Checklist of Points to be Covered for Complete Answers
FSM Bar Examination, March 4, 2021

[Bracketed citations to statutes, rules, and cases are an aid to those reviewing the test. Test takers are not expected to memorize and repeat them as long as the legal principles are cited and discussed]

EVIDENCE

(20 points)

I. (20 points)
   A. (4 points) judge correctly allowed Dan's testimony:
      1. a witness may use a writing to refresh his memory for the purpose of testifying, either while testifying, or before testifying [FSM Evid. R. 612]
      2. the writing need not be prepared by the witness himself, BUT it must truly revive the witness's memory
      3. an adverse party (Paul) is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness (Dan) thereon, and to introduce in evidence those portions which relate to the witness's testimony [FSM Evid. R. 612]
   B. (4 points) judge incorrectly sustained the objection to Dan answering
      1. evidence of subsequent remedial measures is not admissible to prove negligence or culpable conduct in connection with the event [FSM Evid. R. 407]
      2. but evidence of subsequent remedial measures is admissible when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment [FSM Evid. R. 407]
      3. on direct examination, Dan stated that nothing more could have been done before the accident to make the work area safer
      4. since the feasibility of precautionary measures was controverted, the evidence of subsequent remedial measures is admissible to show the feasibility of precautionary measures [FSM Evid. R. 407]
   C. (4 points) judge correctly allowed Frank's testimony:
      1. Frank was not qualified as an expert
      2. Frank was therefore a lay witness giving opinion testimony
      3. lay opinion testimony is limited to those opinions or inferences which are rationally based on the perception of the witness and helpful to a clear understanding of his testimony or the determination of a fact in issue [FSM Evid. R. 701]
      4. forklift's speed was within Frank's perception and Paul's carelessness is an issue for determination
   D. (4 points) judge incorrectly permitted Wendy's testimony
      1. the contents of Friend's e-mail are hearsay because they are out-of-court statements that were admitted for the truth of the matter asserted by the declarant (Friend)

2. hearsay is an out-of-court statement that is being offered to prove the truth of the matter asserted therein [FSM Evid. R. 801(c)]
3. general rule is that hearsay is inadmissible unless falls within one of the exceptions to the hearsay rule [FSM Evid. R. 802]; no exception appears to apply
4. the only exception that might arguably apply is "present sense impression" exception for statement made contemporaneous to or immediately following an event is admissible [FSM Evid. R. 803(1)] but the e-mail was written about a week after the accident & therefore does not qualify as a "present sense impression"

E. (4 points) judge's calling his own witness sua sponte may be acceptable
1. court may, on its own motion or at a party's suggestion, call witnesses [FSM Evid. R. 614(a)]
2. all parties are entitled to cross-examine witnesses thus called [FSM Evid. R. 614(a)]
3. but judge should use this power sparingly and with great caution
4. court may interrogate witnesses, whether called by itself or by a party [FSM Evid. R. 614(b)] and objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity [FSM Evid. R. 614(c)]

ETHICS
(10 points)

II. (10 points)

A. (3 points)
1. one partner's knowledge may be imputed to the other partner, creating a conflict of interest in the partner without actual knowledge;
   a. Smith is thus in a conflict of interest situation preventing him from representing Couch [FSM MRPC R. 1.7(a); R. 1.13(e)]
   b. because when lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so [FSM MRPC R. 1.10(a)]
2. when attorney represents a corporation,
   a. the corporation is the client [FSM MRPC R. 1.13(a)] & has a legal existence separate and apart from its officers, directors, & shareholders and may have interests separate from the other parties named

b. an attorney may not represent a corporation and individuals such as officers, directors, & shareholders in matters where such conflicts exist [FSM MRPC R. 1.13(e); *see also* Nix v. Etscheit, 10 FSM R. 391, 398 (Pon. 2001)]

B. (7 points)

1. criminal co-defendants frequently have adverse interests, which prevent common representation by the same attorney or law firm
   a. joint representation of criminal defendants is rarely proper because the potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to represent more than one codefendant [Ting Hong Oceanic Enterprises v. FSM, 7 FSM R. 471, 479-80 (App. 1996)]
   b. some conflicts can be waived by joint disclosure [*see* FSM Crim. R. 44(c); FSM MRPC R. 1.7 cmt.] but where one defendant is planning to testify against the other, common representation by partners in a law firm is an irreconcilable conflict
2. Jones & Smith must consult with each other (without disclosing client confidences) and decide who could represent one of the co-defendants; both cannot
3. counsel must exercise extreme caution when someone other than the client is paying the attorney's fees
   a. attorney-client privilege exists between the attorney & his client, not the person paying the fee {*see* FSM MRPC R. 1.7 cmt.]
   b. client must be one exercising control over the management of his case
4. attorney cannot undertake a criminal defense on a contingent fee basis [FSM MRPC R. 1.5(d)(2)] & the "bonus" being offered by Hare's father-in-law, Slouch, creates a contingency situation
5. attorney cannot disclose a client's confidences to another unless the client is informed of that fact and consents [FSM MRPC R. 1.6(a)]; 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. 1.6 cmt.]

