

Checklist of Points to be Covered for Complete Answers
FSM Bar Examination, March 4, 1999

[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. (7 points)
 - A. proper burden for proof in civil case is preponderance of the evidence — not reasonable doubt; appellate court will review trial court's findings of fact — that certain words were spoken and acts took place — whether trial court was clearly erroneous in findings by preponderance of the evidence
 - B. whether the words and acts constitute legally-binding contract is question of law which appellate court reviews de novo

- II. (15 points)
 - A. (12 points) Besides usual discovery motions Motion for Suppression of Evidence on ground that searches were unreasonable because done without warrant or probable cause
 1. search of car passenger compartment
 - a. gov't will argue warrantless search reasonable because done for officer's safety — dangerous weapons or devices could be hidden there where arrestee might be able to reach and evidence (fruits & instrumentalities of crime); & search was done within reasonable time of arrest
 - b. you will argue that once Yosiwo arrested and taken away, officers were in no danger
 - c. gov't may also argue plain view, if marijuana was in plain view of anyone looking into car (possible — search was cursory) from place they had right to be
 - d. gov't can also argue would have been inevitably discovered by lawful search at police station (*see* 2b below)
 - e. gov't will succeed if facts fit plain view argument; if not, gov't might (or might not) succeed on other argument
 2. search of entire car at police station
 - a. you will argue that police had plenty time to get search warrant if they had probable cause to believe any evidence of crime in car
 - b. if gov't can show search was part of routine inventory done pursuant to regulations in order to protect police from false claims of missing property and arrestee's property from damage & theft and that search followed guidelines; then motion denied
 - B. (3 points) Yosiwo should make motion for return of property [FSM Crim. R. 41(e)]; car likely

returned (in absence of civil forfeiture statute), because Yosiwo entitled to lawful possession, but marijuana, and probably dynamite, not returned because are contraband & no right to return of contraband

III. (16 points)

A. Procedural Issue

1. Question whether Chuuk State Supreme Court has personal jurisdiction over Palmerston because he's never been there and alleged transaction which suit is over didn't take place there
2. Question whether Chuuk State Supreme Court has subject matter jurisdiction — is this sale of ship an admiralty & maritime case over which FSM Supreme Court has exclusive jurisdiction?
3. steps to take
 - a. can enter special appearance in Chuuk State Supreme Court to assert lack of personal jurisdiction and/or subject matter jurisdiction and move for dismissal; or
 - b. can remove case to FSM Supreme Court, Chuuk, because of diversity of citizenship [see FSM Const. art. XI, § 6(b); FSM GCO 1992-2] and/or exclusive admiralty & maritime jurisdiction and then seek change of venue to Kosrae [6 F.S.M.C. 304(2)] since that's where defendant Palmerston resides [6 F.S.M.C. 301(1)]
4. either 2a or 2b should be successful depending on which step taken; because of automatic nature of removal could be better course if it seems that upon dismissal Keske would refile in another court with jurisdiction

B. Substantive Issues

1. whether binding agreement made
 - a. was there offer and acceptance?
 - (1) reply "Sure, sure, whatever you want." is not agreement or acceptance; under circumstances was a polite rebuff
 - (2) parties too inebriated to make valid offer or acceptance
 - b. was there a meeting of the minds?
 - (1) same reasons as a(1) & a(2)
 - (2) may argue lack of sakau or turtle meat means Palmerston never believed was accepting offer, but since Keske comes from place that custom evidently not followed perhaps not (*e.g.*, did Palmerston drink sakau or eat turtle meat when he bought M/V *Dernita's Fancy*?) & therefore no meeting of minds
 - c. was writing necessary? (would oral contract be valid under law of place where made? or where sought to be enforced?)
2. steps to take
 - a. if parties don't have genuine dispute that the facts are as set out in the question then Palmerston should move for summary judgment that his acts and words did not, as a matter of law, create a binding contract

- b. if factual findings necessary then motion denied and matter proceed to trial
 - c. Palmerston would expect to prevail at trial, if not on summary judgment
3. results — Palmerston prevail (likely); if Keske prevails discuss specific performance v. damages

IV. (14 points)

- A. Gov't's defenses
 - 1. sovereign immunity — FSM has expressly waived sovereign immunity for claims based on contract [6 F.S.M.C. 702(3)] so defense ineffective
 - 2. failure to exhaust administrative remedies — although exhaustion of usually required [*see* 17 F.S.M.C. 108, 111], not required if it would be futile to do so [*see, e.g., Dorval Tankship Pty, Ltd. v. Department of Finance*, 8 FSM Intrm. 111, 115 (Chk. 1997); *Chuuk v. Secretary of Finance*, 7 FSM Intrm. 563, 566 n.4 (Pon. 1996)]; because Secretary himself took action further pursuit of administrative remedies probably futile, so defense likely to fail
- B. Standard of Review of Secretary's action — court will determine if Secretary's action is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law, contrary to constitutional right, in excess of statutory authority or a denial of legal rights, without substantial compliance with procedures required by law, or unwarranted by the facts [17 F.S.M.C. 111]; in this case the arbitrary and capricious most likely will apply to the case's facts
- C. Calculation of damages — Noah entitled to expectancy damages, that is, profits he would've made if allowed to perform contract (which would put him in as good a position as if the contract hadn't been breached); because there was a six-month escape clause allowing either party to terminate contract, damages probably limited to profits Noah would've made in six months after contract's termination; figure may be arrived at by comparing the next six months with the same six months in contract's two previous years

