

Checklist of Points to be Covered for Complete Answers
FSM Bar Examination, March 4, 2010

[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]

ETHICS

(10 points)

- I. (4 points) potential ethical issues:
- A. the fee may be unreasonable for the time, labor, and skill involved [MRPC 1.5(a)]
 - B. lawyer's duty to keep client reasonably informed [FSM MRPC R. 1.4(a)] should mean
 - 1. Radon must inform client of the 1982 certificate of title (which makes Client's case a very strong one) Radon discovered because
 - 2. lawyer may not withhold information to serve the lawyer's own interest or convenience [FSM MRPC R. 1.4 cmt.]
 - C. Radon cannot acquire a proprietary interest in cause of action or subject matter of litigation [MRPC 1.8(j)] (Radon could instead opt for lien to secure his fees)
- II. (6 points)
- A. lawyer is responsible for conduct of a non-lawyer assistant [FSM MRPC R. 5.3]
 - 1. that could be a violation of the rules of professional conduct if engaged in by a lawyer if
 - 2. lawyer has direct supervisory authority over the person, and
 - 3. knows of the conduct at a time when its consequences can be avoided or mitigated
 - 4. but fails to take reasonable remedial action [FSM MRPC R. 5.3(c)(2)]
 - B. lawyer must hold clients' property that is in lawyer's possession in connection with a representation separate from lawyer's own property [FSM MRPC R. 1.15(a)]
 - 1. funds must be kept in a separate account maintained in the state where the lawyer's office is situated
 - 2. lawyer should take prompt remedial action to replace funds in the client trust account [this is regardless OF when or whether your long-time secretary repays the funds]
 - C. ethical obligations to clients
 - 1. client one
 - a. may bill client one for the \$500
 - b. but must see that client one's other \$1500 remains in or is put back in your client trust account
 - 2. client two
 - a. must pay client two the \$4,500 net proceeds without delay when client two visits the office that afternoon because
 - b. lawyer must promptly deliver to the client any funds that the client is entitled to receive [FSM MRPC R. 1.15(b)] &
 - c. upon the client's request must promptly render a full accounting regarding the funds [FSM MRPC R. 1.15(b)]
 - 3. client three
 - a. must ensure that client three's \$2,000 is promptly replaced in account
 - b. if your services are still required \$2,000 advance payment may remain in account to be billed against as fees are earned
 - c. if your services are no longer required, you must promptly return any unearned fees [FSM MRPC R. 1.16(d)]
 - 4. results

- a. \$4,500 paid to client two in the afternoon
- b. \$4,000 should be in client trust account after client two paid
- c. \$3,500 left in client trust account after client one billed for \$500
- d. you must pay client two \$4,500; bill client one \$500; make sure \$3,500 is in your client trust account

EVIDENCE

(20 points)

- III. (17 points) deposition excerpt and police report are hearsay
- 1. 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];
- A. (3 points) deposition excerpt
- 1. should be admissible
 - 2. Bert Bystander is dead and thus unavailable [FSM Evid. R. 804(a)(4)]
 - 3. admissible as former testimony [FSM Evid. R. 804(b)(1)]
 - a. if in a deposition taken in compliance with law in the course of the same or another proceeding
 - b. if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination
 - 4. Driver's statement to Bystander is admissible as admission of party-opponent [FSM Evid. R. 801(d)(2)]
 - 5. if Driver feels that admission at trial of only part of Bystander's deposition is unfair, Driver may require Pedaler to introduce at that time any other part of the deposition which ought in fairness to be considered contemporaneously with it [FSM Evid. R. 106]
- B. (14 points) police report
- 1. police report is admissible under the public-records-and-reports exception [FSM Evid. R. 803(8)]
 - 2. since this is a civil, not criminal case, the ban on police reports in criminal cases doesn't apply [see FSM Evid. R. 803(8)(B)]
 - 3. but statements in report are 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. A.N. Officer's statement he went to downtown bank should be admissible as non-hearsay
 - (1) not offered for truth of matter therein – that there was a bad accident in front of bank
 - (2) was offered for effect of radio message on A.N. Officer – that it caused him to go to downtown bank
 - c. A.N. Officer's statements about Pedaler's injuries is opinion testimony
 - (1) lay witness opinion testimony generally not allowed [FSM Evid. R. 701] except when
 - (a) rationally based on the perception of the witness &
 - (b) helpful to a clear understanding of his testimony or the determination of a fact in issue
 - (2) A.N. Officer is most likely lay witness when it comes to