GENERAL

(70 points)

III. (12 points)

A. (3 points)

1. was looking in car trunk a search?
2. if so, did Patsy have authority to consent to

search?

a. anyone with equal right to use car may consent to search

b. Patsy's apparent authority is enough

3. Patsy's consent was voluntary
   a. voluntary & intelligent
   b. knowledge of right to withhold consent not required
4. Patsy not in custody at time Wyatt asked to look in trunk – she was free to go, thus not custodial search
5. therefore was valid consent search

B. (5 points)
1. should Wyatt have knocked on door first & announced his presence before stepping inside open door? Does not doing so violate Clyde's right to privacy? Wyatt did announce he was police officer & that he had warrant to search
2. no exigent circumstances (hot pursuit, immediate danger of bodily harm, destruction of evidence) present to allow entry unannounced
3. items to be seized must be particularly described in warrant; bullet hole and bloody clothing found after Wyatt given the gun described in warrant; possible argument that they were plain view (especially the bullet hole in wall?) [*see, e.g.*, FSM v. Mark, 1 FSM R. 284, 294 (Pon. 1983) (warrant not needed for items in plain view when officer is where he has right to be)]
4. argue if search good or bad; if bad, exclusionary rule applies [*e.g.* FSM v. Tipen, 1 FSM R. 79, 92 (Pon. 1982)] & evidence inadmissible

C. (4 points)
1. was Clyde in custody? – yes, if freedom of movement limited by police – not free to go
2. if so, must inform Clyde of right to remain silent and right to an attorney (plus other rights found in 12 F.S.M.C. 218) first & Clyde must waive rights before Wyatt can question him; but was first statement "I suppose you are looking for this." a spontaneous outburst made before Wyatt could inform Clyde of his rights?
3. no indication that Wyatt informed Clyde of rights first
4. failure to advise of rights will render confession inadmissable [*see* FSM v. George, 6 FSM R. 626, 629 (Kos. 1994)] even if otherwise voluntary if was result of interrogation (questioning while in custody); statement must be in response to interrogation
5. once Clyde asked if should have lawyer, questioning should stop [*see* FSM v. Edward, 3 FSM R. 224, 235

(Pon. 1987)] until either Clyde voluntarily & knowingly relinquishes right to counsel, or Clyde voluntarily reinitiates the discussion

6. confession will be suppressed because Clyde didn't waive rights before confessed [*see* Moses v. FSM, 5 FSM R. 156, 159 (App. 1991)] violates right not to be compelled to incriminate self [FSM Const. art. IV, § 7]

IV. (10 points)

A. (3 points) statute is constitutional

1. Congress has the power to regulate foreign and interstate commerce [FSM Const. art. IX, § 2(g)]
2. Congress may therefore ban the importation of goods it considers unsafe

B. (3 points) unconstitutional

1. state governor can pardon only those convicted under state law [FSM Const. art. X, § 2(c)]
2. FSM President is person with power to pardon those convicted under nat'l law
3. irrelevant that nat'l law person was convicted under not nat'l law any longer but is punishable offense under state law – wasn't convicted under state law

C. (3 points) mostly constitutional

1. state legislature may make classifications based on age so long as it has a rational basis for doing so; appears constitutional
2. however, the exemption for out-of-state persons may violate the equal protection clause [FSM Const. art. IV, § 3] because appears to be discrimination based on race, ancestry, national origin, or language & thus violative of the FSM Constitution

V. (8 points)

A. Does attorney-client privilege cover documents prepared by Client?

1. Client clearly has attorney-client relationship with Lawyer because Client is seeking legal advice from Lawyer
2. attorney-client privilege applies to confidential communications made to Lawyer by Client, whether written or oral
3. documents were not in existence before Client sought Lawyer's legal advice & so are communications made by Client to Lawyer for the purpose of obtaining legal advice
4. if Client had not sent documents to Accountant, attorney-client privilege would, without doubt, prevent Finance from obtaining them

B. disclosure to Accountant

1. existence of accountant-client privilege very unlikely because there is no right of privacy or financial or business privilege in bank records [FSM Dev. Bank v. Adams, 14 FSM R. 234, 247 (App. 2006)]
2. attorney-client privilege waived by disclosure to Accountant
   a. if Lawyer had retained Accountant to assist Lawyer in rendering legal services attorney-client privilege would cover the documents
   b. but Accountant is not working for Lawyer and Client merely sent the photocopies to Accountant for Accountant's convenience & to prepare Accountant to be able to speak to Lawyer
   c. Client's sending photocopies to Accountant is waiver of attorney-client privilege because Client's communication with Lawyer is no longer confidential

