

**Checklist of Points to be Covered for Complete Answers**  
**FSM Bar Examination, August 3, 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) judge's ruling is incorrect
1. objection – 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]
  2. declarant, Chester, is unavailable since he is deceased [FSM Evid. R. 804(a)(4)]
  3. since declarant is unavailable, transcript is admissible under hearsay exception for former testimony
    - a. former testimony admissible if given as a witness at another hearing of the same or a different proceeding, 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 [FSM Evid. R. 804(b)(1)]
    - b. although Flambeau did not cross-examine Chester at the criminal trial, he had the opportunity to and a similar motive to develop the testimony
- B. (3 points) judge's ruling is incorrect
1. objection – hearsay; relevance
  2. hearsay
    - a. Braz's testimony about Flambeau's statement to him is an admission of party opponent
    - b. admission of party opponent is defined as nonhearsay [FSM Evid. R. 801(d)(2)]
  3. relevance
    - a. relevant evidence is any evidence that evidence having 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]
    - b. generally, evidence of character or prior bad acts not admissible to show that someone acted in conformity with his character [FSM Evid. R. 404]
    - c. evidence that Flambeau tried to concoct a false alibi doesn't only relate to his character but to his consciousness of guilt
    - d. central issue in Nopay's defense is whether Flambeau set the fire; evidence of his state of mind is relevant to that
- C. (3 points) judge's ruling is correct

1. general rule: hearsay inadmissible unless falls within one of the exceptions to the hearsay rule [FSM Evid. R. 802];
  2. no hearsay exception applies
    - a. recorded recollection – a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly is admissible [FSM Evid. R. 803(5)]
    - b. but Walker has no memory of making the notes and therefore cannot satisfy the elements of the recorded recollection hearsay exception
  3. writing may be used to refresh memory [FSM Evid. R. 612]; but it didn't refresh Walker's memory
- D. (3 points) judge's ruling is correct
1. objection – hearsay
  2. Nopay called Semes to rehabilitate Gloria
    - a. ordinarily cannot rehabilitate a witness by showing 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)]

II. (8 points)

- A. (2 points) question objectionable; evidence of proposing or participating in a customary apology or customary settlement is not admissible [FSM Evid. R. 408]; judge should sustain the objection
- B. (3 points) question okay; evidence of liability insurance not admissible to show negligence, but is admissible if offered for other purpose, such as to show ownership or control [FSM Evid. R. 411]; judge should overrule objection if evidence offered to show Pohnpei Trucking Co.'s ownership or control of the truck Boyd drove
- C. (3 points) question okay
  1. police reports are admissible in civil cases (but not criminal cases) since they are matters observed pursuant to duty imposed by law as to which matters there was a duty to report [FSM Evid. R. 803(8)(B)]
  2. Boyd's statement is admissible as non-hearsay as (vicarious) admission of party-opponent [FSM Evid. R. 801(d)(2)] since Boyd is Pohnpei Trucking Co.'s employee or agent; would also be admissible as Boyd's declaration against interest if Boyd unavailable [FSM Evid. R. 804(b)(3)]

ETHICS

(10 points)

III. (10 points)

- A. even though only Medicins is paying Lawyer's fee and although Medicins hired Lawyer, Lawyer represents both Doctor and Medicins
  - 1. Lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client [FSM MRPC R. 1.7 cmt.]
    - a. since Medicins's legal obligation to defend Doctor was created by contract
    - b. but Lawyer must consider interests of both Doctor and Medicins
  - 2. representation of multiple clients in a single matter is permissible if clients consent and
  - 3. the consultation includes an explanation of the common representation's implications and the advantages and risks involved [FSM MRPC R. 1.7(b)(2)]
    - a. this is common representation because Doctor and Medicins are aligned in interest
    - b. if Lawyer believes at any stage of the proceedings that the insured and insurer are in direct conflict, Lawyer must inform both parties and suggest insured (Doctor) retain independent counsel
  - 4. representation of Doctor and Medicins may be limited in scope only to matters related to the insurance coverage [FSM MRPC R. 1.2 cmt.]
- B. Lawyer's ethical behavior
  - 1. Lawyer has duty to clients of
    - a. diligence [FSM MRPC R. 1.3],
    - b. loyalty [*see* FSM MRPC R. 1.7 cmt.],
    - c. to keep client informed [FSM MRPC R. 1.4], and
    - d. confidentiality [FSM MRPC R. 1.6]
  - 2. Lawyer was diligent in reviewing record, conducting discovery, and obtaining expert opinion
  - 3. Lawyer must see to it that neither client is disadvantaged by common representation
    - a. insurance contract's settlement clause may unfairly disadvantage Doctor in Lawyer's representation
    - b. could be unethical to enter common representation if Lawyer knew of contract's settlement clause before he entered representation (although facts indicate that Lawyer recommended settlement, not proof he knew of clause in insurance contract between Doctor and Medicins)
    - c. but when Medicins approved settlement idea, Lawyer immediately began negotiating with Exec;
      - (1) this was breach of loyalty and duty to keep Doctor informed
      - (2) was in Medicins's best interest, but not Doctor's
    - d. when Medicins wanted to settle for \$70,000, avoid trial & other costs (including higher settlement) & Doctor doesn't want to settle, a real and present conflict arose
      - (1) Lawyer had ethical obligation of loyalty to disclose conflict to



