

Checklist of Points to be Covered for Complete Answers
FSM Bar Examination, March 6, 2008

[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. (4 points) evidence is admissible
1. evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence [FSM Evid. R. 401]; relevant evidence generally admissible [FSM Evid. R. 402]
 2. Michael's testimony shows that Daniel used morphine in the past & therefore had a motive to steal morphine in the present case
 3. morphine use is character evidence; character evidence is generally inadmissible to show that a defendant acted in conformity therewith but character evidence is admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident [FSM Evid. R. 404(b)]
 4. Daniel's recent past use of morphine provides a motive for the present robbery
 5. Daniel may argue that although relevant, the evidence should be excluded because its probative value is substantially outweighed by the danger of unfair prejudice – characterizing him as a drug user [see FSM Evid. R. 403] but here there is a great deal of probative value of establishing a motive
- B. (4 points) if letter was meant to be confidential it is inadmissible as privileged
1. letter is relevant because it proves that Daniel intended to rob the pharmacy, which makes it more likely than not that he did rob the pharmacy
 2. Daniel will claim letter is hearsay – hearsay is out of court statement that is being offered to prove the truth of the matter asserted therein [FSM Evid. R. 801(c)]
 - a. general rule hearsay inadmissible unless falls within one of the exceptions to the hearsay rule [FSM Evid. R. 802]
 - b. but admission of party opponent which is defined as non-hearsay [FSM Evid. R. 801(d)(2)]
 - c. Hearsay exception of "then existing mental, emotional, or physical condition" [FSM Evid. R. 803(3)] could also apply
 3. relevant evidence may be excluded if protected by privilege
 - a. a person's privilege is governed by the principles of the common law as they may be interpreted by the courts of the Federated States of Micronesia in the light of reason and experience, including local custom and tradition [FSM Evid. R. 501]
 - b. statements made to clergy in the course of seeking religious guidance with the intent that such statements be confidential are privileged
 - c. unclear if letter was meant to be confidential, but if it was it is

privileged

- C. (3 points)
1. relevant because attempt to flee shows that Daniel believed himself culpable for the robbery
 2. an out-of-court statement includes a person's nonverbal conduct, if it is intended by him as an assertion [FSM Evid. R. 801(a)(2)]
 3. if the attempted flight was assertive conduct, it is admissible as admission of party-opponent; otherwise not
- D. (4 points)
1. relevant because tends to show Daniel committed robbery; ID of criminal suspect always relevant
 2. is hearsay because offered for truth of matter asserted
 3. would be non-hearsay if prior statement of witness who testifies at trial [FSM Evid. R. 801(d)(1)] but Wit is deceased & unable to testify, therefore inadmissible as prior ID;
 4. maybe be admissible under the general catchall exception for statements not specifically covered by any of the other exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence; BUT ONLY if the prosecution made known its intention to offer the statement and its particulars, including Wit's name and address, to the defense sufficiently in advance of the trial to provide the defense with a fair opportunity to prepare to meet it [FSM Evid. R. 803(24)]
- E. (3 points)
1. relevant to show that Daniel was present at time of robbery & to rebut Daniel's alibi that he was at home at the time of the robbery
 2. would be hearsay because is being offered for the truth of the matter, but admission of party opponent which is defined as non-hearsay [FSM Evid. R. 801(d)(2)]
 3. BUT if Daniel has not testified there is nothing to rebut so cannot be used to impeach
 4. violation of Daniel's right to counsel? – only if can be shown that Lockup was working on behalf of police & that he solicited Daniel's statement – then inadmissible;
 5. otherwise admissible
- II. (2 points)
- A. subsequent remedial measures not admissible to prove negligence or culpable conduct, but admissible when offered for other purpose, such as ownership, control or feasibility, if controverted [FSM Evid. R. 407]
- B. since Bullwinkle disputes ownership evidence is admissible for that purpose
- C. objection overruled, evidence admitted for purpose of showing ownership

ETHICS

(10 points)

III. (10 points)

A. diligence

1. a lawyer has duty to act on a client's behalf in a diligent manner, which includes seeing a matter through to completion unless fired or permitted to withdraw [*see* FSM MRPC R. 1.3 cmt.]
2. Since Boris's letter indicates that he intends to suspend all efforts until his bill is paid, Boris is in violation of the model rules & can be disciplined unless he seeks permissive withdrawal