C. work-product doctrine
1. since Client prepared the documents at Lawyer's request in anticipation of litigation they should be covered by the work-product doctrine and generally not be discoverable [Lebehn v. Mobil Oil Micronesia, Inc., 8 FSM R. 471, 479, 481 (Pon. 1998)]
2. work product can be produced in discovery only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means [FSM Civ. R. 26(b)(3)]
3. disclosure of work product to Accountant not likely to produce waiver for the work product privilege like it did for the attorney-client privilege

VI. (14 points)

A. welder's claims
1. breach of contract cause of action against vessel and its owner, giving rise to maritime lien against vessel because contract was for repair to ship
2. FSM Supreme Court has exclusive jurisdiction over admiralty and maritime cases [FSM Const. art. XI, § 6(a)]
3. can proceed *in rem* against vessel by having vessel arrested (vessel may then post bond to cover amount of claim or vessel's worth, whichever's less, so it can leave)
4. and *in personam* against owner (by service on agent present in Pohnpei)

B. Ponape Provisions's claims
1. breach of contract cause of action against vessel

and its owner, giving rise to maritime lien against vessel because supplies were "necessaries" for vessel to continue voyage and therefore a maritime contract

2. FSM Supreme Court has exclusive jurisdiction over admiralty and maritime cases [FSM Const. art. XI, § 6(a)]
3. can proceed *in rem* against vessel by having vessel arrested (vessel may then post bond to cover amount of claim or vessel's worth, whichever's less, so it can leave)
4. and *in personam* against owner (by service on agent present in Pohnpei)

C. Ono's claims

1. against the vessel and its owner – a seaman's action against a vessel for injuries or illness while a seaman (often called "maintenance and cure") is an admiralty case and FSM Supreme Court has exclusive admiralty jurisdiction so Ono may seek to enforce a maritime lien on ship *in rem*
2. battery suit against Abe – may have to proceed in Pohnpei Supreme Court as there is no diversity jurisdiction because both parties are foreigners

D. consolidate all three plaintiffs' claims against vessel so all can be taken care of by arresting ship once

VII. (3 points) motion to remand granted; FSM Supreme court has no jurisdiction over case

1. 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 R. 36, 40 (Chk. 2001)]
2. *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

VIII. (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. 26th
    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 R. 123, 127 (Pon. 1991); *see also* *Nanpei v. Kihara*, 7 FSM R. 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 R. 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 R. 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 R. 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

IX. (~~14~~ 12 points)

A. Possible defendants, all in their official capacity, and their basis for liability

1. Sam
   a. negligence has four essential elements [Luzama v. Mai Xong, Inc., 22 FSM R. 23, 27 (Pon. 2018)]:
      (1) a duty of care owed by the defendant to the plaintiff
      (2) a breach of that duty
      (3) injury to the plaintiff, and
      (4) a showing that the breach was the proximate cause of the plaintiff's injury
   b. premises liability under an attractive nuisance theory
      (1) dangerous to young children, would attract them to trespass and use trampoline
      (2) warning signs inadequate because child too young to read and should know trampoline would be attractive to children that young
   c. negligent supervision of aides
2. school aides – also negligence, breached their assigned duty of care when forgot to chain trampoline to the wall
3. Dan, state director of education – also negligence – approved purchase without investigating whether trampoline would be safe
4. state department of education as respondeat superior of school dep't employees
5. Fred – no basis for liability to the child, not a possible defendant in a suit by child's next friend because Fred does not owe duty to public not to misuse school funds and no statute provides for such a cause of action
6. Supplier – might have possible products liability action if trampoline was defective, but no facts in question suggest that
7. doctor – medical malpractice

a. medical malpractice is negligence in rendering professional medical services [William v. Kosrae State Hosp., 18 FSM R. 575, 580 (Kos. 2013)]

b. one who undertakes to render professional service is under a duty to the person for whom the service is to be performed to exercise such care, skill, and diligence as someone in that profession ordinarily exercises under like circumstances [William v. Kosrae State Hosp., 18 FSM R. 575, 580-81 (Kos. 2013)]

8. state hospital – medical malpractice

9. state as respondeat superior for hospital and doctor

B. damages

1. against Sam, the school aides, Dan, and the state department of education include not only the pain and suffering for the accident but all damages arising out of the doctor's malpractice because medical malpractice is within the foreseeable damages of any personal injury [Primo v. Refalopei, 7 FSM R. 423, 429 (Pon. 1996)], e.g., loss of use of arm, past & future medical expenses, if any; may be apportioned between defendants on a comparative negligence basis

2. against the doctor, state hospital, and the state only the damages arising out of the doctor's malpractice

3. damages limited to $20,000 for a personal injury claim [*see* 6 F.S.M.C. 702(4)]; but maybe can argue that child has two separate personal injury claims against the state – one for the trampoline and other for medical malpractice, total $40,000 may be possible