- C. fraud – elements of fraud are 1) misrepresentations, 2) made to induce action by the plaintiffs, 3) with reliance by the plaintiffs upon the misrepresentations, 4) to their detriment [Pohnpei v. Kailis, 6 FSM Intrm. 460, 462 (Pon. 1994)]
- D. damages – all of the above causes of action require proof of damages;
  - 1. at this stage of litigation, nothing has happened & Doctor hasn't suffered any damages;
  - 2. thus none of the actions above are possible until case against Doctor has been resolved & some damages actually occurred

V. (16 points)

A. (10 points) Abel

1. against Diana

a. negligence

- (1) elements of actionable negligence are: 1) a duty of care, 2) a breach of that duty, and 3) damages proximately caused by that breach [Nelper v. Akinaga, Pangelinan & Saita Co., 8 FSM Intrm. 528, 535 (Pon. 1998)]
- (2) Diana knew there was a risk involved in trying to park her car without help
- (3) Abel was a foreseeable plaintiff, subject to injury if scaffold knocked down
- (4) Diana therefore owed him duty of care (she was on public road or in public place and owed duty to act as reasonably prudent driver operating her car)
- (5) Diana breached duty when tried to park without help because Sam refused (facts indicate that she knew she needed help to park)
- (6) Diana caused Abel's injuries since, but for her actions Abel wouldn't have been injured
- (7) Diana's acts were the proximate cause of Abel's injury
- (8) damages – Abel can recover for actual injury & pain & suffering proximately caused by Diana's acts
- (9) defenses
  - (a) contributory negligence (Abel's failure to wear hard hat) would bar any recovery, but contributory negligence not allowed as generally seen as contrary to Micronesian custom
  - (b) comparative negligence – Abel's recovery will be reduced proportionately by the degree it is proven that he was at fault

b. battery

- (1) Diana is liable to Abel for battery if she acted intending to cause harmful contact with Abel or an imminent apprehension of such contact, and a harmful contact indirectly resulted [Davis v. Kutta, 7 FSM Intrm. 536, 544 (Chk. 1996)]
- (2) Diana didn't hit Abel with her car, set the forces in motion that

