TITLE 4

JUDICIARY OF THE FSM

CHAPTERS

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Editor's note: The words "Federated States of Micronesia" in the title is shortened by using its abbreviation "FSM".

CHAPTER 1

Judicial Organization

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§ 101. Short title.

This title is known and may be cited as the Judiciary Act of 1979.

Source: PL 1-31 § 1.

Cross-reference: For constitutional provisions on the Judiciary, see FSM Const., art. XI. The provisions of the Constitution are found in Part I of this code.

For statutory provisions on Judicial Procedure, see title 6 of this code.

The FSM Supreme Court website can be found at http://www.fsmsupremecourt.org/.

Case annotations: The power to issue declaratory judgments is within the judicial power vested in the FSM Supreme Court by art. XI, § 1 of the Constitution and confirmed by the Judiciary Act of 1979. The FSM Supreme Court may exercise jurisdiction over an action seeking a declaratory judgment so long as there is a "case" within the meaning of art. XI, § 6(b). *Ponape Chamber of Commerce v. Nett*, 1 FSM R. 389, 400 (Pon. 1984).

The Judiciary Act of 1979, in title 4 of the FSM Code, and the Judiciary Article, art. XI of the Constitution of the Federated States of Micronesia govern the structure and powers of the FSM Supreme Court, and make no provision for appointment of special judges to sit with a Justice of this Court. 5 F.S.M.C. 514 has no application to proceedings before the Trial Division of the FSM Supreme Court. *In re Raitoun*, 1 FSM R. 561, 564-65 (App. 1984).

§ 102. Supreme Court.

The judicial authority in the Federated States of Micronesia is vested in the Supreme Court of the Federated States of Micronesia.

Source: PL 1-31 § 2.

Cross-reference: FSM Const., art. XI, § 1 states as follow:

Section 1. The judicial power of the national government is vested in a Supreme Court and inferior courts established by statute.

The provisions of the Constitution are found in Part I of this code.

The statutory provisions on the President and the Executive are found in title 2 of this code. The statutory provisions on the FSM Congress and the Legislative are found in title 3 of this code.

The FSM Supreme Court website contains court decisions, rules, calendar, and other information of the court, the Constitution, the FSM Code, and other legal resource information at http://www.fsmsupremecourt.org/.

The website of the FSM National Government contains announcements, press releases, news, forms, and other information on the National Government at http://fsmgov.org.

The official website of the Congress of the Federated States of Micronesia contains the public laws enacted by the Congress, sessions, committee hearings, and other Congressional information at http://www.fsmcongress.fm/.

The statutory provisions on Judicial Procedure are found in title 6 of this code.

Case annotations: The Constitution contemplates that decisions affecting the people of the FSM will be decided by courts appointed by the constitutional governments of the FSM. This in turn requires an expansive reading of the FSM Supreme Court's jurisdictional mandate while we await establishment of functioning state courts. *In re Nahnsen*, 1 FSM R. 97, 111 (Pon. 1982).

The FSM Supreme Court is not bound by decisions of United States courts; however, careful consideration should be given to United

States decisions regarding court policies as the FSM national courts are modeled on those of the United States. *Nix v. Ehmes*, 1 FSM R. 114, 119 (Pon. 1982).

As a general proposition, a court system resolves disputes by considering and deciding between competing claims of two or more opposing parties. *In re Sproat*, 2 FSM R. 1, 4 (Pon. 1985).

It is thought that the judicial power to declare the law will more likely be exercised in enlightened fashion if it is employed only where the court is exposed to the differing points of view of adversaries. Thus judicial decision-making power is typically exercised by a court which has heard competing contentions of adversaries having sufficient interests in the outcome to thoroughly consider, research and argue the points at issue. Even then, a court's declarations of law should be limited to rulings necessary to resolve the dispute before it. *In re Sproat*, 2 FSM R. 1, 4 (Pon. 1985).

Courts have an affirmative obligation to avoid erroneous rulings and may not be bound by incorrect legal premises upon which even all parties rely. *Michelsen v. FSM*, 3 FSM R. 416, 419 (Pon. 1988).

The FSM Constitution provides no authority for any court to act within the FSM, other than the FSM Supreme Court, inferior courts to be established by statute, and state or local courts. *United Church of Christ v. Hamo*, 4 FSM R. 95, 105 (App. 1989).

The provisions of the FSM Constitution spelling out jurisdiction and vesting the entire judicial power of the national government in the FSM Supreme Court are self-executing, and the judicial power of the FSM Supreme Court is not dependent upon congressional action. *United Church of Christ v. Hamo*, 4 FSM R. 95, 105-06 (App. 1989).

Courts have inherent power, and an obligation, to monitor the conduct of counsel and to enforce compliance with procedural rules. *Leeruw v. Yap*, 4 FSM R. 145, 150 (Yap 1989).

Even when a national court places itself in the shoes of the state court and interprets state law, the state court is always the final arbiter of the meaning of a state law. State court interpretations of state law which contradict prior rulings of the national courts are controlling. *Pohnpei v. MV Hai Hsiang #36 (I)*, 6 FSM R. 594, 601 (Pon. 1994).

§ 103. Composition of the Supreme Court.

The Supreme Court shall consist of a Chief Justice and not more than five Associate Justices.

Source: PL 1-31 § 3; PL 3-3 § 1.

Cross-reference: FSM Const., art. XI, § 2 states as follows:

Section 2. The Supreme Court is a court of record and the highest court in the nation. It consists of the Chief Justice and not more than 5 associate justices. Each justice is a member of both the trial division and the appellate division, except that sessions of the trial division may be held by one justice. No justice may sit with the appellate division in a case heard by him in the trial division. At least 3 justices shall hear and decide appeals. Decision is by a majority of those sitting.

The provisions of the Constitution are found in Part I of this code.

Case annotations:

Judges

Preservation of a fair decision-making process, and even the maintenance of a democratic system of government, requires that courts and individual judges be protected against unnecessary external pressures. *In re Iriarte (I)*, 1 FSM R. 239, 247 (Pon. 1983).

In the FSM, criminal cases are tried before the judge as fact finder. *Andohn v. FSM*, 1 FSM R. 433, 441 (App. 1984).