B. permissive withdrawal

1. a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the client's interests [FSM MRPC R. 1.16(b)]
2. Wilma will be harmed by Boris's immediate withdrawal since the divorce is ongoing & Wilma cannot afford another attorney
3. a lawyer may withdraw from representing a client if the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled [FSM MRPC R. 1.16(b)(4)]
4. thus Boris must first notify Wilma of his intent to withdraw or allow her to make alternative financing arrangements
5. Boris did neither; he did not give Wilma any such warning, instead he just suspended his representation
6. Boris may be disciplined

C. Boris's fee proposal

1. a lawyer cannot enter into an arrangement for, charge, or collect a contingent fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof [FSM MRPC R. 1.5(d)(1)]
2. also contingent fee agreement must be in writing [FSM MRPC R. 1.5(c)]
3. Boris may be disciplined for asking for a contingent in a divorce case

D. Boris's termination by Wilma

1. a client can fire his or her attorney at any time during the representation, but attorney is entitled to compensation (contract or quantum meruit) for fair value of work done [*see* FSM MRPC R. 1.16 cmt]
2. a lawyer must surrender papers and property to which the client is entitled and may only retain papers relating to the client to the extent permitted by other law [FSM MRPC R. 1.16(d)] unclear in the FSM to what extent Boris could retain Wilma's file in order to collect his fee
3. a lawyer must not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement [FSM MRPC R. 1.8(h)]
4. Boris can thus be disciplined for trying to obtain a liability release from Wilma

E. Boris's duty of confidentiality

1. a lawyer must not reveal information relating to representation of a client unless the client consents after consultation [FSM MRPC R. 1.6(a)]; facts indicate that Fred will not consent
2. the duty of confidentiality continues after the client-lawyer relationship has terminated [FSM MRPC R. 1.6 cmt.]
3. unclear if Fred was ever Boris's client since Boris represented the partnership, not Boris personally, but if Boris was privy to any of Fred's confidential financial records while he represented the partnership, then this would relate to Wilma's property settlement & Boris cannot represent Wilma; if he wasn't, Boris may be able to continue to represent Wilma

GENERAL
(70 points)

IV. (10 points)

- A. standard for summary judgment – summary judgment will be granted only if the court, viewing the facts in the light most favorable to the non-moving party, finds there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law [FSM Civ. R. 56(c)]
- B. existence of material issue on the face of the pleadings
 1. Pallas's complaint & Juno's answer disagree as to their factual allegations
 2. the nonmoving party cannot rely upon contradictions in the pleadings to carry its burden, but must present some competent evidence that would be admissible at trial that there is a genuine issue of material fact [*see, e.g., Marar v. Chuuk*, 9 FSM Intrm. 313, 314-15 (Chk. 2000)]
 3. thus, Pallas cannot rely on the contradiction between her complaint's allegation & Juno's answer's denial to show that there is a general issue of material fact
- C. conflicting affidavits about whether weeds obscured Juno's stop sign
 1. Juno's affidavit & police officer's affidavit conflict over whether stop sign obscured
 2. this is a genuine issue & if it is a material issue it will preclude summary judgment
 3. BUT this is not genuine issue, because
 - a. Juno's affidavit & Vesta's deposition show that Juno did manage to see stop sign & come to a complete stop
 - b. the material issue is whether Juno stopped, not how hard it was to see the stop sign
 4. therefore, this issue won't preclude summary judgment
- D. Pallas's affidavit controverting Juno's version of the accident
 1. whether Juno stopped at the stop sign is a material factual issue
 2. for it to be a genuine issue it must appear that Pallas has enough evidence that a reasonable fact-finder could find in her favor
 3. Juno's affidavit says he stopped & Ceres did not; Vesta's affidavit corroborates this
 4. Pallas must thus show that she will have admissible evidence at trial to the contrary
 5. once a party moving for summary judgment 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; non-moving party may not rely on unsubstantiated denials of liability to carry its burden, but must present some competent evidence that would be admissible at trial that there is a genuine issue of material fact [Urban v. Salvador, 7 FSM Intrm. 29, 30 (Pon. 1995)]

