

**Checklist of Points to be Covered for Complete Answers**  
**FSM Bar Examination, March 5, 1998**

[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. (1 point) bank could file in FSM Supreme Court (diversity jurisdiction, assuming since its a commercial bank it has foreign shareholders, as all commercial banks in FSM currently do, or might also argue possibly under national power to regulate banking) in Chuuk (where defendant is present [see 6 F.S.M.C. 301(1)]), or state court in Chuuk (residency) or Pohnpei (where transaction occurred)
  - B. (3 points) clerk can only enter default judgment for a sum certain, or one which by calculation may be made certain, clerk cannot enter default judgment including attorney's fees because fees not sum certain and only judge can determine if attorneys' fees are reasonable; clerk could enter default judgment for the principal, interest, and service costs (\$2,305.25) if bank willing to forgo attorneys' fees; or judge could enter default judgment and include attorney fees thought reasonable [note: the \$350 requested is higher than the 15% allowed by Bank of Hawaii v. Jack, 4 FSM Intrm. 216 (Pon. 1990)], 3½ hours seems excessive for preparing standardized forms in simple loan collection case, judge might reduce to 1 or 1½ hours @ \$100 for total of \$2,405.25 or \$2,455.25
  - C. (unused)
  - D. (2 points) Hertz should've continued to make the \$25 payments while he had a job and informed the bank's attorney, and court if necessary, of changed circumstances when he no longer had job and couldn't pay \$25 biweekly and negotiate new order in aid, or file own motion for revised order in aid if can't agree with bank's atty on joint motion; when state paid its judgment and then promptly used as much of \$5,000 judgment as necessary to pay off balance on judgment against him
  - E. (2 points) may request writ of execution against Hertz's new pickup truck, assuming it's not exempt property, [see 6 F.S.M.C. 1415], must be done by motion because of outstanding order in aid of judgment [6 F.S.M.C. 1413] (or alternatively, a writ of attachment and an order in aid of judgment ordering sale of pickup), costs of sale and an award of attorney's fees would be added to execution amount; other than that Hertz doesn't appear to have present ability to pay that would allow finding of civil contempt
  - F. (2 points) because must have present ability to comply in order to be found in civil contempt of court, judge will deny unless Hertz's leaving job was voluntary and his inability to pay is result of Hertz's

own willful actions, or if Hertz is deemed to have ability to pay by selling pickup

G. (2 points)

1. prosecution for criminal contempt for not using money received two months ago from judgment against state to pay bank's judgment as required by court order (three-month statute of limitation has not expired) [4 F.S.M.C. 119(b)]; [was there misrepresentation under oath if Hertz didn't reveal]
2. bank could seek new order in aid to reflect present circumstances
3. [test takers were given credit for answer if writ of execution mentioned here, only if test taker failed to mention it under E, above]

II. (10 points)

- A. constitution protects against unreasonable search and seizure
- B. when persons or items are seized pursuant to a warrant, defendant's burden to show lack of probable cause in affidavit supporting the warrant, but when, as here, seized without warrant burden on prosecution to show that seizure falls within exception to warrant requirement, if can't, court will suppress filing answer within 20 days stating that
- C. was Dingo's arrest lawful?
  1. probable cause that Dingo robbed Wade existed — victim, obviously injured, identified Dingo as robber
  2. argue
    - a. because violent felony Dingo could be arrested without warrant as soon as found as danger to public — exigent circumstances, therefore lawful; or
    - b. no showing police couldn't have got arrest warrant even though middle of night, therefore unlawful
  3. expectation of privacy in cookhouse? argue
    - a. not in residence, but behind, since cookhouse, probably open and interior in plain view, only in curtilage, probably little or no expectation of privacy, if so the arrest lawful; or
    - b. inside curtilage, expectation of privacy, should've got warrant, if so the arrest unlawful
- D. assuming arrest was lawful was search and seizure of evidence lawful? search incident to lawful arrest [if not. then all evidence excluded as "fruit of poisonous tree"]
  1. may make contemporaneous search within "wingspan" of arrestee, where suspect might reach to obtain weapon or destroy evidence, primarily for protection of arresting officers, defender may argue that Dingo already removed from cookhouse, but not from general vicinity, when search made, prosecution will argue search was still contemporaneous and should be allowed because defendant no more imposed upon than if search had been simultaneous [*see Yinmed v. Yap*, 8 FSM Intrm. 95 (Yap S. Ct. App. 1997)]
    - a. chain was within defendant's reach in cookhouse, also plain view exception may apply

- b. \$800 was within defendant's reach in cookhouse because was under mat Dingo was sleeping on
2. Dingo apparently not read his rights, so any evidence he gives cannot be used against him, but this limited to statements, tee shirt seized from him in jail not statement, and was in plain view, low or no expectation of privacy in jail

