

**Checklist of Points to be Covered for Complete Answers**  
**FSM Bar Examination, August 2, 2007**

[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. (2 points) objection should be sustained; if the defendants had their own experts examine the axle before it was lost it might be admissible, but the axle is no longer available for inspection so the report and opinion must be excluded
  - B. (3 points) objection sustained
    - 1. is hearsay not within any exception
      - a. hearsay is out of court statement that is being offered to prove the truth of the matter asserted therein [FSM Evid. R. 801(c)]
      - b. general rule hearsay inadmissible unless falls within one of the exceptions to the hearsay rule [FSM Evid. R. 802]
    - 2. is not admission of party opponent because opposing party is not eliciting the testimony (admission of party opponent which is defined as nonhearsay [FSM Evid. R. 801(d)(2)])
    - 3. spousal privilege — wife can't reveal confidential marital conversations during marriage, may apply, but since it is spouse that has elicited testimony, is the privilege waived?
  - C. (2 points) objection overruled
    - 1. spousal privilege concerns marital communications; doesn't extend to spouse's observations
    - 2. lay opinion testimony is admissible if rationally based on the perception of the witness and helpful to a clear understanding of his testimony or the determination of a fact in issue [FSM Evid. R. 701]
  - D. (3 points) objection sustained, lack of foundation
    - 1. report is hearsay
    - 2. appears to qualify for business records exception [FSM Evid. R. 803(6)]
      - a. if made at or near the time of, or from information transmitted by, a person with knowledge, and
      - b. if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report
    - 3. BUT this must be shown by the testimony of the custodian or other qualified witness
  - E. (2 points) objection sustained
    - 1. is information relevant? if so,
    - 2. relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues
  - F. (3 points) U-drive's objection sustained
    - 1. if by used Phobos against Deimos is admission of party opponent and admissible non-hearsay [FSM Evid. R. 801(d)(2)(A)]
    - 2. BUT against U-drive is [written] hearsay and would have to be redacted first
    - 3. statement by Deimos that he heard the crack of an axle may be inadmissible lay opinion testimony

unless it can be shown that he has the competence to testify what an axle cracking sounds like [statement he heard a crack then the car lurched should be admissible if redacted]

- G. (2 points) objection sustained
1. psychologist's testimony about daughter's statement is hearsay within hearsay
  2. daughter's statement may (or may not) be privileged as part of treatment
- H. (3 points) objection sustained
1. bartender's testimony about lawyer's statement is hearsay even if Phobos's statement is an admission of a party opponent
  2. Phobos's statement to his lawyer is privileged unless
    - a. Phobos has waived the privilege
    - b. Phobos has disclosed the communication
    - c. right to waive privilege belongs to Phobos, not his attorney
    - d. privilege will be lost though disclosure only when disclosure is by Phobos not his attorney

#### ETHICS

(10 points)

- II. (2 points) with limited exceptions that don't apply here, Phobos's lawyer has duty of confidentiality — cannot reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation [FSM MRPC R. 1.6(a)]; should not have told the bartender anything about what Phobos told him

#### III. (4 points) **general denials generally disfavored;**

- A. lawyer shall not defend or controvert an issue unless basis for doing so is not frivolous [FSM MRPC R. 3.1]
- B. lawyer shall not knowingly make false statement of fact [or law] to tribunal [FSM MRPC R. 3.3]
- C. reasonable efforts to expedite litigation [FSM MRPC R. 3.2] not delay it
- D. by signing answer, lawyer certifies that after reasonable inquiry it is well grounded in fact [and law] and not interposed for improper purpose such as delay [FSM Civ. R. 11]
- E. Xavier Malcolm knows denials in answer are false and seems to have made them for delay (note contradictory denials — defendant denies that he did not pay for jeans and denies that he agreed to pay for them)

#### IV. (4 points)

- A. advance deposit should be deposited into Attorney's client trust account and not into his own account because a lawyer must hold property of clients that is in a lawyer's possession in connection with a representation separate from the lawyer's own property and an advance is the client's property until earned by the lawyer [FSM MRPC R. 1.15(a)]
- B. at termination of his or her services, Attorney must refund any unearned portion of the advance payment of the lawyer's fee [FSM MRPC R. 1.16(d)]; Attorney's tender of \$200 was in compliance with this although payment should've been from his client trust account
- C. the 1½ hour \$150 for "client consultation" on the 28th is in dispute, so Attorney must keep that \$150 separate until the dispute is resolved [FSM MRPC R. 1.15(c)];
- D. Attorney must suggest means for prompt resolution of this dispute [FSM MRPC R. 1.15 cmt.]; comment "You

already have [paid]" is improper.