Where an appellate court has held that a trial judge is under a clear and non-discretionary duty to step aside from presiding over a case and the petitioner has a constitutional right to obtain compliance with that duty, all documents issued after the date of the appellate decision are null and void and shall be expunged from the record and the judge shall be enjoined from taking any further action as a judge in the case. *Etscheit v. Santos*, 5 FSM R. 111, 113 (App. 1991).

The FSM Supreme Court is immune from an award of damages, pursuant to 11 F.S.M.C. 701(3), arising from the performance by the Chief Justice of his constitutionally granted rule-making powers. *Berman v. FSM Supreme Court (II)*, 5 FSM R. 371, 374 (Pon. 1992).

The Chief Justice, in making rules, is performing a legislative function and is immune from an action for damages. *Berman v. FSM Supreme Court (II)*, 5 FSM R. 371, 374 (Pon. 1992).

The grant of immunity to the Chief Justice while performing his rule-making authority is to protect the independence of one exercising a constitutionally granted legislative power. *Berman v. FSM Supreme Court (II)*, 5 FSM R. 371, 374 (Pon. 1992).

A judge is generally granted absolute civil immunity from civil liability for acts done in the exercise of a judicial function. *Jano v. King*, 5 FSM R. 388, 391 (Pon. 1992).

A judge loses the cloak of judicial immunity in only two instances. A judge is not immune for actions not taken in the judge's judicial capacity, and a judge is not immune for actions, though judicial in nature, taken in the absence of all jurisdiction. *Jano v. King*, 5 FSM R. 388, 391 (Pon. 1992).

An act performed by a judge does not have to be an adjudicatory act in order for it to be a judicial act. Judges and justices of the courts of the FSM are protected by the cloak of judicial absolute immunity for judicial functions performed unless they are in complete absence of jurisdiction. *Jano v. King*, 5 FSM R. 388, 392-93 (Pon. 1992).

Judges and justices of the FSM are protected by the cloak of absolute immunity for judicial functions, performed, unless the functions were performed in the complete absence of jurisdiction. Issuance of a search warrant is within the jurisdiction of FSM courts. Therefore it is a judicial act to which immunity attaches. *Liwi v. Finn*, 5 FSM R. 398, 400-01 (Pon. 1992).

In order for a Congressional statute to give the court valid authority in those areas which the Constitution grants the Chief Justice rule-making powers the Chief Justice does not first have to promulgate a rule before Congress may legislate on the same subject. *Hartman v. FSM*, 6 FSM R. 293, 297 (App. 1993).

If someone constitutionally ineligible for appointment, is appointed a judge then his status is that of a *de facto* judge. A *de facto* judge is one who exercises the duties of the judicial office under the color of an appointment thereto. Where there is an office to be filled, and one, acting under color of authority, fills the office and discharges its duties, his actions are those of an officer *de facto*, and binding on the public. *Hartman v. FSM*, 6 FSM R. 293, 298-99 (App. 1993).

Since the acts of a *de facto* judge are valid against all except the sovereign and generally not subject to collateral attack, the proper method to question a *de facto* judge's authority is through a *quo warranto* proceeding brought by the sovereign. *Hartman v. FSM*, 6 FSM R. 293, 299 (App. 1993).

The view that the *de facto* doctrine, where applicable, should operate to prevent challenges to the authority of special judges, acting under color of right, by private litigants, in the proceedings before them is better suited for the social and geographical configuration of Micronesia. *Hartman v. FSM*, 6 FSM R. 293, 299 (App. 1993).

§ 104. Special assignments.

The Chief Justice may give special assignments pursuant to article XI, section 9(b) of the Constitution. In the case of temporary Justices appointed pursuant to this authority:

(1) The person appointed shall meet the qualifications of section 107 of this chapter.

(2) The Congress may by resolution disapprove of the continued service of any temporary Justice whose cumulative service exceeds three months, and the disapproved person shall thereafter be ineligible for further service as a temporary Justice for one year, unless the Congress shall sooner revoke its disapproval.

(3) The Chief Justice shall give notice to the President and the Congress upon the appointment of any temporary Justice.

Source: PL 1-31 § 4; PL 6-102 § 1; PL 7-30 § 1.

Cross reference: The statutory provisions on the President and the Executive are found in title 2 of this code. The statutory provisions on the FSM Congress are found in title 3 of this code.

The official website of the Congress of the Federated States of Micronesia is found at http://www.fsmcongress.fm/.

The FSM Supreme Court website can be found at http://www.fsmsupremecourt.org/.

Case annotations: The Chief Justice has the constitutional authority to make rules for the appointment of special judges, and Congress has the constitutional authority to amend them. Congress has provided the Chief Justice with the statutory authority to appoint temporary justices. Where Congress has acted pursuant to its constitutional authority to provide statutory authority to the court, the court need not have exercised its concurrent rule-making authority. *Jano v. King*, 5 FSM R. 326, 331 (App. 1992).

Congress may not remove at its discretion a justice temporarily assigned to a case any time after that justice has served 90 days because any such resolution and the statute upon which it is based, 4 F.S.M.C. 104(2) violate Article IX, Section 7 of the Constitution. *Urusemal v. Capelle*, 12 FSM R. 577, 587 (App. 2004).

When the President is contesting, not the manner in which the special justice was assigned, but the manner in which he was removed, the delay resulting from a specially assigned justice's removal pursuant to 4 F.S.M.C. 104(2) is a real injury sufficient to bestow standing on the President to contest the constitutionality of that statute. *Urusemal v. Capelle*, 12 FSM R. 577, 584 (App. 2004).

§ 105. Vacancy in the Office of Chief Justice.

Whenever the Office of Chief Justice is vacant or the Chief Justice is unable to perform the duties of office, and no appointment of an Acting Chief Justice has been made by the Chief Justice or the President pursuant to article XI, section 4 of the Constitution, the powers and duties of the office shall devolve upon the Associate Justice senior in precedence who is able to act, until such disability is removed or another Chief Justice is appointed and duly qualified.

Source: PL 1-31 § 5.

Case annotations: The Chief Justice may appoint an acting chief justice if he is unable to perform his duties. "Unable to perform his duties" refers to a physical or mental disability of some duration, not to the legal inability to act on one particular case. *Jano v. King*, 5 FSM R. 326, 331 (App. 1992).

