

Checklist of Points to be Covered for Complete Answers
FSM Bar Examination, August 1, 1996

GENERAL
(70 points)

- I. (14 points)
- A. Semis may first seek administrative relief (request hearing before, or reconsideration by Director of Education); (following Administrative Procedures Act)
1. Argue absence wasn't without explanation; because principal knew Semis would return; no intent to abandon job
 2. Argue absence didn't affect job because knew Semis would return before school started
- B. Assuming reconsideration is denied, Semis may file suit in court as he has exhausted his administrative remedies (or, if he goes to court first he will argue that further attempts at administrative relief would be futile)
1. Argue administrative decision was arbitrary and capricious and should thus be overturned, or if that fails
 2. Argue that termination was unconstitutional (without due process of law) taking of Semis's property (his expectation of continued government employment); could claim under both state and FSM Constitutions, and if claim under FSM Constitution could sue in FSM Supreme Court, otherwise sue in state court
- II. (13 points)
- A. Motion to Dismiss
1. Venue — in criminal case, venue is proper only in state where crime committed
 - a. gov't might argue crime was committed in Pohnpei because that's where check was presented
 - b. most likely crime was committed in Kosrae where check was written and passed
 - c. wrong venue doesn't necessarily mean dismissal, court could transfer case to proper venue instead
 2. Jurisdiction
 - a. No major crimes jurisdiction in FSM Supreme Court anymore, most crimes are state jurisdiction and must be brought in state court; but
 - b. Congress has constitutional power to regulate banking; if statute is proper exercise of Congress's power to regulate banking, Congress can make bouncing checks a crime, and put jurisdiction in FSM Supreme Court [Argue whether this is proper exercise of Congressional power]
- B. Other defenses — statute requires that act be intentional and writer must know that there are insufficient funds in account; can defend by arguing unaware that only \$35 in account (maybe deposit wasn't made, or deposited funds hadn't cleared, or perhaps even expected to deposit sufficient funds into account before check presented for payment) and thus was not written

"knowing" check would bounce

III. (11 points)

- A. State "Entertainment Tax" is unconstitutional — a percentage tax levied on business is an income tax; national gov't has sole power to levy income taxes
- B. Relief Sought — Success Likely
 1. file for a declaratory judgment in FSM Supreme Court declaring "Entertainment Tax" unconstitutional
 2. seek injunction against state to prevent collection of tax (analyze the four factors for injunctive relief — likelihood of success on the merits, irreparable harm (lack of adequate legal remedy), relative harms to the parties, and public interest)
 3. if must pay tax before case can be heard, pay under protest, and include in suit a claim for repayment (failure to pay "under protest" may mean might not be able to get repayment) [might also try to get court to allow payment into court instead while suit pending]

IV. (20 points)

- A. (3 points) grounds for dismissal: lack of subject matter jurisdiction (when all parties foreigners no diversity jurisdiction); failure to state a claim upon which relief may be granted (argue George is not Phred's employer (is corporation the employer? is Truk Trucking co. a corporation or partnership? unknown from facts) and not the owner of the premises where Phred worked)
- B. (3 points) either Chuuk State Supreme Court (state law case) or FSM Supreme Court (Chuuk) [because diversity jurisdiction exists, *but* maybe Truk Trucking Co. also foreign citizen (unknown whether it is a corporation or a partnership), so maybe no diversity jurisdiction if all parties foreign citizens]
- C. (4 points) causes of action: negligence (in keeping unsafe workplace) against Truk Trucking Co.; wrongful discharge (being fired for exercising lawful right to file suit) against Truk Trucking Co. and George; possibly breach of contract depending on terms of contract with Truk Trucking Co.
- D. (4 points)
 1. Defenses — negligence:
 - a. statute of limitations — two years for personal injury; injury took place on Apr. 15, 1994, and suit filed June 14, 1996 (*but if* June 14, 1996 filing can be related back to the original Apr. 10, 1996 filing this defense might be avoided)
 - b. Phred was negligent therefore all his fault or if partly his fault then liability reduced by comparative negligence
 - c. injury due to intervening cause (Chuuk Hospital) won't work because (1) facts say he was treated properly there, (2) medical malpractice is not an intervening cause because it is always within the risk of any injury.
 2. Defenses — wrongful termination
 - a. employment at will, could be fired for any reason or no reason
 - b. fired for good cause (some reason other than law suit) (facts as given don't tell whether other cause for firing or not);