6. Pallas cannot; court should grant Juno's summary judgment motion

V. (13 points)

A. (10 points) Zed's suit

1. against Max

a. assault

(1) an assault refers to the apprehension of harmful or offensive contact with a person [Conrad v. Kolonia Town, 8 FSM Intrm. 183, 191 (Pon. 1997)]

(2) Max's threat to knock Zed's block off could be assault

(3) defense – since Zed couldn't hear it, no apprehension, therefore no assault

b. battery

(1) battery is a harmful, offensive contact with a person resulting from an act intended to cause the contact [Elymore v. Walter, 9 FSM Intrm. 450, 458 (Pon. 2000)]

(2) while an assault has to do with the apprehension of the offensive contact; when the court determines that a battery has occurred, it need not consider the separate tort of assault [Elymore, 9 FSM Intrm. at 458; Conrad, 8 FSM Intrm. at 191]

(3) battery when max hit Zed with can of corned beef, when he wrestled with him on the ground, when he slapped him

(4) defense – Max privileged with authority of law since he was using reasonable force to effect an arrest

(a) was reasonable force used to effect arrest? arguably no since threw can of corned beef

(b) was there probable cause for an arrest? probably not since Zed didn't fit thief's description

c. false imprisonment

(1) elements of false imprisonment are 1) detention or restraint of one against his or her will, and 2) the unlawfulness of such detention or restraint [Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 295 (Pon. 1998)]

(2) was detention unlawful? arguably since wrong man arrested & he didn't resemble description – not young, not drunk, bicycle instead of motorcycle

(3) held against his will; yes, unless so dazed didn't know what was going on, but Zed knew enough to complain of injuries

2. against Jim

a. battery

(1) threw stick that had contact with bike which was attached

- to Zed
 - (2) helped hold Zed down when Max wrestled with Zed in order to handcuff Zed
 - b. false imprisonment
 - (1) helped restrain Zed by holding him down while Max arrested him
 - (2) not a police officer so no defense of privilege
 - 3. against Chief of Police and/or State
 - a. respondeat superior
 - (1) was Max "on duty" at the time of the incident? argue
 - (a) YES
 - i) was in uniform
 - ii) made an arrest
 - iii) handcuffed Zed
 - iv) went with Zed to police station
 - (b) NO
 - i) was before his shift started
 - ii) didn't use police procedure to stop Zed, instead threatened him & threw can of corned beef
 - iii) didn't identify himself as police officer when ordering Zed to stop
 - b. civil rights – argue
 - (1) violation of Zed's right to due process by
 - (2) unreasonable force to effect arrest &
 - (3) arrest without probable cause
 - (4) if Max not trained in proper police procedure, the Chief of Police, as a policy-making official could be liable
 - 4. damages
 - a. compensatory
 - (1) two weeks' lost wages
 - (2) damage to bicycle
 - (3) medical expenses
 - (4) pain & suffering
 - (5) successful civil rights claim would also entitle Zed to reasonable attorney's fees and costs
 - b. no punitive damages against the gov't, but possible against individuals such as Max & Jim if force used was found to be deliberate and malicious [*see Herman v. Municipality of Patta*, 12 FSM Intrm. 130, 139 (Chk. 2003)]
- B. (3 points) Cal's suit
 - 1. by Mom, as next friend
 - 2. against Zed, Max
 - a. battery (offensive contact)
 - b. Max's and Jim's intents to batter Zed transferred to Cal (was foreseeable result)
 - c. Zed would argue he had no intent, or
 - d. Zed, as third-party plaintiff, would contend that if he's liable to