§ 106. Precedence of Associate Justices.

Associate Justices shall have precedence according to the seniority of their commissions. Justices whose commissions bear the same date shall have precedence according to seniority in age.

Source: PL 1-31 § 6.

§ 107. Qualifications of Supreme Court Justices.

A person nominated to the position of Chief Justice or Associate Justice of the Supreme Court shall:

(1) be at least 30 years of age at the time of nomination; and

(2) be a graduate from an accredited law school and be admitted to practice law in any jurisdiction, or be a person of equivalent and extraordinary legal ability obtained through at least five years of experience practicing law.

Source: PL 1-31 § 7.

Cross-reference: FSM Const., art. XI, § 5. The provisions of the Constitution are found in Part I of this code.

§ 108. Compensation of the judiciary.

(1) *Salaries.* The Chief Justice of the Supreme Court of the Federated States of Micronesia shall receive a salary of $45,000 per annum. The Associate Justices of the Supreme Court shall receive a salary of $43,000 per annum.

(2) *Overtime compensation.* No Justices of the Supreme Court shall be entitled to any form of additional compensation for any work performed in excess of 40 hours per week.

(3) *Health insurance.* Each Justice of the Supreme Court shall be entitled to participate in the National Government group health insurance program in effect during his tenure in office, under the same terms and conditions which apply to employees of the National Public Service System.

(4) *Housing.* Furnished housing and utilities shall be provided without cost to each Justice of the Supreme Court.

(5) *Vehicle.* Each Justice of the Supreme Court shall be provided with a Government automobile at his duty station, which shall be used primarily for official business.

(6) *Recruitment expenses.*

(a) Each Justice of the Supreme Court shall be entitled to whatever recruitment expenses are available to regular Government prime contract employees at the time he is confirmed, under the same terms and conditions which apply to employees of the National Public Service System.

(b) For the purpose of determining the benefits available pursuant to this subsection, the dependents, if any, of each Justice shall be determined in accordance with subsection (9) of this section.

(c) The shipment of household goods and personal effects for each Justice must commence within two years of the date of entry on duty of the Justice, notwithstanding any contrary provisions of the standard Government prime contract.

(d) Notwithstanding any contrary provisions of this section, the household goods and personal effects

of any Justice confirmed after the effective date of the act from which this section derives, must be shipped to his duty station within the time limit applicable to regular Government prime contract employees at the time he is confirmed.

(7) *Repatriation expenses.*

(a) Whenever a Justice of the Supreme Court shall retire or otherwise terminate his service as a Justice of the Court, he shall be entitled to whatever repatriation expenses are available to regular Government prime contract employees at the time he terminates his service, under the same terms and conditions which apply to employees of the National Public Service System; provided, however, that for the purpose of determining the benefits available pursuant to this section, the dependents, if any, of each Justice shall be determined in accordance with subsection (9) of this section.

(b) The provisions of this subsection shall not apply to any Justice who terminates his service as a Justice of the Supreme Court due to impeachment.

(8) *Life insurance.* Each Justice of the Supreme Court shall be entitled to participate in the National Government group life insurance program in effect during his tenure in office, under the same terms and conditions which apply to employees of the National Public Service System.

(9) *Dependents.* As used in this section, the term "dependents" is limited to the spouses and children of Justices; provided, that no child shall be considered a dependent after he graduates from undergraduate school, is married, or reaches the age of 22 years, whichever occurs first.

(10) *Compensation limitations.* No Justice of the Supreme Court shall be entitled to any benefits, remuneration, salary, or any other form of compensation except as provided by this section.

Source: PL IC-27 § 2; PL 3-40 § 1; PL 15-14 § 1.

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Cross-reference: FSM Const., art. XI, § 5. The provisions of the Constitution are found in Part I of this code.

§ 109. Trial Division sessions.

The Trial Division shall be continuously in session subject to recess and shall serve the States of Kosrae, Yap, Truk, and Ponape as needed and as consistent with their respective charters.

Source: PL 1-31 § 8.

Cross-reference: FSM Const., art. XI, § 9. The provisions of the Constitution are found in Part I of this code.

The statutory provisions on Judicial Procedures are found in title 6 of this code.

The FSM Supreme Court website containing the trial division calendar and other court information can be found at http://www.fsmsupremecourt.fm/.

Case annotations: Where plaintiff's complaint is written in English and the defendant requests a written translation into a local Micronesian language, and where appears that this is the only language the defendant can speak or read, the trial judge may order that the court provide a written translation and that the expense of providing the translation shall be taxed as a cost to the party not prevailing in the action. *Rawepi v. Billimon*, 2 FSM R. 240, 241 (Truk 1986).

§ 110. Appellate Division sessions.

The Appellate Division shall convene from time to time as may be necessary for the efficient disposition of appellate matters. A single Appellate Division Justice may make all necessary orders concerning any appeal prior to the hearing and determination thereof, subject to review by the full Appellate Division.

Source: PL 1-31 § 9.

Cross-reference: FSM Const., art. XI, § 9. The provisions of the Constitution are found in Part I of this code.

The statutory provisions on Judicial Procedures are found in title 6 of this code.

The FSM Supreme Court website containing the appellate calendar and other court information can be found at http://www.fsmsupremecourt.fm/.

Case annotations: The appellate division of the Supreme Court of the FSM may accept direct filing of a case and an expedited briefing schedule may be established where there is limited time available and prompt resolution of the issues in the case is decidedly in the national interest. *Constitutional Convention 1990 v. President*, 4 FSM R. 320, 324 (App. 1990).

An appeal at the early stage of development of FSM judicial systems is a significant event calling for relatively large expenditure of judiciary resources. In order to preserve and uphold the legitimate right of parties to appropriate appeals, the FSM Supreme Court must be vigilant and exercise its inherent powers to avoid unnecessary expenditure of resources for premature or unauthorized appeals. *FSM v. Yal'Mad*, 1 FSM R. 196, 197-98 (App. 1982).

When the remanding appellate court has not mandated a hearing on remand, it is within the sound discretion of the trial court to decide whether or not to convene a post-remand hearing. *FSM v. Hartman (I)*, 5 FSM R. 350, 351 (Pon. 1992).

