

Checklist of Points to be Covered for Complete Answers
FSM Bar Examination, March 1, 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)
 - 1. objection – leading on direct examination
 - 2. ordinarily, leading questions not permitted on direct [FSM Evid. R. 611(c)]
 - 3. leading questions may be allowed on direct for preliminary questions as may be necessary to develop his testimony
 - 4. question where Phobos lived is preliminary question so is okay; objection overruled
 - B. (3 points)
 - 1. objection – 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)];
 - 2. general rule: hearsay inadmissible unless falls within one of the exceptions to the hearsay rule [FSM Evid. R. 802]
 - 3. but if Bonnie Blue's statement is offered to show the effect it had on Phobos and not for the truth of the matter asserted, then it's not hearsay
 - 4. "excited utterance" exception to hearsay if statement relating to a startling event made while Bonnie Blue was under the stress of excitement caused by the event [FSM Evid. R. 803(2)] but no facts that the situation was startling or exciting at this point of the incident
 - 5. "present sense impression" exception for statement made contemporaneous to or immediately following an event is admissible [FSM Evid. R. 803(1)]
 - 6. Objection overruled – if Bonnie Blue's statement is offered to show the effect it had on Phobos is admissible as non-hearsay, if offered for hearsay purposes is admissible as a present sense impression
 - C. (2 points)
 - 1. objection – assumes fact not in evidence (that Deimos was waving a knife); also misstates the record (that is, Phobos's testimony)
 - 2. therefore objection sustained
 - D. (2 points)
 - 1. objection – leading on direct examination
 - 2. leading questions not permitted on direct [FSM Evid. R. 611(c)] & isn't preliminary question
 - 3. objection – compound question (asked in same question what he said to Deimos & if he had provoked Deimos)
 - 4. therefore objection to form of question sustained
 - E. (2 points)
 - 1. objection – hearsay

2. Phobos may claim that it's not offered for the truth of the matter but to bolster his credibility
 - a. ordinarily cannot show a prior consistent statement
 - b. but when testimony is impeached through express or implied charge that testimony is of recent fabrication it is defined as non-hearsay and admissible [FSM Evid. R. 801(d)(1)(B)]
 - c. but since Phobos not yet been cross-examined, so there's no charge to rebut
 3. therefore objection sustained
- F. (2 points)
1. objection – the attorney is testifying – attorney provided Phobos with amount of medical bill, which was the substance of question asked Phobos
 2. only witness, not attorney may testify
 3. improper past recollection recorded – witness must be afforded opportunity to remember event on his own before attempt to refresh his memory can occur – attorney should've tried to refresh Phobos's memory by showing him the bill and letting him remember the amount on his own
 4. objection sustained
- G. (3 points)
1. objection – non-responsive answer
 - a. Phobos asked if he remembers
 - b. Phobos testifies that the bill says . . .
 - c. therefore that portion of answer should be stricken
 2. objection – hearsay
 - a. because Phobos is reading from hospital records it is hearsay
 - b. any writing made as a memorandum or record of any act, transaction, occurrence or event is admissible if made in the regular course of business [FSM Evid. R. 803(6)]
 - c. BUT no foundation has been laid to enter the hospital billing record into evidence as business record
 - d. therefore inadmissible from Phobos's testimony
 - e. best evidence rule [FSM Evid. R. 1002] requires an original or a duplicate [FSM Evid. R. 1003] of a writing be used to prove its contents
 - f. other evidence of the contents of a writing is admissible if 1) original is lost or destroyed unless the proponent lost or destroyed them in bad faith) or 2) original not obtainable by any available judicial process or procedure; or 3) original in opponent's possession [FSM Evid. R. 1004(1)-(3)] but Phobos has no recollection of contents of bill
 - g. objection sustained, bill should come in after proper authentication
- H. (2 points)
1. objection – compound question (asked in same question if he expelled three students & if he changed lock to Deimos's office)
 2. therefore objection sustained

- I. (2 points)
 1. objection – non-responsive answer
 - a. question asked about Phobos’s differences with Deimos
 - b. therefore part of answer about lethal weapon was non-responsive & inadmissible
 2. objection – lay opinion testimony
 - a. description of weapon as "lethal" is opinion
 - b. lay opinion okay if 1) rationally based on the perception of the witness and 2) helpful to a clear understanding of his testimony or the determination of a fact in issue
 - c. describing a knife as lethal is within the knowledge of a lay witness

GENERAL
(70 points)

