

Checklist of Points to be Covered for Complete Answers
FSM Bar Examination, March 2, 1995

GENERAL
(70 points)

- I. (15 points) Jurisdiction – Does FSM Supreme Court have? Discuss the following:
- A. National Government is a party, therefore exclusive jurisdiction in FSM Supreme Court
 1. Does forfeiture of fishing vessel also come under court's exclusive admiralty and maritime jurisdiction?
 2. If exclusive jurisdiction, no other court has jurisdiction, therefore can't dismiss
 - B. Constitution grants states power to regulate natural resources within 12 mile-limit; nat'l gov't power to regulate between 12-mile and 200 mile from island baseline
 1. *But* unexpressed concurrent power of nat'l gov't to regulate fishing within 12-mile limit. See FSM v. Kotobuki Maru No. 23 (I), 6 FSM Intrm. 65 (Pon. 1993). Is state's prohibition regulation?
 2. Is this action by nat'l gov't to enforce reasonable terms of foreign fishing agreement to which it's a party, and thus not attempt to regulate within 12 miles? Regulation of foreign commerce?
 - C. Motion to dismiss based on exclusive state power denied (do not discuss other grounds on which *Dernita's Pride* might have brought motion to dismiss; stick to facts in the question)
 - D. Abstention not possible;
 1. Remember who the parties are – nat'l gov't (π), and *Dernita's Pride* (Δ); state is not a party (do not change the facts given in question)
 2. Nat'l gov't is party therefore exclusive jurisdiction in Supreme Court; cannot abstain to court with no jurisdiction.
- II. (25 points)
- A. (5 points) Indigene Constr. Co. (π) is local citizen; Eneriko (Δ) is local citizen, and Lohn Constr. Co. (Δ) is foreign citizen based on Japanese citizenship of its stockholder, Godzilla Constr. Co. ;

therefore although cause of action based on state law (tort), diversity jurisdiction exists & FSM Supreme Court may hear case

B. (5 points)

1. Actual damages (object is to make plaintiff whole) = put in position would be if contract performed or in no worse position than if contract not entered into).
 - a. First measure of damages is expected profit (expectancy) = contract price (\$2.5 mil.) minus plaintiff's cost of performing contract (wages, materials, equipment, depreciation, etc.); and lost profits on any other contracts lost due to Eneriko's statement. May be too speculative to calculate with reasonable certainty (or might not have made profit on contract), if so cannot award, but
 - b. Reliance damages may be awarded = amount expended by plaintiff in reliance on the contract (Was the \$150,000 spent on new equipment in reliance? Can it be used on other project or sold to mitigate damages?)
2. Punitive damages.
 - a. available only to punish and deter, and therefore available only if fact-finder finds egregious behavior, *e.g.*, fraud, oppression, malice, deliberate disregard of other's rights, etc. (doesn't appear present in facts, but if . . .)
 - b. awarded only if actual (compensatory) damages awarded; must bear some reasonable relationship to amount of actual damages awarded (*e.g.*, 3x); and based on ability of defendant to pay

C. (6 points) a properly-served nonmoving party's failure to timely oppose motion is deemed a consent to it, FSM Civ. R. 6(d), but court may not grant motion unless proper grounds to do so exist even though it is consented to, *see Senda v. Mid-Pacific Constr. Co.*, 6 FSM Intrm. 440 (App. 1994), no motion for enlargement of time to oppose, for cause shown, made; therefore only if court finds no genuine issue of material fact exists (burden on moving party to show) and that moving party entitled to judgment as matter of law, can it grant partial summary judgment on liability; nonmoving party's consent to motion waives its right to oral argument in opposition

- D. (4 points) generally, only appeals from final judgments or orders allowed; a judgment as to liability, but not as to damages is not a final order; therefore it is a impermissible interlocutory appeal (not one allowed under FSM App. R. 4, *e. g.*, from orders *re* injunctions, appointing receivers, determining rights in admiralty); no permission granted under FSM App. R. 5(a) for interlocutory appeal; court should grant motion to dismiss
- E. (5 points) a) in trial division – motion to reconsider, motion for relief from proceeding, order, or judgment for mistake, inadvertence, or excusable neglect (FSM Civ. R. 60(b)) (*but* is this a final order?), motion to amend order to include language that would allow petition to appellate division to hear interlocutory appeal, wait until damages decided then appeal whole case & ask for stay pending appeal b) in appellate division – petition for permission to interlocutory appeal (FSM App. R. 5(a)) if proper language added to trial court order (involves controlling question of law as to which substantial ground for difference of opinion and appeal will materially advance ultimate termination of the litigation); extraordinary writ (certiorari, mandamus, prohibition) [very unlikely]

III. (10 points)

- A. same caption and heading as Complaint, but entitled NOTICE OF MOTION AND either MOTION FOR JUDGMENT ON THE PLEADINGS or MOTION FOR SUMMARY JUDGMENT
- B. should include notice for hearing date and time on motion; motion; points and authorities for motion; and separate supporting affidavit; signature of atty with address & phone #, certificate of service
- C. should recite, in numbered paragraphs, the facts as alleged by plaintiff and admitted to by defendant, discuss the effect of failure to deny Complaint para. 7, and move for judgment because plaintiff is entitled to judgment as a matter of law based on the pleadings (if for judgment on pleadings), or because no genuine issue of material fact exists and plaintiff entitled to judgment as matter of law (if for summary judgment)

