

**Checklist of Points to be Covered for Complete Answers**  
**FSM Bar Examination, August 7, 2003**

[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. (10 points)

- A. (3 points) 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] — it fits into "excited utterance" exception because was statement relating to a startling event made while Montpelier 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)]
- B. (4 points) in order for Concord's opinion to be admissible
1. objection relevance [FSM Evid. R. 402]; evidence is relevant because Boston was being criminally prosecuted for arson and intent is an element of the offense so prosecution must prove Boston intended to start fire so if he was merely using it to clean and it accidentally caught fire it could support a state-of-mind defense, to that extent it's relevant
  2. objection to Concord as expert — if Concord is to testify as to his opinion of scientific or technical knowledge he must be qualified as an expert — a person whose knowledge, skill, experience, training, or education will assist the trier of fact to understand the evidence or to determine a fact in issue [FSM Evid. R. 702]; because Concord is a math teacher he may be unable to qualify as an expert; if he qualifies he will be able to testify on his experiments if they are of a type reasonably relied upon by experts in the field [FSM Evid. R. 703], may also testify to the contents of the learned treatise as this is a hearsay exception [FSM Evid. R. 803(18)]
- C. (3 points) Augusta's testimony objections
1. doesn't appear relevant, therefore inadmissible [FSM Evid. R. 402]
  2. evidence of other bad acts not admissible to prove character, but may be admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident [FSM Evid. R. 404(b)], none appear to be here, so inadmissible, and even if admissible would prejudice outweigh any (slight?) probative value? [FSM Evid. R. 403]
  3. as it occurred during her marriage to Boston it might be inadmissible under the spousal privilege; 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 or other marital privilege, act of Congress barring spouses from testifying against each other in a criminal proceeding [6 F.S.M.C. 1301] presumably wouldn't apply because Augusta no longer married to Boston

II. (10 points)

- A. (4 points) Herbert's testimony
1. that he "saw Ron hurting real bad" — lay opinion testimony not admissible unless based on witness's own perception and information helpful to fact finder [FSM Evid. R. 701]
  2. Ron's statement about accident not happening if he weren't in a hurry — probable hearsay objection overruled because is admission of party opponent which is defined as nonhearsay [FSM Evid. R. 801(d)(2)], Ron's statement is an admission and is made by a party (Speedy Taxi) if Ron is Speedy Taxi's agent or servant & statement concerned matter within scope of his employment [FSM Evid. R. 802(d)(2)(D)]
- B. (3 points) Herbert's cross-examination
1. improper to ask Herbert if he had any traffic accidents because improper to use prior acts to show that he acted in conformity therewith [FSM Evid. R. 404(b)]
  2. since it was a felony & presumably punishable by more than a year's imprisonment, the conviction is admissible to impeach Herbert if the court determines that the probative value outweighs its prejudicial effect to the defendant [FSM Evid. R. 609(a)(1)] (since Speedy Taxi's the defendant, it's not prejudicial to them at all, but favorable)
- C. (3 points) Doctor's testimony
1. relevant because it indicates negligence on Herbert's part and therefore a defense for Speedy Taxi (comparable negligence)
  2. since Vicky is dead she cannot claim any confidentiality privilege
  3. hearsay objection — exception for statements for purpose of medical diagnosis or treatment [FSM Evid. R. 803(4)] while Vicky's statement about her having drunk beer relates to her physical condition and may have been necessary to her treatment & thus would fit in the hearsay exception, it's not relevant (she wasn't driving) & should've been excluded; rest of her statement doesn't fit in any hearsay exception & also should've been excluded [FSM Evid. R. 802]

#### ETHICS

(10 points)

- III. (8 points) Yeti's conduct
- A. Yeti has duty to keep Nessie informed of status of matter he's handling for her [FSM MRPC R. 1.4(a)]
- B. Yeti is Nessie's lawyer because he represents her interests in a land sale; although he says he'll buy her expectancy for his mother, it's apparent he is real buyer because he made the offer which was accepted & he paid with his own money; a lawyer cannot enter into a business transaction with a client unless the transaction and terms are fair and reasonable to the client and fully disclosed in writing to client in terms client can understand and client is given reasonable opportunity to seek advice of independent counsel in transaction and the client consents to in writing [FSM MRPC R. 1.8(a)]; Yeti has not complied with these conditions — his conduct has violated FSM MRPC R. 1.8
- C. Yeti had no conflict of interest with another client since Nessie was his only client at the time so no violation of rule against conflict with another client [FSM MRPC R. 1.7]; Yeti's mother wasn't his client because he only used her name to buy Nessie's expectancy & he was the real buyer; likewise since his mother wasn't a client, Yeti wasn't acting as intermediary between two clients [FSM MRPC R. 2.2] so didn't need to comply with

