

Checklist of Points to be Covered for Complete Answers
FSM Bar Examination, March 7, 1996

GENERAL
(70 points)

- I. (15 points) (assume that events did not take place at national capital at Palikir where there is national jurisdiction)
- A. Public Defender's Arguments
1. State court without jurisdiction
 - a. no state law enacted banning "ice"
 - b. can't borrow Trust Territory Code [even though Transition Clause in state constitution saved it] because by enactment of comprehensive criminal code state repealed the TT criminal code that contained controlled substance chapter
 - c. Transition Clause allows TT laws to remain part of state law; doesn't convert FSM Code to state law
 2. Controlled Substance law is national crime, must be prosecuted in FSM Supreme Court
 - a. FSM Congress enacted controlled substance law
 - b. transfer of major crimes jurisdiction to states has no effect because drugs is matter of national concern and necessarily involves interstate and foreign commerce [drug or ingredients to make it must be imported] which Congress may legislate on
 3. State court cannot make something state crime that isn't — Legislature must enact or is violation of separation of powers
- B. State Prosecutor's Arguments
1. Transition Clause applies; TT Code chapter on controlled substances part of state law
 2. enactment of state criminal code did not repeal chapter on drugs; only repealed those portions of criminal code inconsistent with new criminal code
 3. drug trafficking not indisputedly national in character or expressly delegated to nat'l gov't; state has concurrent power to regulate drugs; national gov't no longer has power to legislate major crimes
- C. Court's Ruling
1. pick one side and back it up with your arguments
 2. defendant's argument about enactment of comprehensive state criminal code repealing TT criminal code may be stronger, if rule that way allow appeal
- II. (19 points)
- A. Cement-mixer
1. Is cement-mixer exempt under 6 F.S.M.C. 1415(2)? (probably not, if Dartmouth has waived defense, or if no longer in the cement business); if cement-mixer is exempt the writs were illegally levied, if not then
 2. highest bidder at auction receives title to and possession of cement-mixer
 3. \$100 to pay for costs of sale
 4. next \$5000 to Berkeley — Berkeley's writ of execution issued first (assuming that the auction price

was high enough) [first in time, first in right]

5. any remainder to Arlington because he has second writ of execution
6. Can argue that Arlington and Berkeley receive pro rata shares (\$2700 each), but likely to fail, especially since cases not consolidated
7. Arlington may argue that although his writ was issued second, it was executed first, so the police could not seize the cement mixer when it was already seized

B. Dartmouth's Land

1. land appears that it might not be exempt under 6 F.S.M.C. 1515(3) because it doesn't appear to support the judgment-debtor or his dependents; land may only be sold to FSM citizens
2. Arlington and Berkeley are judgment-creditors, with writs of execution, will argue that their writs take precedence over a judgment without a writ and seek priority rights to proceeds from sale of land for whatever part of their judgments that remain unsatisfied after the sale of the cement-mixer
3. Arlington and Berkeley may also argue that order in aid of judgment was illegally granted because outstanding writ of execution was not filed with Clarendon's application for order [6 F.S.M.C. 1413(2)], but Clarendon will argue that the statute applies only to orders in the same action and that Clarendon's action was separate, and remained that way because the cases were never consolidated
4. Clarendon will argue that writs of execution cannot be issued for land, 6 F.S.M.C. 1415(3), so his order has priority

III. (18 points)

A. (8 points) motions probably denied

1. employment contract for work at sea is admiralty matter — exclusive jurisdiction in FSM Supreme Court [abstention not possible]
2. if not an admiralty matter
 - a. Cap'n Kelly did exhaust administrative remedies by sending letter, receiving no answer, and being told something would be done thereby making any further attempts at administrative relief futile
 - b. Pohnpei state law cannot divest FSM Supreme Court of jurisdiction granted by FSM Constitution (either admiralty or diversity of citizenship) [abstention possible]

