

**Checklist of Points to be Covered for Full and Complete Answers**  
**FSM Bar Examination, March 3, 2005**

[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. (20 points)
- A. (5 points) trial judge improperly admitted the police report
1. 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]
  2. public records are an exception to hearsay rule [FSM Evid. R. 803(8)], but that exception generally excludes, in criminal cases matters observed by police officers and other law enforcement personnel [FSM Evid. R. 803(8)(B)], but
  3. even if police report admissible, statements within report that are hearsay are inadmissible (as hearsay within hearsay) unless each part of the combined statements conforms to an exception to the hearsay rule [FSM Evid. R. 805]; Libra's statement may fall within "excited utterance" exception where statement related to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition [FSM Evid. R. 803(2)]
- B. (3 points) trial judge properly admitted emergency room physician's statement because, although hearsay, it
1. falls within the "dying declaration" exception to hearsay rule [FSM Evid. R. 804(b)(2)] since this is
    - a. a prosecution for homicide &
    - b. declarant is unavailable
    - c. statement was made by Virgo while believing that his death was imminent & it concerned the cause or circumstances of what he believed to be his impending death
  2. hearsay exception of statement made for medical diagnosis [FSM Evid. R. 803(4)] would appear not to apply because statement wasn't related to a diagnosis
- C. (3 points) trial judge may have improperly taken judicial notice
1. judicial notice is to be given of adjudicative facts when the fact is one not subject to reasonable dispute in that it is either (1) generally known within the trial court's territorial jurisdiction or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned [FSM Evid. R. 201(b)]
  2. although dates that movie played might be easily verifiable, for instance, by resort to newspaper ads showing which dates what movies were playing at local theater, these were not introduced
  3. is whether Spiderman 2 (rather than some other movie) playing relevant?
- D. (6 points) final judgments of prior conviction [FSM Evid. R. 803(22)]
1. probably properly admitted
    - a. witness's conviction may be used to attack witness's credibility [FSM Evid. R. 608(b)] if

- conviction is for a crime punishable by death or imprisonment in excess of one year under the law under which he was convicted, and if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant [FSM Evid. R. 609(a)(1)], &
- b. generally evidence of witness's conviction is admissible if less than ten years have elapsed since the date of the conviction or of the witness's release from the confinement imposed for that conviction [FSM Evid. R. 609(b)]
  - c. although unclear whether release was less than 10 years ago, court can determine, in the interests of justice, that the probative value of the conviction, supported by specific facts and circumstances substantially outweighs its prejudicial effect & admit older convictions, only if the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence [FSM Evid. R. 609(b)]
2. improperly admitted; Draco's conviction for idle & disorderly conduct appears to be a misdemeanor — less than one year maximum sentence & therefore not admissible under to impeach [FSM Evid. R. 609(a)(1)] since does not involve dishonesty or false statement [FSM Evid. R. 609(a)(2)]
  3. improperly admitted — actual conviction must exist [FSM Evid. R. 609; 803(22)] & this is only a charge of dishonest act; prosecution might try to admit as evidence of Taurus's bias, but would likely fail because what Taurus charged with is not related to charges against Draco
- E. (3 points) properly admitted because is defined as non-hearsay since prior statement was consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive [FSM Evid. R. 801(d)(1)(B)]

#### ETHICS

(10 points)

#### II. (10 points)

- A. you should recommend that Serpens be suspended from the practice of law because
1. Serpens's fee agreement was improper because it is in part contingent
    - a. contingent fee must be in writing (as Serpens's was), and must state method for determining [FSM MRPC R. 1.5(c)] Serpens's method for calculating amount once contingent payable was too vague
    - b. contingent fees are prohibited in where fee is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement (as was Serpens's) [FSM MRPC R. 1.5(d)(1)]
  2. Serpens's actions in assisting in sale of Hawaii real estate were improper because
    - a. a lawyer cannot assist a client to engage in conduct that the lawyer knows is criminal or fraudulent [FSM MRPC R. 1.2(d)];
    - b. a lawyer cannot unlawfully obstruct another party's access to evidence or unlawfully or conceal material having potential evidentiary value [FSM MRPC R. 3.4(a)] as he did when he assisted fraudulent conveyance of Hawaii real estate; and
    - c. a lawyer should not knowingly make a false statement of material fact or law to a tribunal [FSM

