

Checklist of Points to be Covered for Complete Answers
FSM Bar Examination, August 1, 2002

[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. (16 points)

- A. issues the FSM Supreme Court appellate division will rule on all properly-raised issues
 - 1. requiring the interpretation of the nat'l constitution, law, or treaties
 - 2. if appeal from highest state court of Yap or Pohnpei the FSM Supreme Court appellate division will decline to rule on whether the seizure of the clock-radio as evidence violated the state constitution; same result for issue of whether state law or constitution required that the motion to dismiss because of the traditional apology be granted
 - 3. if appeal from highest state court of Kosrae or Chuuk (because both states have provisions in their state constitutions that permit appeal from highest state court of "other cases,") the FSM Constitution allows the court to hear the state issues as well, FSM Const. art. XI, § 7
- B. motion to dismiss because of traditional apology
 - 1. court will affirm denial; dismissal of criminal prosecution because of traditional apology to victim and her family not required by FSM Constitutional provision protecting Micronesian custom [*see FSM v. Mudong*, 1 FSM Intrm. 135 (Pon. 1982)]
 - 2. if court also rules on state law or constitutional claims on this issue, same result is likely, but may differ depending on the particular state law or constitutional provision that applies
- C. arrest without warrant — police may arrest without warrant when criminal offense has been committed and officer has reasonable ground (was Suva's identification reliable?) to believe person to be arrested did it [*see* 12 F.S.M.C. 211(3)]
- D. motion to suppress clock-radio
 - 1. house on state land
 - a. even though house on state property its residents would still have expectation of privacy & right to be secure against unreasonable search, seizure or invasion of privacy [FSM Const. art. IV, § 5]
 - b. thus either search warrant needed or some exception to search warrant requirement must apply in order for seizure of clock-radio to be reasonable
 - 2. argue the following search warrant exceptions
 - a. consent — did Canberra consent to the search when, in response to Det. Wellington's statement that he'd like to look around, Canberra shrugged and replied "What can I do?"; court would probably rule no
 - b. search incident to arrest — since Wellington did not search premises for purpose of protecting self and public there appears to be no search incident to arrest that would

- justify seizure of clock-radio
- c. in plain view — police don't need warrant to seize evidence when it is in plain view when police are in a place where they have right to be; did Det. Wellington have right to be in house where he could see clock-radio? Det. Wellington had arrested Canberra & when Canberra retreated into house he had right to follow his arrestee & clock-radio was in plain view when he did [*see, e.g., FSM v. Mark*, 1 FSM Intrm. 284 (Pon. 1983)]
3. lack of counsel at initial appearance and Wellington's failure to advise Canberra Suva of his rights before taking him to the immediate initial appearance does not appear to have had any effect on Canberra's prosecution; if error, harmless error as far as motion to suppress

II. (8 points)

- A. interpleader — an action by a stakeholder to determine the rights of various claimants to property it holds but does not claim so as not to be subject to multiple and potentially conflicting judgments — e.g., an insurance company must pay for damage its insured caused to certain property, but ownership of the property is claimed by several people; the insurance company will institute an interpleader action, name as defendants all those having a claim to the property, pay the money into court, and the court can determine who among the defendants (is) (are) entitled to the proceeds [*see* FSM Civ. R. 22]
- B. entry of default — when the plaintiff has shown by affidavit or otherwise that the defendant was properly served with the complaint and summons and has not answered or otherwise defended within 20 days of service the plaintiff may request that the clerk enter the defendant's default [FSM Civ. R. 55(a)]; an entry of default is the first and a necessary step in the two-step process by which a plaintiff may obtain a default judgment
- C. clear and convincing evidence — a higher burden of proof than a preponderance of the evidence generally applicable in civil cases, but lower than the beyond a reasonable doubt necessary in a criminal case; used in some settings, e.g., the standard of proof needed to discipline an attorney [FSM Dis. R. 5(e); *see also In re Attorney Disciplinary Proceeding*, 9 FSM Intrm. 165, 173 (App. 1999)]
- D. standing — generally, a party's material interest in an action's outcome; if a plaintiff does not have a material interest in the outcome or standing then the action is academic, hypothetical, or moot and does not constitute a case or dispute, which is a constitutional requirement for the FSM Supreme Court to exercise jurisdiction over the matter, FSM Const. art. XI, § 6