- medical injuries
 - (3) but his description of Pedlar's injuries is within exception for lay opinion & thus admissible
 - d. A.N. Officer's statement that he agreed that accident was Driver's fault
 - (1) is a legal opinion &
 - (2) thus inadmissible
 - e. Pedaler's statement about how accident happened is hearsay
 - (1) doesn't fit in excited utterance exception [FSM Evid. R. 803(2)] because
 - (2) it was too late after accident
 - (3) not admissible
 - f. Driver's statement that he was sorry
 - (1) is defined as not hearsay because
 - (2) is admission of party-opponent [FSM Evid. R. 801(d)(2)]
 - (3) admissible
 - g. Bert Bystander's statement is hearsay
 - (1) too long after event to be excited utterance exception [FSM Evid. R. 803(2)]
 - (2) is lay witness opinion testimony with a legal conclusion [FSM Evid. R. 701]
 - (3) inadmissible
- 4. police report is admissible but the inadmissible portions thereof should be redacted

- IV. (3 points) judge should rule the statement inadmissible
- A. although statement is non-hearsay as admission of party-opponent [FSM Evid. R. 801(d)(2)]
 - B. evidence of statements made in participating in a customary apology or customary settlement is not admissible [FSM Evid. R. 408]

GENERAL

(70 points)

- V. (8 points)
- A. (3 points) motion to remand granted
 - 1. FSM Supreme court has no jurisdiction over case
 - 2. whether case is one arising under national law (a case over which FSM court would have jurisdiction) is determined from the complaint's allegations not from the defenses raised [*e.g.*, Enlet v. Bruton, 10 FSM Intrm. 36, 40 (Chk. 2001)]
 - 3. *Pohnpei Enterprise's* defense may be a national law defense but Anne's causes of action are only state law claims so no FSM Supreme Court trial division jurisdiction
 - B. (2 points) remand should be denied because
 - 1. diversity jurisdiction exists
 - 2. plaintiff and defendant are citizens of different states when suit filed
 - a. Drummer's, Inc., since it is a corporation, its citizenship is determined by the citizenship of its owner [Luzama v. Ponape Enterprises Co., 7 FSM Intrm. 40, 44 (App. 1995)] – Pohnpei citizenship

- b. Ben is Chuuk citizen
 3. plaintiff's move to Pohnpei doesn't change his citizenship
 4. drummer, Inc. Has constitutional right to have case heard in nat'l court [e.g., Gilmete v. Carlos Etscheit Soap Co., 13 FSM Intrm. 145, 150 (App. 2005)]
 - C. (3 points) remand should be denied
 1. although the parties are citizens of the same state so no diversity
 2. claim alleging discrimination in violation of nat'l law is claim arising under national law [FSM Const. art. XI, § 6(b)] and therefore nat'l court jurisdiction exists
 3. FSM court may hear claim alleging discrimination in violation of state law under pendent jurisdiction since claim appears to arise from same nucleus of operative fact [e.g., Estate of Mori v. Chuuk, 10 FSM Intrm. 6, 13 (Chk. 2001)]
- VI. (6 points)
- A. Argon should move to amend the complaint
 1. under Rule 15(b) leave to amend is freely granted
 2. pleadings may even be amended after judgment to conform to the evidence [FSM Civ. R. 15(b)]
 - B. if evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings
 1. court may allow the pleadings to be amended and shall do so freely
 - a. when the presentation of the merits of the action will be subserved thereby and
 - b. the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits
 2. court may grant a continuance to enable the objecting party to meet such evidence
 - C. since it doesn't appear defense will be prejudiced (claim involves same arrest) court should grant amendment; & continuance if needed by defendant
- VII. (12 points) when a search or seizure is conducted without a warrant the burden is on the government to justify the search or seizure [FSM v. Aiken, 16 FSM Intrm. 178, 184 (Chk. 2008); FSM v. Santa, 8 FSM Intrm. 266, 268 (Chk. 1998)] prosecutor's responses to suppression motion
- A. George isn't a government agent
 1. so should be no suppression based upon George's acts
 2. Constitution's protection against unreasonable search & seizure [FSM Const. art. IV, § 5] only protects persons from gov't actions
 3. but, since George seems to be regular police informant could he be considered a gov't actor? probably not
 - B. Oliver is police officer
 1. so his entry of Dennis's hotel room covered by Constitution's protection against unreasonable search & seizure [FSM Const. art. IV, § 5]
 2. Oliver doesn't have warrant
 3. police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure [FSM v. Tipen, 1 FSM Intrm. 79, 85 (Pon. 1982)]
 4. burden is on the government to justify a search without a warrant [FSM v. Tipen, 1 FSM Intrm. 79, 87 (Pon. 1982)]
 5. possible applicable exceptions to general requirement for warrant