B. (6 points)

1. Steps to take by Cap'n Kelly's attorney
 - a. move for enlargement of time to investigate (by discovery) relationship between the parties
 - b. move to amend complaint
 - (1) to join Rock Enterprises, Inc. as an indispensable party (analyze requirements)
 - (2) to add cause of action against state for tortious interference with contractual relationship
2. Court's Ruling
 - a. will allow enlargement of time
 - b. allow motion to add party-defendants

- c. will be considered a summary judgment motion if matters outside pleadings considered
- 3. Likely Result If Only Step Is to Oppose Motion — Judgment for State

C. (4 points)

- 1. if action against Rock Enterprises, Inc. is considered action for seaman's wages, then is admiralty case — exclusive jurisdiction in FSM Supreme Court (or possibly court on Guam with admiralty jurisdiction — U.S. District Court)
- 2. if not admiralty, then no diversity jurisdiction (because all parties are foreigners) then either Pohnpei Supreme Court or a court on Guam (or Canadian court?)

IV. (18 points)

A. Possible Defendants

- 1. Harrison, the driver
- 2. Subco, his corporate employer
- 3. Junco, the owner of truck and corporate owner of Subco
- 4. Rentall, the company that rented Grover the car

B. Courts suit filed in

- 1. State court of state where accident happened
- 2. FSM Supreme Court on basis of diversity jurisdiction in state of accident (state where all defendants present)

C. Basis for Potential Liability

- 1. Harrison, the driver — negligence in operating vehicle
- 2. Subco, his corporate employer — respondeat superior
- 3. Junco, the corporate owner of Subco — owner of truck, negligence in allowing use of property by Harrison; also respondeat superior (only if Subco is alter ego of Junco)
- 4. Rentall, the company that rented Grover the car, negligence in renting car to someone without driver's license

D. Steps taken by Defendants

- 1. Harrison's, the driver, best step might be to settle for a small amount and let suit proceed against other defendants, file third party claim against Rentall for negligently renting Grover a car when he had no license
- 2. Subco, his corporate employer, move to dismiss on ground that Harrison was not acting within the scope of his employment when he went on a frolic — out of the way of his assigned to task to take care of his personal business, not Subco's; file third party claim against Rentall for negligently renting Grover a car when he had no license
- 3. Junco, the owner of truck and corporate owner of Subco, move to dismiss on same grounds as Subco, plus no respondeat superior because separate corporate entity from Subco; file third party claim against Rentall for negligently renting Grover a car when he had no license
- 4. Rentall, the company that rented Grover the car, Grover should not benefit from own failure to have proper license; defend against third party claims on ground not liable for Grover, and if were liable Grover didn't cause accident or any damage

E. Grover's Response to Claims Against Him

- 1. Harrison's driving, not his, was negligent, and he [Grover] wasn't cause of accident

2. driving without a license is not negligence per se, he has no duty to others that he be licensed, lack of license not cause of accident
3. no contributory negligence in FSM (contrary to custom), only comparative, comparative not available because Grover's failure to have license, or any other of his actions not cause of accident

EVIDENCE
(20 points)

V. (12 points)

A. (5 points)

1. Prosecution will introduce business journal by calling custodial of business records to authenticate business journal
2. objection on hearsay basis [define hearsay] overruled as journals kept in regular course of business are specific hearsay exception

B. (3 points) probable hearsay objection overruled — admission of party opponent is defined as nonhearsay [Note: word Jane in question is a typo — should have been Georgia — equal credit given those who noticed and analyzed on that basis]

C. (4 points)

1. receipt
 - a. probable objection is best evidence rule — best evidence of contents of writing is the original (*see* FSM Evid. R. 1002, 1003)
 - b. but other evidence may be used to prove contents if original not available, FSM Evid. R. 1004(2)
 - c. therefore judge will probably allow Carolina to testify that she was shown the receipt and what she saw of its contents
2. Georgia's statement
 - a. probable objection is hearsay
 - b. judge will likely overrule
 - (1) not offered for truth of matter contained within — not offered to show that Georgia was debt-free — therefore not hearsay
 - (2) may also fit in present sense impression exception to hearsay
 - (3) may also fit in exception for statement made of personal knowledge shortly after the fact and not in anticipation of litigation (only when declarant unavailable, as she is here)
 - c. relevance? yes, statement "Now, I have no debts" may indicate has just paid a debt