- MRPC R. 3.3(a)(1)] thus helping Hercules to commit fraud on the court
3. Serpens's actions in intimidating witnesses were improper because
    - a. a lawyer must not use methods of obtaining evidence that violate the legal rights of a third person [FSM MRPC R. 4.4] and
    - b. while a lawyer may act zealously in representing a client but must remain within reason [*see* FSM MRPC preamble]
  4. Serpens's actions in asking Vela questions he knew sought inadmissible evidence were improper because a lawyer in trial, must not allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence [FSM MRPC R. 3.4(e)]
- B. you should recommend that Perseus be disciplined because by failing to do any discovery he failed to act
1. competently in representing Vela [FSM MRPC R. 1.1] since he did not adequately prepare the case and
  2. was not diligent in representing her (FSM MRPC R. 1.3]
- C. any complaint against lawyer Leo would be frivolous as Leo has not done anything questionable or sanctionable

**GENERAL**  
(70 points)

III. (13 points)

- A. (3 points) the court may grant the motion
1. the complaint's claim that the defendant "tricked" him into buying a worthless boat appears to allege fraud
  2. the complaint does not comply with the requirement that allegations of fraud be pleaded with particularity [FSM Civ. R. 9(b)]
  3. complaint contains no allegations about what misrepresentations the plaintiff relied on or who made them
  4. complaint is thus inadequate & court may either dismiss without prejudice because the fraud allegation is not pleaded with particularity, or grant plaintiff leave to amend the complaint
- B. (4 points) court should deny motion to compel
1. although a party has the right to ask that another party produce for inspection and copying any designated documents which are in the possession, custody or control of the party upon whom the request is served [FSM Civ. R. 34(a)(1)] pleadings in another case are a matter of public record & can be obtained without resorting to a discovery request or motion
  2. defendant can obtain the plaintiff's work product only upon a showing that the defendant has substantial need of the materials in the preparation of 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)]; here defendant could depose it appears that the broker, therefore signed statement should not be discoverable [FSM Civ. R. 26(b)(3)]
- C. (3 points)
1. case should not be dismissed because plaintiff refused to answer questions at deposition
    - a. defendant has right to depose witnesses & plaintiff

- b. defendant should move for order to compel plaintiff to answer
  - c. therefore refusal to answer is not yet grounds for dismissal
  - d. plaintiff is pro se — he is his own counsel — so defendant may depose him even though he has no lawyer; but plaintiff may, if he wishes, engage counsel for his deposition (but NO constitutional right to be represented by counsel in a civil case)
2. case might be dismissed on statute of limitations grounds
- a. statute of limitations is six years [6 F.S.M.C. 805]
  - b. complaint alleges sale was seven years ago
- D. (3 points) defendant should be granted summary judgment
- 1. summary judgment must be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law [FSM Civ. R. 56(c)]
  - 2. moving party is entitled to summary judgment when it has demonstrated that there are no genuine issues of material fact remaining, and that it is entitled to judgment as a matter of law [Iriarte v. Etscheit, 8 FSM Intrm. 231, 236 (App. 1998)]
  - 3. once moving party has presented a *prima facie* case of entitlement to summary judgment, the burden shifts to the non-moving party to produce evidence showing a genuine issue of material fact [Nanpei v. Kihara, 7 FSM Intrm. 319, 325 (App. 1995)]
  - 4. non-moving party may not rely on unsubstantiated denials of liability to carry its burden; it must set forth specific facts showing that there is a genuine issue for trial; if the adverse party does not respond by affidavits or as otherwise provided in Rule 56, summary judgment, if appropriate, will be entered against the adverse party present some competent evidence that would be admissible at trial which demonstrates that there is a genuine issue of fact [*see, e.g., Suldán v. Mobil Oil Micronesia, Inc.*, 10 FSM Intrm. 574, 579 (Pon. 2002)]
  - 5. plaintiff did not offer any affidavits or competent evidence to show genuine issue; only responded by oral argument;
  - 6. also, failure by opposing party to file responsive papers to written motion constitutes a consent to the granting of the motion [FSM Civ. R. 6(d)] (but even if a motion is consented to the court still needs good grounds before it can grant it)