- II. (11 points)
 - A. Al Catraz’s rights
 1. Al can be held liable for the contract Beth entered into with Catatonic
 2. under an agency theory, principal can be held liable to third party if valid authority given to agent
 3. Al gave Beth actual valid authority to contract with Catatonic
 4. can’t argue not liable to Catatonic because Catatonic didn’t know about Al; both principal and agent liable if principal undisclosed
 - B. Desrine’s rights
 1. Desrine not liable on the contract under agency theory
 2. Desrine never gave Beth any authority to act on her behalf to enter contract with Catatonic
 3. Desirine cannot be held liable by Catatonic
 - C. Catatonic’s rights
 1. \$3,000 liquidated damages might not be recoverable
 - a. damages for breach by either party to a contract may be liquidated in the agreement
 - b. but only in an amount that is reasonable in light of the anticipated or actual loss caused by the breach and of the difficulties of proof of loss
 - c. term fixing unreasonably large liquidated damages may be unenforceable on grounds of public policy as a penalty [Island Homes Constr. Corp. v. Falcam, 11 FSM Intrm. 414, 416 (Pon. 2003)]
 2. Catatonic has duty to mitigate its damages by looking for other gigs to replace the one it lost when Al’s wedding was canceled [*e.g.*, Panuelo v. Pepsi Cola Bottling Co. of Guam, 5 FSM Intrm. 123, 129 (Pon. 1991); George v. Alik, 13 FSM Intrm. 12, 15 (Kos. S. Ct. Tr. 2004)]
 - a. Catatonic did mitigate its damages by accepting concert gig on Guam
 - b. Catatonic was paid more for Guam gig than it would’ve made for Al’s

wedding; therefore no damages

D. Beth's rights

1. Beth acted as Al's agent when contracted with Catatonic
 - a. as agent Beth is bound to the contract unless principal's identity is disclosed
 - b. Al's identity not disclosed when contract formed, therefore Beth liable to Catatonic for damages
 - (1) if liquidated damages not void as penalty, then recoverable from Beth, BUT must be offset by substitute job
 - (2) since substitute job (Guam concert) paid more, no damages
2. if Beth has to pay Catatonic damages
 - a. she may recover from Al
 - b. promissory estoppel [Kilafwakun v. Kilafwakun, 10 FSM Intrm. 189, 195 (Kos. S. Ct. Tr. 2001)]
 - (1) Beth contracted with Catatonic at Al's request
 - (2) & can be assumed on Al's promise to pay
 - (3) Beth's reliance on her brother Al is reasonable
 - (4) & it was to her detriment
 - (5) therefore Al would have to pay Beth

III. (4 points)

- A. (2 points) contract formed on Pohnpei between Guam band and Pohnpei citizens
 1. state law cause of action source – contract &
 2. citizenship appears to be diverse (Guam & Pohnpei); therefore
 3. FSM Supreme Court, Pohnpei (diversity jurisdiction); OR
 4. Pohnpei Supreme Court
 5. Guam court unlikely since Guam court probably couldn't obtain personal jurisdiction over the defendants
- B. (2 points) under long arm statute, Catatonic did business (formed contract) on Pohnpei out of which suit arises, so Beth could sue in either
 1. FSM Supreme Court, Pohnpei (diversity jurisdiction); OR
 2. Pohnpei Supreme Court [as above]; OR
 3. a Guam court because as Guam residents, Guam court could obtain personal jurisdiction over Catatonic

IV. (12 points)

- A. (7 points) Sally v. Jack
 1. Sally could sue Jack for negligence
 - a. elements of actionable negligence [Fabian v. Ting Hong Oceanic Enterprises, 8 FSM Intrm. 63, 65 (Chk. 1997)] are
 - (1) breach of a duty
 - (2) owed on the part of one person to protect another from injury
 - (3) that breach is the proximate cause of an

