

Checklist of Points to be Covered for Complete Answers
FSM Bar Examination, August 3, 2000

[Citations to statutes, rules, and the like are included in brackets as an aid to those reviewing the exam; a test taker is not expected to memorize and repeat the numbers so long as the legal principles are cited and discussed.]

GENERAL
(70 points)

- I. (12 points)
- A. Defenses raised
1. Javier entered the FSM lawfully because he complied with Immigration's requirement that he buy an onward ticket
 2. if he has overstayed the 30 days Immigration allowed him it was due to circumstances beyond his control and is therefore not guilty of remaining "willfully and unlawfully" after expiration of his entry authorization in violation of 50 F.S.M.C. 112(1)
 - a. he intended to leave on his friends' yacht
 - b. when that didn't work out he tried to leave with the Swiss couple on their sailboat
 - c. and when that didn't work out, but he made arrangements to leave on another yacht
 3. Javier might also argue that if convicted he would remain in the FSM longer than if allowed to leave with the yacht in a month; he might also argue that his failure to get an extension of his entry authorization was unintentional and therefore not willful; he might also argue his refusal to sign an Argentine promissory note is not willfully staying in the FSM because the terms and conditions are so onerous as not to be a meaningful choice
- B. likely outcome — judge will probably convict [*see FSM v. Jorg*, 1 FSM Intrm. 378 (Pon. 1983)] because
1. refusing to take the loan and leaving FSM satisfied willful element of offense
 2. not usually the FSM court's business to inquire into relations between a foreign national and his government

[Note: the answer's crux is whether Javier's remaining in the FSM is "willful," thus satisfying the statute's elements. An answer that identifies that as the central problem but which assembles arguments from the question's facts that his overstaying was not "willful" is still a good answer.]

- II. (10 points)
- A. Case or Dispute — a real live controversy between adverse parties with standing (a material interest in the outcome), not academic hypothetical or moot; a constitutional requirement for the FSM Supreme Court to exercise jurisdiction over the matter, FSM Const. art. XI, § 6.
- B. Ex Post Facto Laws — legislation which does any of the following: 1) makes criminal and punishable an act innocent when done; 2) aggravates a crime, or makes it greater than it was when committed; 3) increases the punishment for a crime and applies the increase to crimes committed before the enactment of the laws; or 4) alters the legal rules of evidence so that testimony insufficient

to convict for the offense when committed would be sufficient as to that particular offense and accused person; Ex post facto laws are unconstitutional, FSM Const. art. IV, § 11

- C. Summary Judgment — a partial or complete judgment issued before trial, usually on a party's motion, when there are no material facts in dispute and one of the parties is entitled to judgment as a matter of law
- D. Burden of Proof — generally, who has the obligation to convince the court that its case is proven; in civil cases the plaintiff has the burden to prove its case, usually by a preponderance of the evidence, but sometimes by clear and convincing evidence; in a criminal case the prosecution has the burden to prove the defendant guilty beyond a reasonable doubt
- E. 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, or is evidence and information sufficiently persuasive to warrant a cautious person to believe it is more likely than not that a violation of the law has occurred and that the accused committed that violation; a probable cause determination must be made by the deliberate, impartial, judgment of a judicial officer who will issue warrant; searches and seizures without probable cause are generally invalid

III. (14 points)

- A. Bishek's claims — constitutional due process violations for lack of notice and loss of pay if Bishek's pay was stopped when suspended (the loss of pay claim could keep jurisdiction in the courts even if the case lasts past the next election and new Legislature is elected), (but since Bishek only suspended instead of expelled he's likely still being paid)
- B. Assuming that the special session was properly called under state law, special sessions are often limited to what they were called for, but internal business may be conducted; election of its officers and qualification of its members is internal business; if call not proper (can Speaker call Legislature into session or does Governor have to?) court might have jurisdiction on the constitutional due process violation claims
- C. but Constitution grants Legislature sole authority to judge election and qualification of its members therefore no jurisdiction for court because it is a non-justiciable political question, but has Bishek become constitutionally unqualified to be member? (but if he's only suspended and not expelled, isn't he still member?)
- D. Legislature can change its officers at anytime; no court jurisdiction over who is Deputy Floor Leader

IV. (20 points)

- A. (3 points) 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 Nevis filing suit against *Dernita's Folly* in Pohnpei Supreme Court improper, particularly if Nevis seeks to enforce a maritime lien on ship
- B. (3 points) Chuuk State Supreme Court might have jurisdiction if suit solely against Barbuda Corp. because state courts have concurrent jurisdiction in diversity cases, but with *Dernita's Folly* also a party it is probably an admiralty case with exclusive jurisdiction in FSM Supreme Court

