

Checklist of Points to be Covered for Complete Answers
FSM Bar Examination, October 11, 1994

GENERAL

- I. (14 points)
 - A. Complaint should contain:
 1. Heading – FSM Supreme Court Trial Division – Pohnpei (exclusive jurisdiction in FSM Supreme Court when nat' l gov' t party; venue – Pohnpei – where defendants can be found)
 2. Caption – Abel Esor, Plaintiff, v. Department of External Affairs, FSM National Government, [or some variation thereof] Defendant. [also may add as defendant, John George, in His Official Capacity,]; Civil Action No. 1994-___; Complaint
 3. numbered paragraphs for each statement; statements should include:
 - a. parties
 - b. averment of jurisdiction (FSM Const. art. XI, § 6(a) [exclusive juris. when nat' l gov' t is a party])
 - c. description of the facts
 - d. causes of action (can plead in the alternative)
 - (1) breach of contract
 - (2) unjust enrichment
 - e. prayer for relief
 - (1) \$650.00 damages plus costs
 - (2) general prayer *e.g.*, "any other relief court deems just and proper"
 4. signature, name, address and phone # of attorney filing complaint
 - B. Summons should contain:
 1. same caption and heading as Complaint
 2. notice to defendant(s) [and FSM AG] that they are summoned by the court to serve written answer on plaintiff's attorney within 20 days
 3. failure to do so could cause default judgment to be entered against defendant(s)
 4. name, address and phone # of attorney filing complaint
 5. place for Chief Clerk of Court to enter and sign summons

- C. Attachments to Complaint – copy of plaintiff's invoice and copy of John George's letter
- II. (24 points)
- A. (5 points) FSM Supreme Court is only court with jurisdiction [exclusive jurisdiction in admiralty and maritime cases] can be brought in Trial Division in Chuuk (where defendant may be found) (argument can be made can be brought in FSM Supreme Court in Yap because collision took place there); nature of plaintiff's claim is a maritime tort – negligence (or negligent navigation)
- B. (5 points) FSM Supreme Court [exclusive admiralty and maritime jurisdiction] in Yap [where defendants can be found and where collision took place]; nature of plaintiff's claim – maritime tort of negligence or negligent navigation; defendants may be: the *Georgia Star* [in rem], the Outer Islands Development & Trade Corp., and the State of Yap (both as owners on a respondeat superior theory)
- C. (5 points) file immediate suit in FSM Supreme Court against the *Dernita Maru* in rem; and seek immediate (ex parte) issuance of civil arrest warrant for the *Dernita Maru* for enforcement of maritime lien for seamen's wages; and arrest of the ship
- D. (5 points) all plaintiffs may sue in FSM Supreme Court, Chuuk [shipwrecks are admiralty or maritime cases; Chuuk is where defendant can be found]; causes of action are maritime tort – negligence (negligent navigation; improper stowage of cargo, etc.); violations of FSM [by nat'l gov't] and Yap [by Yap State] environmental regulations (argument: if Yap can divorce violation of its environment regulations from the maritime nature of case it can sue in Yap State Court using its long-arm statute to assert personal jurisdiction over owners of *Dernita Maru*; FSM would still sue in FSM Supreme Court because of its exclusive jurisdiction when nat'l gov't a party; inhabitants of Satawal, unless environmental regulations allowed for private cause of action for private citizens, would be in FSM Court under its maritime jurisdiction); additional steps – seek civil arrest of vessel, and posting of bond to cover ship's value (to allow its release)
- E. (4 points) if *Dernita Maru* leaves Chuuk before suit filed – file suit and seek arrest of vessel in any port where it is

found; if *Dernita Maru* leaves Chuuk after suit filed – either proceed as above, or proceed to judgment (most likely by default) and seek to have judgment enforced wherever ship may be found (Bonus Points – malpractice action against attorney who filed suit for his failure to seek ship's arrest and/or posting of bond)