- requirements to act as intermediary, but if mother had in fact been client then would have had to
- D. Yeti is entitled to the \$1,000 he took from the client trust account as his agreed fee for selling Nessie's land, fee appears reasonable [FSM Evid. R. 1.5(a)]; the \$1,000 for "work involved with his mother buying Nessie's expectancy" Yeti doesn't appear entitled to, since Yeti is actual buyer why he was entitled to a fee at all is a mystery, the basis for this fee was not communicated to client either orally or in writing beforehand or a reasonable time after commencing representation [FSM Evid. R. 1.5(b)] — but Yeti didn't represent Nessie in selling her expectancy, he was the buyer
- E. Yeti should be sanctioned for unethically entering business deal with client; sanction should include restitution of the \$1,000 "fee" for buying Nessie's expectancy [FSM Dis. R. 3(e)]
- IV. (2 points) lawyer in private practice may use a trade name so long as it is not false & misleading & if it does not imply a connection with a government agency or with a public or charitable legal services organization [FSM MRPC R. 7.5(a); *see also* FSM MRPC R. 7.1]; term "State Justice Center" may be misleading as it seems to imply that she is connected with state government; she should use another name

**GENERAL**  
(70 points)

- V. (19 points)
- A. (8 points) written contract's enforceability
1. need mutual consent, definite offer and unequivocal acceptance, & definite terms to be enforceable; is incentive compensation sufficiently specific?
  2. fraud — if argued by Patrick, would have to prove the elements of fraud or intentional misrepresentation: 1) a misrepresentation by the defendant, 2) scienter or the defendant's knowledge that the statements were untrue, 3) intent to cause the plaintiff to rely on the misrepresentations, 4) causation or actual reliance by the plaintiff, 5) justifiable reliance by the plaintiff and 6) damages. [Kaminanga v. FSM College of Micronesia, 8 FSM Intrm. 438, 442 (Chk. 1998)] — issue here is intent — unclear whether Dernita innocently inserted wrong terms or intended to all along and deliberately misrepresented the offer
  3. mutual mistake — will allow parties to avoid the contract, but relief can be denied for either fraud or mistake if the aggrieved party's misunderstanding was caused by his unexplained failure to read the necessary documents [Melander v. Kosrae, 3 FSM Intrm. 324, 329 (Kos. S. Ct. Tr. 1988)].
  4. parol evidence rule — bars evidence of a contemporaneous or prior oral agreement that contradicts or alters the terms of the written agreement [*see* FSM Dev. Bank v. Bruton, 7 FSM Intrm. 246, 250 (Chk. 1995)]; written contract contained integration clause that it contained entire understanding; but may introduce parol evidence to explain terms as long as doesn't contradict terms
    - a. therefore might be able to introduce evidence of 10% commission if it doesn't contradict term "such incentive compensation as may be set by Conco from time to time"
    - b. bars introducing evidence that agreement was \$600, not \$400
    - c. might be able to introduce parol evidence if error was result of fraud or mutual mistake [FSM Dev. Bank v. Arthur, 10 FSM Intrm. 479, 480 (Pon. 2001)]
- B. (4 points)