No appellee is forced to do anything in any appeal. *Kitti Mun. Gov't v. Pohnpei*, 11 FSM R. 622, 627 (App. 2003).

An appellant must timely file a request for a transcript, or a statement of the issues, a designation of the appendix, and an opening brief,

with an appendix. An appellant's failure to comply with these rules may subject its appeal to dismissal. *Kitti Mun. Gov't v. Pohnpei*, 11 FSM R. 622, 627 (App. 2003).

If not requested to by the court, a non-party may participate in an appeal as an amicus curiae by either written consent of all parties or leave of court unless the non-party seeking to be an amicus curiae is a state or is the FSM or an officer or agency thereof. *Kitti Mun. Gov't v. Pohnpei*, 11 FSM R. 622, 627 (App. 2003).

An appellate court will first consider an appellant's due process contentions, when, if the appellant were to prevail on these, the decision below would be vacated (without the appellate court considering its merits), and the matter remanded for new proceedings. *Anton v. Cornelius*, 12 FSM R. 280, 284 (App. 2003).

§ 111. Clerks of Courts.

The Chief Justice of the Supreme Court may appoint a Clerk of the Supreme Court, who shall maintain an office in Ponape. The Clerk of the Supreme Court shall perform those duties prescribed by the Chief Justice. The Chief Justice may also appoint Assistant Clerks in the States who may also serve as clerks of the State or District courts. The Clerk of the Supreme Court in Ponape shall be the Chief Clerk. The Clerks of the Supreme Court shall perform those duties prescribed by the Chief Justice.

Source: PL 1-31 § 10.

§ 112. Other employees.

The Chief Justice may appoint and prescribe duties for such other officers and employees of the Supreme Court as he deems necessary, and may delegate this authority to an Associate Justice.

Source: PL 1-31 § 11.

Cross-reference: FSM Const., art. XI, § 9. The provisions of the Constitution are found in Part I of this code.

§ 113. Assessors.

Any Justice of the Supreme Court may appoint one or more assessors to advise him at the trial of any case with respect to local law or custom or such other matters requiring specialized knowledge. All such advice shall be of record and the assessors shall be subject to examination and cross-examination by any party.

Source: PL 1-31 § 12.

Cross-reference: FSM Const., art. XI, § 9. The provisions of the Constitution are found in Part I of this code.

The statutory provisions on Judicial Procedures are found in title 6 of this code.

§ 114. Removal of Clerks, officers, and employees.

The Chief Justice may remove any Clerk, officer, or employee of the Supreme Court for good cause. The removal may be appealed to the Appellate Division of the Supreme Court.

Source: PL 1-31 § 13.

Cross-reference: FSM Const., art. XI, § 9. The provisions of the Constitution are found in Part I of this code.

§ 115. Assistance to State courts.

Pursuant to article XI, section 10 of the Constitution:

(1) The Chief Justice of the Supreme Court shall establish suitable arrangements and procedures for State court utilization of facilities, Clerks, officers, and employees of the Supreme Court and for Supreme Court utilization of facilities, clerks, officers, and employees of the State or District courts. The Chief Justice may delegate this authority to an Associate Justice.

(2) The Justices of the Supreme Court shall make themselves available, to the extent not inconsistent with the proper performance of their duties as Supreme Court Justices, for appointment as temporary judges of State or District courts or assessors on matters of law on State courts.

Source: PL 1-31 § 14.

Cross-reference: FSM Const., art. XI, § 10, states: "The Congress shall contribute to the financial support of state judicial systems and may provide other assistance."

The constitutions of the states of Chuuk, Kosrae, Pohnpei, and Yap are found in Part III of this code.

§ 116. Seal.

The Appellate Division of the Supreme Court shall have a seal which shall be kept in the custody of the Clerk of the Supreme Court in Ponape. The Trial Division of the Supreme Court shall have seals which shall be kept in the custody of the Assistant Clerks of the Supreme Court in each State.

Source: PL 1-31 § 15.

§ 117. General powers of the Supreme Court.

The Supreme Court and each division thereof shall have power to issue all writs and other process, make rules and orders, and do all acts, not inconsistent with law or with the rules of procedure and evidence established by the Chief Justice, as may be necessary for the due administration of justice, and, without limiting the generality of the foregoing, may grant bail, accept and cause forfeit of security therefor, make orders for the attendance of witnesses with or without documents, and make orders for the disposal of exhibits.

Source: PL 1-31 § 16.

Cross-reference: FSM Const., art. XI, § 9. The provisions of the Constitution are found in Part I of this code.

The statutory provisions on Judicial Procedures are found in title 6 of this code. The FSM Supreme Court website can be found at http://www.fsmsupremecourt.fm/.

Case annotations: The FSM Supreme Court has inherent constitutional power to issue all writs: this includes the traditional common law writ of mandamus. 4 F.S.M.C. 117. *Nix v. Ehmes*, 1 FSM R. 114, 118 (Pon. 1982).

The writ of mandamus is used to compel public officials to perform a duty ministerial in nature and not subject to the official's own discretion. *Nix v. Ehmes*, 1 FSM R. 114, 118 (Pon. 1982).

The writ of mandamus is an extraordinary remedy, the object is not to cure a mere legal error or to serve as a substitution for appeal, but to require an official to carry out a clear nondiscretionary duty. *In re Raitoun*, 1 FSM R. 561, 562 (App. 1984).

Only under special circumstances that render the matter rare and exceptional should the Appellate Division of the FSM Supreme Court issue a writ of mandamus to alter the conduct of a trial judge before the trial court has completed proceedings and reached a final decision. *In re Raitoun*, 1 FSM R. 561, 562-63 (App. 1984).

The finality requirement and its underlying rationale mandate appellate court restraint and preclude issuance of writs of mandamus and prohibition on an interlocutory basis except in those rare and exceptional circumstances when the precise requirements for issuance of the writ are met and the appellate court in its discretion determines that immediate relief is called for. *In re Main*, 4 FSM R. 255, 258 (App. 1990).

The writ of mandamus is an extraordinary remedy issued to require a public official to carry out a clear non-discretionary duty. *Office of the Pub. Defender v. FSM Supreme Court*, 4 FSM R. 307, 309 (App. 1990).

