
1. costs of sale [19 F.S.M.C. 338(4)]
 2. wages, salaries & other employment payment due the M/V *Dernita's Pride's* officers and crew (including paying the social security taxes on their pay to Social Security) [19 F.S.M.C. 326(2)(a)] (maritime liens take priority over all recorded mortgages [19 F.S.M.C. 326(1)])
 3. mortgage held by the Bank of Hawaii (priority goes to the first-recorded mortgage by date & time of recordation in the Register, not by mortgage's date [19 F.S.M.C. 326(7)])
 4. mortgage held by FSM Dev. Bank [19 F.S.M.C. 326(7)]
 5. the supplier of groceries and other necessities for the M/V *Dernita's Pride's* last voyage [19 F.S.M.C. 335(1)(d) (other maritime liens & mortgages take priority over necessities maritime lien)]
 6. any proceeds leftover (if any) are Manx Co.'s assets, [19 F.S.M.C. 329(3); 19 F.S.M.C. 338(4)] against which the other plaintiffs can proceed in their suits & against which the Social Security Administration & the FSM Finance Department, will assert tax liens & the office employees claim priority for their pay [In re Mid-Pacific Constr. Co., 3 FSM Intrm. 292, 301 (Pon. 1988) (tax liens have priority over employees' pay; pay has priority over other claims)]
- E. (3 points)
1. Welsh — writ of execution cannot issue until 10 days after entry of judgment [FSM Civ. R. 62(a)]; Welsh may apply for order in aid of judgment [6 F.S.M.C. 1409]; no writ of execution can issue while an application for an order in aid of judgment is pending [6 F.S.M.C. 1413(1)]; thus, if application for order in aid of judgment is filed within ten days after entry of judgment, no writ of execution can issue unless made part of an order in aid of judgment; parties can then negotiate an agreeable order in aid of judgment to present to judge, or plaintiffs can present evidence and argue before judge what would be the fastest way Welsh could reasonably pay the judgment [6 F.S.M.C. 1409, 1410(1)]
 2. Cornish — judgment creditors may have to use their judgments to file claims against Cornish's estate in a probate case