III. (11 points)

- A. (3 points) Aristotle may sue in either the FSM Supreme Court (in Chuuk where defendant is) or the Chuuk State Supreme Court; FSM Supreme Court would have jurisdiction over case under its "arising under" the Constitution or its diversity jurisdiction, both of which are concurrent with other courts so the state court might also entertain; but if considered admiralty or maritime the exclusive jurisdiction in the FSM Supreme Court
- B. (8 points)

1. Aristotle's contentions:
 - a. violates his right to equal protection of the law because equal protection of the law cannot be denied or impaired on account of language [FSM Const. art. IV, § 4];
 - b. under strict scrutiny analysis there's no compelling state interest in requiring pilots in Truk Lagoon to be fluent in Chuukese;
 - c. if lesser standard such as intermediate scrutiny (or even rational basis?) standard used, still no rational basis for requiring fluency in Chuukese, important thing is that pilot be intimately familiar with the passages, reefs, channels and anchorages of Truk Lagoon (as Aristotle is)
2. Chuuk's contentions:
 - a. that the states have the power to regulate shipping within lagoons — nat'l gov't has power to regulate navigation and shipping except within lagoons [FSM Const. art. IX, § 2(h)]; what isn't nat'l power is state power unless prohibited to state [FSM Const. art. VIII, § 2]
 - b. that there's a rational basis to require fluency in Chuukese, e.g., may need to communicate with small vessels whose crews only speak Chuukese
3. expected outcome — Aristotle appears to have the strongest argument, but marshal your facts and arguments for either side

IV. (21 points)

A. (12 points)

1. Smiths can file suit in either Kosrae State Court, or (on basis of diversity of citizenship) in the FSM Supreme Court in Kosrae
2. causes of action
 - a. against Manny Minor
 - (1) trespass (for driving thru Smith's driveway without permission and for leaving rocks on their property)
 - (2) negligence (for driving with unstable load of rock) — breach of duty of care to others when drove with unstable load, which caused damages when it fell on Smiths' car
 - b. against Blast Co.
 - (1) nuisance — intentional invasion of Smith's interest in use & enjoyment of their own land [*see Nelper v. Akinaga, Pangelinan & Saita Co.*, 8 FSM Intrm. 528, 534 (Pon. 1998)] either because
 - (a) gravity of harm outweighed usefulness of Blast Co.'s conduct, or
 - (b) harm caused to Smiths is serious and Blast Co.'s financial burden of compensating for it and similar harm to others would not force it out of business
 - (c) gravity of harm — court considers the extent and character of the harm, the social value and suitability to the community of the use and enjoyment involved, and the burden on the person harmed of avoiding the harm
 - (d) conduct's utility — court considers conduct's social value and suitability to