IV. (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 Intrm. 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 Paradise 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. Trance overheard sounds of argument & struggle while outside door of hotel room which is a public place
      - b. Trance therefore in place he has legal right to be when he overhears argument & struggle
      - c. Trance knew serious injury or destruction of evidence about to occur & he had to enter room to prevent a crime
      - d. if Trance's entry is lawful for this purpose, once Trance entered room legally then any evidence in "plain view" may be seized
    - 2. consent
      - a. Don opened door for Trance
      - 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 (Trance 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

V. (12 points)

- A. facts state that Homer & Bilder entered into a valid written contract; under that contract
  - 1. Bilder had a duty to finish house by Nov. 30
  - 2. at which time Homer had a duty to pay \$300,000
- B. Homer's duty to pay doesn't arise until condition precedent of completion of house has occurred
  - 1. condition is an event (other than passage of time) the occurrence or nonoccurrence of which will create,

- limit, or extinguish a party's absolute duty to perform; condition may be express or implied
  - 2. condition precedent is one that must occur, or be legally excused or discharged before other party's absolute duty arises
  - 3. if one party's performance takes longer than the other, the longer is usually a condition precedent to shorter
  - 4. here, Bilder's completion of house is express condition precedent to Homer's duty to pay
  - 5. Bilder only completed half of house before injunction issued; after injunction lifted Bilder refused to finish house; therefore failed to fulfill condition; thus Bilder in breach of contract unless his obligation to perform was discharged
- C. if nonoccurrence of event is contract parties' basic assumption & neither party has assumed risk of event occurring, contract duties may be discharged
  - 1. contractual duties may be impossible or impractical to perform or contract performance frustrated because of unanticipated event
  - 2. temporary injunction not caused by either party & was dismissed without merit, thus neither party could've anticipated it
  - 3. Bilder's duty to perform suspended during period of temporary injunction (temporarily impossible to perform because was illegal to perform)
  - 4. if Bilder resumes work on Homer's house, Bilder will be in violation of (at least) two other contracts for other construction work
  - 5. argue whether Bilder's increased costs to complete (because of his other work [Bilder builds no more than 2 projects at a time, but did Homer know this when contract made?]) as well as increased construction costs generally) discharge Bilder for impracticability
- D. remedies
  - 1. Homer's specific performance claim
    - a. requirement for specific performance
      - (1) must show inadequacy of legal remedy (that is - money damages)
      - (2) contract must be definite & certain
      - (3) enforcement of specific performance must be feasible
      - (4) remedy must be mutual
      - (5) no defenses available
    - b. specific performance not granted if Homer can hire another contractor
      - (1) although Homer may argue Bilder's services are unique because of high quality of his work, if Homer can hire another to do same job Homer suffers no injury & damages can compensate for loss
      - (2) courts traditionally do not find it feasible to determine quality of personal services if a person forced to work for another
  - 2. Homer's damages
    - a. usual damages for partially finished construction project is cost of completion plus reasonable compensation for delay
    - b. \$200,000 is cost of completion; no evidence of any damage to Homer from delay
  - 3. BUT Homer hasn't paid anything for work already done, if Homer awarded \$200,000 and he uses it to pay another contractor eh will receive house for free

4. Bilder entitled to quantum meruit recovery for work already done — \$150,000 (½ of \$300,000 house —contract price)
5. Bilder will owe Homer \$200,000 as damages for failure to complete house
6. offsetting the two damage awards, court will order Bilder to pay Homer \$50,000

