

Checklist of Points to be Covered for Complete Answers
FSM Bar Examination, March 2, 2006

[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) objection — hearsay
 - 1. Wife may use diary entry to refresh her memory for the purpose of testifying [FSM Evid. R. 612(1)]
 - 2. but Wife wants to offer diary entry into evidence; diary entry itself is hearsay
 - 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]
 - c. hearsay exception for recorded recollection may apply [FSM Evid. R. 803(5)]
 - (1) memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable her to testify fully and accurately
 - (2) shown to have been made or adopted by the witness when the matter was fresh in her memory and to reflect that knowledge correctly
 - d. might also be admissible under the present sense impression [FSM Evid. R. 803(1)] or then existing mental condition ("state of mind") [FSM Evid. R. 803(3)] exceptions
 - B. (3 points) objection — hearsay; relevance
 - 1. Husband's statement to his best friend that he has secret bank accounts is an admission of party opponent
 - 2. admission of party opponent is defined as nonhearsay [FSM Evid. R. 801(d)(2)]
 - 3. in divorce case where property division is at issue, bank accounts' existence is highly relevant
 - C. (4 points) objection — hearsay
 - 1. general rule hearsay inadmissible unless falls within one of the exceptions to the hearsay rule [FSM Evid. R. 802];
 - 2. public records exception doesn't allow police reports to be used in criminal case [FSM Evid. R. 803(8)(B)] -- but this isn't criminal case
 - 3. Neighbor's statement in the police report is hearsay within hearsay
 - a. hearsay included within hearsay is admissible under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule [FSM Evid. R. 805]
 - b. while rest of police report can come in, no hearsay exception allows Neighbor's statement; it's inadmissible
 - D. (3 points) objection — hearsay
 - 1. *The Handbook of Business Appraisals* qualifies as a learned treatise
 - a. to the extent called to an expert witness's attention upon cross-examination or relied upon by him in direct examination,

- b. statements, contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice may be admitted
 - 2. admissible under hearsay rule exception for learned treatises [FSM Evid. R. 803(128)]
 - a. if admitted, the statements may be read into evidence
 - b. but may not be received as an exhibit
- E. (3 points) objection — opinion testimony
 - 1. Husband's lay opinion testimony admissible only if
 - a. rationally based on the Husband's perception [FSM Evid. R. 701(a)] and
 - b. helpful to a clear understanding of his testimony or the determination of a fact in issue [FSM Evid. R. 701(b)]
 - 2. opinion testimony generally barred, and since Husband's testimony about condominium's value doesn't fit in either exception should be inadmissible
- F. (3 points) objection — hearsay; relevance
 - 1. Wife's employer's wage records are business records; admissible if
 - a. if kept in the course of a regularly conducted business activity
 - b. if it was the regular practice of that business activity to make the record
 - c. and is shown by the record custodian's testimony or other qualified witness's
 - 2. Wife's wage history is relevant since in divorce a property division is at issue

ETHICS
(10 points)

- II. (7 points)
 - A. previous representation of Anita, Bill, and Clare
 - 1. representation of multiple clients in a single matter is permissible if clients and
 - 2. the consultation includes an explanation of the common representation's implications and the advantages and risks involved [FSM MRPC R. 1.7(b)(2)]
 - 3.
 - B. Primo's conversation with Segundo
 - 1. lawyer cannot reveal information relating to a client's representation 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)]
 - 2. okay
 - a. if Primo restricted conversation with Segundo to generalized description for purpose related to representation
 - b. informed Segundo and obtained his assurances of confidentiality before proceeding with conversation
 - C. offer of part ownership
 - 1. Primo can't enter into a business transaction with a client unless
 - a. the transaction and terms are fair and reasonable to the client and
 - b. fully disclosed in writing to client in terms client can understand and

- c. client is given reasonable opportunity to seek advice of independent counsel in transaction and
- d. the client consents to it in writing [FSM MRPC R. 1.8(a)]
- 2. if he has complied with these conditions — his conduct has not violated FSM MRPC R. 1.8
- 3. however, the situation creates possibility of conflict insofar as it may impair the Primo from providing disinterested advice; Primo should therefore disclose the potential for such conflicts and urge them to seek advice from a second attorney before entering a business arrangement with Primo

GENERAL
(70 points)

III. (9 points)

A. (4 points) business entities

- 1. corporation
 - a. advantages
 - (1) corporation is legal entity separate from its shareholders
 - (2) shareholders generally not liable for corporation's debts
 - (3) shares are freely transferrable
 - b. disadvantages
 - (1) management vested in board of directors, not owners, but
 - (2) in a close corporation the owners are usually on the board of directors
 - (3) although shares are freely transferrable, they may be difficult to sell when it's a close corporation
- 2. partnership
 - a. advantages
 - (1) doesn't need incorporation papers or board of directors
 - (2) partners control business
 - b. disadvantages
 - (1) partners personally liable for partnership's debts
 - (2) personal liability is unlimited

