

Sample Checklist of Points to be Covered for Complete Answers
FSM Bar Examination, August 5, 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 have memorized and repeated the numbers so long as the legal principles are cited and discussed.]

ETHICS
(10 points)

- I. (10 points)
- A. (2 points) unlikely; Mr. A is former client (even though Ms. B paid all of the legal fees [*see* FSM MRPC R. 1.7 cmt.; FSM MRPC R. 1.8(f)]); you can't represent someone in same or substantially related matter when position is materially adverse to former client unless former client consents after consultation (unlikely here), can't use information relating to representation to former client's disadvantage unless info generally known [FSM MRPC R. 1.9]
 - B. (2 points) probably can't; loyalty to client generally prohibits undertaking representation directly adverse to another client without that client's consent; because both X Corp. & Y Corp. must consent after consultation and representation of X Corp. & you must reasonably believe that it will not adversely affect your relationship with Y Corp. [FSM MRPC R. 1.7(a)] (can argue whether likely or unlikely) probably should withdraw
 - C. (2 points) maybe; you may act as intermediary between clients if each client consulted about implications including risks and advantages, effect on attorney-client privileges, and they agree to common representation; if lawyer reasonably believes matter can be resolved in clients' best interests; if lawyer reasonably believes there's little risk of prejudice to clients' interests if resolution fails, and if lawyer reasonably believes that common representation can be undertaken impartially [*see* FSM MRPC R. 2.2(a)]; would long association with X Corp. make this unlikely?
 - D. (2 points) you can't reveal confidential information without client's consent [FSM MRPC R. 1.6(a)]; must withdraw as intermediary and not represent either X Corp. or Y Corp. concerning subject matter of dispute if knowledge of the confidential information means you can no longer satisfy requirements to be intermediary [FSM MRPC R. 2.2(c)]
 - E. (2 points) if Ms. B is client (& she appears to be — she certainly thinks so) you can't inform Mr. X of Ms. B's difficulties with Mr. A because you can't reveal confidential information without client's consent [FSM MRPC R. 1.6(a)]; you may be able to maintain loyalty to Mr. X by informing him that because of your past representation of [and recent consultation by] Ms. B you'll be unable to represent him (or her) in this matter and that he would be wise to seek other counsel; but what if information generally known to public?

GENERAL
(70 points)

II. (8 points)

- A. specific performance — not usually awarded when money damages would adequately compensate plaintiff (can argue if true here); also court would be forcing parties into business partnership when they obviously aren't capable of acting together anymore
- B. punitive damages — no liability for punitive damages — punitive damages not ordinarily recoverable in breach of contract action — damages limited to actual amount lost
- C. compensatory damages
 - 1. expectancy damages unlikely because Z Corp. was new business with no track record — impossible to tell what profits it would've made, or if it would've made any profit; no expectancy damages for lost opportunity to sell stock because loss must be reasonably foreseeable
 - 2. reliance damages unlikely to put Ms. B in the position she would've been if contract hadn't been breached; only reliance expenditures seem to have been the permit fees and the attorney fees, might be recoverable
 - 3. restitution damages — most likely because return of the \$200,000 investment plus expenses would most nearly make Ms. B whole

III. (12 points)

- A. Director's arguments for suppression, evidence was fruit of poisonous tree because
 - 1. warrantless search of personal property inside closed briefcase, not in plain view — had expectation of privacy for its contents; therefore unreasonable search violation of constitutional protection against unreasonable searches; not under arrest so wasn't search incident to valid arrest
 - 2. director's consent to search briefcase wasn't voluntary — it was coerced because gov't wouldn't let him take his briefcase unless he consented
- B. Government's Arguments against
 - 1. director's consent to search was valid — it was voluntary, knowing and intelligent — he knew he could refuse; he knew what was being asked and its results, weighed his choices and made intelligent decision, knew that gov't could get search warrant under circumstances; director not coerced because he was free to go at anytime
 - 2. director's consent not needed
 - a. director was found on gov't property after normal working hours and after he had been suspended therefore he had no right to be there;
 - b. he was found there under circumstances that indicate probable cause a crime might be in progress — director appeared to be removing gov't property from gov't

premises; evidence might easily be disposed of or destroyed if not seized then (exigent circumstances)

C. likely outcome — gov't's search and seizure probably upheld

IV. (39 points)

A. (4 points) jurisdiction issue raised because suit seems to be between two foreign citizens; FSM Supreme Court doesn't have diversity jurisdiction when all parties are foreigners; jurisdiction must then be based on some other ground; case would otherwise be dismissed for lack of subject matter jurisdiction

B. (3 points) FSM Supreme Court is only FSM court Quick could file this suit in because the nat'l gov't is a party, & FSM Supreme Court has exclusive jurisdiction over suits to which nat'l gov't is party unless title to land is in dispute & no land title is involved in this suit

C. (10 points) causes of action against

1. Xenon Ltd. — breach of contract & action to enforce security interest and repossess & sell Super Spreader 7
2. Yttrium Inc. — same, but alleging that Yttrium Inc. is agent of Xenon Ltd. and actual possessor of Super Spreader 7; conversion also possible
3. national government — same but alleging that nat'l gov't is agent of Xenon Ltd. for purposes of payment, or intended beneficiary of contract; quantum meruit theory for benefit conferred
4. state government — same but alleging that state gov't is either agent or intended beneficiary of Xenon Ltd. and actual possessor of Super Spreader 7 as evidenced by shipping invoice; conversion also possible; quantum meruit theory for benefit conferred