- a. exigent circumstances
 - (1) exigent circumstances may make it necessary or constitutionally reasonable to proceed with a search without first obtaining a warrant [FSM v. Sapusi, 16 FSM Intrm. 315, 318 (Chk. 2009)]
 - (2) George's report provided Oliver with probable cause to believe evidence of crime in Dennis's room since George had been reliable informant in the past
 - (3) Oliver may not have had time to obtain warrant if
 - (a) Dennis coming back soon (might not wait until dinnertime)
 - (b) & could take watches away easily in one suitcase
 - (c) Dennis apparently out looking for buyer while search going on
 - (4) BUT Oliver may have been able to obtain search warrant quickly &
 - (a) if Dennis isn't returning until dinnertime
 - (b) Oliver would've had time to obtain & execute a search warrant
 - b. consent
 - (1) consent can be given by anyone with lawful authority
 - (2) does George have lawful authority to consent?
 - (a) normal hotel employee probably doesn't
 - (b) but George was Dennis's friend & was invited in by Dennis
 - (c) George was security guard; does this give George more authority to grant consent?
 - (d) Oliver entered in George's presence
 - c. Oliver's search didn't exceed scope of George's
 - (1) possible argument
 - (2) George's search didn't violate Constitution so when Oliver, accompanied by George, search was less intrusive than George's, possibly legal?
- C. seizure of watches
1. if Oliver's warrantless search is justifiable on one of grounds listed above, then
 2. seizure of watches in plain view [FSM v. Sato, 16 FSM Intrm. 26, 29-30 (Chk. 2008)]
 - a. warrant is not necessary to authorize seizure and the seizure is therefore reasonable
 - b. when the contraband or the instrument of a crime is in plain view of a police officer
 - c. who has a right to be in the position to have that view
 3. inevitable discovery of watches (doesn't seem likely & seems contrary to spirit of warrant requirement)
- VIII. (12 points)
- A. (8 points)
1. Phobos's claims against Deimos
 - a. assault
 - (1) assault refers to the apprehension of offensive contact resulting from an act intended to cause the contact [Conrad

- [Ludwig v. Mailo, 5 FSM Intrm. 256, 259 (Chk. S. Ct. Tr. 1992)]
- b. Deimos probably not acting within scope of his employment when he threw the pizza or even acting on its behalf
 2. negligent supervision/retention
 - a. Phobos might argue that Island Pizza Palace was negligent in retaining Deimos or in supervising him
 - b. negligence is 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
 - c. Phobos might argue that Island Pizza Palace should've expected Deimos's violent outburst because it had to reprimand Deimos earlier for a fight, but
 - d. one fight shouldn't be enough notice to employer that to protect public it should've fired Deimos so negligent retention claim would likely fail
 - e. negligent supervision might work
 - (1) Phobos would argue that Island Pizza Palace was negligent in supervising Deimos because earlier fight with co-worker & Deimos's foul temper that day showed that he needed closer supervision
 - (2) but Island Pizza Palace would argue that isolated fight wasn't enough
 - (3) if Phobos can prove duty and breach by Island Pizza Palace, causation and damages would fall into place

IX. (11 points)

- A. (8 points) Harry's argument in reply to Exotic Excursion Inc.'s opposition to his summary judgment motion
1. 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)]
 2. summary judgment must be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law [FSM Civ. R. 56(c)]
 3. moving party is entitled to summary judgment when it has demonstrated that there are no genuine issues of material fact remaining, and that it is entitled to judgment as a matter of law [Iriarte v. Etscheit, 8 FSM Intrm. 231, 236 (App. 1998)]
 4. once moving party 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 [Nanpei v. Kihara, 7 FSM Intrm. 319, 325 (App. 1995)]
 5. non-moving party may not rely on
 - a. unsubstantiated denials of liability to carry its burden; it must set forth specific facts showing that there is a genuine issue for trial; if the adverse party does not respond by affidavits or as otherwise provided in Rule 56, summary judgment, if appropriate, will be entered against the adverse party present some competent evidence