VI. (13 points)

- A. state constitutional provision is a nullity because it requires the state legislature to enact statutory scheme in an area over which the state has no jurisdiction since
  1. copyright and patent are powers expressly delegated to FSM Congress to legislate upon [FSM Const. art. IX, § 2(g)]
  2. trademarks regulation would generally come under regulation of foreign and interstate commerce, a power also expressly delegated to Congress [FSM Const. art. IX, § 2(g)], although state may be able to regulate a trademark used only within the state and protect it from another trademark used only within state
  3. powers expressly delegated to nat'l gov't are national, not state powers [FSM Const. art. VIII, § 1]
- B. state constitution can grant persons more rights and protections than FSM Constitution, but such additional rights are only protections against state, not nat'l gov't; state constitutional provision is not unconstitutional; it just doesn't apply to nat'l gov't or any warrants issued by nat'l courts and executed by nat'l police
- C. 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]; 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
- D. nat'l gov't has the expressly delegated powers to control immigration [FSM Const. art. IX, § 2(c)]; this municipal law appears to infringe on nat'l gov't power & thus unconstitutional (may also violate guarantee of equal protection [FSM Const. art. IV, § 3])
- E. state gov't's right to control its employees' speech is greater than its right to control that of private citizens, although gov't may be able to regulate time, place, & manner of speech, pre-approval of speech usually violates freedom of expression; but even public employees have right to speak out on matters of public concern; although employee may not reveal confidential information under guise of expressing personal view; probably unconstitutional

VII. (13 points)

- A. (9 points) Ricky can claim against Ed and Willie for
  1. negligence
    - a. Ed's negligence
      - (1) Ed had duty of reasonable care
      - (2) Ed breached duty by applying too much Weed Killer (beyond the directions) & applying it in windy conditions
      - (3) Weed Killer that drifted onto Ricky's land appears to be legal cause (cause in fact) of the damage to Ricky's fruit trees
      - (4) Ricky's damage was foreseeable result of Ed's negligence
    - b. Willie, Ed's employer

- (1) employers generally vicariously liable for
  - (2) negligent acts of employee committed while acting within the scope of their employment
    - (a) spraying fields was kind of job Ed was employed to perform
    - (b) was done within time & space limits of his employment
    - (c) was done to serve his employer
  - 2. trespass — interference with another’s exclusive possession of land; must show that
    - a. the spray invaded his exclusive possession of the land
    - b. Spraying excess amounts in wind was negligent, reckless, or intentional
    - c. damages are same as for negligence
  - 3. nuisance — same elements & damages as for trespass except must show that the spraying caused an interference with Ricky’s exclusive use & enjoyment of his property
  - 4. strict liability
    - a. if the spraying was deemed ultrahazardous
    - b. may be strictly liable to Ricky regardless of fault
    - c. defense — spraying Weed Killer not ultrahazardous
  - 5. defenses, in general, argue the non-existence of proof of any element of each tort which the facts might reasonably allow
- B. (4 points) Ricky v. Chemco
- 1. negligence
    - a. Chemco liable if negligent in designing, manufacturing, selling, or distributing Weed Killer
    - b. privity of contract not needed for liability
    - c. Chemco owed duty of reasonable care
    - d. was duty breached? was warning adequate?
    - e. if not, did breach cause damage to Ricky’s trees?
    - f. was it foreseeable result of Chemco’s failure to warn? if so, Chemco liable
    - g. damages — same as for negligence above
  - 2. strict liability
    - a. manufacturer or seller of product can be strictly liable for defective design, manufacturing flaw, or failure to warn, if
    - b. Weed Killer is a product in a dangerously defective condition
    - c. was warning adequate? or was there failure to warn? if so, Chemco liable
    - d. potential defense — if product used in unreasonable way that manufacturer or seller could not have foreseen
    - e. damages — same as for negligence

VIII. (5 points) FSM Supreme Court should remand case to state court because was improvidently removed because no FSM Supreme Court jurisdiction present when case removed

- A. no diversity jurisdiction because diverse "party" was not party at time of removal; must be party before can be removed [Enlet v. Bruton, 10 FSM Intrm. 36, 40 (Chk. 2001) (in determining the question of jurisdiction based on the parties’ citizenship, the FSM Supreme Court must look only to the parties of record)]
- B. that defendant’s defense will be based in part on national law is not ground upon which arising under national

law jurisdiction of FSM Supreme Court can be based; must be based on plaintiff's claim [Enlet v. Bruton, 10 FSM Intrm. 36, 40 (Chk. 2001) (determination of whether a case arises under the Constitution, national law, or a treaty is based on the plaintiff's statement of his cause of action, not on whatever defenses that are or that might be raised)]