

Checklist of Points to be Covered for Complete Answers
FSM Bar Examination, September 4, 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. (11 points) will file motion to suppress evidence on grounds that stop was unlawful — police didn't have probable cause to stop pickup, because
- A. no search warrant as prescribed by FSM Const.
 - 1. search warrant generally needed
 - 2. but, if probable cause exists, search of motor vehicle is usually exception to warrant requirement because of its mobility, and
 - 3. can search area within occupant's immediate control or reach
 - B. no probable cause because unreasonable to rely on unreliable informant (police need reasonable suspicion to make stop)
 - 1. informant drunk
 - 2. informant unknown to police officer, so his reliability unknown
 - 3. *but* informant's information was corroborated by police officer's own observation that color of pickup and license plate number matched informant's information, therefore reliable
 - C. decide whether informant reliable and argue your case
- II. (8 points) Assuming Rousseau's business is not a separate corporation which cannot be held liable for Rousseau's debts
- A. writ of execution cannot issue until 10 days after entry of judgment [FSM Civ. R. 62(a)]
 - B. any party may apply for order in aid of judgment [6 F.S.M.C. 1409]
 - C. no writ of execution can be issued while an application for an order in aid of judgment is pending [6 F.S.M.C. 1413(1)]
 - D. therefore, if application for order in aid of judgment is filed within ten days after entry of judgment, no writ of execution can issue unless made part of an order in aid of judgment
 - E. parties can then negotiate an agreeable order in aid of judgment to present to judge, or Rosseau can present evidence and argue before judge that considering his abilities to pay time payments would be the fastest way to reasonably pay the judgment [6 F.S.M.C. 1409, 1410(1)]
 - F. Other possible steps — none advisable [shouldn't be in answer]
 - 1. Appeal not advisable because
 - a. Rosseau doesn't want
 - b. supersedeas bond required for stay of money judgment on appeal [FSM Civ. R. 62(d)] would likely disrupt business as much as writ of execution on bank

account

2. motion for new trial or judgment not advisable because
 - a. stay while motion pending is discretionary
 - b. unlikely to prevail

III. (12 points)

- A. request reconsideration by administrator
- B. request Dep't of Finance for hearing
- C. if hearing decision adverse, Masao may seek trial de novo in FSM Supreme Court trial division as he has exhausted his administrative remedies (or, if he goes to court first he will argue that further attempts at administrative relief would be futile)
 1. argue administrative decision was arbitrary and capricious and should thus be overturned, or if that fails
 2. argue that was unconstitutional (without due process of law) taking of Masao's property (his pay for prior work) [breach of contract not applicable — public employment governed by statute, not contract]
- D. if judgment adverse to Masao, it may appeal to FSM Supreme Court appellate division (if no facts in dispute, both parties agree and can agree on the record, and case is one of national importance that would ultimately have to be decided by the appellate division, a direct appeal to FSM Supreme Court appellate division might be allowed)
- E. unlikely to succeed on pay reduction if bill has become law; might succeed on not having refund back pay

IV. (11 points) file motion for relief from judgment [FSM Civ. R. 60(b)] on grounds of

- A. insufficient service
 1. summons and complaint may be served by delivering a copy of the summons and of the complaint to the individual personally or by leaving at individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein [FSM Civ. R. 4(d)(1)]
 2. if successful, then may move to dismiss for failure to serve within 120 days [FSM Civ. R. 4(j)] if 120 days has run by then
 3. *but* is 16-year-old daughter a "person of suitable age and discretion"?, probably
- B. excusable neglect
 1. explain circumstances that, while service made, caused Benido not to get actual notice of complaint and summons until too late
 2. has colorable defense to at least part of judgment [colorable defense necessary for relief from default judgment *see* Walter v. Meippen, 7 FSM Intrm. 515, 519 (Chk. 1996)]
 - a. \$400 in late fees is excessive; should only be one late fee charge (if any) before loan defaulted
 - b. default judgment for attorney fees can't be entered by clerk, must be entered by court, so void if entered by clerk

- c. if default judgment was entered by court, amount of attorney's fee still improper — fees limited to 15% in most collection cases [Bank of Hawaii v. Jack, 4 FSM Intrm. 216, 221 (Pon. 1990)] 15% of \$897.20 (or \$997.20 with \$100 late fee) is \$135.58 (or \$150.58)