B. (5 points)

- 1. liability of Anita, Bill, and Clare
 - a. owners are personally liable for corporation's debts if business started before $\frac{3}{4}$ of stock subscribed & at least 10% paid in [Mid-Pac v. Senda, 4 FSM Intrm. 376, 384-86 (Pon. 1990)]
 - b. all but 8% (Bill's share) of start-up capital paid in, so owners not personally liable on this ground
 - c. but Bill liable for unpaid stock subscription [Creditors of Mid-Pac Constr. Co. v. Senda, 4 FSM Intrm. 157, 161 (Pon. 1989)]
- 2. how creditors would be paid in consolidated insolvency cases; after secured creditors paid (with their security) generally, first in time, first in right [see In re Island Hardware, 5 FSM Intrm. 170, 173-75 (App. 1991).]
 - a. first priority — FSM Wage & Salary Tax (statutory lien)
 - b. Second priority — wages of low-level employees
 - c. third priority

- (1) creditors with judgments and writs of execution thereon (in order of date of writ unless consolidated action) or orders in aid of judgment [*see In re Engichy*, 11 FSM Intrm. 520, 528 (Chk. 2003)]
 - (2) gross revenue tax (by date gov't gave notice to judgment creditors)(equal status with writ holders)(statutory lien; no lien status for penalties and interest on GRT)
- d. fourth priority — judgment creditors
- e. fifth priority
 - (1) unsecured creditors
 - (2) gross revenue tax penalties and interest
- 3. other avenue of relief — Congress has passed a bankruptcy law; creditors may wish to pursue an involuntary bankruptcy action

ETHICS (cont.)

IV. (3 points)

- A. generally, a lawyer can't reveal information relating to a client's representation unless
 - 1. the client consents after consultation
 - 2. except for disclosures that are impliedly authorized in order to carry out the representation
- B. Asquith has duty to maintain Gates's admission of customs tax evasion confidential [FSM MRPC R. 1.6(a)]
- C. since lawyer Asquith has direct supervisory authority over the nonlawyer Dolores
 - 1. he must make reasonable efforts to ensure that the person's conduct is compatible with the lawyer's professional obligations [FSM MRPC R. 5.3(b)]
 - 2. Asquith failed to instruct Dolores not to reveal the note's contents (or generally instruct her about confidentiality)
 - 3. Asquith could be disciplined since he has direct supervisory authority over Dolores
 - a. if he knows of the conduct at a time when its consequences can be avoided or mitigated
 - b. but fails to take reasonable remedial action
 - c. but it appears that Asquith might not have known of Dolores's conduct
- D. Asquith may have to withdraw if Gates continues to persist in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; but the information here is about Gates's past, not future, acts

GENERAL (cont.)

- V. (15 points) 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
 - A. whether items seized should be suppressed
 - 1. there was probable cause for search warrant for Gates's financial records;
 - a. the initial source of the information, Dolores, may have disclosed Gates's confidences illegally (violation of lawyer-client privilege); but

- b. Dolores was not acting as a police agent;
 - c. corroborating evidence — tax records and employees' confirmation
 - d. under totality of circumstances, no suppression
 - 2. uncertain from facts (including those in question IV) whether there was probable cause for the handguns (the previous question doesn't disclose the nature of the contraband that Gates told lawyer Asquith he was smuggling in); (more facts would come out in suppression hearing about why the police thought the contraband was handguns) discuss possible suppression
 - 3. vial of cocaine found in tank of toilet; if not in plain view in place where items sought in search warrant could be hidden, cocaine should be suppressed
 - a. documents wouldn't be hidden there because would get wet, but
 - b. handguns might (if wrapped in plastic), argue either way
- B. whether any items seized should be returned to Gates
 - 1. contraband, even if illegally seized is forfeit and can't be returned to Gates [handguns and cocaine are contraband]
 - 2. documents appear to be legally seized; therefore no requirement to return them although the police might once they have copied them
- C. FSM Supreme Court ruling
 - 1. nat'l firearms statute not unconstitutional; is a power the nat'l gov't can exercise based on its power to regulate interstate and foreign commerce [FSM Const. art. IX, 2(g)] and to provide for the national defense [FSM Const. art. IX, § 2(a)] [*see* Jano v. FSM, 12 FSM Intrm. 569 (App. 2004)]
 - 2. argue whether the same holds true for controlled substances although no case precedent [but charge probably dismissed after seized cocaine suppressed]

