

Checklist of Points to be Covered for Complete Answers
FSM Bar Examination, August 2, 2001

[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. (13 points)

A. analyze four factors for injunctive relief - likelihood of success on the merits, irreparable harm (lack of adequate legal remedy), relative harms to the parties, and the public interest; a party requesting injunctive relief must clearly establish the legal right to be invoked

1. likelihood of success on the merits - movant cannot demonstrate the because a bona fide dispute as to the right to vote the shares exists (unless can show Charleen Lava likely to succeed on her ownership claim)

2. irreparable harm - from the present record, it does not appear that permitting present management to continue to manage Yap's Best Dang Tuna, Inc. during the time necessary for a determination of the directors elected at the Annual Meeting will result in any irreparable harm; therefore adequate legal remedy exists

3. other factors for injunctive relief do not need to be reached as the absence of the first two factors is certain, but

a. does not appear that a balancing of the interests of the parties favors either

b. likewise, there appears to be no known impact on the public interest

B. when actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay [FSM Civ. R. 42(a)]; consolidation is used as a solution to problems created by the existence of two or more cases involving the same parties and issues, simultaneously pending in the same court; consolidation of the three pending cases seems appropriate because

1. there appears to be a commonality of parties in the three pending cases as Yap's Best Dang Tuna, Inc., Lava and FEPI are all necessary parties to ascertain the ownership of the disputed shares

2. likewise there is a common issue in all the cases as to the ownership of the disputed shares and whether they should be voted in the election of directors

II. (16 points)

- A. (3 points) even though tax not levied until 75 days after import it is act of importation that triggers eventual liability therefore it is import tax which is an exclusive power of national government & prohibited to states [See, e.g., Department of Treasury v. FSM Telecomm. Corp., 9 FSM Intrm. 575 (App. 2000)]
- B. (3 points) FSM Constitution prohibits non-FSM citizens from acquiring title to land [FSM Const. art. XIII, § 4] and guarantees persons the equal protection of the law [FSM Const. art. IV, § 4] so state constitution violates national equal protection clause by preventing other FSM citizens from acquiring land and by creating two classes of state citizens - those that may acquire land & those that cannot; right of FSM citizens to travel may also be implicated
- C. (3 points)
 1. added tax on travel agency is tax which restricts interstate commerce and thus prohibited to state and local governments [FSM Const. art. VIII, § 3; Stinnett v. Weno, 6 FSM Intrm. 392 (Chk. 1994)]
 2. regulating banking is power reserved to national government [FSM Const. art. IX, § 2(g)] & added tax on bank is form of regulation therefore prohibited
 3. appears okay
 4. possible equal protection argument since fast food take out place taxed at lower rate but unlikely to prevail
 5. percentage of rental fees collected if levied on hotel is in effect a tax on income, a power reserved to national government, thus unconstitutional; but if it is paid by the person renting the hotel room, in which case it is a sales tax [Truk Continental Hotel, Inc. v. Chuuk, 7 FSM Intrm. 117 (App. 1995)]
- D. (3 points) \$1,000 surcharge on the importation of any motor vehicle with the steering wheel on the right-hand side okay because Congress has power to levy import taxes [FSM Const. art. IX, § 2(d)] but \$500 tax on resale appears to be sales tax, which because not power expressly delegated to the national government is a state power [FSM Const. art. VIII, § 2]

- E. (2 points) added statutory qualification for congressmen is constitutional because Constitution specifically provides that Congress can prescribe additional qualifications (other than knowledge of the English language) for congressmen [FSM Const. art. IX, § 9]; but possible argument that having a high school diploma would require a knowledge of English so this is unconstitutional because it is really adding the forbidden additional requirement - knowledge of English
- F. (2 points) such state constitutional provisions are permitted by the FSM Constitution [FSM Const. art. XI, § 8]