V. (12 points)

- A. possible grounds to challenge inventory tax, argue constitutionality
 1. states are prohibited from imposing taxes which restrict interstate commerce [FSM Const. art. VIII, § 3] (argue taxing inventory imported from other states and inventory held to be exported constitutes restriction of interstate commerce)
 2. only nat'l gov't has power to impose taxes based on imports [FSM Const. art. IX, § 2(d); FSM Const. art. VIII, § 1] (argue that it appears to be import tax because is percentage of import price for 90% of inventory)
- B. legal steps to take on Chuukco's behalf
 1. file suit seeking declaratory judgment that tax is unconstitutional and injunction against enforcement of tax
 2. seek TRO and preliminary injunction against enforcement of tax, or seek to pay tax into court for duration of lawsuit

VI. (10 points)

- A. Local Constr. Co.'s liability
 1. not liable to Selena because
 - a. no privity of contract (was privity between Local & Xavier)
 - b. Selena rec'd as gift — no damages
 2. possible liability under tort theory for breach of duty to act as reasonable builder (?)
- B. theory of damages if liable
 1. difference between fair market value of property before defects appeared and now, or
 2. cost of repair
 3. cost of repair may be most appropriate if it does not exceed diminution of fair market value

VII. (6 points)

- A. (2 points) deny it; too late, deadline passed without motion for enlargement, not court's responsibility to assist Hagar in his fee arrangements by delaying its settings
- B. (2 points) none; the appellate court's decision will be based upon the record below and the briefs and arguments before it; appellant does not win by default if appellee fails to oppose
- C. (2 points) probably not; an appellee's failure to file brief is usually considered waiver of right to oral argument

ETHICS

(10 points)

- VIII. (3 points) Hagar had obligation to represent client diligently and see case through; even if there were any question whether Hagar represented Helga on the appeal, once Hagar made appearance by filing motion for enlargement he was obligated to perform [*see* FSM MRPC R. 1.3 cmt. ("Unless the relationship is terminated as provided in Rule 1.6, a lawyer should carry through to conclusion all matters undertaken for a client."); fee arrangements should've been made earlier [FSM MRPC R. 1.5(b)]
- IX. (3 points) Descartes should've communicated to Fermat basis of his fee before or within reasonable time after commencing representation, preferably in writing [FSM MRPC R. 1.5(b)]; fee must be reasonable [FSM MRPC R. 1.5(a)]
- X. (4 points) Dalton has not been diligent in representing Dernita [*see* FSM MRPC R. 1.3] by
- A. not serving Phlogiston properly
 - B. apparently not filing the answer with the clerk [if there had been an answer in the court file the clerk would not have entered a default or a default judgment or issued the subsequent writ of execution to Phlogiston]
 - C. failure to monitor status of Dernita's case (if Dalton had, he could have prevented things from going as far as the Dernita's boat's seizure);
 - D. because Phlogiston wasn't served with answer and no answer was filed Phlogiston's actions were not improper

EVIDENCE

(20 points)

- XI. (5 points) prosecution's motion should be denied
- A. Zelazny has constitutional right against self-incrimination [FSM Const. art. IV, § 7]
 - B. this right is not waived by testimony on preliminary matter [FSM Evid. R. 104(d)]
 - C. question related to court's jurisdiction is preliminary matter, therefore no waiver
- XII. (15 points)
- A. (5 points) objection will be on ground of spousal privilege [*see* 6 F.S.M.C. 1301]; issue will be whether Ballard and Carol are married; under facts of situation are Ballard and Carol married under local custom?; if so, court must recognize custom [Judicial Guidance clause, FSM Const. art. XI, § 11] and marriage and enforce privilege; (*but* was Carol's throwing Ballard out of their residence on her land a customary divorce?)
 - B. (4 points) evidence of other wrongs not admissible to prove character, but may be admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident [FSM Evid. R. 404(b)]; also, is act three years earlier relevant?
 - C. (3 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]; —

- D. (3 points) objection overruled; an accused may offer evidence of pertinent trait of his own character [FSM Evid. R. 404(a)(1)], especially if Stanza's testimony were allowed under part B