V. (18 points)

- A. (11 points)
 - 1. MCI may sue for damages, and, if necessary, enjoin future interference with its business by Sinclair
 - 2. cause(s) of action
 - a. malicious prosecution (the defendant initiated the civil litigation, the litigation was resolved in the plaintiff's favor, the defendant did not have probable cause to initiate the civil litigation, the defendant exhibited malice or ill will, and the litigation caused significant interference with the plaintiff's property), or maybe
 - b. abuse of process (one uses legal process against another's person or property to accomplish an ulterior purpose for which the process was not designed)
 - 3. damages calculation — although expectancy damages (lost income) not usually awarded for businesses just starting because they are not capable of calculation with reasonable certainty, here they can be; MCI lost one month's fees from all its subscribers (since it is unknown how long the 15 that canceled would've continued subscribing can only get one

month's loss for them, too), one month's rent for time it could use the land Isenuff, and fees, if any, it had to pay for programs it couldn't rebroadcast

B. (7 points)

1. Sinclair and others v. MCI — case will proceed in court, likely to turn on whether MCI can run its lines on public utilities' poles through public utilities' easement with public utilities' permission without having to get its own easement; if can't, then MCI owes damages for trespass
2. Sinclair — might be liable for damage to MCI's property for cutting cable even if MCI trespassing because Sinclair can be compensated with money for any trespass (punitive damages?)
3. MCI — might be liable for trespass; has right to damages for destroyed cable, *e.g.*, cost of repair, lost income from 15 cut-off subscribers, if any

EVIDENCE

(20 points)

VI. (5 points) judge could permit plaintiff to voir dire witness before witness proceeds; plaintiff will be allowed to impeach witness even if is own witness; may use prior inconsistent statement at deposition because it's not hearsay when used that way [FSM Evid. R. 801(d)(1)(A)]

VII. (7 points)

A. (2 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]; — Statements of fact contained in a properly authenticated baptismal certificate that the maker administered the sacrament, made by a clergyman, or other person authorized by the rules or practices of a religious organization to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter are a hearsay exception [FSM Evid. R. 803(12)], also qualifies as ancient document exception [FSM Evid. R. 803(16)]

B. (5 points) birth certificate may be admissible as hearsay exception for records of vital statistics [FSM Evid. R. 803(9)] or as a public record [FSM Evid. R. 803(8)] and if sealed is self-authenticating [FSM Evid. R. 902(1)]; Ermine's counsel may prove the absence of any birth records in the hospital either by a self-authenticating certification or testimony, that diligent search failed to disclose the record, report, statement, or entry [FSM Evid. R. 803(10)]

VIII. (6 points) Generally settlement offers not admissible to prove liability for or invalidity of the claim or its amount, but exclusion not required when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, or negating a contention of undue delay [FSM Evid. R. 408]; since Fitikoko raised laches as an affirmative defense and one of the elements of laches is undue delay, judge should rule Avalon's

testimony admissible for purpose of negating undue delay; payment of medical expenses and offering to pay also inadmissible to prove liability for injury [FSM Evid. R. 409], but should be admissible for other purpose, such as reason for delay (but can Avalon offer until Fitikoko has offered evidence in support of its affirmative defense of laches?)

- IX. (2 points) Objection overruled; Evidence Rules do not apply to bail hearings [FSM Evid. R. 1101(d)(3)]

ETHICS

(10 points)

- X. (3 points) FSM-admitted attorney must, upon being subjected to professional disciplinary action in another jurisdiction, promptly inform the Chief Justice in writing of such action [FSM Dis. R. 11(a)] but no requirement of notification when only being investigated; might not be liable for reciprocal discipline in FSM because it could be argued that because there are no bar dues in FSM, that the conduct disciplined in the other jurisdiction does not constitute misconduct in FSM, and therefore no reciprocal discipline imposed [FSM Dis. R. 11(c)(4)]; but discipline might be sought for failure to report Calif. discipline promptly
- XI. (4 points) suspension orders take effect 30 days after entry [FSM Dis. R. 12(c)] so Emory was practicing law while suspended (preparation of the two briefs [but part or all of first brief may have been prepared before 30 days ran] and giving legal advice (how to file) to Nectar) and may be held in contempt of court for unauthorized practice of law [FSM Dis. R. 14] (even though not paid for work); Disciplinary counsel will prosecute contempt charge
- XII. (3 points) general rule — lawyer cannot represent a client if representation will be adverse to another client [FSM MRPC R. 1.7(a)], or to a former client [FSM MRPC R. 1.9]; but was Darius ever Gonzaga's client?; it appears that Gonzaga only represented the Xerxes family lineage — the lineage, not Darius, was his client, and if represented Darius it was only in his official capacity as *mwääniichi*; is Darius's estate being sued in Darius's personal, as opposed to official capacity as *mwääniichi*? Argue