

Checklist of Points to be Covered for Complete Answers
FSM Bar Examination, April 7, 1994

GENERAL

I (26 points)

- A. Possible actions and alternative actions by PSO
- 1. attempt to repossess outboard engines (seller's lien?)
- 2. bring suit, seek attachment on the 40 outboard motors, obtain judgment, then obtain writ of execution on judgment, and levy on the writ

Causes of action

- a. breach of contract
- b. account stated
- 3. if other creditors have obtained writs of execution, motion to consolidate
- 4. investigate possible personal liability of Fujita Bino
- B. Priority of payment to Creditors of Insolvent Corporation
- Generally, first in time, first in right
- 1. FSM Wage & Salary Tax (statutory lien)
- 2. wages of low-level employees
- 3. a. creditors with judgments and writs of execution thereon (in order of date of writ unless consolidated action)
b. gross revenue tax (by date gov't gave notice to judgment creditors) (equal status with writ holders) (statutory lien; no lien status for penalties and interest on GRT)
- 4. judgment creditors
- 5. unsecured creditors; gross revenue tax penalties and interest

II (20 points)

- A. Validity of Search Warrant
- 1. sufficiency for probable cause
 - a. reliability of informant in past;
 - b. basis for present report
- 2. whether can include detached cookhouse occupied by one other than suspect
- B. Validity of Search of Garage
- 1. not mentioned in warrant
- 2. attached or detached from house (covered by warrant or warrantless search?)
- 3. illegal search if not covered by warrant (or by some exception) - "fruits of the poisonous tree"
- C. Marco's Arrest
 - no arrest warrant
 - only misdemeanor, and not committed in officer's presence (argue validity)
 - argue invalid search warrant
- D. Resisting Arrest
 - common law rule - may lawfully resist unlawful or illegal arrest

- modern trend - cannot lawfully resist unlawful or illegal arrest; must use courts to vindicate rights
 - E. Answer to Question Immediately after Arrest
 - admissibility of statement
 - no "Miranda" warnings before question
 - custody and question = interrogation
 - F. Marijuana in Pocket
- argue
1. whether search incident to arrest (admissible)
 2. product of illegal arrest, therefore inadmissible as "fruit of poisonous tree"

III (12 points)

- A. Requirements for Clerk to Enter Default Judgment only if -
 1. defendant served with complaint and summons
 2. defendant failed to answer or otherwise defend
 3. defendant not infant or incompetent
 4. 1-3 above made to appear by affidavit or otherwise
 5. clerk has already made entry of default
 6. upon affidavit of sum due and sum due is for a sum certain or a sum that can by computation be made certain
 - no previous entry of default
 - an award of attorney's fees is not for a sum certain, and therefore must be entered by the court (Bank of the FSM v. Bartolome)
- B. Steps for Attorney Rorrho to Take
- vacate default judgment
 - 1. improperly entered (no entry of default & not for sum certain, see above)
 - 2. court preference for adjudication the merits (if meritorious defense)
 - reduce plaintiff's attorney's fees
reasonable fees must bear relation to size of debt being collected (max. 15% = \$90 here) (Bank of Hawaii v. Jack)
 - may negotiate with creditor for more favorable terms of settlement
 - defendant may seek order in aid of judgment

IV (12 points)

- License fee is a tax regardless of what it is called
- if goes up with income, is income tax
 - income tax is exclusive power of national government; prohibited to states
1. Eiron may sue in state court and state court can decide question of constitutionality of business license tax or

- question can be certified to the FSM Supreme Court on parties request or state court's own motion
2. Eiron may sue in FSM Supreme Court over license fee's constitutionality and court will decide the issue of constitutionality, but may abstain in favor of state court over action to recover past tax payments
 3. May obtain refund of past taxes for those taxes paid under protest; and possibly for any constitutionally infirm tax
 4. If state sues Eiron in state court for collection of tax if Eiron refuses to pay, Eiron may try to remove to FSM Supreme Court (Argue: Does the case "arise under" the FSM Constitution or national law?)

EVIDENCE

V (7 points)

Hearsay definition and general rule of inadmissibility unless within one of the exceptions

1. admissible if not offered for truth of matter asserted therein (not hearsay) inadmissible if offered for truth of matter therein (hearsay)
2. hearsay – exception for statements made for medical diagnosis and treatment insofar as pertinent to diagnosis or treatment (FSM Evid. R. 803(4))
3. hearsay – inadmissible – public records exception does not apply to police officers in criminal cases (FSM Evid. R. 803(8)(B))
4. & 5. hearsay – exception for former testimony
– if declarant unavailable (FSM Evid. R. 804(b)(1))
 - Ava may be unavailable if proponent of her statement (prosecution) unable to obtain her attendance by process or other reasonable means (FSM Evid. R. 804(a)(5))
 - police officer unavailable due to death (FSM Evid. R. 804(a)(4))
 - and if party against whom the testimony is now offered had an opportunity and similar motive to develop the witness's testimony through direct, cross, or re-direct examination

VI (7 points)

- A. points to note: civil case, witness is offered in plaintiff's case-in-chief, plaintiff's witness is testifying to plaintiff's character and offers specific instances of conduct to prove character
 - generally, only opinion and reputation evidence may be used to support a witness's credibility, not specific instances (FSM Evid. R. 608)

- but where character of a person is an essential element of the charge, claim, or defense proof may be made of specific instances of conduct (FSM Evid. R. 405(b))
 - argue whether defamation cause of action makes character essential element of claim
- B.
- Is cheating at bingo relevant to fraud claim? Definition of relevant evidence. If relevant, is probative value outweighed by unfairly prejudicial effect, or confusion of the issues?
 - Further objection on ground evidence of other wrongs not admissible to show person acted in conformity therewith (FSM Evid. R. 404(b))

VII (3 points)

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)

VIII (3 points)

Hearsay within hearsay problem

Johnny's statement to mother was not hearsay, admission of party-opponent

Mother's recounting of it to doctor is hearsay

- dying declaration exception

1. must be made under belief of impending death
 2. must concern the cause or circumstance of impending death
- objection sustained

ETHICS

IX (6 points)

1. Jimi not admitted to practice law in FSM
- may represent self
- may represent others pro hac vice only by leave of court; otherwise is unauthorized practice of law
2. Defendants have differing interests
- Janis personally liable for all of THC's corporate debt if THC insolvent because she did not pay in start-up capital; Jimi not liable for THC's corporate debt; bartender, if liable, may claim Janis and THC liable to him because he followed her orders and was an employee and trained by THC
- may only represent multiple clients if clients consent after consultation full explanation of risks and advantages and if lawyer reasonably believes representation will not adversely affect any one of the co-defendants

3. May not use client's funds to pay Rule 11 sanction levied personally on the attorney
4. Only admitted attorney may file papers in appellate division without leave of court, no pro se
5. may not be subject to attorney discipline in FSM because not admitted here; could be subject to discipline in jurisdiction where admitted for actions in FSM

XPossible ethical problems

- conduct prejudicial to the administration of justice?
- statement made with reckless disregard to truth concerning qualifications of judge?

But

- may make statement concerning result of any step in litigation
- Garden's free speech rights