D. (4 points) Quick Co. could move that Yttrium Inc.'s answer be stricken because it is a general denial & general denials are disfavored [Yttrium Inc.'s answer apparently even denied that the Super Spreader 7 exists or that it was imported into FSM]; once answer is stricken order would either allow new answer to be filed or enter Yttrium Inc.'s default

E. (4 points) Quick Co. should move for summary judgment against Xenon Ltd. on breach of contract claim on ground there's no genuine dispute that Xenon Ltd. bought Super Spreader 7 from Quick Co. and that $\frac{1}{2}$ of price remains unpaid; summary judgment is granted when no genuine dispute of material fact exists and movant is entitled to judgment as a matter of law; ownership & current possession of Super Spreader 7 not genuine issue of material fact when Quick Co. (judgment on the pleadings might also be possible)

F. (2 points) Quick Co. should ask clerk for entry of default against state government & could request default judgment once default entered

- G. (4 points) Quick Co. should file answer to nat'l gov't's counterclaim and deny liability for customs duty because didn't own Super Spreader 7 when it was imported to FSM, it only held security interest
- H. (8 points)
1. Quick Co. not liable because doesn't own Super Spreader 7 anymore, only has security interest to in it to collect the $\frac{1}{2}$ of purchase price still owed and is not a $\frac{1}{2}$ th owner, Quick Co. also not the importer
 2. Xenon Ltd. buyer and importer of Super Spreader 7 therefore most likely party to be liable for full customs duty
 3. Yttrium Inc., not owner of Super Spreader 7 until after airport project completed, not importer therefore probably not liable for customs duty
 4. state government, not owner, but shipping invoice was made out to state gov't so state gov't could be liable for customs duty as the importer
- V. (11 points)
- A. (3 points) motion doesn't have to be transferred to another judge — statute doesn't require it; not constitutionally mandated due process [Skilling v. FSM, 2 FSM Intrm. 209, 213 (App. 1986)]; judge could transfer it in his own discretion
- B. (8 points) motion probably should be denied
1. judge has no personal knowledge of disputed evidentiary facts concerning the proceeding
 2. judge hasn't shown any personal bias toward Antimony or Antimony's attorney
 3. can judge's impartiality be reasonably questioned?; probably not; argue
 - a. judge not required to recuse self merely because case or issue is similar to case or issue judge decided earlier
 - b. Antimony's motion doesn't accurately state judge's reasoning in Mercury case
 - c. statement "presumption that the maximum sentence authorized by statute could be imposed" only states principle, doesn't decide case before heard

EVIDENCE

(20 points)

- VI. (4 points) no contest (nolo contendere) plea not admissible in any civil or criminal proceeding against defendant who made it [FSM Evid. R. 410(b)]; but evidence of conviction of crime may be used for the purpose of attacking witness's credibility if elicited during cross-examination but only if the crime was punishable by death or imprisonment for over one year under the law under which he was convicted, and court determines that the probative value of admitting evidence outweighs its prejudicial effect to the defendant, or the crime involved dishonesty or false statement [FSM Evid. R. 609(a)]; objection probably sustained

VII. (7 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 cause of fall not necessary for medical diagnosis & is hearsay within hearsay [FSM Evid. R. 805] for which no exception exists & is inadmissible; if Detor claims that Pandinus's story of slipping on liquid on floor of Detor's theater was one of recent fabrication it will be admissible as nonhearsay prior statement by witness, consistent with Pandinus's testimony, to rebut charge of recent fabrication [FSM Evid. R. 801(d)(1)(B)] (bonus); authentication of document?

B. (4 points)

1. Walter's testimony that Pandinus had been drinking that day is admissible if of Walter's personal knowledge & relevant to defense (assume defense is Pandinus fell because he was drunk)
2. Walter's testimony that Pandinus drinks every day — question relevance [FSM Evid. R. 402]; can it qualify as admissible evidence of habit to show that he acted in conformity therewith? [FSM Evid. R. 406], argue; probably not
3. if relevant, Walter's testimony that Pandinus is well-known drunk is character evidence which is generally not admissible to prove conduct [FSM Evid. R. 404] but if admissible must be proven by reputation or opinion [FSM Evid. R. 405(a) (method of proving character)]; therefore probably not admissible

VIII. (5 points) is relevant to alternative conversion claim, but maybe not to contract claim; plaintiff seeks to prove content of a writing — the check; to do so must provide the original [FSM Evid. R. 1002] or a duplicate [FSM Evid. R. 1003] unless original lost or destroyed or unobtainable by judicial process or procedure, or is in opponent's possession [FSM Evid. R. 1004(1), (2), (3)]; plaintiff's testimony that there was a check made out to him is hearsay & probably not of personal knowledge; should've obtained copy of check through discovery, if copy not available then copy of documents pertaining to issuance of check that would show him as a payee

IX. (4 points) [misprint in exam when it said 5 points] Clarke's reply to Asimov's statement that July 19th was shipment date repeated Asimov's statement concerning the late shipment date and did not deny it although reasonable person would expect someone to deny then if it weren't true; can court assume that this means Clarke does not dispute that July 19th was shipment date? if so is nonhearsay admissible as admission of party opponent [FSM Evid. R. 801(d)(2)], then there is no dispute of material fact and summary judgment proper