III. (18 points)

- A. all parties have obligation to perform the terms of the contracts and have the right to expect the other party's good-faith performance of its obligations
- B. contract damages principles — parties to be put in position it would've been in if contract not breached (in order of preference)
  1. expectancy damages — position party would have been in if contract performed (*e.g.*, profit Korea, Inc. would've made)
  2. reliance damages — expenses incurred on reliance that contract was to be performed
  3. restitution damages — return of money paid to other party to contract when contract not performed
  4. punitive damages not available in routine breach of contract cases and not available against a government
- C. Korea Inc.'s
  1. right to be paid \$550,000 for cement
  2. obligation to timely ship cement
  3. obligation to mitigate damages by reselling cement for highest price it can get, so only damages difference in price if cement sold for less than contract price
- D. Chuuk State's
  1. rights
    - a. delivery of cement by May 20th (there may be a some leeway here because cement must be in Chuuk in time to be transshipped June 1st and that might still be possible if cement arrived later, say May 24th or so)
    - b. cement quality and quantity must meet contract specifications
  2. obligations — to pay the \$550,000 contract price
  3. remedies
    - a. when apparent one party cannot possibly perform its part of contract other party may anticipatory breach of contract
    - b. damages, duty to mitigate
      - (1) \$8,000 damages to cancel ship charter okay because reasonably foreseeable (Korea, Inc. knew cement was to be transhipped on another vessel June 1)
      - (2) storage charges for other supplies will not be allowed unless reasonably foreseeable, and because of duty to mitigate the least expensive alternative (*e.g.*, could they have been sold or traded to merchants and new supplies obtained when project ready at less cost?)

- (3) other expectancy damages might've been available if Chuuk had, instead of canceling charter, immediately bought other cement at higher price and shipped it June 1, expectancy damages would've been the price difference; restitution damages available if Chuuk State had made a partial or full advance payment on contract
  - (4) (reliance damages — money paid in reliance that contract would be performed probably don't apply here because money spent on other supplies not damages when other supplies were eventually used to finish project)
- E. key point: was time of essence in contract so cement absolutely had to be there by 24th?; Discuss: could later arrival had still made June 1st? was Chuuk's cancellation on May 15th thus premature and not valid anticipatory breach because Korea, Inc. might still perform? could ship charter have been extended at less cost than the \$8,000 liquidated damages so that cement that arrived June 3rd could then have been transhipped with other supplies? should Chuuk have notified Korea, Inc. of cancellation by phone or other method as well so as to make sure Korea, Inc. didn't ship cement?
- F. {bonus points} liquidated damages provision of contract between Chuuk State and ship it chartered is valid and enforceable if the liquidated damages bear some real relation to actual damages

IV. (20 points)

- A. Government's preliminary objections
- 1. Kedwerer failed to exhaust administrative remedies before taking court action [*see* 17 F.S.M.C. 108, 111] (*e.g.* petition Sec'y of Finance); no standing because can only sue for recovery of tax illegally paid [6 F.S.M.C. 702(1)] so must pay disputed tax before suing; & controversy not sufficiently ripe for adjudication
  - 2. Kedwerer argues no need to exhaust administrative remedies if to do so futile, that court has authority, when taxpayer threatened with legal action, to prevent enforcement of unconstitutional tax; court probably agrees [*see* Dorval Tankship Pty v. Department of Finance, 8 FSM Intrm. 111 (Chk. 1997); Michelsen v. FSM, 3 FSM Intrm. 416 (Pon. 1988)]
  - 3. gov't claims sovereign immunity
  - 4. Kedwerer argues no sovereign immunity for enforcement of unconstitutional tax [*see* F.S.M.C. 702(1), (2), and (5)]
  - 5. gov't claims
- B. Congress's authority to enact tax statute
- 1. import [and income] tax is national power, can be levied by Congress
  - 2. Congress may delegate regulation-making authority to agency that enforces statute
- C. validity of regulation
- 1. improper public notice given of intent to adopt regulation [*see* 17 F.S.M.C. 102(1)], not posted for 30 days, not posted in all proper places, no broadcast announcements, no public hearing, etc. (but is regulation invalid against person who had actual notice?)
    - a. Kedwerer cannot challenge improper procedure in adopting regulation more than one-year after effective date unless can show good cause [17 F.S.M.C. 102(3)]

- b. Kedwerer argues does financial inability constitutes good cause, if court doesn't agree can't challenge regulation on this ground
- 2. constitutionality of tax regulation
  - a. regulation appears to exceed what Congress authorized in legislation [reg. can't exceed scope of statute authorizing it] because
  - b. regulation taxes ice-making equipment in years after it was imported, therefore not import tax [also isn't income tax], even if called that, but a property or use tax; national government has no constitutional authority to levy such tax
  - c. can invalid portion of regulation (tax in subsequent years) be severed from valid portion without whole regulation being declared invalid? [but note: statute still valid and enforceable] if so, Werer Co. liable for \$50,000 import tax only
- D. also no need for permanent injunction if tax declared unconstitutional