- C. (4 points) since Barbuda Corp.'s incorporation papers were untrue in that Antigua and the other incorporators had not each paid in \$3,000 in startup capital (the startup operating capital came from Pohnpei state one month after papers filed) Mobil can sue the incorporators in their individual capacity for the corporation's debts [Mid-Pacific Constr. Co. v. Semes, 7 FSM Intrm. 522, 526 (Pon. 1996); Mid-Pac Constr. Co. v. Senda, 4 FSM Intrm. 376, 385 (Pon. 1990)]; the cause of action would be breach of contract
 - D. (3 points) plaintiffs in an admiralty case may seek the vessel's arrest on their maritime liens and ask the court to set a bond sufficient to cover their claims or the vessel's value if that is less than the amount of claims for the vessel to be released; if bond paid plaintiffs will proceed against bond; if bond not paid and plaintiffs obtain judgment can order vessel sold to satisfy judgment
 - E. (3 points) remove the cases to FSM Supreme Court from Chuuk State Supreme Court and Pohnpei Supreme Court on lack of jurisdiction (& diversity) grounds; then move to consolidate all three cases into one action
 - F. (4 points) would ask court to set bond for vessel if arrested so vessel can be released and continue earning money; sue the absconding bookkeeper if he can be found; raise any defenses, such as comparative negligence, that appear viable after investigation
- V. (14 points) Legal Remedies
- A. For items that were included in the budget that was passed (e.g., electricity), money appropriated, and funds available, and for which the proper documents were submitted over 30 days ago
 - 1. request Director to pay immediately, and if he denies or is silent appeal to the governor if the state's administrative procedures act so provides [i.e., exhaust administrative remedies, if they exist, as quickly as possible]
 - 2. legal action — two possibilities; discuss
 - a. Writ of Mandamus, to issue must involve non-discretionary, ministerial duty Director of Finance's part and no adequate remedy at law can be available; or
 - b. Declaratory Judgment and court order to pay in compliance with Financial Management Act
 - B. For items not included in passed budget
 - 1. no legal remedy, Finance acted properly in not paying; only political remedies — request passage of supplemental budget for landowner's rent, more electricity, chief justice's car
 - 2. landowner can sue state for rent (but can he collect if and when he wins?)
 - C. But if actions of executive and legislative should "substantially impair" the court's performance [see Mackenzie v. Tuuth, 5 FSM Intrm. 78 (Pon. 1991)] because of no rent and no electricity there may be a cause of action

ETHICS
(10 points)

- VI. (5 points)

- A. contingent fee arrangement — attorney's fees should be reasonable [FSM MRPC 1.5(a)], reflect the time and labor required and difficulty of questions involved; contingent fee agreement (the 50% with client bank is probably okay [FSM MRPC 1.5(c)] (although court usually won't award more than 15% attorney's fees if in loan agreement) but 50% is on the outside limit for a contingency fee, the \$100 added fee for filing suit probably okay for fee regardless of outcome
- B. a lawyer cannot enter into a business transaction with a client unless the transaction and terms are fair and reasonable to the client and fully disclosed in writing to client in terms client can understand and client is given reasonable opportunity to seek advice of independent counsel in transaction and the client consents to in writing [FSM MRPC R. 1.8(a)]; apparently, Hermano did not give the board of directors proper prior notice of his interest in Fitikoko Construction Co. — wasn't in writing and it didn't give board time to seek independent counsel; Hermano should not have participated in the Fitikoko contract vote because it is a conflict of interest

VII. (5 points)

- A. an attorney has a duty to not to offer evidence the lawyer knows to be false [MRPC 3.3(a)(4)], and not to assist a witness to testify falsely [MRPC 3.4(b)], but lawyer also has obligation not to reveal confidences of client [MRPC 1.6]
- B. you must try to persuade Clancy not to offer false testimony and inform Drudge that you will take remedial steps if Clancy testifies falsely and will disclose Clancy's deception to the court (remedial step — move to withdraw from case)

EVIDENCE

(20 points)

VIII. (5 points)

- A. (2 points)
 - 1. will object on ground of hearsay, 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)]; general rule hearsay inadmissible unless falls within one of the exceptions to the hearsay rule [FSM Evid. R. 802]
 - 2. but the rules of evidence don't apply to bail hearings and preliminary examinations in criminal cases [FSM Evid. R. 1101(d)(3)]; objection overruled
- B. (3 points) objection will again be hearsay;
 - 1. admissible through exception for prior testimony 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 the opportunity and similar motive to develop the testimony by direct, cross, or redirect examination [FSM Evid. R. 804(b)(1)]

2. but some of the prior testimony, such as the parts about flight rumors will be excludable as hearsay within hearsay unless some other hearsay exception will admit it [see FSM Evid. R. 805], but none apparent

IX. (4 points)

- A. in a criminal rape case, past sexual behavior is generally inadmissible [FSM Evid. R. 412(a)]
- B. but past sexual behavior which is with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which rape or assault is alleged is admissible [FSM Evid. R. 412(b)(2)(B)]
- C. unless the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence, the defendant must raise defense in pretrial motion accompanied by a written offer of proof and served on all other parties and on the alleged victim after which the court will order a hearing in chambers to determine if the evidence is relevant and if its probative value outweighs the danger of unfair prejudice; if it is, the evidence will be admissible to the extent allowed in the court order [FSM Evid. R. 412(c)]
- D. objection will be overruled if the defense has complied with FSM Evid. R. 412(c)
- E. (bonus) question may need to be rephrased because it is a compound question

- X. (3 points) objection will be Timor's competency to testify because of her tender age; generally all witnesses are competent to testify [FSM Evid. R. 601], a witness's competency is a preliminary matter for court to decide [FSM Evid. R. 104(a)], judge will determine if Timor had ability to observe and recount the what she observed and whether the child knows the difference between truth and lies and understands that it is important that she must tell the truth; marshal your arguments for the result you think most likely

XI. (8 points)

- A. Arguments in favor of admission — the declarant Chut is unavailable because he asserted his right against self-incrimination and that his out-of-court statements were made under circumstances where there would be little reason for Chut to lie and are those of a co-conspirator
- B. Arguments against admission
 1. their admission would violate Kelly's constitutional right in a criminal proceeding to confront witness against him [FSM Const. art. IV, § 6]
 2. the statements are hearsay not within any exception
 3. the statements are not statements of a co-conspirator because they are not statements made in the furtherance of a conspiracy (and conspiracy isn't charged)
- C. court will exclude evidence because of Kelly's his constitutional right to confront witnesses against him