- that would be admissible at trial which demonstrates that there is a genuine issue of fact [*see, e.g., Suldan v. Mobil Oil Micronesia, Inc.*, 10 FSM Intrm. 574, 579 (Pon. 2002)] or
- b. denials in its answer [*FSM Social Sec. Admin. v. Fefan Municipality*, 14 FSM Intrm. 544, 547 (Chk. 2007)]
6. Exotic Excursions, Inc.'s interrogatory response admitted to fact that the M/V *Miraculous* discharged untreated sewage into FSM waters; this evidence isn't controverted by any other evidence; therefore no genuine issue of material fact as to that point
 7. Exotic Excursions, Inc. omitted its affirmative defense of innocent passage from its answer
 - a. Exotic Excursions, Inc. could've moved to amend its answer to include "innocent passage" as an affirmative defense
 - b. but didn't; Harry will argue that that omission constitutes Exotic Excursions, Inc.'s waiver of defense
 8. if court considers the Exotic Excursions, Inc.'s opposition to also constitute a motion to amend its answer, the court may
 - a. grant motion to amend answer if
 - (1) Harry can't show that he would be prejudiced by the amendment, or
 - (2) that any prejudice to Harry couldn't be cured by granting Harry a continuance to investigate
 - b. reasons to allow amendment
 - (1) motions to amend pleadings should be freely granted [FSM Civ. R. 15(b)]
 - (2) court prefers to decide cases on the merits rather than technicalities
- B. (2 points) if granted the \$12,000 judgment, Harry can also seek
1. reasonable attorney's fees since the statute permits it (to be determined by the court after Harry's application for fees)
 2. post-judgment interest of 9% per annum until the judgment is paid [6 F.S.M.C. 1401]
 3. costs, customarily granted to the prevailing party [FSM Civ. R. 54(d)]
- X. (14 points)
- A. substantive Issues
1. whether binding agreement made
 - a. was there offer and acceptance?
 - (1) reply "Sure, sure, whatever you want." is not agreement or acceptance; under circumstances was a polite rebuff
 - (2) parties too inebriated to make valid offer or acceptance
 - b. was there a meeting of the minds?
 - (1) same reasons as a(1) & a(2)
 - (2) may argue lack of sakau or turtle meat means Webster never believed was accepting offer,
 - (3) but since Aisek comes from place that custom evidently not followed perhaps not (*e.g., did Webster drink sakau or eat turtle meat when he bought M/V Caroline Pride?*)
 - (4) therefore no meeting of minds
 2. was writing necessary for a binding agreement?
 - a. would oral contract be valid under law of place, Palau, where made? or

- b. is a writing needed to change the ship's registry where ship was registered? or
 - c. is a writing needed where contract sought to be enforced?
 - B. steps to take
 - 1. if parties don't have genuine dispute that the facts are as set out in the question then Webster could move for summary judgment that his acts and words did not, as a matter of law, create a binding contract
 - 2. if factual findings necessary then motion denied and matter proceed to trial
 - 3. Webster would expect to prevail at trial (if not on summary judgment)
 - C. results
 - 1. Webster prevails (likely)
 - 2. if Aisek prevails, discuss specific performance v. damages
 - a. specific performance remedy 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. damages; definiteness of the contract terms and the ease or difficulty of enforcement or supervision must be considered before awarding specific performance damages [Pohnpei v. Ponape Constr. Co., 7 FSM Intrm. 613, 623 (App. 1996)]
- XI. (& points) standard of review
- A. proper burden for proof in civil case is preponderance of the evidence – not reasonable doubt; appellate court will review trial court's findings of fact – that certain words were spoken and acts took place – whether trial court was clearly erroneous in findings by preponderance of the evidence
 - B. whether the words and acts constitute legally-binding contract
 - 1. where the existence of a contract is at issue, the trier of fact determines whether the contract did in fact exist
 - 2. standard of review for findings of fact is whether the trial court's findings are clearly erroneous [Pohnpei v. Ponape Constr. Co., 7 FSM Intrm. 613, 620 (App. 1996)]
 - C. interpretation of contract terms is question of law which appellate court reviews de novo [*see, e.g.,* Wolphagen v. Ramp, 9 FSM Intrm. 191, 194 (App. 1999)]