V. (10 points)

- A. may move Board for reconsideration and rehearing, or
- B. pursue matter before investigative team it was remanded to, or
- C. appeal to (probably state) court as appeal from state administrative agency decision;
  - 1. but discuss — administrative remedies not exhausted yet (was remanded to team for new decision which would then have to be confirmed by Board) thus no court jurisdiction versus court jurisdiction because further administrative action futile (team's new decision would have to be confirmed by same Board that already indicated what it wanted decision to be)
  - 2. grounds for appeal — board's decision was arbitrary, capricious, or unlawful because
    - a. violation of due process
      - (1) one of board members — Francis's nephew — should have disqualified self from participation in decision because of relation to litigant;
      - (2) board based decision on evidence parties unaware of, therefore parties not given notice and opportunity to be heard, which is essence of due process
    - b. abuse of discretion, decision was clearly erroneous because
      - (1) was contrary to evidence before registration team, and
      - (2) forty-year old survey improperly considered as evidence
  - 3. ask for relief that
    - a. Board's decision be vacated
    - b. declaratory judgment along lines of team's original decision, or
    - c. Francis's nephew be disqualified for all proceedings on remand, if case remanded

**EVIDENCE**

(20 points)

VI. (11 points)

- A. (4 points) objection will be 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];  
— admissible as evidence of reputation concerning boundaries of land before controversy arose [FSM Evid. R. 803(20)] as Joseph has personal knowledge of reputation in community; court can decide what weight to give evidence

B. (7 points)

1. testimony offered — how and where found in public land authority's records (testimony of board member who found survey), testimony of one or more witnesses, presumably public land authority employees, many of older surveys have name and signature of same land surveyor, and that authority has duty to keep and maintain such records
2. prepare for hearsay and possibly authentication objections
3. argue that is admissible hearsay as a public record [FSM Evid. R. 803(8)] and as an ancient document the authenticity of which has been established [FSM Evid. R. 803(16)], and if genuineness questioned, presence in official records and similarity to other official surveys lends air of authenticity; no best evidence objection because public record is self-authenticating if survey is an original [FSM Evid. R. 902(1) or (2); *see also* FSM Evid. R. 901(b)(7) & (8) (examples of circumstances public records and ancient documents are considered authentic when found where they would be expected to be found)] or certified copy thereof [FSM Evid. R. 902(4)]; expect judge to admit

VII. (5 points) under the rules a court may take judicial notice of facts not subject to reasonable dispute in that it is either generally known within the territorial jurisdiction of the trial court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned [FSM Evid. R. 201(b)], and court must take judicial notice if requested by a party and supplied with the necessary information [FSM Evid. R. 201(d)]; therefore, reading statute and rule together, court will take judicial notice of generally-known custom, as requested, if plaintiff provides satisfactory evidence, (defendant has opportunity to be heard on propriety of taking judicial notice [FSM Evid. R. 201(e)])

VIII. (4 points) objection — conduct or statements made during participation in traditional apology ceremony are inadmissible [FSM Evid. R. 408], and is hearsay (Sabado's wife is not a party; so is not admissible non-hearsay as admission of part-opponent) not within any exception; judge should sustain objection and not allow question [spousal privilege not involved because wife is not witness testifying]

### ETHICS

(10 points)

IX. (7 points) Quentin's ethical problems

- A. attorney's fees should be reasonable [FSM MRPC 1.5(a)], reflect the time and labor required and difficulty of questions involved; a flat fee of \$1,000 plus  $\frac{1}{3}$  of recovery for all cases ignores this requirement
- B. contingent fee agreement (the  $\frac{1}{3}$ ) must be in writing [FSM MRPC 1.5(c)]

- C. Quentin failed to communicate contents of Buccaneer George's letter to him contrary to his obligation to keep Zacharias reasonably informed of matter [FSM MRPC 1.4]
  - D. Quentin misappropriated to his own use the extra \$35 Buccaneer George sent for Zacharias, which with his failure to communicate Buccaneer George's letter to his client is dishonest, fraudulent, or deceitful [FSM MRPC 8.4(c)], and a criminal act that reflects on lawyer's honesty and trustworthiness [FSM MRPC 8.4(b)]
  - E. when deposited Buccaneer George's \$3,035 check in his own personal account Quentin improperly commingled client funds with his own [FSM MRPC 1.15(a)], and failed to promptly notify Zacharias that funds were received [FSM MRPC 1.15(b)]
  - F. lawyer's fee should be reasonable [FSM MRPC 1.5]; factors determining reasonableness include the time and labor required [FSM MRPC 1.5(a)(1)], amount involved and results obtained [FSM MRPC 1.5(a)(4)], \$2,0[35].00 fee to collect a \$3,000 debt for which attorney only had to write one letter appears not to be
- X. (3 points) seems that only Ann Masao retained Tom Collins and that he represents only her; misrepresentation to court to file answer for both defendants when only has attorney-client relationship with Ann [MRPC 3.3] (Tom's signature on answer may thus violate FSM Civ. R. 11); Tom Collins's answer may prejudice John Masao's case by answering for John when John never served; unknown if conflict in representing both; Tom's supervising attorney is also responsible for Tom's lack of competence