Cal, then Max and Jim are liable to him for his liability to Cal

- VI. (10 points) argue
- A. information was from previously reliable informant
 - B. officer therefore had no reason not to trust information
 - C. BUT officer did not look for anything to corroborate Sam's tip
 - D. however, "ice" might not remain at Ken's house for long if he was dealer & user, so time was short
 - E. affidavit not false since it stated that it was according to Sam, a previously reliable informant
 - F. if warrant not invalid, then contraband handgun found as part of search is properly seized & won't be suppressed
- VII. (11 points) lack of jurisdiction over the
- A. subject matter
 - 1. contract & fraud are generally state law causes of action
 - 2. BUT the parties are of diverse citizenship
 - 3. FSM Supreme Court can exercise jurisdiction over cases with diverse parties when all parties are not foreigners even though the rules of decision are state law (or foreign law) [FSM Const. art. XI, § 6(b); *e.g.*, Enlet v. Bruton, 12 FSM Intrm. 187, 189 (Chk. 2003)]
 - B. person
 - 1. the Supreme Court may exercise personal jurisdiction in civil cases only over persons residing or found in the FSM or who have been duly summoned and voluntarily appear [4 F.S.M.C. 203]
 - 2. Godzilla and Yeti not resident in FSM & none of the alleged causes of action – fraud and misrepresentation, breach of contract, breach of warranty, and negligence – took place in the FSM, but in Palau (or Japan)
 - 3. jurisdiction over Godzilla and Yeti would have to be based on the "longarm statute" [4 F.S.M.C. 204]
 - 4. to obtain personal jurisdiction over a non-resident defendant in a diversity action, a plaintiff must show that jurisdiction is consistent with the "long arm" statute, and that the exercise of jurisdiction does not deny the defendant due process of law as guaranteed by FSM Const. art. IV, § 3 [National Fisheries Corp. v. New Quick Co., 9 FSM Intrm. 120, 128 (Pon. 1999)]
 - 5. under the longarm statute, court may have jurisdiction over persons outside the FSM
 - a. whose acts caused injury to persons or property within the FSM arising out of an act or omission outside of the FSM by the defendant,
 - b. provided in addition, that at the time of the injury either the defendant was engaged in the solicitation or sales activities within the FSM or products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within the FSM [4 F.S.M.C. 204(1)(j)]
 - c. (other longarm provisions obviously couldn't apply)
 - 6. neither Godzilla nor Yeti solicited sales within the FSM or had any contact

with the FSM; & when he sold it, Yeti had no reason to believe Kong was going to take the Rav4 back to Yap because even Kong didn't know that then

7. FSM Supreme Court applies a minimum contacts analysis to determine the extent to which the FSM long-arm statute may be used consistently with due process to exert jurisdiction over a non-forum defendant; under the minimum contacts doctrine, a defendant 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 [National Fisheries Corp. v. New Quick Co., 9 FSM Intrm. 120, 129 (Pon. 1999)]
8. thus, even if "longarm statute" applied, due process analysis would result in no personal jurisdiction over Godzilla and Yeti
9. motions granted & case dismissed for lack of jurisdiction over the persons of Godzilla and Yeti

VIII. (10 points)

- A. (4 points) NO, the clerk can't enter the default judgment
 1. only if the default judgment is for a sum certain or for a sum which can by computation be made certain can the clerk enter default judgment for that amount and for costs against the defendant [FSM Civ. R. 55(b)(1)]; otherwise the application must be addressed to the court [FSM Civ. R. 55(b)(2)]
 2. since the store requests that reasonable attorney's fees be included in the default judgment, the clerk cannot enter as requested because
 3. any award of attorney's fees must be based upon a judicial finding and thus is not for a sum certain and therefore cannot be granted by the court clerk [Bank of the FSM v. Bartolome, 4 FSM Intrm. 182, 184 (Pon. 1990)]
- B. (6 points) amount of default judgment
 1. \$710.20 principal amount
 2. \$25 costs of service of process
 3. \$0 for prejudgment interest, because
 - a. wasn't prayed for in the complaint and default judgment can't be different in kind from or exceed in amount that prayed for in the demand for judgment, therefore no prejudgment interest can be awarded [FSM Civ. R. 54(c); Western Sales Trading Co. v. Billy, 13 FSM Intrm. 273, 277 (Chk. 2005)]
 - b. prejudgment interest wasn't a term in the contract (the credit application) between the parties, therefore store not entitled to it even if had been prayed for in the complaint [*see* Albatross Trading Co. v. Aizawa, 13 FSM Intrm. 380, 382 (Chk. 2005)]
 4. no more than \$106.53 for reasonable attorney's fees
 - a. this is a simple collection case with no vexatious conduct by the defendant
 - b. in simple collection case, attorney's fees are limited to an amount not in excess of 15% of the outstanding principal and prejudgment interest due [Bank of Hawaii v. Jack, 4 FSM Intrm. 216, 221 (Pon. 1990)]
 - c. since only \$710.20 principal is outstanding & \$106.53 is 15% of