VI. (12 points)

- A. (2 points) clerk can't enter default judgment because it includes attorney's fees and punitive damages which can only be determined by the court; clerk can only enter default judgments for sums certain & attorney's fees and punitive damages are never sums certain
- B. (4 points) amounts included in judgment
 - 1. \$12,345.67 for goods sold
 - 2. \$25 costs of service
 - 3. prejudgment interest only if included in the contractual terms for the sale of goods and if sought in complaint (it appears it wasn't mentioned in complaint)
 - 4. attorney's fees only if included in the contract and if sought in complaint (it appears it wasn't mentioned in complaint); and then only in an amount determined reasonable by the court
 - 5. no punitive damages; punitive damages are not a contract remedy; only compensatory damages are allowed for breach. [Amayo v. MJ Co., 10 FSM Intrm. 244, 249 (Pon. 2001)]
- C. (3 points) motion for relief because of insufficient service probably denied
 - 1. service may be made upon an individual other than an infant or an incompetent person, 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 [FSM Civ. R. 4(d)(1)]
 - 2. Diogenes's 16-year old high school honors student daughter appears to be of suitable age and discretion

- D. (3 points) motion for relief would be on basis of excusable neglect [FSM Civ. R. 60(b)(1)]
1. argue heart attack & medical treatment in Manila constituted excusable neglect
 2. motion won't be granted unless meritorious defense also present [UNK Wholesale, Inc. v. Robinson, 11 FSM Intrm. 118, 122 (Chk. 2002)]
 3. Diogenes may have asserted meritorious defense to parts
 4. courts favor resolution on the merits
 5. probably granted
- VII. (16 points)
- A. (6 points) John can sue
1. Bill for battery (harmful or offensive contact); battery is the harmful or offensive contact with a person, resulting from an act intended to cause that contact [Conrad v. Kolonia Town, 8 FSM Intrm. 183, 191 (Pon. 1997)]
 2. Bill and Dep't of Pub. Safety for negligence; civil rights
 - a. elements of actionable negligence are the breach of a duty on the part of one person to protect another from injury, and that breach is the proximate cause of an injury to the person to whom the duty is owed, which may be summarized as: a duty of care, a breach of that duty, which breach proximately causes damages [Fabian v. Ting Hong Oceanic Enterprises, 8 FSM Intrm. 63, 65 (Chk. 1997)]
 - b. Bill left John by the side of road unconscious assuming someone would come to pick him up
 - c. Bill owed John duty of care when he took him into custody to see that no further harm came to him and that he got needed medical attention [*see* Estate of Mori v. Chuuk, 10 FSM Intrm. 6, 14 (Chk. 2001)]
 - d. civil rights [11 F.S.M.C. 701(3)] John in police custody (arrested) and denied needed medical care because left by side of road [*see* Estate of Mori v. Chuuk, 10 FSM Intrm. 6, 14 (Chk. 2001)]
 - e. Dep't Pub. Safety on *respondeat superior* theory since Bill was acting within the scope of his authority by arresting John
 3. unknown driver for negligence, if driver ever identified
 4. Dr. Doom, Nurse Painless, & Chuuk State Hosp. for negligence — medical malpractice; battery
 - a. battery for unconsented touching — the operation
 - b. negligence for medical care below
 5. John's wife can sue for loss of consortium
 - a. loss of consortium claim is derivative from a spouse's claim for damages [Epiti v. Chuuk, 5 FSM Intrm. 162, 170 (Chk. S. Ct. Tr. 1991)]
 - b. loss of consortium contemplates something more than loss of general overall happiness, and includes components of love and affection, society and companionship, sexual relations, right of performance of material services, right of support, aid and assistance, and felicity. [Amayo v. M] Co., 10 FSM Intrm. 244, 253 (Pon. 2001)]
- B. (4 points) defenses
1. for battery Bill can claim self-defense and using reasonable force to effect John's arrest for assault with a machete
 2. Dep't of Pub. Safety can assert that it did not ratify Bill's actions in leaving John by the roadside; it isn't