4 F.S.M.C. 117 gives both the trial division and the appellate division the powers to issue all writs not inconsistent with law or with the rules of civil procedure. FSM Appellate Rule 22(a) requires petitions for writs of habeas corpus be first brought in the trial division. When circumstances have been shown to warrant, the appellate division clearly has the authority to suspend the rule. *In re Extradition of Jano*, 6 FSM R. 31, 32 (App. 1993).

That the FSM Supreme Court has the general power to issue writs of mandamus is beyond controversy. 4 F.S.M.C. 117. However, exercise of such power must be tempered by sober judgment, for it is equally settled that the writ of mandamus is an extraordinary remedy, the object of which is not to cure a mere legal error or to serve as a substitute for appeal, but to require an official to carry out a clear non-discretionary duty. *Damarlane v. Santos*, 6 FSM R. 45, 46 (Pon. 1993).

When a justice is called upon to alter the conduct of a trial judge in a state court before that court has completed proceedings and reached a final decision in a case, the pertinent inquiry is whether or not special circumstances exist so as to render the matter rare and exceptional for issuance of a writ of mandamus. *Damarlane v. Santos*, 6 FSM R. 45, 46-47 (Pon. 1993).

A request for mandamus so as to avoid a long and costly appeal does not present rare and exceptional circumstances so as to warrant issuance of a writ of mandamus. *Damarlane v. Santos*, 6 FSM R. 45, 47 (Pon. 1993).

The writ of mandamus is an extraordinary remedy, the object of which is not to cure a mere legal error or to serve as a substitute for appeal, but to require an official to carry out a clear non-discretionary duty. *Senda v. Trial Div.*, 6 FSM R. 336, 338 (App. 1994).

A writ of prohibition will only issue to prevent an inferior court or tribunal from acting without or in excess of its jurisdiction. It must be directed to a court or tribunal inferior in rank to the one issuing the writ. As a general rule, it cannot issue from one court to another of equal rank. *Berman v. FSM Supreme Court (I)*, 7 FSM R. 8, 3 (App. 1995).

A writ of prohibition is an extraordinary writ and cannot be issued when there is a plain, speedy and adequate remedy otherwise available that has not been exhausted. *Berman v. FSM Supreme Court (I)*, 7 FSM R. 8, 3 (App. 1995).

A writ of prohibition will not issue to disqualify an FSM Supreme Court justice where the party seeking disqualification has not filed a motion to disqualify or recuse to be considered by the justice whose disqualification is sought. *Berman v. FSM Supreme Court (I)*, 7 FSM R. 8, 10 (App. 1995).

The proper method to obtain a writ of prohibition to disqualify a member of an appellate panel is to move for disqualification before that member, and, if the recusal motion is denied, to file a petition for a writ of prohibition as a separate matter to be considered by an appellate panel constituted pursuant to Appellate Rule 21(a). *Berman v. FSM Supreme Court (I)*, 7 FSM R. 8, 10 (App. 1995).

In order for a writ of prohibition to issue to require a judge to recuse himself it must be an abuse of discretion for the judge not to recuse

himself. Where it is not apparent what interest of the judge could be substantially affected by the outcome of the proceeding or that the judge is biased or prejudiced the writ will not issue. *Berman v. FSM Supreme Court (I)*, 7 FSM R. 8, 10 (App. 1995).

A writ of mandamus may only force a ministerial act or prevent a clear abuse of power and cannot be used to test or overrule a judge's exercise of discretion. *Senda v. Trial Div.*, 6 FSM R. 336, 338 (App. 1994).

Mere legal error by a judge, even gross legal error in a particular case, as distinguished from a calculated and repeated disregard of governing rules, does not suffice to support issuance of the writ of mandamus. *Senda v. Trial Div.*, 6 FSM R. 336, 338 (App. 1994).

The party seeking a writ of mandamus has the burden of showing that its right to issuance of the writ is clear and indisputable. *Senda v. Trial Div.*, 6 FSM R. 336, 338 (App. 1994).

Where the most the petitioner alleges is that the trial justice committed gross legal error and where the matter is already on appeal a writ of mandamus will not issue because it was not shown that the trial justice breached a duty, ministerial in nature, or that he had engaged in a clear abuse of power. *Senda v. Trial Div.*, 6 FSM R. 336, 338 (App. 1994).

In order to overturn the trial judge's denial of a motion to recuse an appellant must show an abuse of the trial judge's discretion. The same standard of review applies to a petition for a writ of prohibition ordering a judge to recuse himself. *Nahnken of Nett v. Trial Div.*, 6 FSM R. 339, 340 (App. 1994).

Since a prerequisite to the issuance of a writ of mandamus is the existence of a clear duty that is being violated by the trial court, no writ will issue when the petitioner has not established that the trial court had any duty, much less a clear duty. *Gimnang v. Trial Div.*, 6 FSM R. 482, 485 (App. 1994).

The writ of mandamus is an extraordinary remedy designed to prevent public officials from committing clear abuses of power. As such, mandamus relief cannot be used as a precaution against future events that may never occur. *Damarlane v. Pohnpei State Court*, 6 FSM R. 561, 563-64 (Pon. 1994).

A writ of mandamus is an extraordinary remedy issued to require a public official to carry out a clear non-discretionary duty to which the petitioner has an indisputable right, and it may not be issued for the purpose of requiring a public official to carry out an act that is not within his authority. *Katau Corp. v. Micronesian Mar. Auth.*, 6 FSM R. 621, 622 (Pon. 1994).

Because the Micronesian Maritime Authority has discretion in negotiating and entering into foreign fishing agreements and because statutorily a fishing permit cannot be issued without a signed agreement a court cannot issue a writ of mandamus to compel issuance of a fishing permit because it cannot order performance of a statutorily forbidden act. *Katau Corp. v. Micronesian Mar. Auth.*, 6 FSM R. 621, 624 (Pon. 1994).

Under 4 F.S.M.C. 117, the FSM Supreme Court has the power to issue all writs and other process as may be necessary for the due administration of justice and, under 6 F.S.M.C. 1503, the court may grant a writ of *habeas corpus* to inquire into the cause of imprisonment or restraint of a person, who has applied or who has had an application made on his behalf, and who is unlawfully imprisoned or restrained of his liberty under any pretense whatsoever. *In re Mefy*, 16 FSM R. 401, 403 (Chk. 2009).