**GENERAL**  
**(70 points)**

V. (14 points)

A. Buyer v. Seller

1. may have entered into contract which Seller refuses to perform
  - a. contract needs mutual assent to contract's essential terms
  - b. \$400,000 price and July 15 delivery date appear to have been agreed to by both parties
  - c. no facts show that Seller rejected these terms
  - d. liquidated damages (\$500 per day) may not have been agreed to
  - e. statute of frauds? does state have a statute of frauds that would apply requiring contract to be in writing?
2. modification of contract
  - a. Buyer's memo, by its terms, could only be modified by a writing; not
  - b. Buyer orally agreed to modify (in response to Seller's written fax) & parties may orally modify a contract
3. remedies
  - a. liquidated damages \$500 per day if that term is part of contract, if not
  - b. cost of reasonable substitute
  - c. consequential damages can only be awarded if the loss was such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract as the probable result of the breach of it — if foreseeable [FSM Dev. Bank v. Adams, 14 FSM Intrm. 234, 256 (App. 2006)]
  - d. specific performance
    - (1) since the generator was custom-built to order, Buyer may be unable to obtain adequate substitute generator on the open market
    - (2) therefore unable to obtain adequate legal remedy

B. Buyer v. Trader

1. tortious interference with a contractual relationship — when a party's economic advantages obtained through dealings with others are knowingly jeopardized out of petty or malicious motives or by the improper or unjustified conduct of a third party [Federated Shipping Co. v. Ponape Transfer & Storage Co., 4 FSM Intrm. 3, 14 (Pon. 1989)]
2. injunctive relief (if specific performance is the proper remedy against Seller, injunctive relief would be proper against Trader) if there is no adequate remedy at law

VI. (5 points)

A. jurisdiction over the case

1. diversity jurisdiction
2. Buyer is FSM person

3. Seller is foreign citizen
  4. FSM Supreme Court therefore has subject matter jurisdiction over the case
- B. jurisdiction over the parties
1. Buyer (plaintiff) submitted to court's jurisdiction over him by filing suit in court
  2. Seller, if properly served [*see* 4 F.S.M.C. 204(2), (3)], court will have jurisdiction over him under long-arm statute because Seller conducted business in the FSM [4 F.S.M.C. 204(a)(1)]

VII. (13 points)

- A. jurisdiction
1. State AG will argue that the case is not ripe for adjudication because there is no case or dispute present until the State enforces the Act
  2. Micro may seek declaratory judgment so long as there is a case within the meaning of article XI, section 6(b) [*Ponape Chamber of Commerce v. Nett Mun. Gov't*, 1 FSM Intrm. 389, 400 (Pon. 1984)]
  3. when a party has been that he is required to comply with a statute which imposes criminal sanctions for failure to comply, argue whether the question is sufficiently ripe to support a suit seeking declaratory judgment [*Michelsen v. FSM*, 3 FSM Intrm. 416, 418 (Pon. 1988)]
- B. freedom of expression
1. gov't can regulate obscenity
  2. Microsystems should argue that the media is a public forum & gov't may only make regulations as to the time, place, & manner of expression only if
    - a. content-neutral
    - b. narrowly-tailored to serve significant governmental interest
    - c. leaves open alternative channels of communication
    - d. & Act is not content neutral & immunizes the state & doesn't leave other channel open
  3. State will argue it has compelling interest in preventing children from being exposed to "R" & "X" movies
  4. Microsystems will argue it has already taken such precautions by making the movies available only on premium channels
  5. prior restraint of speech by the gov't is generally not allowed
- C. equal protection
1. Microsystems will argue not all cable channels treated alike — State-owned channels immune from liability & under strict scrutiny, because freedom of expression is involved, statute must be struck down
  2. State will argue that the it is an economic regulation, & passes the rational basis test because the State can directly control its own cable channels so the law needn't be applied to it