- how it trained its officers
3. for negligence Bill can assert that unknown driver's acts and medical malpractice at hosp. were independent supervening causes of John's injuries; but
 - a. leaving near road is negligent and being hit by a careless driver is a foreseeable consequence when John not visible because lying down and was unconscious and thus unable to protect himself by moving out of the way
 - b. medical malpractice by hospital staff does not relieve a tortfeasor of his responsibility for damages, because any injuries that might have been caused by the staff flowed naturally from his own acts [Primo v. Refalopei, 7 FSM Intrm. 423, 429 (Pon. 1996)]
 4. Dr. Doom, Nurse Painless, & Chuuk State Hosp. can defend battery because it was emergency, life-threatening situation and consent could not be obtained
 5. comparative negligence
- C. (3 points) damages
1. for John
 - a. medical expenses, past & future
 - b. pain and suffering
 - c. past lost wages
 - d. future lost wages
 - e. loss of enjoyment of life(?)
 - f. punitive damages
 - (1) not available for negligence
 - (2) only available for gross negligence
 - (3) generally not available against state, unless waived by statute
 - g. attorney's fees (provided for in civil rights statute [11 F.S.M.C. 701(3)])
 2. for John's wife — loss of consortium damages only
- D. (3 points) Bill's cause of action against *Chuuk Barracuda*
1. defamation (libel because was written); but truth is complete defense against defamation
 2. possibly false light — whoever publicizes a matter about another that places the other in a false light before the public is liable for tortious invasion of privacy if the false light in which the other was placed would be highly offensive to a reasonable person, and the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed [Nethon v. Mobil Oil Micronesia, Inc., 6 FSM Intrm. 451, 456 (Chk. 1994)]; again truth should be a defense

VIII. (6 points)

- A. (3 points) both municipal constitutional provision and municipal ordinance unconstitutional
1. the nat'l gov't has the power to appropriate public funds [FSM Const. art. IX, § 3(a)]
 2. foreign financial assistance received by nat'l gov't must go into separate fund [FSM Const. art. XII, § 1(b)]
 3. FSM Const. is supreme law of the land [FSM Const. art. II, § 1]
 4. municipal constitution can't overrule or restrict the nat'l gov't's power to spend
 5. municipal ordinance; unconstitutional because it tries to enforce unconstitutional municipal constitutional provision

- B. (3 points) unconstitutional
1. although state may impose taxes other than on income and imports
 2. this tax singles out insurance businesses and thus is state regulation of the insurance business
 3. regulation of insurance industry is power expressly reserved to the nat'l gov't [FSM Const. art. IX, § 2(g)]
- IX. (8 points)
- A. interpleader — an action by a stakeholder to determine the rights of various claimants to property it holds but does not claim so as not to be subject to multiple and potentially conflicting judgments — e.g., an insurance company must pay for damage its insured caused to certain property, but ownership of the property is claimed by several people; the insurance company will institute an interpleader action, name as defendants all those having a claim to the property, pay the money into court, and the court can determine who among the defendants (is) (are) entitled to the proceeds; stakeholder/plaintiff is then dismissed from action [see FSM Civ. R. 22]
 - B. pendent jurisdiction — power of national court to decide matters over which it ordinarily would not have subject matter jurisdiction but because it is a part of a larger case over which it does have subject matter it has jurisdiction to decide it as well if they arise out of a common nucleus of operative fact and are such that they ordinarily would be expected to be tried in one judicial proceeding; the rule of decision will be state law [*Ponape Constr. Co. v. Pohnpei*, 6 FSM Intrm. 114, 116 (Pon. 1993)]
 - C. admiralty and maritime — cases involving vessels, contracts to be performed at sea [*Lonno v. Trust Territory (I)*, 1 FSM Intrm. 53, 68-71 (Kos. 1982)] including supplying necessities [*Maruwa Shokai (Guam), Inc. v. Pyung Hwa* 31, 6 FSM Intrm. 1, 3 (Chk. 1993)], ship mortgages, torts occurring at sea [*Federal Bus. Dev. Bank v. S.S. Thorfinn*, 4 FSM Intrm. 367, 374 (App. 1990)], vessel forfeitures [*M/V Hai Hsiang #36 v. Pohnpei*, 7 FSM Intrm. 456, 463 (App. 1996)], offenses at sea, etc.; exclusive jurisdiction in FSM Supreme Court [FSM Const. art. XI, § 6(a)]
 - D. [none]
 - E. diversity jurisdiction — national courts have concurrent jurisdiction over disputes between a state and a citizen of another state, between citizens of different states, and between a state or a citizen thereof, and a foreign state, citizen, or subject [FSM Const. art. XI, § 6(b)] even though the case may be a state law cause of action and state law will provide the rules of decision [bonus: no diversity jurisdiction when parties are all foreign citizens]
- X. (4 points)
- A. facts state that parties agree there was a contract (offer, acceptance, consideration) to pay \$2400 for damaged car
 - B. Deimos breached the agreement by failing to pay the \$2400
 - C. no time limit given, so breach occurred when no payment after reasonable time
 - D. Phobos (plaintiff) has duty to mitigate damages when contract breached [*George v. Alik*, 13 FSM Intrm. 12, 15 (Kos. S. Ct. Tr. 2004); *Panuelo v. Pepsi Cola Bottling Co. of Guam*, 5 FSM Intrm. 123, 129 (Pon. 1991)]
 - E. Phobos did mitigate damages by selling damaged car for \$800
 - F. court should award Phobos \$1600 to put Phobos in position would've been had the parties performed