- resulted in Abel's fall and injury
- (3) Diana will be found to have intended the consequences of her act if she knew with reasonable certainty offensive contact would occur
  - (4) however, knowledge of a "risk" is not the same as substantial certainty; court must find Diana knew the probability scaffold was occupied and proceeded in face of that knowledge; otherwise Diana doesn't have requisite intent
  - (5) since battery is an intentional tort; none of the defenses to negligence such as assumption of risk, comparative negligence, contributory negligence and last clear chance apply [Conrad v. Kolonia Town, 8 FSM Intrm. 183, 193 (Pon. 1997)]
2. against Sam
    - a. would have to proceed against Sam for negligence
    - b. negligence requires breach of a duty to a foreseeable plaintiff
    - c. Sam owed Abel no duty
    - d. Sam only owed duty if had affirmative duty to act
    - e. Sam has no preexisting duty to Abel – there is no legally recognized relationship between the two; Sam is merely a passerby
- B. (6 points) Baker against Ed
1. Baker will sue Ed in negligence
  2. Ed owed duty to Baker (or anyone else on the public road) to act as a reasonably prudent driver operating his car
  3. Ed breached that duty when he struck Baker's car from behind
  4. Baker would not have been more injured after he fell were it not for Ed's collision with him
  5. Ed's actions were the direct cause of Baker's paralysis
    - a. in negligence, the defendant takes the victim as he finds him;
    - b. prior injury aggravated by new negligence will not bar recovery
    - c. Diana may also be liable (she settled) for Baker's paralysis if event was foreseeable; since car accidents are foreseeable, Diana & Ed would be jointly and severally liable as joint tortfeasors
  6. damages – Baker suffered paralysis and property damage as a result of Ed's acts
  7. defenses – comparative negligence – but since Baker felt only slight pain, no negligence on his part in going home
  8. since Ed & Diana are joint tortfeasors for the paralysis, Ed may seek contribution from her for the damages he owes [*see* Joy Enterprises, Inc. v. Pohnpei Utilities Corp., 8 FSM Intrm. 306, 311 & n.4 (Pon. 1998)]
- VI. (15 points)
- A. (3 points) statute of limitations
    1. doesn't start to run until cause of action accrues, that is, until an injury has occurred [*see, e.g.,* Segal v. National Fisheries Corp., 11 FSM Intrm. 340, 342

- (Kos. 2003)]
2. injury occurred on July 13, 2004 when Proff was unable to reach Rota in time for his lecture
  3. Proff therefore timely filed suit within two years on July 4, 2006
- B. (4 points) tort cause of action – negligent misrepresentation
1. negligent misrepresentation is established when
    - a. the defendant in his business or professional capacity;
    - b. made a false representation of fact which was either known by the defendant to be false or the defendant had an insufficient basis of information to make the factual representation (breach of duty owed to client);
    - c. the representation is made with the intent to induce the plaintiff to act or refrain from acting, in reliance upon the misrepresentation;
    - d. plaintiff has justifiably relied thereupon; and
    - e. causes
    - f. damage to plaintiff from such reliance. [*see Phillip v. Marianas Ins. Co.*, 12 FSM Intrm. 301, 308 (Pon. 2004)]
  2. misrepresentation must be of a present or past fact which becomes the basis of the bargain
  3. Flyright is travel agency & was thus working in business capacity
  4. Flyright can be held vicariously liable for its employees' tortious acts, if they occur within scope of employment
  5. Flyright owes its clients duty of reasonable care; liable if Proff's reliance on its representation could be contemplated, since Proff told Flyright when he had to be on Rota, his reliance is contemplated
  6. Proff actually relied on Flyright's representation
- C. (5 points) other legal theories – contract
1. Proff must show contract was formed; parties had duty to perform it; and duty was breached
    - a. for valid contract to exist, must be
      - (1) offer,
      - (2) acceptance, and
      - (3) consideration
    - b. Flyright offered to sell Proff ticket on Flight #1
    - c. Proff accepted buy his verbal agreement
    - d. Proff provided consideration by paying for ticket
    - e. one of parties' duties must be breached for contract to be actionable
    - f. Flyright's duty was to provide Proff with ticket that would get him to Rota in time for his lecture; Flyright breached that duty (no alternative transportation available)
  2. Flyright's possible defenses
    - a. mutual mistake
      - (1) mutual mistake occurs when both parties are under substantially

the same erroneous belief as to the facts; in a mutual mistake case, the party adversely affected must show that: 1) the mistake goes to a basic assumption on which the contract was made; 2) the mistake has a material effect on the agreed exchange of performances; and 3) the mistake is not one of which he bears the risk [FSM Dev. Bank v. Arthur, 13 FSM Intrm. 1, 9 (Pon. 2004)]