VIII. (13 points)

- A. Constitution protects against unreasonable search and seizure [FSM Const. art. IV, § 4] when items are seized pursuant to a warrant, defendant's burden to show lack of probable cause in affidavit supporting the warrant; probable cause is a 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
1. validity of search warrant
    - a. sufficiency for probable cause
      - (1) reliability of informant in past;

- (2) basis for present report
    - b. whether can include detached cookhouse occupied by one other than suspect
  - 2. validity of search of garage
    - a. not mentioned in warrant
    - b. attached or detached from house (covered by warrant or warrantless search?)
    - c. illegal search if not covered by warrant (or by some exception) — "fruits of the poisonous tree"
- B. Marco's arrest
  - 1. no arrest warrant
  - 2. only misdemeanor, and not committed in officer's presence (argue validity)
  - 3. argue invalid search warrant
  - 4. resisting arrest
    - a. common law rule — may lawfully resist unlawful or illegal arrest
    - b. modern trend — cannot lawfully resist unlawful or illegal arrest; must use courts to vindicate rights
- C. answer to question immediately after arrest
  - 1. admissibility of statement
  - 2. no warnings of Marco's rights before question asked
  - 3. custody and question = interrogation
- D. methamphetamine in pocket argue
  - 1. whether search incident to arrest (admissible)
  - 2. product of illegal arrest, therefore inadmissible as "fruit of poisonous tree"

IX. (10 points)

- A. (6 points)
  - 1. negligence
    - a. duty of reasonable care — [argue] to maintain power supply within parameters that will not harm the property of consumers
    - b. breach of that duty by failure to keep power reasonably steady
    - c. causation — but for test — but for Island Power's failure to keep power steady (when on)
    - d. damages — partial loss of two fingers
  - 2. breach of contract (?)
    - a. does householder's contract with Island Power require Island Power to supply electricity at a certain phase and voltage? Or
    - b. is there a disclaimer in the customer agreement that absolves Island Power of liability for damages caused by power surges? (if so, is waiver limited only to property damage & not personal injury?)
- B. (4 points) case should be reversed and remanded
  - 1. assumption of the risk or contributory negligence not recognized in FSM since they are 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)]
  - 2. comparative fault or comparative negligence is the rule in the FSM; trial court should be instructed to apply that doctrine

X. (7 points)

- A. since plaintiff refused to obey court order & produce documents before trial, plaintiff or plaintiff's attorney liable for sanctions [FSM Civ. R. 37(b)]
- B. since all discovery responses are required to be signed by party's attorney [FSM Civ. R. 26(g)] which is certification (similar to Rule 11) that attorney has read responses & it is not interposed for an improper purpose
- C. remedies
  - 1. plaintiff &/or attorney liable for any defense costs incurred by failure to produce documents for inspection before trial [FSM Civ. R. 37(b)(2)]
  - 2. plaintiff's attorney liable for attorney's fees & costs [FSM Civ. R. 26(g)]
  - 3. other considerations
    - a. documents' materiality
    - b. whether failure to produce was intentional
    - c. extent to which defense was prejudiced
  - 4. other sanctions may include
    - a. contempt finding (if failure was willful) [FSM Civ. R. 37(b)(2)(D)]
    - b. continuance to permit defense to inspect documents
    - c. declaration documents are inadmissible
    - d. striking from pleadings those causes of action to which the suppressed documents relate [FSM Civ. R. 37(b)(2)(C)], or
    - e. even dismissal of plaintiff's case [FSM Civ. R. 37(b)(2)(C)]

XI. (4 points)

- A. unconstitutional
  - 1. national taxes must be imposed uniformly [FSM Const. art. IX, § 5]
  - 2. income in some state(s) is exempt from the surcharge
  - 3. is surcharge unconstitutional or just the exemption unconstitutional?
    - a. if exemption provision can be severed from surcharge
    - b. then only exemption is unconstitutional
- B. unconstitutional unless all FSM citizens resident in municipality also must pay \$20 head tax because
  - 1. violates equal protection [FSM Const. art. IV, § 4]
  - 2. only nat'l gov't can regulate immigration [FSM Const. art. IX, § 2(c)]

XII. (4 points)

- A. standing — generally, a party's material interest in an action's outcome; if a plaintiff does not have a material interest in the outcome or standing then the action is academic, hypothetical, or moot and does not constitute a case or dispute, which is a constitutional requirement for the FSM Supreme Court to exercise jurisdiction over the matter, FSM Const. art. XI, § 6
- B. 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