the community, and the impracticability of preventing or avoiding the invasion

- (2) strict liability
 - (a) arises when activity performed is not merely dangerous, but abnormally dangerous
 - (b) Smiths will contend that use of 50% more dynamite than permit allows made blasting abnormally dangerous
 - (c) whoever carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm [Nelper, 8 FSM Intrm. at 535]
 - (3) negligence
 - (a) breach of duty to use reasonable care shown in blasting by failure to announce on radio as required by permit & by exceeding by 50% the amount of dynamite permit allows them to use; caused damages (cracks in Smiths' house) [is violation of permit negligence per se or just some evidence of negligence?]
 - (b) on respondeat superior theory for Manny Minor's negligence
 - (4) negligent infliction of emotional distress — negligence (see (3)(a) above); to be compensable, a physical manifestation is required [Pau v. Kansou, 8 FSM Intrm. 524, 526 (Chk. 1998)], Smiths will claim their sleeplessness qualifies;
 - (5) trespass
 - (a) for landslides that deposited rocks on Smiths' property;
 - (b) on respondeat superior theory (for Manny Minor's trespass)
- c. against Hiro Fuji & David Santos — if the Blast Co. joint venture is a partnership between two individuals then the two partners are individually liable for everything partnership (Blast Co.) is liable; if Blast Co. is a corporation then Fuji and Santos not liable unless Smiths can pierce corporate veil on ground corporation has acted fraudulently (e.g., deliberately impoverished itself) & is alter ego of Fuji & Santos
- d. against Kosrae State — negligence unlikely to succeed because gov't's generally cannot be held negligent for failing to enforce its laws and regulations because duty owed to public at large, not to individual members of public
3. to halt blasting Smiths can
- a. seek injunctive relief
 - (1) temporary restraining order (TRO); if Smiths seek *ex parte*, must have affidavit or verified complaint showing reasons that immediate irreparable injury to the applicant will result unless TRO granted without notice; also Smiths must post bond in case TRO wrongfully granted
 - (2) TRO with notice if cannot show immediate irreparable injury will result to applicant unless TRO granted without notice; BUT all TRO's good only 14 days, may be renewed for another 14 days (longer, only with agreement of all parties),

then must have preliminary injunction hearing before TRO expires. Therefore might be wiser to seek

(3) preliminary injunction — done at hearing with notice to other parties (parties can also stipulate to one); remains in place until disposition of case when it is either vacated or permanent injunction is granted

b. factors to prove for injunctive relief prior to disposition of case — Smiths must show that a balancing of the following four factors weighs in their favor

(1) likelihood of success on the merits

(2) irreparable harm (lack of adequate legal remedy)

(3) relative harms to the parties, and

(4) the public interest

B. (9 points)

1. Utwe Auto

a. Mrs. Smith offered & Utwe accepted \$10 consideration — created valid option contract

b. Utwe obligated to hold Toyota for a week

c. Mrs. Smith has option to buy Toyota in that period but is not obligated to

d. Utwe can spend the \$10 on anything he likes

e. Utwe is liable to Mrs. Smith for breach of contract for selling Toyota to someone else if at anytime in the one-week period Mrs. Smith comes back and offers the \$800 to buy it — otherwise no damages caused by breach

f. buyer of Toyota is bona fide purchaser for value & entitled to keep Toyota

2. Kosrae Klunkers

a. Mrs. Smith made conditional offer

b. it was accepted

c. consideration was exchange of mutual promises

d. the conditions were fulfilled — Yap Team won 10 medals

e. Mrs. Smith will be liable for breach of contract if she doesn't buy the Bluebird, unless the Bluebird isn't sufficient to travel up hill to Kosrae State Court, in which case Mrs. Smith may refuse to buy Bluebird because it was not as warranted by the seller — essential contract term not fulfilled

V. (14 points)

A. since permit is to do business only in one state FSM Sec'y of R&D must approve it if the State has already approved it, unless compelling reason not to is based on national security or public welfare

B. steps to take

1. appeal to President to overturn Sec'y's decision (generally must exhaust administrative remedies, unless futile, before can proceed to court)

2. appeal to FSM Supreme Court appellate division, but only if opposing party will agree to it, no factual findings need be made, and the record can be agreed to [*see, e.g., Robert v. Mori*, 6 FSM Intrm. 394, 397 (App. 1994)];

3. otherwise, appeal to FSM Supreme Court trial division, where trial de novo may be had if fact

finding needed; by summary judgment if no fact finding needed; if decision is adverse then may appeal to appellate division;

4. if can argue that issuance of permit is a ministerial, non-discretionary duty of Sec'y of R&D can seek writ of mandamus from either trial or appellate division (trial division preferable as only one judge need act)

EVIDENCE

(20 points)