1. modification of contract (or novation of a new contract) needs consideration; is Patrick's continuing to work sufficient consideration or is it pre-existing duty?
  2. although previous contract requires modifications to be in writing, parties can agree to oral modification or to new oral contract; can introduce parol evidence to show subsequent modification of contract [FSM Dev. Bank v. Bruton, 7 FSM Intrm. 246, 251 (Chk. 1995)]
- C. (7 points) remedies
1. contract damages — assuming Patrick can enforce as contract Dernita's oral promise to pay \$600 + 10% commission (the modified contract?) — can enforce his expectancy damages = 2 months @ \$600 biweekly (\$2,400) + 10% of \$25,000 (\$2,500) = \$4,900 - \$1,600 actually paid = \$3,500
  2. contract reformation — reformation (of the written contract) by court for mutual mistake where through mistake or fraud contract does not reflect parties' agreement
    - a. needs written prior agreement between parties, variance between that actual agreement and writing, & mutual mistake
    - b. but duty to read contract before signing may bar court from reforming contract
    - c. damages as above
  3. promissory estoppel — promise made without consideration (Dernita's "Don't worry, I'll pay you the \$600 biweekly and the 10% commission.") may be binding when promisee acts in reliance on the promise to his detriment & promisor should reasonably expected the promise to induce such action [Kilafwakun v. Kilafwakun, 10 FSM Intrm. 189, 195 (Kos. S. Ct. Tr. 2001)]
    - a. **reasonable to expect Patrick to continue working in response to Dernita's promise**
    - b. Patrick, to his detriment, turned down higher paying job to remain at Conco in reliance on Dernita's promise
    - c. should prevail on promissory estoppel theory if not on others
  4. possible unjust enrichment claim
- VI. (26 points)
- A. (9 points)
1. (2 points) no, although parties are diverse citizens & state courts have concurrent jurisdiction in diversity cases, a ship collision is an admiralty or maritime case over which FSM Supreme Court has exclusive jurisdiction [FSM Const. art. XI, § 6(a)]
  2. (1 point) no, it's still an admiralty case with exclusive jurisdiction in FSM Supreme Court
  3. (3 points) procedural steps — either
    - a. move to dismiss in Chuuk State Supreme Court for lack of subject matter jurisdiction; or
    - b. remove from state court to FSM Supreme Court [FSM GCO 1992-2] following removal procedures
  4. (3 points) FSM Supreme Court is the only proper court because it has exclusive jurisdiction; venue in admiralty actions is where defendant can be served or where ship involved can be seized [6 F.S.M.C. 302] so unless *Pihna's Pride* is still in Chuuk & can be seized there, case must be brought in Pohnpei where Ben is
- B. (5 points) yes, Ben can include the Equitable Insurance Co., the Turtle Boat Co., & Seldom Shipwrights, Inc. in Kachuo's lawsuit against him by filing third party complaint [FSM Civ. R. 14(a)]; since Ben is defendant, no leave

of court needed to file third party complaint & summons if done promptly — within 10 days of filing his answer; otherwise must obtain leave by motion with notice to all other parties [FSM Civ. R. 14(a)]

- C. (3 points) under common law contributory negligence is a complete bar to recovery in a negligence action; FSM courts have generally held that this common law defense is inapplicable here as contrary to Micronesian custom and tradition; courts will usually instead apply comparative negligence, which is a partial defense [*see 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); *Koike v. Ponape Rock Products, Inc.*, 3 FSM Intrm. 57, 67 (Pon. S. Ct. Tr. 1986)] [bonus: in Chuuk, the "pure system" of comparative negligence is available *Epiti v. Chuuk*, 5 FSM Intrm. 162, 167-68 (Chk. S. Ct. Tr. 1991) (defendant is entitled to a proportional reduction in any damage award upon proof that the plaintiff's negligence was in part the cause of his injuries)]
- D. (4 points)
1. (1 point) Seldom Shipwrights can raise defense of no personal jurisdiction without subjecting itself to FSM jurisdiction by having its attorney make a "special appearance" for the sole purpose of challenging personal jurisdiction
  2. (3 points) for Ben to obtain personal jurisdiction over Seldom Shipwrights
    - a. he must show that jurisdiction is consistent with the "long arm" statute, 4 F.S.M.C. §§ 203-04, and that the exercise of jurisdiction does not deny Seldom Shipwrights due process of law guarantees [FSM Const. art. IV, § 3]; Ben will contend there is personal jurisdiction because his action arises from an injury caused in the FSM by a product manufactured by Seldom Shipwrights outside of the FSM but used in the FSM [4 F.S.M.C. 204(j)(ii)]
    - b. Seldom Shipwrights must have certain minimum contacts with a forum such that maintenance of the suit does not offend traditional notions of fair play and substantial justice [*see National Fisheries Corp. v. New Quick Co.*, 9 FSM Intrm. 120, 128-29 (Pon. 1999)]; Ben will contend that since there is evidently a regular business relationship between Seldom Shipwrights and Turtle Boat Co. because Turtle buys most of the boats it sells from Seldom, there are sufficient minimum contacts that Seldom could reasonably expect to be sued in the FSM; court will make determination
- E. (5 points)
1. (1 point) the FSM Development Bank must sue in FSM Supreme Court as it's arm of nat'l gov't & FSM Supreme Court has exclusive jurisdiction when nat'l gov't is a party & no interest in land at issue [*see, e.g., FSM Dev. Bank v. Mori*, 2 FSM Intrm. 242, 243-44 (Truk 1986)]
  2. (2 points)
    - a. yes, if letter wasn't also sent to court because claim appears to be for a sum certain or a sum which can be made certain by calculation so default judgment can be entered by clerk [FSM Civ. R. 55(b)(1)]
    - b. no, if letter was also sent to court as court will consider Ben's letter as a pro se answer [*O'Sullivan v. Panuelo*, 10 FSM Intrm. 257, 260 (Pon. 2001)], default judgment then not proper; bank should move for judgment on the pleadings [FSM Civ. R. 12(c)]
  3. (2 points) bank has right to issuance of writ of execution [6 F.S.M.C. 1407] anytime after ten days from entry of judgment [FSM Civ. R. 62(a)]; can apply for writ of attachment on Ben's property; or can apply for an order in aid of judgment [6 F.S.M.C. §§ 1409-1411]