III. (14 points) move to quash the TRO immediately because of TRO's deficiencies

- A. no recitation or finding of irreparable injury if not issued
 - 1. argue no irreparable harm because the Salamander Dive Club is already built
 - 2. \$1,000 "security" is inadequate considering nature of the business
- B. no recitation of why the TRO had to be issued without notice and an opportunity to be heard [FSM Civ. R. 65(b)]
- C. can also demand hearing to dissolve or modify TRO on 3 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe [FSM Civ. R. 65(b)], court must then act expeditiously; court will probably dissolve because
 - 1. Gerry likely to prevail on merits
 - 2. Burr has not shown any irreparable harm
 - 3. balance of harms favors Gerry because the Salamander Dive Club is already built
 - 4. public interest likely to favor Gerry because of economic benefit to community
- D. possible counterclaim for malicious prosecution or abuse of process [see Island Cable TV-Chuuk v. Aizawa, 8 FSM Intrm. 104, 106-07 (Chk. 1997); Mailo v. Twum-Barimah, 2 FSM Intrm. 265, 268 (Pon. 1986)]

IV. (14 points)

- A. (8 points) causes of action v. Deimos & post office (only defendants named in suit)
 - 1. premises liability v. the post office
 - a. based on negligence
 - b. has duty to provide safe premises for its customers
 - 2. negligence v. Deimos; discuss negligence; [see, e.g., Nelper v. Akinaga, Pangelinan & Saita Co., 8 FSM Intrm. 528, 535 (Pon. 1998) elements of

- actionable negligence are:
- a. a duty of care,
 - b. a breach of that duty,
 - c. damages
 - d. proximately caused by that breach.
3. negligent infliction of emotional distress v. Deimos
- a. Deimos's conduct must be negligent
 - b. the emotional distress must have some physical manifestation (present here) [see for a negligent infliction of emotional distress claim to be compensable, a physical manifestation is required) Fau v. Kansou, 8 FSM Intrm. 524, 526 (Chk. 1998); Eram v. Masaichy, 7 FSM Intrm. 223, 227 (Chk. S. Ct. Tr. 1995)], sleeplessness qualifies as physical manifestation
- B. (3 points) the FSM Supreme Court has exclusive jurisdiction over case because an arm of the national government (post office) is a party [FSM Const. art. XI, 6(a)] [note: there is no diversity jurisdiction as both Phobos and Deimos appear to be local citizens (Deimos is company owned by local woman) & only they & post office are parties in the state court suit] Deimos can either
1. remove the case from state court [FSM GCO 1992-2] (probably quickest), or
 2. move to dismiss in state court for lack of subject matter jurisdiction
- C. (3 points) Deimos cannot raise hospital's care as defense
1. because medical malpractice is within any proximate damages his negligence caused
 2. might be able to bring third-party claim that if he is liable the hospital is partly liable to indemnify him or for contribution
- V. (5 points)
- A. action to take - file immediately (if threat to file doesn't work) for a writ of habeas corpus - a civil action against jailer to justify his restraint of Callisto
 - B. can file in either state court or FSM Supreme Court (some states may also grant power to issue writ to their municipal courts); can bring case under both FSM and state constitutional provisions
- VI. (8 points) move to suppress statement because police failed to bring Io before court within reasonable time, not to exceed 24 hours [12 F.S.M.C. 218(5), (6); see Chuuk v. Arnish, 6 FSM Intrm. 611 (Chk. S. Ct. Tr. 1994)]

- B. failure to inform Io of his rights
1. to see members of his family [12 F.S.M.C. 218(2)]
 2. to see his employer or representative thereof [Id.]
 3. to send message members of his family or his employer or representative thereof [12 F.S.M.C. 218(3)]
 4. and failure to release or charge arrested person within reasonable time, not to exceed 24 hours [12 F.S.M.C. 218(4)] (unclear from facts given whether that was the case here)
- C. court would therefore suppress statement because obtained while Io's rights were violated [12 F.S.M.C. 220] (exclusionary rule) [see, e.g., FSM v. Sangechik, 4 FSM Intrm. 210, 211 (Chk. 1990); FSM v. Edward, 3 FSM Intrm. 224, 233 (Pon. 1987)]

