Checklist of Points to be Covered for Complete Answers

FSM Bar Examination, March 2, 2000

[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

1. likelihood of success on the merits – poor because it doesn't appear to be an ex post facto law; ban on ex post facto law applies to criminal acts only; retroactive noncriminal laws may be valid; [Robert v. Mori, 6 FSM Intrm. 394, 400 (App. 1994) (ex post facto laws limited to legislation which does any of the following: 1) makes criminal and punishable an act innocent when done; 2) aggravates a crime, or makes it greater than it was when committed; 3) increases the punishment for a crime and applies the increase to crimes committed before the enactment of the laws; or 4) alters the legal rules of evidence so that testimony insufficient to convict for the offense when committed would be sufficient as to that particular offense and accused person)]; strongly favors FSM (bonus: but is there a substantive due process claim that would favor Importco?)
2. irreparable harm (lack of adequate legal remedy) – Importco could sue for refund of tax so has legal remedy of a money judgment whether it is adequate might depend on how difficult it is to get refund once has judgment, Importco has already received vehicles so not irreparably harmed by being unable to get its goods until tax paid, but Importco now liable for more than ten times the duty it expected (and can't add it to selling price for any vehicles it has already sold); argue if favors FSM or Importco
3. relative harms to the parties – FSM would get tax money later than expected but probably hadn't relied on it in its original budget because fiscal year 2000 budget prepared long before tax law passed fiscal year started before law passed and before time period for tax started, Importco would be forced to make substantial unexpected payment that could get back only with difficulty; probably favors Importco
4. public interest – not clear

B. might order Importco to pay disputed tax into court for deposit in interest-bearing account to be turned over to the FSM gov't if it should win or to Importco if it should

II. (10 points)

A. Mandamus – a preemptory writ directed for a higher court to a lower tribunal commanding it to perform a ministerial, non-discretionary duty

B. Writ of Prohibition – virtually the same as a writ of mandamus except that it commands a lower tribunal not to do something that is in excess of its jurisdiction

C. Clearly Erroneous – appellate standard of review of a trial court's factual findings

D. Pendent Jurisdiction – power of national court to decide matters over which it ordinarily would not have subject matter jurisdiction but because it is a part of a larger case over which it does have subject matter it has jurisdiction to decide it as well; the rule of decision will be state law

E. Exclusionary Rule – excludes government's use of illegally obtained evidence in criminal prosecution

F. Personal Jurisdiction – power of court to exercise jurisdiction over the parties to the case, usually based on consent, citizenship, person's presence in jurisdiction, or long-arm statute allowing jurisdiction for tortious act in jurisdiction, etc. if sufficient minimum contacts for due process

III. (14 points)

A. Possible defendants, all in their official capacity, and their basis for liability

1. Platinum – negligence – premises liability under an attractive nuisance theory – dangerous to young children, would attract them to trespass and use trampoline, warning signs inadequate because child too young to read and should know trampoline would be attractive to children that young; negligent supervision of aides; therefore breached duty to such persons as plaintiff; negligence is a duty of care, breach of this duty, damage caused by the breach, and determination of the value of the damage
2. school aides – also negligence, breached their assigned duty of care when forgot to chain trampoline to the wall
3. Dubnium, state director of education – also negligence – approved purchase without investigating whether trampoline would be safe
4. state department of education as respondeat superior of school dep't employees
5. Fermium – no basis for liability to the child, not a possible defendant in a suit by child's next friend because Fermium does not

owe duty to public not to misuse school funds and no statute provides for such a cause of action

6. Supplier – might have possible products liability action if trampoline was defective, but no facts in question suggest that
7. doctor – medical malpractice
8. state hospital – medical malpractice
9. state as respondeat superior for hospital and doctor

B. damages

1. against Platinum, the school aides, Dubnium, and the state department of education include not only the pain and suffering for the accident but all damages arising out of the doctor's malpractice because medical malpractice is within the foreseeable damages of any personal injury, e.g., loss of use of arm, past & future medical expenses, if any; may be apportioned between defendants on a comparative negligence basis
2. against the doctor, state hospital, and the state only the damages arising out of the doctor's malpractice
3. damages limited to $20,000 for a personal injury claim [*see* 6 F.S.M.C. 702(4)]; but maybe can argue that child has two separate personal injury claims against the state – one for the trampoline and other for medical malpractice, total $40,000 might be possible (?)