An applicant for a writ of *habeas corpus* should name as the respondent the person who has custody over him. *In re Mefy*, 16 FSM R. 401, 403 (Chk. 2009).

Since habeas corpus proceedings are commenced with an order, directed to the person having custody of the person detained, to show cause why the writ should not be issued, an application is deficient when it does not name a respondent. *In re Mefy*, 16 FSM R. 401, 403 (Chk. 2009).

When the issues raised in an application for a writ of *habeas corpus* are moot because the applicants have already been granted the relief sought release from jail any consideration or relief would thus be ineffectual. No justiciable case or dispute is presented when events subsequent to a case's filing make the issues presented moot. Since the FSM Supreme Court lacks jurisdiction to consider moot cases or issues, it must dismiss a moot application because, when the court lacks jurisdiction over a case, it should not remain lifelessly on the docket however harmless that may seem. *In re Mefy*, 16 FSM R. 401, 403 (Chk. 2009).

To the extent that the issues that the applicants for a writ of *habeas corpus* seek to raise in a moot application are significant and relevant to other issues to be raised and considered in a criminal case, they should be raised for consideration in that case in the proper manner or in a civil suit for damages. *In re Mefy*, 16 FSM R. 401, 403-04 (Chk. 2009).

§ 118. Authority to administer oaths and take acknowledgments.

Each Justice, Clerk, and Assistant Clerk of the Supreme Court shall have power to administer oaths and affirmations, take acknowledgements, and exercise all powers of a notary public.

Source: PL 1-31 § 17.

Cross-reference: The form of oath or affirmation is found at 1 F.S.M.C. 301.

§ 119. Contempt.

(1) Any Justice of the Supreme Court shall have the power to punish contempt of court. Contempt of court is:

(a) any intentional obstruction of the administration of justice by any person, including any Clerk or officer of the Court acting in his official capacity; or

(b) any intentional disobedience or resistance to the Court's lawful writ, process, order, rule, decree, or command.

(2) All adjudications of contempt shall be pursuant to the following practices and procedures:

(a) any person accused of committing any civil contempt shall have a right to notice of the charges and an opportunity to present a defense and mitigation. A person found in civil contempt may be imprisoned until such time as he complies with the order or pays an amount necessary to compensate the injured party, or both;

(b) any person accused of committing a criminal contempt shall have a right to notice of the charges and an opportunity to present a defense and mitigation; provided, however, that no punishment of a fine of more than $100 or imprisonment shall be imposed unless the accused is given a right to notice of the charges, to a speedy public trial, to confront the witnesses against him, to compel the attendance of witnesses in his behalf, to have the assistance of counsel, and to be released on bail pending adjudication of the charges. He shall have a right to be charged within three months of the contempt and a right not to be charged twice for the same contempt; and

(c) a person found to be in contempt of court shall be fined not more than $1,000 or imprisoned for not more than six months.

(3) Any adjudication of contempt is subject to appeal to the Appellate Division of the Supreme Court. Any punishment of contempt may be stayed pending appeal, but a punishment of imprisonment shall be stayed on appeal automatically, unless the Court finds that a stay of imprisonment will cause an immediate obstruction of justice, which finding must be supported by written findings of fact. A denial of a stay of imprisonment is subject to review.

Source: PL 1-31 § 18.

Case annotations: The right of citizens to express their views, including views critical of public officials, is fundamental to the development of a healthy political system. Therefore, courts are generally reluctant to find that expression of opinions asserted outside of the court itself, however intemperate or misguided, constitute contempt of court. *In re Iriarte (I)*, 1 FSM R. 239, 247-48 (Pon. 1983).

When the court has ordered counsel to submit a brief solely on the issue of whether the defendant's parcel is exempt from attachment and execution and counsel has chosen to ignore the court's order and proceeded to relitigate the issue of her ability to pay, normally, such intentional disobedience of the court's lawful order may be sanctionable under 4 F.S.M.C. 119(1)(b). *FSM Dev. Bank v. Jonah*, 17 FSM R. 318, 323 (Kos. 2011).

Civil contempt is a prospective remedial measure designed to encourage, or even coerce, compliance with a lawful court order when the contemnor has been found to have the ability to comply with that order, but criminal contempt is retrospective and is punishment for past wrongful conduct. Criminal contempt is not designed to secure compliance with a court order, but instead punishes the intentional violation of a lawful court order. *Berman v. Pohnpei Legislature*, 17 FSM R. 339, 352 (App. 2011).

Failure to pay a judgment in accordance with a court order may in the appropriate case constitute conduct that is sanctionable by an order of contempt under 4 F.S.M.C. 119. For such an order to issue, it must be shown that the putative contemnor had knowledge of the order and the ability to obey, and that he did not do so. *Barrett v. Chuuk*, 12 FSM R. 558, 561 (Chk. 2004).

Criminal contempt (available under 4 F.S.M.C. 119) is retrospective and is punishment for past wrongful conduct. It is not designed to secure compliance with a court order, but instead punishes the intentional violation of a lawful court order. Except for summary cases when the contempt is before a judge and is needed to maintain courtroom decorum, criminal contempt cases are normally prosecuted by the government, and not by an opposing party. *Rodriguez v. Bank of the FSM*, 11 FSM R. 367, 382 n.23 (App. 2003).

Criminal contempt is not a specified remedy in 6 F.S.M.C. 1412, but is an available remedy under the general FSM contempt statute, 4 F.S.M.C. 119, under which the court may punish any intentional disobedience to a lawful court order. *Davis v. Kutta*, 10 FSM R. 125, 127 (Chk. 2001).

An essential element of a criminal contempt is the subjective intent to defy the court's authority. *Davis v. Kutta*, 10 FSM R. 125, 127 (Chk. 2001).

A finance director's actions in attempting to achieve payment of a judgment indicates that he lacks the subjective intent necessary for

criminal contempt and a court therefore cannot hold him in contempt. *Davis v. Kutta*, 10 FSM R. 125, 127 (Chk. 2001).