IV. (20 points)

- A. Potential Causes of Action
 - 1. Violation of Right to Due Process

- a. Substantive due process – Does CBA have power to conduct the hearing which resulted in fine? Are CBA's Beautification Regulations valid and enforceable?
 - (1) statute required Board within 1 year of Director's appointment but wasn't done until 18 months after [late] and "bylaws" governing procedures were adopted without public notice or comment as required by APA; argue bylaws void for improper adoption
 - (2) APA requirements concerning public notice not fully complied with for adoption of Beautification Regulations (argue void for noncompliance or not void due to substantial compliance)
- b. Procedural Due Process –
 - (1) service proper? notice of hearing to atty, not to KM (good notice when atty not atty of record? argue)
 - (2) scheduling of hearing over request for enlargement of time (copy of bylaws and regs. only rec'd 2 days before hearing– argue whether complies with "8 days notice before hearing" bylaw procedure)
 - (3) Is right to be heard before impartial body violated by Board's atty having already concluded that KM guilty and will be advising Board as well as prosecuting KM?
- 2. to Equal Protection – commercial and residential property treated differently – assuming KM's property is residential, argue whether rational basis for different treatment (but res. not barred & not need permit to store junk car out of sight of road; commercial need permit whether in sight of road or not, and conditions can be put on permit; Is KM's property res. or comm. for purpose of reg. (because computer repair business unrelated to junk car)?
- B. Remedies – Agency actions are subject to judicial review and therefore may be appealed to the courts; declaratory judgment and TRO may also be sought in independent action; Civil Rights suit under 42 F. S. M. C. 701 in independent action; Writ of Prohibition [possible, but unlikely considering availability of other remedies]
- C. Probable Outcome – KM's fines overturned for one or more of above due process violations; restraining order granted against further

finer, pending conclusion of appeal/civil action

ETHICS

(10 points)

- V. (2 points) conflict between role as advisor to adjudicators and acting as prosecutor; letter with conclusion of guilt shows bias where obligation to act fairly and honestly prior to adjudication on merits
- VI. (2 points) trial counsellor should provide competent representation to client (MRPC 1.1), shall act with reasonable diligence and promptness in representing client (MRPC 1.3), must keep client reasonably informed and promptly comply with reasonable requests for information (obviously not lie to client who relies on misrepresentation & is thus prejudiced by the delay) (MRPC 1.4), may take advance fee but must return any unearned portion (MRPC 1.16(d))
- VII. (6 points) general denials generally disfavored; lawyer shall not defend or controvert an issue unless basis for doing so is not frivolous (MRPC 3.1), shall not knowingly make false statement of fact [or law] to tribunal (MRPC 3.3), reasonable efforts to expedite litigation (MRPC 3.2) not delay it, and by signing answer lawyer certifies that after reasonable inquiry it is well grounded in fact [and law] and not interposed for improper purpose such as delay (FSM Civ. R. 11); Xavier Malcolm knows denials in answer are false and seems to have made them for delay (note contradictory denials – defendant denies that he did not pay for jeans and denies that he agreed to pay for them)

EVIDENCE

(20 points)

- VIII. (3 points) define hearsay as out of court statement that is being offered to prove the truth of the matter asserted therein; general rule hearsay inadmissible unless falls within one of the exceptions to the hearsay rule; – admissible as nonhearsay on ground the words of Pete had operative legal effect of making grant of land; or as hearsay exceptions of then existing mental state showing intent, plan, motive, or design; or reputation in community as to boundaries of lands

- IX. (10 points)
- A. Is inquiry into Charles's alleged diversion of funds relevant? Yes, if intent is to assess Charles's credibility; any witness may be impeached; specific instances of misconduct may be inquired into, at discretion of court, on cross-examination of witness if probative of witness's character for truthfulness or untruthfulness (FSM Evid. R. 608(b)); therefore likely objection overruled
- B. giving of testimony by witness does not operate as waiver of privilege against self-incrimination when examined with respect to matters that relate only to credibility; therefore judge should not instruct Charles to answer if refusal based on self-incrimination privilege (*Id.*)
- C. specific instances of witness's conduct may be inquired into on cross-examination for purpose of attacking witness's credibility, but may not be proved by extrinsic evidence unless it is conviction of crime punishable by one year or more or involved dishonesty or false statement; conviction may only be proved by eliciting admission from witness on cross, or by public record of conviction (FSM Evid. R. 608(b); 609(a)); therefore judge should not allow other witness to testify that Charles fired for embezzlement
- X. (3 points) extrinsic evidence to prove collateral matter generally inadmissible because not relevant; but here evidence of William's teeshirt color may be admissible as habit of person (FSM Evid. R. 406) that William acted in conformity with; thus may be relevant as to whether Paulus correctly identified William, who he did not know, as his assailant (*but* Kasiano's competency [foundation] to testify to whether William owns yellow teeshirt, and how he knows William thinks its unlucky to wear yellow (*e. g.*, reputation in community? hearsay?))
- XI. (4 points) Baker's statement was unconstitutionally obtained, and could not be used against him, but statement is not being used – Baker is testifying personally; also right to object to unconstitutional evidence is personal only Baker could have objected to use of his statement, not Able and Charlie (Able & Charlie could have objected, if Baker had not testified, to admission of those portions of Baker's statement that referred to them on grounds they could not confront witness against them); therefore motion denied