

**Checklist of Points to be Covered for Complete Answers**  
**FSM Bar Examination, March 6, 1997**

**GENERAL**  
(70 points)

I. (10 points)

- A. Does receipt of satellite signal meet definition of "import of a product" as contemplated in statute?
  - 1. electronic media not expressly listed as product
  - 2. if dutiable would fall under 54 F.S.M.C. 201(11) with duty of "4% ad valorem"
  - 3. statute speaks about "inspection of cargo"
  - 4. thus statute appears to levy import taxes only on tangible goods, not intangibles and tax statutes are usually construed strictly against the government
- B. Cable can ask for hearing before highest administrative official of agency by submission of petition for ruling no import duties due of satellite signals
- C. hearing must be held within 30 days, within written decision within 15 days of end of hearing
- D. if decision adverse, Cable may seek trial de novo in FSM Supreme Court trial division, also seek stay until trial over and judgment rendered
- E. if judgment adverse to Cable, 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)

II. (6 points)

- A. Impleader is third party practice — e.g., when a plaintiff has sued a defendant and the defendant believes that if he is liable to the plaintiff then some other person is liable to him, he will implead that other person as a third party defendant (defendant will be third party plaintiff) (*see* FSM Civ. R. 14)
- B. Interpleader is 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)
- C. Intervention is when someone not a party to a pending action seeks to be joined as a party to that action, such intervention may be of right (either by statute or disposition without applicant would impair or impede applicant's ability to protect his interest) or it may be permissive (either by statute or has claim or defense in common) — e.g., a lawsuit is pending concerning the ownership of certain property which another also has a claim of ownership to, the other may seek to intervene in pending suit (*see* FSM Civ. R. 24)

III. (20 points)

- A. (8 points)

1. ABC has right to cease performance on the contract because of the state's nonpayment, has right to payment for work done on a quantum meruit theory, or on theory that contract is a series of contracts
2. cause of action is breach of contract and/or quantum meruit
3. damages of
  - a. \$500,000 for putting batch plant into operation
    - (1) but duty to mitigate damages
    - (2) therefore if can easily sell batch plant elsewhere for more than the \$175,000+ shipping cost may have to reduce the \$500,000 by the sale price minus the shipping cost
  - b. plus the value of the repair work done before state informed ABC it couldn't pay
  - c. plus expectancy damages — lost profits — for work not performed, if such profits are not merely speculative but can be reasonably calculated [note: ABC is experienced contractor in Micronesia and had estimated at \$180,000 (6% of \$3 million) on the repair work and \$150,000 (5% of \$600,000 x 5 years) for five years of maintenance — therefore expectancy damages would be \$330,000 minus the profit on the one month's work it did; because damages includes some future payments it should be reduced to present value]
4. if state had paid \$500,000 and a little over ½ of the repair work was done ABC would be entitled to recovery for amount of work done (about \$1.5 million) and expectancy damages on the remaining undone work

B. (6 points)

1. governor has no right to require the work to be done in eight months when contract allows one year, but since only 10% of repair work done and ABC is working on another project (contract apparently did not require that ABC work solely on the roads or use batch plant solely for road work) governor is entitled to assurances that the road repair work will be done within the one year time limit
2. ABC is entitled to its first quarterly payment, which should be \$300,000 because only 10% of work done
3. because of principle of "anticipatory breach" ABC could seek and be awarded payment of \$300,000 in court; state could sue for breach of contract, but won't prevail unless it can prove that ABC is unable to complete work on time and that time is of the essence to the contract

- C. (6 points) state has cause of action for breach of contract, damages will be difference between cost to state to hire another contractor to complete job and its contract price with ABC, state gets batch plant (state might attach ABC's interest in batch plant) for use by new contractor (there may be offset to ABC if contract contemplated that ABC could use batch plant for other projects while performing on state contract), which will be offset against amount owed ABC for repair work it did do

IV. (14 points)

- A. Public Defender arguments that FSM Supreme Court doesn't have jurisdiction: major crimes jurisdiction repealed by 1991 constitutional amendment, only charged with possession, not importation of drugs or use of the mail to transport drugs and regulation of possession not a power inherently national in character or beyond

the ability of the states to control

- B. Prosecutor's arguments that FSM Supreme Court does have jurisdiction: is national crime because all drugs are imported from abroad and the national government has power to regulate foreign and interstate commerce, drug offenses are thus inherently national in nature, and because national government controls country's customs borders it is beyond power of states to effectively control; additionally in this case the post office was used and the post office is an arm of the national government
- C. Pick a result and make argument why that result better than the other