IV. (15 points)

A. Gov't's arguments and evidence put forward

1. search of carry-on bag found on aircraft, brought from plane to customs by airline personnel who are not gov't agents, action not instituted by gov't
   a. was a border search – no warrant needed as FSM customs has the right to search any goods or items entering the country without a warrant, customs and agricultural agents have duty to search
   b. put on testimony of customs and agricultural inspection agents present when bag opened and searched, defendant's name found in bag when searched, trained personnel recognized the "ice," testimony of police officers that Burr later identified bag as his property and took possession of it; flight crew may be unavailable to testify so may try to submit affidavits, possible objection Burr has Constitutional right to confront witnesses against him so may need to make arrangements for one of crew to be present to testify

2. search of checked luggage at police station
    a. was a border search – same argument as above
    b. was an inventory search – police may conduct a warrantless search of an arrestee's property for the purpose of making an inventory of arrestee's property to guard against false claims of missing property, to discourage damage or disappearance of arrestee's property & to guard against dangerous instrumentalities, etc.
    c. put on testimony that Burr already arrested when checked luggage brought to police station and searched, put on testimony that making inventory of arrestee's property is a standardized procedure and done every time, submit in evidence a copy of the written inventory, testimony of officer who conducted the actual inventory

B. likelihood of success
1. border search – argument likely to succeed for carry-on bag because it was searched at the functional equivalent of a border – the airport terminal – by customs & agriculture agents
2. border search – argument not likely to succeed for checked luggage at police station because station not functional equivalent of border, not searched by customs, and was allowed to pass functional equivalent of border without search
3. inventory search – likely to succeed if arrest was lawful because detailed inventory made, if evidence can show that inventory searches were standardized and were routine practice always done for arrestee's belongings at police station

EVIDENCE

(20 points)

V. (6 points)

A. (3 points) 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]; – statements made for purpose of medical diagnosis are hearsay exception [FSM Evid. R. 803(4)], so "Fracture of hip; apparently sustained in fall" should be admissible, but statement concerning Monaco's drunkenness may not be necessary for medical diagnosis & could be hearsay within hearsay [FSM Evid. R. 805] and might not be admissible, *see* B, *infra*; authenticate through business records exception to hearsay rule [FSM

Evid. R. 803(6) & (7)]

B. (3 points) how would doctor know Monaco too drunk to see steps unless Monaco said so to doctor, in which case argue that it is an admission of a party-opponent, by definition non-hearsay [FSM Evid. R. 801(d)(2)], and therefore admissible as non-hearsay within admissible hearsay if authenticated as hospital record [FSM Evid. R. 803(6) & (7)] or by doctor's testimony

GENERAL

(cont.)

VI. (9 points)

A. Further pleadings

1. Andorra might file a third-party complaint against San Marino & Assocs. and Liechtenstein alleging that if Andorra is liable to Monaco then San Marino & Assocs. and Liechtenstein are liable to Andorra because they built an unsafe theater that was in breach of their contract with Andorra
2. Monaco might also seek leave to file an amended complaint adding San Marino & Assocs. and Liechtenstein as co-defendants on a breach of contract claim (alleging that Monaco as a theater customer was an intended third-party beneficiary of the safety clauses in the theater construction contract between them & Andorra) negligent construction, etc.
3. if Monaco has amended the complaint to include San Marino & Assocs. and Liechtenstein before Andorra has acted, then Andorra could file a cross claim against codefendants San Marino & Assocs. and Liechtenstein instead of a third-party complaint

B. Andorra would use the information to establish a breach of contract claim against because a modern theater would have followed the U.S. standard building codes; Monaco might use the information against San Marino & Assocs. and Liechtenstein on a breach of contract claim (alleging that Monaco as a theater customer was an intended third-party beneficiary of the safety clauses in the theater construction contract between them & Andorra) negligent construction, etc. and against Andorra on a premises liability claim – premises unsafe for the use it is put to and dangerous to theatergoers