III. (14 points)

- A. since permit is to do business only in one state FSM Sec'y of R&D must approve it if the State has already approved it, unless compelling reason not to based on national security or public welfare
- B. steps to take
 1. appeal to President to overturn Sec'y's decision
 2. appeal to FSM Supreme Court appellate division, but only if opposing party will agree to it, no factual findings need be made, and the record can be agreed to;
 3. otherwise, appeal to FSM Supreme Court trial division, where trial de novo may be had if fact finding needed; by summary judgment if no fact finding needed; if decision is adverse then may appeal to appellate division;
 4. if can argue that issuance of permit is a ministerial, non-discretionary duty of Sec'y of R&D can seek writ of mandamus from either trial or appellate division (trial division preferable as only one judge need act)

IV. (18 points)

- A. Arguments for defense counsel – Statement should be suppressed under "fruit of poisonous tree" doctrine as illegally obtained because
 1. statement not given after knowing, intelligent, voluntary waiver because Odavacer not informed of what he would be questioned about before he agreed to answer questions – cannot knowingly, intelligently, voluntarily waive a right unless know what are waiving
 2. right to remain silent may have been waived, but right to have attorney present was not waived, therefore statement taken illegally
 3. Odavacer, probably not free to leave, therefore under

arrest, not accorded other, statutory rights of arrested person, *e.g.*, to call a family member, etc.

- B. Arguments for prosecution
 - 1. right to have attorney present was waived by implication, because Odavacer knew and understood had that right and voluntarily started answering questions anyway;
 - 2. Odavacer, not under arrest – came to station voluntarily, in response to request, and was free to leave at any time
 - 3. even if Odavacer was not informed what would be questioned about he knew as soon as questions were asked and he knew he did not have to answer so could have stopped there, but continued voluntarily
- C. Court's Ruling – argue either way (but, defense's arguments may be more convincing)

EVIDENCE

- V. (10 points total) Hearsay (out-of-court statement whose admission is sought for the truth of the matter asserted therein) generally inadmissible unless within one of the exceptions to the hearsay rule
 - A. (5 points) Is hearsay; falls within regularly kept public records exception, BUT matters observed by police officers cannot be used in criminal cases; also violates defendant's constitutional right to confront (cross-examine) witnesses against him; Objection sustained, evidence inadmissible.
 - B. (5 points) Is not hearsay because is admission of party-opponent (defendant Odavacer); chain of custody okay; (argue whether can be tampered with?)
- VI. (5 points) subsequent remedial measures not admissible to prove negligence or culpable conduct, but admissible when offered for other purpose, such as ownership, control or feasibility, if controverted; therefore since Hillman disputes ownership is admissible for that purpose; Objection overruled, evidence admitted for purpose of showing ownership
- VII. (5 points) "Best evidence" rule only covers contents of writings, recordings, and photographs not other forms of evidence; foundation

was laid for admission of "pacing-off" measurement, judge can give it whatever weight he thinks appropriate; "exceptions" do not have to be made in order to preserve issue for appeal, therefore attorney's remark is pointless.

ETHICS

VIII. (5 points)

- A. Jimi's ethical problems
 - 1. ex parte communication with the court
 - 2. conduct prejudicial to administration of justice
- B. Judge's potential actions
 - 1. Ignore it.
 - 2. admonish Jimi for ex parte communication and insist other parties be sent copies,
 - 3. commence disciplinary action in FSM by referral to Chief Justice (problem: since Jimi not admitted in FSM does FSM Court have jurisdiction?),
 - 4. refer matter to Australia where Jimi admitted for possible disciplinary action there

IX. (5 points) Potential ethical problems

- A. cannot use information relating to representation of former client to the disadvantage of the former client (Does lawyer know confidences and secrets of former clients he could use to their disadvantage? *E.g.*, can corporate veil be pierced to collect debt because lawyer knows corporate formalities were not complied with and incorporators therefore personally liable?)
- B. if substantially related matter can only represent new client if former clients consent after disclosure and consultation (Is this a substantially related matter?)
- C. Steps to take – determine whether you know any secrets and confidences of former clients that will be used to their disadvantage, if none, consult with former clients and seek their consent after disclosure