- (a) BUT was absence of life jackets cause of injury?
 - (b) back injury not type of injury life jacket intended to prevent
 - (4) injury to the person to whom the duty is owed
 - (5) may be summarized as: a duty of care, a breach of that duty, which breach proximately causes damages
 - b. negligence per se –
 - (1) violation of a statute creates a rebuttable presumption of negligence; put another way, the unexcused violation of law which defines reasonable conduct is negligence in itself [Glocke v. Pohnpei, 8 FSM Intrm. 60, 61 (Pon. 1997)]
 - (2) Sally was in class of persons the life jacket statute was designed to protect
 - c. defenses
 - (1) assumption of risk or written waiver of responsibility
 - (a) written waiver construed strictly against drafter
 - (b) written waiver only releases Boatlife from liability, not Boatlife's employees
 - (c) does "any injuries" waiver include those from negligence?
 - (2) contributory negligence not available as defense; contrary to custom
 - (3) comparative negligence [Fabian v. Ting Hong Oceanic Enterprises, 8 FSM Intrm. 63, 66 (Chk. 1997)]
 - (a) Sally told Jack she could swim but she couldn't
 - (b) Sally'll argue injury caused by her fall, not her inability to swim
 - (c) "pure" form of comparative negligence, which is a defense available in Chuuk,
 - (d) 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
 - (e) but the plaintiff may still recover for all of the harm attributable to the defendant's wrongdoing even if plaintiff's negligence was greater than the defendant's
 - (4) emergency or supervening cause
 - (a) emergency may excuse otherwise negligent act
 - (b) supervening cause of other boat's actions
- B. (2 points) Sally v. Boatlife negligence claim
- 1. respondeat superior
 - a. Boatlife owns the boat and employs Jack
 - b. must show Jack was working in the scope of his employment
 - 2. defenses – same as above
- C. (3 points) Ivan v. Jack
- 1. loss of consortium

- a. derivative from spouse's claim for damages [Epiti v. Chuuk, 5 FSM Intrm. 162, 170 (Chk. S. Ct. Tr. 1991)]
- b. if comparative negligence succeeds against Sally any loss of consortium award will be reduced by the percentage of fault attributable to Sally (the spouse) [Id.]
- 2. negligent infliction of emotional distress
 - a. must show manifestation of physical injury to self [Pau v. Kansou, 8 FSM Intrm. 524, 526 (Chk. 1998)]
 - b. must be nearby accident when it occurred (but was watching through binoculars)

V. (15 points)

A. (4 points)

- 1. service on Dynx
 - a. service on Dynx must be delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode or of business with some person of suitable age and discretion then residing or employed therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process [FSM Civ. R. 4(d)(1)]
 - b. not delivered personally
 - c. MaruCo's office in Chuuk is not Dynx's dwelling house & since he only makes occasional trips to Chuuk, probably wouldn't be considered his usual place of business
- 2. service on MaruCo
 - a. service on corporation must be delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process [FSM Civ. R. 4(d)(3)]
 - b. unless MaruCo's Chuuk lawyer is an agent authorized to receive service of process, mailing him the complaint and summons isn't effective service; &
 - c. Dynx, an officer, wasn't properly served either
- 3. Nix may serve process since he is an adult & not a party [FSM Civ. R. 4(c)(1)]
- 4. proof of service wasn't properly filed, but failure to provide proof of service doesn't affect service's validity [FSM Civ. R. 4(g)]
- 5. service on Dynx & MaruCo both probably improper
- 6. both motions to dismiss may be granted
 - a. Paul may refile & reserve unless statute of limitations has run out; OR
 - b. since a Rule 12(b)(5) dismissal is without prejudice and with leave to renew, court may often quash service instead of dismissing the action; that way only the service need be repeated [Dorval Tankship Pty, Ltd. v.

Department of Finance, 8 FSM Intrm. 111, 115 (Chk. 1997)]

- B. (3 points)
1. Lynx's motion for protective order should be granted because
 - a. plaintiff can't take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant without court permission [FSM Civ. R. 30(a)]; UNLESS
 - b. person to be examined is about to go off of the island where the action is pending, and will be unavailable for examination unless the person's deposition is taken before expiration of the 30-day period, and & the notice of deposition sets forth facts to support the statement [FSM Civ. R. 30(b)(2)]
 2. Paul's motion for sanctions should be denied because he was premature in seeking to depose Lynx
- C. (3 points) Lynx's pretrial remedies
1. move for summary judgment; must show
 - a. that there is no genuine issue as to any material fact and that
 - b. Lynx is entitled to judgment as a matter of law;
 - c. court must view the facts presented and inferences made in the light most favorable to Paul
 - d. burden of showing a lack of triable issues of fact belongs to the moving party (Lynx) [Adams v. Etscheit, 6 FSM Intrm. 580, 582 (App. 1994)];
 - e. Lynx, as a defendant, may move for summary judgment at any time [FSM Civ. R. 56(b)]
 - f. motion may be supported by the pleadings, and discovery on file, together with the affidavits
 - g. when opposing party (Paul) has burden of proof at trial,
 - (1) movant (Lynx) need only show that opponent (Paul) cannot prove an essential element of his case
 - (2) Lynx could probably get summary judgment to dispose of allegations negated by document Paul produced in discovery
 2. Rule 11 sanctions may also be available
 - a. when attorney signs pleading he certifies that to the best of his knowledge, information, and belief that there is good ground to support it
 - b. if Lynx can show Rule 11 violated she's entitled to the expenses of her summary judgment/Rule 11 motion
- D. (2 points) Bank may seek interpleader
1. Bank may join all parties with a claim to the disputed funds and shares held by the Bank because Bank is exposed to double or multiple liability [FSM Civ. R. 22]
 2. Bank, with leave of court [FSM Civ. R. 67] may deposit funds & shares with court
 3. court, if I determines Bank is disinterested party, may then discharge Bank as