C. Andorra is more likely to succeed than Monaco in claims against San Marino & Assocs. and Liechtenstein if can prove that it was intended that

at a minimum the U.S. standard building codes were necessarily included in the contract term "modern, state-of-the-art movie theater"

VII. (9 points)

A. (3 points)

1. grounds – involves tort, state law matter & the state is defendant and should be sued in own court
2. unlikely to succeed because plaintiff under diversity jurisdiction has constitutional right to be in national court, no issues of land or other matters crucial to state interests for which the state is actively developing policy and law are involved [by filing abstention motion state has impliedly conceded that FSM Supreme Court has jurisdiction]

B. (6 points)

1. clerk should enter default – state had twenty days after service to answer [FSM Civ. R. 12(a)] (state must have been served because it filed motion) and did not answer, plead or otherwise defend clerk must enter default [FSM Civ. R. 55(a)]; abstention motion is not pleading or a defense – is not a 12(b) motion that suspends the time to answer until after the court has decided it
2. clerk can't enter default judgment because suit isn't for sum certain or for a sum which can by computation be made certain [FSM Civ. R. 55(b)(1)], court must consider evidence of what the reasonable damages are [FSM Civ. R. 55(b)(2)],

VIII. (6 points)

A. (2 points) Objection sustained; to impeach witness with evidence of criminal conviction, crime must carry a maximum sentence of over one year imprisonment or death [FSM Evid. R. 609(a)(1)] or involve dishonesty or false statement regardless of maximum sentence [FSM Evid. R. 609(a)(2)] and disorderly conduct only carries a three-month maximum sentence and doesn't involve dishonesty or false statement

B. (4 points) both objections probably overruled; possession of untaxed alcoholic beverages probably involves false statement or dishonesty so conviction may be used to impeach witness even though maximum sentence is less than one year [FSM Evid. R. 609(a)(2)]; although

pendency of appeal doesn't make evidence of conviction inadmissible, evidence of appeal's pendency may be admitted [FSM Evid. R. 609(e)] so Wiranto may answer, "It's on appeal."

IX. (8 points)

A. (2 points) objection sustained, evidence of statements made in customary apologies not admissible [FSM Evid. R. 408]

B. (4 points) Baku's objection asserts the spousal privilege – wife can't testify against husband can't reveal confidential private marital conversations; plaintiff will argue that Yerevan no longer married to Baku and therefore marital privilege would not apply; judge would apply the privilege law of the state where the civil action takes place [FSM Evid. R. 501] to see if there is private marital communication privilege, act of Congress barring spouses from testifying against each other [6 F.S.M.C. 1301] only applies to criminal cases [not hearsay because is admission of party-opponent [FSM Evid. R. 801(d)(2)]]

C. (2 points) Baku's objection is that it was a privileged private marital conversation, plaintiff will argue that it was not privileged because it was not private – overheard by hospital worker [not hearsay because is admission of party-opponent [FSM Evid. R. 801(d)(2)]]

ETHICS

(10 points)

X. (6 points) you can assist Tuva by advising him to seek assistance of other counsel as you cannot represent another person in a substantially related matter in which that person's interests are materially adverse to the interests of Kyzyl, your former client, unless the former client consents after consultation [FSM MRPC R. 1.9(a)], and it doesn't seem likely Kyzyl would consent when it would jeopardize his compensation from Diveco.

XI. (4 points) lawyer prohibited from using information relating to representation to disadvantage of former client except when information generally known [FSM MRPC R. 1.9(b)], so if Artash Corp. only wants you because of your inside knowledge of foreign investment board you can't accept position because you can't use that knowledge and that's all they want you for; if you inform Artash that you will not be able to use any confidential information you learned representing the foreign investment board to assist Artash & they agree, and if no overtures were made regarding your employment with Artash before the foreign investment board granted Artash's permit you may be able to accept position