5. \$710.20, no more than \$106.53 can be awarded as attorney's fees
total judgment = \$841.73

IX. (12 points)

- A. valid contract formed
1. offer made when Hardy e-mailed Laurel
 2. Laurel accepted by starting work & e-mailing his acceptance
 3. consideration = \$900 and boat
 4. essential terms agreed on
 - a. price \$900
 - b. goods – 16-foot boat in Laurel's "usual style"
- B. Laurel didn't breach contract (?)
1. Hardy's requested delivery date not met, BUT
 - a. Hardy didn't specify that time was of the essence of the contract
 - b. Hardy didn't respond to Laurel's e-mail indicating that he had started work on the boat but wasn't sure he could finish in time
 - c. therefore the contract wasn't conditioned on the boat being finished by Nov. 23rd
 2. when time not of the essence, court will not consider a due date to be a condition indicating forfeiture or breach [Panuelo v. Pepsi Cola Bottling Co. of Guam, 5 FSM Intrm. 123, 127 (Pon. 1991); *see also* Nanpei v. Kihara, 7 FSM Intrm. 319, 324 (App. 1995)]
 3. boat was ready within reasonable time (8 days after due date)
 4. red trim instead of blue
 - a. was trim color an essential contract term?
 - b. probably not, since trim color a minor item which could be fixed later anytime blue paint became available
 - c. blue trim therefore not a contract condition requiring forfeiture
 5. Laurel didn't breach contract & was therefore entitled to payment by Hardy
- C. Laurel's request for \$120 advance payment
1. not a contract term
 - a. Hardy never agreed to it
 - b. Laurel continued building the boat anyway
 2. therefore not a breach that would've required Laurel to cease work on boat or continue at his own peril
- D. Laurel's remedies
1. specific performance
 - a. is available when money damages are inadequate compensation for the plaintiff – when damages cannot be computed or when a substitute cannot be purchased [Ponape Constr. Co. v. Pohnpei, 6 FSM Intrm. 114, 126 (Pon. 1993)]
 - b. may be ordered when goods are unusual or unique
 - c. since boat was in Laurel's "usual style" not unique
 - d. money damages will suffice, thus no specific performance
 2. damages
 - a. injured party (Laurel) has duty to mitigate damages [Pohl v. Chuuk Public Utility Corp., 13 FSM Intrm. 550, 556 (Chk. 2005)]

- b. Laurel should therefore sell boat to someone else for highest price can get
 - (1) if sells for less than \$900 the difference between sale price & \$900 is Laurel's damages
 - (2) if sells for \$900 or more, there are no damages & Laurel will not have a breach of contract cause of action
- E. Hardy's claim for damages
 - 1. Hardy's claim is for consequential damages, which
 - 2. 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 [FSM Dev. Bank v. Adams, 14 FSM Intrm. 234, 256 (App. 2006)]
 - 3. since time was never made the essence of the contract, contemplation that Hardy would need to rent another boat if Laurel's not delivered by Nov. 23 not in Laurel's contemplation
 - 4. Hardy thus not entitled to any damages
- X. (4 points) argue
 - A. unconstitutional
 - 1. is an income tax, & only nat'l gov't can tax income [FSM Const. art. IX, § 2(e)]
 - 2. the ability to tax is the ability to regulate & only nat'l gov't can regulate banking [Actouka v. Kolonia Town, 5 FSM Intrm. 121, 122 (Pon. 1991); FSM Const. art. IX, § 2(g)]
 - B. unconstitutional
 - 1. although FSM Constitution prohibits a noncitizen, or a corporation not wholly owned by citizens, may not acquire title to land or waters in Micronesia [FSM Const. art. XIII, § 4],
 - 2. it also guarantees that equal protection of the laws may not be denied or impaired on account of sex, race, ancestry, national origin, language, or social status [FSM Const. art. IV, § 4], which the state constitution appears to violate because
 - a. denies FSM citizens who are not state citizens the right to acquire title to land in the state &
 - b. denies state citizens who aren't native-born from acquiring title to land in state thus making them second-class citizens