- (2) in the case of mutual mistake the adversely affected party may rescind or avoid the contract [Id.]
  - (3) but Proff is party who was adversely affected & he doesn't want to rescind or avoid the contract
  - b. unilateral mistake, will not prevent contract formation;
    - (1) since Flyright had received notice of flight schedule change, its employees are charged with such knowledge
    - (2) therefore mistake was unilateral
    - (3) unilateral mistake will not prevent contract formation
- D. (4 points) damages
1. Proff can recover ticket price
  2. Proff tried to get alternative transportation, but none available, so may get consequential damages of trip (departure fees, etc.)
  3. lost lecture fee – only recoverable if he had told Flyright of purpose of trip; since it appears that he didn't, no recovery
  4. punitive damages
    - a. not recoverable for ordinary negligence [Elwise v. Bonneville Constr. Co., 6 FSM Intrm. 570, 572 (Pon. 1994)] & may be awarded when a tort was committed with actual malice, or deliberate violence, or the acts complained of were wanton, reckless, malicious and oppressive and are given to enhance compensatory damages [Primo v. Refalopei, 7 FSM Intrm. 423, 435-36 & n.29 (Pon. 1996)]; therefore not available here
    - b. not a contract remedy, since only compensatory damages are allowed for breach [Amayo v. MJ Co., 10 FSM Intrm. 244, 249 (Pon. 2001)]
- VII. (13 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. (7 points) Xenon's motion to suppress
1. whether search warrant was invalid – whether there was probable cause for search warrant to issue for Xenon's financial records; When a search or seizure is conducted pursuant to a judicially-issued warrant the burden rests with the defendant to prove the illegality of the search or seizure [FSM v. Santa, 8 FSM Intrm. 266, 268 (Chk. 1998)]
    - a. informant's information of whereabouts of Xenon's purchase records was corroborated by Radon, the pickup driver

- b. that Radon not informed of his rights is irrelevant – the evidence is not being used to incriminate him
  - c. is description "Xenon's business records" state with sufficient particularity the items to be seized? argue
  - d. under totality of circumstances, search warrant not invalid
2. discovery deadline
- a. search warrant is usually used at the start of an investigation before charges are brought, but no statute, rule, legal principle, or constitutional provision bars its use at a later stage in the proceeding [FSM v. Wainit, 11 FSM Intrm. 1, 10 (Chk. 2002)]
  - b. discovery rule [FSM Crim. R. 16(b)] only concerns the limited amount of information that the gov't may, in very limited circumstances, seek by discovery; it is not concerned with what the gov't may seek to obtain through the use of a search warrant – search warrants are not "discovery" [FSM v. Wainit, 11 FSM Intrm. 1, 10 (Chk. 2002)]
  - c. therefore discovery deadline does not prevent gov't from seeking warrant to seize new evidence it becomes aware of
  - d. continuing duty to provide discovery [FSM Crim. R. 16(c)]
    - (1) if, before or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection, or discovers additional witnesses or defenses that party must promptly notify the other party or that other party's attorney or the court of its existence [FSM v. Wainit, 11 FSM Intrm. 186, 189 (Chk. 2002)]
    - (2) therefore gov't had to provide Xenon with any of newly-discovered evidence that was Xenon had earlier requested in discovery (assuming that he had)
    - (3) gov't constitutionally required to provide any evidence that might be exculpatory, even if not requested [*see* FSM v. Cheng Chia-W (I), 7 FSM Intrm. 124, 128 n.4 (Pon. 1995); FSM Crim. R. 16(a)(1)(F)]
    - (4) when the government makes a late disclosure of evidence preferred remedy is to offer the defendant a continuance to prepare to meet the additional evidence [FSM v. Wainit, 11 FSM Intrm. 186, 190 (Chk. 2002)]
3. thus Xenon's motion to suppress should be denied
- B. (6 points) Krypton's motion to suppress & to return items seized
- 1. if warrant ruled invalid then everything found in search is fruit of poisonous tree and should be suppressed
  - 2. but if warrant valid, and found during reasonable search, then
    - a. handguns found in box while searching for Xenon's records which
      - (1) were believed to be in boxes at the location searched
      - (2) gov't had valid search warrant to search location for Xenon's

- records
- (3) handguns are contraband in FSM
- (4) contraband may be seized when inadvertently seized during lawful search
- (5) document (bill of sale), not contraband, argue whether legally seized because found with, and referred to, contraband handguns
- b. marijuana was visible from inside building for which police had valid search warrant
  - (1) warrant is not necessary to authorize seizure when marijuana is in plain view of a police officer who has a right to be in the position to have that view [FSM v. Mark, 1 FSM Intrm. 284, 294 (Pon. 1983)]
  - (2) police had right to be in building because had valid search warrant for it
  - (3) marijuana was in plain view from building
  - (4) seizure of marijuana was okay
- c. whether any items seized should be returned to Krypton
  - (1) contraband, even if illegally seized is forfeit and can't be returned
  - (2) handguns and marijuana are contraband
  - (3) document (bill of sale) may be legally seized; if not suppressed, gov't can retain for use as evidence at trial, copy may be provided to Krypton