- E. (3 points) contributory negligence, a complete defense to negligence, not in keeping with Micronesian custom and tradition therefore is not a defense in FSM to negligence; comparative negligence, a partial defense based on each's degree of fault, compatible with Micronesian custom and tradition, should be applied instead.
- F. (3 points) failure to include points and authorities with motion is deemed a waiver of the motion, FSM Civ. R. 6(d); therefore motion denied.
- V. (12 points)
- A. Grant of TRO — Why or Why Not?
1. TRO is sought *ex parte*, no affidavit or verified complaint and no reasons shown that immediate irreparable injury to the applicant will result unless TRO granted without notice
 2. No bond or security given to pay Hard Wreck Hotel if Hard Wreck Hotel wrongfully enjoined
 3. Analyze the four factors for injunctive relief
 - a. applicant's likelihood of success on merits — not likely here when another holds the Certificate of Title to land applicant claims (court must presume cert. of title correct)
 - b. irreparable harm to plaintiff — not shown here because no lack of adequate legal remedy — plaintiff only asks for money damages, therefore there is adequate legal remedy
 - c. relative harms to the parties, no harm to plaintiff if not granted, but great harm to defendant if granted and Hard Wreck Hotel can't open for guests who have already paid
 - d. public interest probably in favor of not granting and allowing hotel to open
 4. Conclusion: under these circumstances deny TRO
- B. If TRO granted, Hard Wreck Hotel should seek immediate hearing (has a right to one with three days notice (or less by court order) when TRO granted without notice) to dissolve (or modify) TRO; [might also attempt to work to agree to dissolve TRO with Sylvester's attorney because if Hard Wreck Hotel can't open it won't have money to pay money damages]

EVIDENCE

(20 points)

- VI. (2 points) Grounds for objection: How long Deacon Jones has been a deacon is irrelevant; Evidence of a witness's religious beliefs or opinions (the deacon's faithfulness) not admissible to show whether the deacon's credibility is enhanced or impaired, FSM Evid. R. 610. Objection sustained.
- VII. (4 points) Defendant cannot be excluded because he is a party; Officer or representative of party who is not natural person cannot be excluded; Defense's expert witness may be excluded unless the defense can show that his presence is essential to presentation of defense (*E.g.*, expert's opinion testimony might have to be based on other witnesses' testimony). FSM Evid. R. 615.

- VIII. (4 points) Defense counsel will argue that court may take judicial notice of the high tide times in Al's Calendar and Tidal Chart as facts capable of accurate and ready determination by resort to a source whose accuracy cannot reasonably be questioned (everyone relies on Al's Calendar). FSM Evid. R. 201(b)(2). Al's Calendar and Tidal Chart is a self-authenticating document. FSM Evid. R. 902(5). Judge will probably admit it; at least he will take judicial notice of its contents.
- IX. (10 points)
- A. (3 points) Because this is criminal trial Dwayne has the constitutional right to confront witnesses against him. Octo therefore cannot testify as to Falstaff's hearsay statement incriminating Dwayne. *See Hartman v. FSM*, 6 FSM Intrm. 293, 301-03 (App. 1993). [It could have been used against Falstaff, if Falstaff had been on trial.]
- B. (3 points) [Define hearsay; state general rule that hearsay is inadmissible] Worthy's statement is hearsay, but admissible because it falls within [explain why] the dying declaration exception to hearsay rule, FSM Evid. R. 804(b)(2). Argue Erwin's degree of guilt is relevant to the severity of the sentence that might be imposed and therefore appropriate to be heard at sentencing hearing.
- C. (4 points) Dwayne's objections to Portia's testimony: Client-attorney communication is privileged; ethical violation of attorney to reveal confidences and secrets of clients; client (Dwayne) is the holder of the privilege. *But* Dwayne waived the privilege by challenging effectiveness of his counsel, Portia. Objection overruled.

ETHICS

(10 points)

- X. (4 points)
- A. Joint representation of parties not proper unless lawyer reasonably believes the representation will not be affected and the clients consent after full disclosure and consultation; in criminal cases even if consented to lawyer should not represent joint defendants who have conflicting defenses.
- B. Discuss conflicting defenses (for example, Hubert Beagle was engineer and had no other responsibilities; William Beagle, the captain, George Beagle the harpooner might blame each other; Ding Dong and Peripatetic Pelagic Piscatorial Co. could defend by arguing that the Beagle Boys were acting outside the scope of their employment and they are thus not guilty; Ding Dong could defend on ground that it took all measures that could reasonably be expected to see that Peripatetic Pelagic Piscatorial Co. and the Beagle Boys complied with the permit).
- C. Rayleen must withdraw from multiple criminal representation; might not even be able to represent any of the defendants if might violate client confidentiality of other defendants; for similar reasons should withdraw from companion civil case
- XI. (6 points)
- A. (3 points)
1. a lawyer may not represent another person in the same or substantially related matter in

which that person's interests are materially adverse to former client unless former client consents after consultation (Is Point, Inc. the former client, or are Claude and Leo?), this is presumably not substantially related matter; *but* did Bailey learn something in the incorporation process that would qualify as a secret or confidence that would, if known make Bank of Hawaii's collection efforts easier? [for example, improper incorporation, thus making the incorporators personally liable for the debts of the corporation]

2. Bailey can represent Bank of Hawaii against Leo without Leo's consent if matter is not substantially related to incorporation of Point, Inc. (but was Leo even a former client?)

B. (3 points)

1. Bailey can represent Leo in action against Jack unless he agreed to represent Bank of Hawaii against Leo earlier that day;
2. Bailey shouldn't represent Leo against Claude — it is possible Bailey may end up a witness for one or the other in this action, it is also possible Claude may be considered a former client and a lawyer may not represent another person in the same or substantially related matter in which that person's interests are materially adverse to former client unless former client consents after consultation