- party
- E. (3 points)
1. Bank's ability to object to Jinx's dismissal depends on whether the court has discharged it as a party yet
 2. dismissal of Jinx
 - a. dismissal not signed by all parties who have appeared;
 - b. so can't be voluntary dismissal by the parties [*see* FSM Civ. R. 41(a)(1)(ii)]
 - c. an action can't be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper [FSM Civ. R. 41(a)(2)]
- VI. (7 points)
- A. when a search or seizure is not conducted pursuant to a judicially-issued warrant the burden rests with the government to prove the legality of the search or seizure [FSM v. Santa, 8 FSM Intrm. 266, 268 (Chk. 1998)]
 - B. seizure of the daughter & Romeo was an illegal arrest
 1. constitutional search may be conducted without a warrant if the search is incidental to a lawful arrest [Ludwig v. FSM, 2 FSM Intrm. 27, 32 (App. 1985)] BUT
 2. arrest was unlawful
 - C. evidence is obtained pursuant to an unlawful arrest will be suppressed
 1. one exception to the general rule is when the government obtains the evidence based on an independent source – if knowledge of such facts is gained from an independent source they may be proved like any others [FSM v. Inek, 10 FSM Intrm. 263, 265 (Chk. 2001)]
 2. since police had no intention of searching Romeo his search was not incident to his "arrest" damages
 3. search was result of independent source – of the father's informing the police that Romeo was carrying a handgun
 - D. motion to suppress should be denied
- VII. (13 points)
- A. agency (state alcoholic control board) must publish notice of its intended action for at least 30 days by posting copies of the proposed regulation in convenient public places [17 F.S.M.C. 102(1)(a)]
 1. notice must include
 - a. a statement of either the terms or substance of the proposed regulation or a description of the subjects and issues involved
 - b. reference to the authorities under which the action is proposed
 - c. the time when, the place where, and the manner in which interested persons may present their views thereon; and
 - d. the proposed effective date
 2. communicate the general nature of the proposed regulations and the place

- where the regulations are available for review by radio announcements in English and in the languages of the state [17 F.S.M.C. 102(1)(b)]
3. transmit copies to certain gov't officials [17 F.S.M.C. 102(1)(c)]
 4. afford all interested persons reasonable opportunity to submit data, views, or arguments, in writing & under some circumstances afford an oral hearing [17 F.S.M.C. 102(1)(d)]
- B. BUT if an imminent peril to the public health, safety, or welfare requires adoption of a regulation upon less than 30 days' notice, and the chief executive states in writing his reasons for that finding, an emergency regulation may be adopted without prior notice or hearing upon any abbreviated notice and hearing that is found to be practicable
1. regulation can't be effective for a period of longer than 120 days
 2. but the adoption of an identical regulation under subsection later is not precluded
- C. regulations not adopted in this manner may be judicially challenged on the basis of noncompliance with the procedural requirements of this section must be commenced within one year from the effective date of the regulation [17 F.S.M.C. 102(3)]
- D. Callisto may challenge the regulations as improperly adopted;
1. state alcoholic control board only ground to defend would be that there was an imminent peril to public health
 2. but no proclamation by gov'r to that effect
- E. Callisto, as an aggrieved person is entitled to hearing before the highest administrative official of the department or office of which the state alcoholic control board is a part [17 F.S.M.C. 108(1)]
1. Europa's assistant is not highest administrative official of the state alcoholic control board
 2. hearing is to be public [17 F.S.M.C. 109(5)] therefore Callisto's lawyer can't be excluded
 3. since hearing involves PTI's license, PTI must be given an opportunity to show compliance with all lawful requirements for the retention of its license [17 F.S.M.C. 110(2)]
 - a. no such opportunity given
 - (1) attorney Ganymede was excluded from hearing
 - (2) Callisto not given opportunity to testify (beyond asking what's going on) or present evidence)
- F. Callisto therefore has right to trial *de novo* in court to contest both the state alcoholic control board adoption of regulation and its revocation of his license [17 F.S.M.C. 111] and to appeal the trial court decision [17 F.S.M.C. 112]