VIII. (13 points)

- A. (3 points) contract cases generally matter of state law, but
  - 1. FSM Telecom is instrumentality of nat'l gov't
  - 2. FSM Supreme Court has exclusive jurisdiction over cases where the nat'l gov't is a party and an interest in land not at issue
  - 3. no interest in land at issue
  - 4. telecommunications, by its nature, is interstate commerce, subject to nat'l regulation
  - 5. motion to dismiss should be denied
- B. (10 points) class certification
  - 1. party seeking certification of class action has the burden of showing that all four prerequisites – numerosity, commonality, typicality, and adequacy of representation – to utilizing the class action procedure have been satisfied [Lavides v. Weilbacher, 7 FSM Intrm. 591, 593 (Pon. 1996)]
  - 2. class action can then be maintained only if the court finds
    - a. that questions of law or fact that pertain to the class members predominate over those questions affecting only individual members, and
    - b. class action is superior to other available methods for fair and efficient adjudication of controversy
  - 3. numerosity – class must be so numerous as to make joinder of all members

- impractical; 80 possible plaintiffs appears to satisfy this requirement
4. commonality – must be common questions of law or fact to class; appears satisfied here; but it appears that there are really two class – 1) of people in Rex’s village who were overcharged for their telephone line and 2) people in adjoining village overcharged for cell phone use
  5. typicality – claims of representative party must be typical of class;
    - a. Rex’s claim’s are typical of those in his village
    - b. but different enough that are not typical of those in adjoining village
    - c. each class or subclass must be represented by someone who claims the same injuries as the absent class or subclass members, otherwise the typicality requirement is not met and the class or subclass cannot be certified [People of Rull ex rel. Ruepong v. M/V Kyowa Violet, 12 FSM Intrm. 192, 200 (Yap 2003)]
  6. adequacy of representation – representative must be able to fairly and adequately represent members of class;
    - a. Rex appears to be able to represent the class of telephone subscribers in his village;
    - b. but not to be able to represent class of cell phone users in other village; cell phone user’s class can’t be certified unless a separate representative for that class is named; each class, or subclass, must have a named class representative(s) of its own [Id.]
  7. class action is superior to other available methods because of small amounts of individual claims and large number of claimants
  8. class should be certified for class of telephone subscribers in Rex’s village with Rex as named representative; class of cell phone users not certified until a representative is found for them

IX. (8 points)

- A. indispensable party – party, who, having interests that would inevitably be affected by a judgment in a case, must be joined in the case or otherwise the case must be dismissed [*see* FSM Civ. R. 19(b)]
- B. removal of cases – FSM Supreme Court General Court Order 1992-2 sets forth the governing procedures for the removal of state court actions to the FSM Supreme Court; removal is effected upon compliance with these procedures; state court takes no further action following removal unless and until a case is remanded; removal petition must be filed within sixty days after the receipt by any party, through service or otherwise, of a copy of an initial or amended pleading, motion, order or other paper from which it may first be ascertained that the case is removable – a case over which the Constitution gives the FSM Supreme Court either concurrent or exclusive jurisdiction
- C. exhaustion of administrative remedies – when administrative remedy is provided by statute, relief ordinarily must not only be sought initially from the appropriate administrative agency but such remedy usually must be exhausted before a litigant may resort to the courts [*see, e.g., Choisa v. Osia*, 8 FSM Intrm. 567, 569 (Chk. S.

Ct. Tr. 1998)]; person who has exhausted all administrative remedies available within an agency and who is aggrieved by a final decision in a contested case may seek judicial review [International Bridge Corp. v. Yap, 9 FSM Intrm. 362, 365 (Yap 2000)]

- D. personal jurisdiction – power of court to exercise jurisdiction over the parties in a case, usually based on consent (plaintiff consents by filing case; defendant consents by not raising lack of personal jurisdiction as ground to dismiss), citizenship, person’s presence in jurisdiction, or long-arm statute allowing jurisdiction for tortious act etc. in jurisdiction if sufficient minimum contacts for due process