V. (20 points)

- A. (8 points) Complaint should contain
  - 1. heading
  - 2. caption with Xenon, plaintiff, v. Argon and Krypton, (and possibly Boron) defendants.
  - 3. numbered paragraphs with following statements
    - a. naming the parties
    - b. allegation of court's jurisdiction (if in FSM Supreme Court, allegation of parties' citizenship and of diversity of citizenship)
    - c. stating the pertinent facts
    - d. stating cause(s) of action and claims
      - (1) negligence
      - (2) negligent failure to provide proper safety instructions and to provide safe workplace
      - (3) respondeat superior
    - e. containing a prayer for relief for damages of
      - (1) lost wages
      - (2) future wages
      - (3) medical bills (if any)
      - (4) future medical bills (if any)
      - (5) pain and suffering, including future pain and suffering
      - (6) such other damages the court deems just and proper
  - 4. attorney's signature with address and phone number
- B. (2 points) because tort took place on Chuuk either Chuuk State Supreme Court, Chuuk; or FSM Supreme Court, Chuuk, which might be easiest because defendants are scattered in three jurisdictions (could also sue each defendant in jurisdiction they are present in, but would be unnecessarily cumbersome and costly)
- C. (3 points) personal service may be made upon Krypton or by mail [FSM Civ. R. 4(e)], if by mail must be by registered or certified mail, return receipt requested, delivery restricted to addressee [FSM Civ. R. 4(d)(8)]
- D. (2 points) Chuuk state law — law of state where tort took place — because tort law is generally state law and FSM court will apply state law in diversity cases

E. (5 points)

1. statute of limitations two years for personal injury (if question read one way only 23 months have passed, if read another 25 months have passed and statute would apply)
2. assumption of risk and contributory negligence not defenses — contrary to custom
3. comparative negligence a possible successful partial defense
4. laches and estoppel, not enough facts to know but might be argument that Xenon's continued employment after his injury was the result of agreement that he would not sue and that he would be compensated by continued employment and that Xenon's employer relied on agreement to its detriment

## EVIDENCE

(20 points)

- VI. (5 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 made for purpose of medical diagnosis or treatment are admissible hearsay insofar as reasonably pertinent to diagnosis or treatment [FSM Evid. R. 803(4)]; may be introduced by medical records custodian if such record was made at or near time of diagnosis and kept in the course of regularly conducted business [FSM Evid. R. 803(6)]; statement "I guess I was careless." does not appear to be reasonably pertinent to treatment; objection sustained [the name "Krypton" should be "Xenon"]
- VII. (4 points) objection will be on ground that evidence of prior acts not admissible to show that person acted in conformity with, but prosecutor should argue not seeking admission for that purpose, instead seeks admission to show opportunity, preparation, or plan [FSM Evid. R. 404(b)] because since there is only one Willie McCovey baseball bat on island it was unlikely someone else had opportunity to use it for a similar act; judge likely to rule in favor of admission
- VIII. (5 points)
- A. Rincon's silence and smile is an out-of-court statement because it was apparently intended as an assertion, it is inadmissible as hearsay not within any exception (see above for definition of hearsay and general rule) unless plaintiff can show that Rincon was Malibu's agent or servant and that Rincon's "statement" was made within the scope of his agency or employment and thus not hearsay, but an admission of a party-opponent [see FSM Evid. R. 801(d)(2)(D)]
- B. if Rincon is a party his "statement" will be considered not to be hearsay because it will be admission of a party-opponent and therefore admissible
- IX. (6 points)
- A. (2 points) object on the ground that character evidence is not admissible to prove conduct, judge should sustain objection because despite use of word "habitual" the defense is trying to introduce evidence of character, not habit [FSM Evid. R. 404(a)]
- B. (2 points) judge should overrule objection, inquiry is allowed on cross-examination into specific instances of conduct when character evidence admitted on direct testimony [FSM Evid. R. 405(a)] (but second question is conjectural and Fabio already testified he didn't know why the defendant recently stopped working at warehouse)
- C. (2 points) objection sustained, cannot offer proof of collateral matters (relevance); defendant's character is not essential element of claim or defense [FSM Evid. R. 405(b)]

## ETHICS

(10 points)

- X. (6 points)
- A. conflict for Reverb to represent Subito in private matter while representing state in negotiation with Reverb (Reverb may know information from Subito that could be used against him in negotiation or Reverb may be inclined not to represent state zealously in negotiation with Subito in order to make his client Subito happy [see MRPC R. 1.7]), could only represent Subito if Reverb reasonably believes representation of Subito will not adversely affect his representation of the state and both the state and Subito consent after full disclosure and consultation
  - B. Arnez should only take cases which he is competent to handle, or for which he can become competent with reasonable preparation [MRPC 1.1]; unethical for Arnez to make arrangement to prospectively limit his liability for malpractice [MRPC 1.8(h)]
  - C. may be proper for another state assistant attorney general to represent state in defense of Subito's suit if Reverb is screened from any involvement in matter [see MRPC 1.11(a)(1)], but could also contract case out to another attorney
- XI. (4 points) although it is permissible for judges to attend lectures on legal issues, Jean's actions may constitute an attempt at an *ex parte* communication with the justice who will hear the case and with those who might hear any appeal concerning an issue in a pending law suit [see MRPC 3.5(a)]; assuming Jean's contract can't be canceled, the trial justice should inform opposing counsel of the situation, and could avoid attending Jean's lecture and deny Jean's motion to appear *pro hac vice*; the other judges could avoid the lecture or recuse themselves from any involvement in the case