EVIDENCE
(20 points)

VII. (3 points)

- A. will object 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]
- B. but because this is a probation revocation hearing the FSM Rules of Evidence do not apply [FSM Evid. R. 1101(d)(3)] so no hearsay prohibition; testimony will be allowed because it is relevant to issue of whether Nereid violated terms of probation

VIII. (17 points)

- A. (3 points) expert testimony allowed if will assist trier of fact if witness has knowledge, skill, experience, training, or education [FSM Evid. R. 702], but Henderson's information is ten years old and therefore not the type that an expert would rely upon - inadmissible
- B. (3 points) surveyor's letter is hearsay; hearsay is out of court statement (statement can be written) 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]; this doesn't fall within any of the

- exceptions - inadmissible
- C. (3 points) copies of originals are admissible unless
1) a genuine question is raised as to the authenticity of the original or 2) in the circumstances it would be unfair to admit the duplicate in lieu of the original [FSM Evid. R. 1003] but since Ducie is trying to prove contents of original (that Pitcairn was at party) and since maker is unknown its authenticity may be in question and original required
 - D. (3 points) crime didn't involve dishonesty and since was misdemeanor was probably not punishable imprisonment in excess of one year under the law under which he was convicted therefore probably inadmissible to impeach Ducie [FSM Evid. R. 609(a)] (assuming Ducie is called as witness) although within ten year time limit [FSM Evid. R. 609(b)]; also inadmissible to prove Ducie acted in conformity with prior bad acts [FSM Evid. R. 404(b)]
 - E. (3 points) Ducie's statement to Oneo is by definition non-hearsay because it is Ducie's own statement and an admission of party-opponent and offered against him [FSM Evid. R. 801(d)(2)(A)] therefore admissible
 - F. (2 points) certified copy of public record is self-authenticating [FSM Evid. R. 902(4)], and contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, may be proved by certified copy [FSM Evid. R. 1005] - therefore deed admissible

ETHICS

(10 points)

- IX. (4 points) advice to Lima
 - A. lawyer cannot prepare will for client giving substantial bequest to lawyer unless lawyer is related to client [FSM MRPC R. 1.8(c)] so unless Lima is related to Quito it was unethical for her to draft Quito's will with the provision she wanted
 - B. Lima should immediately inform Quito of problem & ask that if Quito still wishes to have that provision in her will she should have the will drawn up by someone else because Quito should have detached advice another lawyer can provide (otherwise Lima will need to find another way to get paid)
 - C. but usually okay for lawyer who drafted will to serve as executor

X. (6 points)

A. findings & recommendations concerning Wolfram

1. use of phrase "International Lawyer" on letterhead & in advertisements unethical because it misleading communication about lawyer or his services [violating FSM MRPC R. 7.1]; phrase is misleading because it could mean lawyer is licensed to practice in more than one country (apparently true) or many countries (unknown) or that Wolfram specializes in international law (untrue); also unethical because implies that lawyer is a specialist [violating FSM MRPC R. 7.4]; recommend that Wolfram be prohibited from using phrase in his advertising
2. Wolfram's comment in his affidavit about opposing counsel unethical because it has no substantial purpose other than to embarrass, delay, or burden a third person [violating FSM MRPC R. 4.4] & because is conduct prejudicial to administration of justice [violating FSM MRPC R. 8.4(d)] by sullyng the court files and diverting court's time & energy from civil case affidavit was filed in; recommend strong sanction (public reprimand or short suspension)

B. findings & recommendations concerning Leon

1. one vulgar term in one letter to opposing counsel may be unprofessional
2. but if violation it is so de minimis does not rise to level of verbal abuse warranting disciplinary action thus not likely to recommend prosecution