VIII. (4 points)

- A. seizing tuba
1. possession of 22 proof tuba does not appear illegal; only sale (or manufacture?) in state

2. tuba was being shipped to state where its sale was legal
 3. tuba was in interstate commerce, which only nat'l gov't can regulate
 4. tuba seizure appears to be seizure & taking of property without due process of law
- B. serving tuba
1. if seized as contraband, should've been destroyed
 2. Primo Tuba, Inc. Entitled to just compensation or seizure & use of its 22 proof export tuba
- IX. (4 points)
- A. unconstitutional
1. appears to be tax on income, a power reserved exclusively to nat'l gov't [FSM Const. art. XI, § 2(e)]
 2. if is regulation of insurance industry, that is also power reserved to nat'l gov't [FSM Const. art. XI, § 2(g)]
- B. unconstitutional
1. Constitution allows importation of radioactive materials only with nat'l gov't permission [FSM Const. art. XIII, § 2]
 2. Constitution therefore reserves regulation of radioactive material to nat'l gov't
 3. Constitution also requires nat'l gov't to promote health [FSM Const. art. IX, § 2(r)]

ETHICS

(10 points)

- X. (8 points) Lawyer must adhere to the Federated States of Micronesia Model Rules of Professional Conduct; issue is whether Lawyer must honor Buyer's requests; although client is entitled to make decisions that will affect the merits of his case, Lawyer must conduct his client's case by lawful means [*see* FSM MRPC R. 1.2]
- A. Lawyer shouldn't honor request to pay mechanic's shop owner \$250
1. Lawyer can't pay witness contingent on his testimony
 2. Lawyer can pay witness's reasonable expenses & loss of time
 3. Lawyer can't unlawfully obstruct another party's access to evidence [FSM MRPC R. 3.4(a)] or offer inducement to witness prohibited by law [FSM MRPC R. 3.4(b)]
 4. it appears that Buyer is trying to influence the witness's testimony by overcompensating him
- B. Lawyer shouldn't honor request to arrange Buyer's secretary to be off-island
1. Lawyer can't arrange for potential relevant witness to be unavailable for trial
 2. Lawyer can't unlawfully obstruct another party's access to evidence or conceal material having potential evidentiary value [FSM MRPC R. 3.4(a)]
- C. Lawyer can't d
1. Seller's attorney must hold Seller's property that is in his possession in connection with a representation separate from the lawyer's own property

- 2. [FSM MRPC R. 1.15(a)]; commingling funds would violate that although Lawyer is obligated to report disciplinary violations [FSM MRPC R. 8.3(a)]
 - a. if the violation raises a substantial question as to Seller's attorney's honesty, trustworthiness or fitness as a lawyer in other respects
 - b. BUT Lawyer can't threaten criminal or disciplinary action solely to gain advantage in civil case
- D. Lawyer might be able to place the advertisement in the newspaper
 - 1. Lawyer must not make an extrajudicial statement to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding [FSM MRPC R. 3.6(a)]
 - 2. this may not apply in a civil case where there's no jury [FSM MRPC R. 3.6(b)]
 - a. Lawyer may state without elaboration
 - (1) the general nature of the claim or defense;
 - (2) the information contained in a public record;
 - (3) that an investigation or the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;
 - (4) the scheduling or result of any step in litigation;
 - (5) a request for assistance in obtaining evidence and information necessary thereto;
 - b. if it appears that ad wouldn't have a substantial likelihood of materially prejudicing in trying the case and doesn't elaborate, it may be acceptable

XI. (2 points) Sara may

- A. have husband as non-lawyer employee [FSM MRPC R. 5.4(a)(3)], but
- B. lawyer cannot practice with or in the form of a professional corporation or association authorized to practice law for a profit, if a nonlawyer owns an interest therein [FSM MRPC R. 5.4(d)(1)]; therefore Sara cannot make husband a part owner of her law firm