VII. (15 points)

- A. issues to be raised — illegal search & illegal seizure of evidence
- B. issues will be raised by  $\Delta$ 's motion for suppression of evidence, which must be made before trial [FSM Crim. R. 12(b)(3)]; exclusionary rule will suppress any illegally seized evidence
- C. analyze
  - 1. Constitution bans unreasonable searches and seizures [FSM Const. art. IV, § 5]; searches and seizures pursuant to a judicially-issued warrant are presumed reasonable; warrantless searches & seizures presumed unreasonable & burden is on gov't to show that they are reasonable & thus constitutional
  - 2. entry into warehouse & into office was without warrant; gov't must show was reasonable
    - a. gov't's position — police had information (report of gunshots & screaming in the area & police discovery of unoccupied car indicating crime may be in progress or injured victim may need help) that potentially lives were in danger or injured persons may need assistance; in exigent circumstances such as these warrant not needed, could search area; also no warrant needed for entry into office as it was by consent, as Castor voluntarily opened the door for them
    - b. defendant's position — although warehouse had no door there was still expectation of privacy for anything not in plain view (Castor & Pollux in office); Castor's opening door wasn't voluntary but in response to an unjustified order
    - c. when investigating officers have reason to believe that somebody on private premises may have information pertaining to their investigation, they may enter those private premises, without a warrant or prior judicial authorization, to make reasonably nonintrusive efforts to determine if anybody is willing to discuss the substance of their investigations [FSM v. Mark, 1 FSM Intrm. 284, 288 (Pon. 1983)] so entry probably okay; but demand, even if courteously expressed, is different from a request, and person's compliance with a police officer's demand, backed by apparent force of law, is perhaps different from voluntary consent to a request [FSM v. George, 1 FSM Intrm. 449, 458 (Kos. 1984)]; motion probably denied
  - 3. warrantless search of desk
    - a. gov't's position — search reasonable to protect safety of officers because they had reason to believe firearms present & thus threat to their safety when evidence (smell of marijuana) of other crime (drug possession) present & weapons possible within Pollux's "wingspan"
    - b. defendant's position — no exigent circumstances, could've taken time to obtain warrant
    - c. most likely motion would be denied
- D. motion to dismiss on ground nat'l gov't doesn't have jurisdiction over firearms & drug possession cases since 1991 constitutional amendment transferring major crimes jurisdiction to states? [*but see* FSM v. Fal, 8 FSM Intrm. 151 (Yap 1997) (FSM has jurisdiction over firearms as interstate & foreign commerce involved); *see also* FSM v. Joseph, 9 FSM Intrm. 66 (Chk. 1999) (marijuana prosecution although issue not raised)]; no definite appellate ruling on issue, so could raise for purpose of preserving issue for appeal, but will be denied

VIII. (10 points)

- A. (3 points) may be unconstitutional as violative of a person's due process rights [FSM Const. art. IV, § 3] because it appears to be punishment (36 hours in jail) without being charged or convicted of any offense (being jailed for 36 hours cannot be for the prisoner's own protection because he will be kept for 36 hours regardless of

whether he sobers up); must be released or charged & brought before magistrate within reasonable time, not to exceed 24 hours

- B. (3 points) the constitutional problem is whether the higher charge for persons other than state citizens violates the equal protection clause [FSM Const. art. IV, §§ 3, 4] as discrimination based on race or ancestry; but since state owns & operates airport can it argue that its citizens have already paid their share through their taxes?
- C. (2 points) nat'l gov't has power to levy only two types of taxes — on imports [FSM Const. art. IX, § 2(d)] and on income [FSM Const. art. IX, § 2(e)]; this appears to be a sales tax which is a state power, but Congress does have authority to regulate foreign and interstate commerce [FSM Const. art. IX, § 2(g)], if this \$5 "tax" can be considered "regulation" of foreign and interstate commerce could be constitutional, otherwise unconstitutional tax
- D. (2 points) state governments are prohibited from imposing taxes which restrict interstate commerce [FSM Const. art. VIII, § 3] and only nat'l gov't can regulate foreign & interstate commerce [FSM Const. art. IX, § 2(g)], also a percentage (2½%) tax appears to be a tax on export income & income taxes are sole power of nat'l gov't [FSM Const. art. IX, § 2(e)]; so export tax may be unconstitutional even though not specifically prohibited by Constitution, as no court has decided this yet you may argue either way