VI. (4 points)

- A. Hearsay objection overruled — is nonhearsay — admission of party opponent [is not former testimony because not taken where opponent had opportunity to cross-examine]
- B. Judge should allow admission of entire affidavit under the "Rule of Completeness" — FSM Evid. R. 106

VII. (4 points)

- A. Is Banastare's statement relevant?
- B. Is Banastare's statement a privileged communication with attorney? Argue: Yes, made with expectation would be confidential (Did attorney-client relationship exist at time statement made?); but no, when overheard by third party no privilege applies even if client expected would be confidential
- C. Is Banastare's statement hearsay? Argue, no, is admission of party opponent; is not admitted for truth of matter therein (*i.e.*, that Banastare needs lawyer); and that it fits in state of mind exception to hearsay rule
- D. Does Cornwallis know what part of his conversation with Banastare Tarleton overheard? (Note that question doesn't tell you whether attorney Cornwallis represented Banastare at trial); if Cornwallis is not Banastare's trial attorney, may testify as long as doesn't reveal any confidential communications; if Cornwallis is Banastare's trial attorney judge may still allow testimony, but is its probative value outweighed by the prejudicial effect of an attorney testifying against his client?

ETHICS
(10 points)

VIII. (5 points)

- A. Yosarian's considerations
 - 1. Withdrawal as prosecutor proper because was done as soon as conflict discovered
 - 2. Should Yosarian have agreed to defend Major Minor? Argue: Did Yosarian learn anything when special prosecutor other than what was already in the public record — any confidential information? Argue whether Yosarian might have been special prosecutor only long enough to discover his conflict before any other involvement with (or pay for) the case; Is Yosarian being disloyal to former client by taking client directly adverse? (Note that this is a criminal case therefore the prosecution must turn over any exculpatory evidence to the defense) Did Yosarian consult with prosecutor's office and obtain permission to defend Yosarian after full disclosure?
 - 3. Argue: When Yosarian withdrew had he already entered an appearance for Major Minor? Is Major Minor substantially prejudiced by Yosarian's withdrawal — does Major Minor have an attorney to replace Yosarian, or does it leave him unrepresented? (Attorneys are rarely, if ever, allowed to withdraw from criminal cases once an appearance has been entered merely because the client can't pay the fees)
- B. Quince's Considerations
 - 1. representation by a member of a law firm is representation by the whole firm
 - 2. an attorney should not represent a client when he knows he (or a member of the firm) will be a witness in the case
 - 3. even if Quince has had no contact with other firm members will his zealotness in representing his client, the defendant, be hindered because when senior members of his firm are on the stand? Can he effectively cross-examine his co-workers, or his superiors? will he be hindered in conducting a pretrial investigation because of reluctance to question other firm members
- C. therefore Quince's motion to appear should be denied — Quince cannot provide unimpaired representation for Major Minor

IX. (5 points)

- A. attorney Schurmensch's ethical problems
 - 1. pretrial statement contained misrepresentation to court — lack of candor
 - 2. seems to have violated his obligation to represent client competently — to be diligent in preparing his client's case
- B. defense counsel have ethical obligation (as bar members) to report violations of ethical rules by other members of the bar
- C. judge has ethical obligation similar to bar members to report violations of ethical rules by members of the bar; also has obligation to keep the trial fair so violations probably won't be reported by judge until trial proceedings final
- D. Actions attorney Schurmensch exposed himself to
 - 1. disciplinary actions by the FSM Supreme Court
 - 2. malpractice suit (but in order to be successful former client must prove that attorney lost case that he would have won if not for his unprofessional performance)