A criminal contemnor's intent must be ascertained from all the acts, words, and circumstances surrounding the occurrence. *Davis v. Kutta*, 10 FSM R. 125, 127 (Chk. 2001).

Voluntary acts or omissions by a person, done with knowledge of facts sufficient to warn the person that such acts or omission could create a substantial risk of court delay, may constitute intentional obstruction of the administration of justice. *In re Tarpley*, 2 FSM R. 221, 224 (Pon. 1986). [Editor's note: reversed by *In re Tarpley*, 3 FSM R. 162 (App. 1987).]

A counsel's decision to take steps which may cause him to be late for a scheduled court hearing, coupled with his failure to advise the court and opposing counsel of the possibility that he might be late to the hearing, may, when followed by failure to appear at the scheduled time, constitute an intentional obstruction of the administration of justice within the meaning of section 119(1)(a) of the Judiciary Act, and may be contempt of court. 4 F.S.M.C. 119(1)(a). *In re Robert (II)*, 1 FSM R. 18, 20 (Pon. 1981).

When counsel receives notice of a hearing, yet intentionally departs without making adequate efforts to reschedule the hearing or to assure that someone will appear on behalf of the client, he knowingly creates a substantial risk of obstruction of justice. *In re Tarpley*, 2 FSM R. 221, 224_25 (Pon. 1986). [**Editor's note:** reversed by *In re Tarpley*, 3 FSM R. 162 (App. 1987).]

The need to assure fairness in judicial proceedings is especially pronounced where, as in a criminal contempt proceeding, the court itself is the accuser. *In re Iriarte (I)*, 1 FSM R. 239, 248 (Pon. 1983).

In criminal contempt proceedings, reasonable notice of a charge and an opportunity to be heard are basic in our system of jurisprudence; these rights include a right to examine witnesses against one, to offer testimony, and to be represented by counsel. *In re Iriarte (I)*, 1 FSM R. 239, 250 (Pon. 1983).

To insure that order is maintained in court proceedings, courts have a limited power to make a finding of contempt summarily, where the contemptuous conduct takes place during courtroom proceedings and is personally observed by the judge, and where the judge acts immediately. *In re Iriarte (I)*, 1 FSM R. 239, 250 (Pon. 1983).

A hearing on a charge of contempt is less critical to fairness where the events occur before the judge's own eyes and a reporter's transcript is available. *In re Iriarte (I)*, 1 FSM R. 239, 250 (Pon. 1984).

A summary punishment always, and rightly, is regarded with disfavor. Where conviction and punishment is delayed it is much more difficult to argue that action without notice or hearing of any kind is necessary to preserve order and enable the court to proceed with its business. *In re Iriarte (I)*, 1 FSM R. 239, 251 (Pon. 1983).

The defendant of a criminal contempt charge is entitled to those procedural rights normally accorded other criminal defendants. *In re Iriarte (II)*, 1 FSM R. 255, 260 (Pon. 1983).

Where the accused disrupts courtroom proceedings and the judge must act immediately to restore order, a trial judge may immediately convict a defendant (the accused) through a "summary contempt" procedure, that is, without prior notice or hearing. *In re Iriarte (II)*, 1 FSM R. 255, 260 (Pon. 1983).

The summary contempt power may be invoked even after some delay if it was necessary for a transcript to be prepared to substantiate the contempt charge, or where the contemner is an attorney and immediate contempt proceedings may result in a mistrial. *In re Iriarte (II)*, 1 FSM R. 255, 261 (Pon. 1983).

When the necessity to restore order by immediate court action ends, the court's summary contempt power has expired. *In re Iriarte (II)*, 1 FSM R. 255, 261 (Pon. 1983).

Failure to proceed with a contempt hearing offered by the court without prior notice cannot be deemed a loss or waiver of the hearing right itself when no clear and unmistakable warning is issued that a failure to proceed immediately with the hearing will constitute a loss or waiver of that right. *In re Iriarte (II)*, 1 FSM R. 255, 264-65 (Pon. 1983).

"Intentional Obstruction," as specified in 4 F.S.M.C. 119, requires that the consequences of the act are the purpose for which it was done, or that the consequences were substantially certain to follow the act. *In re Tarpley (II)*, 3 FSM R. 145, 149 (App. 1987).

One who acts negligently but whose actions do not create a substantial risk of obstruction, may not be deemed to have acted with the necessary intention to be found in contempt. *In re Tarpley (II)*, 3 FSM R. 145,150 (App. 1987).

The Judiciary Act of 1979 permits the court to both fine and imprison a person found to be in contempt of court, but does not permit the fine to exceed $1,000.00 or the term of imprisonment to go beyond six months. *Soares v. FSM*, 4 FSM R. 78, 84 (App. 1989).

In a contempt trial, the trial court may consider information in addition to evidence adduced in the contempt hearing itself when the other information came to the knowledge of the trial court in previous judicial hearings related to the matter which gave rise to the contempt charge, and when the judge identified the "outside" information and gave the defendant an opportunity to object but the defendant failed to do so. *Semes v. FSM*, 5 FSM R. 49, 52 (App. 1991).

While the Judiciary Act says relatively little about the appropriate distinctions between civil and criminal contempt proceedings, the statute does reveal a general expectation of Congress that the legal system here shall adhere generally to the same kinds of distinctions between civil and criminal contempt proceedings that have been established in other common law systems. *Damarlane v. Pohnpei Transp. Auth.*, 5 FSM R. 62, 65 (Pon. 1991).

Although judiciaries are vested with power to require or authorize initiation of criminal contempt proceedings, and may appoint private counsel to prosecute those proceedings, judiciaries typically attempt to appoint for that purpose government attorneys who are already responsible for public prosecutions. *Damarlane v. Pohnpei Transp. Auth.*, 5 FSM R. 62, 66 (Pon. 1991).

A contempt motion brought, not to obtain leverage to force compliance with a existing court order, but instead to attempt to punish the party for a previous violation is criminal in nature. *Damarlane v. Pohnpei Transp. Auth.*, 5 FSM R. 62, 66 (Pon. 1991).

Counsel for a party in a civil action may not be appointed to prosecute the opposing party for criminal contempt for violating an order in that action because the primary focus of the private attorney is likely to be, not on the public interest, but instead upon obtaining for his or her client the benefits of the court's order. *Damarlane v. Pohnpei Transp. Auth.*, 5 FSM R. 62, 67 (Pon. 1991).