VI. (10 points)

- A. (3 points) physical therapist is an expert witness qualified to give opinion testimony if proper foundation laid; therapist's experience and knowledge sufficient to assist judge to understand the evidence and determine facts at issue (damages) therefore may testify as expert [FSM Evid. R. 702]; may offer opinion on ultimate issue [FSM Evid. R. 704]
- B. (3 points) husband's testimony is opinion testimony of a lay witness; such opinion testimony is permitted if rationally based on husband's perceptions and is helpful to understand his testimony or to determine fact in issue (in this case, damages is at issue) [FSM Evid. R. 701]
- C. (4 points) appellate court will probably rule that sustaining the objection was error because
 1. any witness's credibility may be impeached by evidence of conviction of crime punishable by more than one year imprisonment (felonies) or that involves dishonesty or false statement [FSM Evid. R. 609(a)]; but convictions not admissible if more than 10 years old (or if more than 10 years since release of witness from imprisonment) unless advance warning of intention to introduce given adverse party timely notice in writing and if court determines probative value of conviction outweighs prejudicial effect [FSM Evid. R. 609(b)]
 2. evidence is limited to either witness's admission of conviction or certified copy of conviction if witness denies conviction [FSM Evid. R. 609(a)]

- VII. (4 points) response — not hearsay by definition — admission of party-opponent [FSM Evid. R. 801(d)(2)]; defendant's words were not offered as out-of-court assertion for truth contained therein but were a verbal act creating contract (bonus); judge should therefore overrule the objection

VIII. (6 points)

- A. when a hearsay statement has been admitted into evidence, the declarant's credibility may be attacked by any evidence admissible for that purpose as if the declarant had been a witness [FSM Evid. R. 806]; therefore judge will rule
- B. Theodric's credibility may be attacked by his reputation for truthfulness or untruthfulness [FSM Evid. R. 608(a)] (thus to the extent that Theodric's reputation for untrustworthiness and unreliability relies on his reputation for untruthfulness it is admissible)
- C. Theodric's prior inconsistent statement is admissible [FSM Evid. R. 613] even though he has not been afforded the opportunity to deny or explain [FSM Evid. R. 806]

ETHICS
(10 points)

IX. (7 points)

- A. any sums paid to Astatine on account of work to be performed by her in the future and that are not yet earned, or costs and expenses to be incurred in the future, must be placed in her trust account [*see* FSM MRPC R. 1.15(c)] unless her fee agreement with Bismuth clearly stated that the \$5,000 paid in advance was a non-refundable retainer, earned on receipt
1. since it appears that the \$5,000 probably wasn't a non-refundable retainer because she said she would bill her time at \$100 per hour, use of \$2,750 to pay her rent was improper; payment of the investigator may have been proper as an expense once it was incurred
 2. Astatine must return any unearned portion of fee when her representation of Bismuth ends [FSM MRPC R. 1.16(d)]
 3. also, lawyers are barred from engaging in conduct involving deceit or dishonesty
- B. can't represent someone in same or substantially related matter when position is materially adverse to former client unless former client consents after consultation [FSM MRPC R. 1.9(a)], should've maintained client list to check for conflicts; can't use information relating to representation to former client's disadvantage unless info generally known [FSM MRPC R. 1.9(b)]; argue whether —
1. since Radon's drinking was involved both times, is this a "substantially related matter"? If so, Astatine needs Radon's consent
 2. Astatine may have learned confidences or secrets about Radon's drinking habits which could harm him in case, Astatine may be able to attack his credibility as a witness from what she learned in the earlier case concerning his drinking habits or ability to function under the influence

X. (3 points) assuming that Minsk is competent to handle the appointment

- A. Minsk should not seek to avoid appointment except for good cause such as violation of the FSM MRPC, or unreasonable financial burden, or client is so repugnant to Minsk that it is likely to impair attorney-client relationship [FSM MRPC R. 6.2]
- B. Minsk claims a conflict (conflicts are violations of MRPC); but is conflict real? She works for Congress, a co-equal branch of the nat'l gov't, and she's asked to defend someone prosecuted by the Executive, a different co-equal branch of gov't, (with trial held before the third co-equal branch, the courts) (if just working for the gov't caused a conflict then the Public Defenders' Office couldn't represent defendants because they are all gov't employees, and public defenders work for the same co-equal branch as the Attorney General); Minsk's only client is Congress; not the Department of Justice; therefore representation of criminal defendant not directly adverse to another client [*see* FSM MRPC 1.7];