Where the record lacked any identifiable order directing a particular counsel to appear before the court, insofar as the court's expectation was that "somebody" from the Office of the Public Defender appear, no affirmative duty to appear existed; nor did any intentional obstruction of the administration of justice occur to support the lower court's finding of contempt against counsel. *In re Powell*, 5 FSM R. 114, 117 (App. 1991).

Criminal contempt under the FSM Code results from intentional disregard of a court order; the fact that the defendant was not specifically informed that he would be subject to punishment for disobedience does not negate a finding of requisite intent. *Alfons v. FSM*, 5 FSM R. 402, 406 (App. 1992).

A garnishee who deliberately disobeys a court order may be held in contempt of court. *Mid-Pacific Constr. Co. v. Senda*, 6 FSM R. 135, 136 (Pon. 1993).

The intentional disobedience required for a conviction for contempt necessarily includes an element of voluntariness. *In re Contempt of Cheida*, 7 FSM R. 183, 185 (App. 1995).

The tardiness of a person who appears before the court as a witness, not as an attorney, who was presented with an unexpected legitimate and confirmed conflict between the demands of two branches of government, and who made efforts to notify the court he would be late, cannot be considered intentional disobedience of the court's summons. *In re Contempt of Cheida*, 7 FSM R. 183, 186 (App. 1995).

§ 120. Sessions and records to be public.

(1) All sessions and records of the Supreme Court shall be public, except when otherwise ordered by the Court for good cause.

(2) Any person desiring to attend any session that has been closed or view any record that has been suppressed may petition the Court closing the session or suppressing the record. Any interested person may appeal the action of the Court on said petition to the Appellate Division of the Supreme Court.

Source: PL 1-31 § 19.

Cross-reference: FSM Const., art. XI, § 9. The provisions of the Constitution are found in Part I of this code.

The statutory provisions on Judicial Procedures are found in title 6 of this code. The FSM Supreme Court website can be found at http://www.fsmsupremecourt.fm/.

Case annotations:

Records

A court's inherent supervisory power over its own records includes the discretion to seal those records if it determines that the public's right to access is outweighed by legitimate competing needs for privacy and confidentiality. *In re Property of Doe*, 6 FSM R. 606, 607 (Pon. 1994).

A court will use a three step process designed to protect the public's interest in access to its files to determine whether the records should be sealed: (1) the court will give the public adequate notice that the judicial records in question may be sealed; (2) the court will give all interested persons an opportunity to object; and (3) if, after considering all objections, the court decides that the records should be sealed, it will seal those records and state on the record the reasons supporting its decision. *In re Property of Doe*, 6 FSM R. 606, 607 (Pon. 1994).

When the court has posted public notices throughout the state and no member of the public, nor any interested party, objected, and the court has found good cause shown, the records in a case may be sealed. *In re Property of Doe*, 6 FSM R. 606, 607 (Pon. 1994).

§ 121. Publication of decisions.

All decisions of the Appellate Division of the Supreme Court, including concurring and dissenting opinions, shall be published. The Trial Division of the Supreme Court may order one or more of its decisions to be published.

Source: PL 1-31 § 20.

Editor's note: The publication of decisions of the FSM Supreme Court are done in an FSM Interim Reporter (FSM Intrm). The published decisions of the FSM Supreme Court and some state court decisions can be found on the FSM Supreme Court website at http://www.fsmsupremecourt.fm/.

Case annotation: Although 4 F.S.M.C. 121 mandates the publication of FSM Supreme Court appellate opinions, confidentiality in the spirit of the rules can been maintained in a continuing attorney disciplinary matter by the omission of names and identifying characteristics. *In re Attorney Disciplinary Proceeding*, 9 FSM R. 165, 175 (App. 1999).

§ 122. Judicial ethics.

Justices of the Supreme Court shall adhere to the standards of the Code of Judicial Conduct of the American Bar Association except as otherwise provided by law or rule. The Chief Justice may by rule prescribe stricter or additional standards.

Source: PL 1-31 § 21.

Case annotations: Judges on the FSM Supreme Court are bound by the American Bar Association Code of Judicial Conduct incorporated into law by 4 F.S.M.C. 122. *Andohn v. FSM*, 1 FSM R. 433, 444 (App. 1984).

Canon 3C of the ABA Code of Judicial Conduct applies in the FSM by virtue of 4 F.S.M.C. 122. There is no hint that Canon 3C as incorporated by the Judiciary Act of 1979, and 4 F.S.M.C. 124, were intended by Congress to have different meanings here. *FSM v. Skilling*, 1 FSM R. 464, 471 n.2 (Kos. 1984).

The bar against "public comment" by a judge regarding a case in trial, contained in 4 F.S.M.C. 122 and Canon 3A(b) of the Code of Judicial Conduct of the American Bar Association, is not violated by a trial court judge's encouraging a representative of the national official newspaper to publish his opinion on a motion for recusal, and such encouragement does not demonstrate partiality requiring recusal. *Skilling v. FSM*, 2 FSM R. 209, 215 (App. 1986).

The trial judge is justified in denying a motion for recusal on the basis of failure of the moving party to file an affidavit explaining the factual basis for the motion. *Skilling v. FSM*, 2 FSM R. 209, 216-217 (App. 1986).

§ 123. Practice of law prohibited.

No Justice, Clerk, officer, or employee of the Supreme Court shall practice law in the Federated States of Micronesia.

Source: PL 1-31 § 22.

§ 124. Disqualification of Supreme Court Justice.

(1) A Supreme Court Justice shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(2) He shall also disqualify himself in the following circumstances:

(a) where he has a personal bias or prejudice concerning a party or his counsel, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the Justice or

such lawyer has been a material witness concerning it. The term private practice shall include practice with legal service or public defender organizations;

(c) where he has served in governmental employment and in such capacity participated as counsel, adviser, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(d) where he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(e) where he or his spouse, or a person within a close relationship to either of them, or the spouse of such a person is:

(i) a party to the proceeding, or an officer, director, or trustee of a party;

(ii) acting as lawyer in the proceeding;

(iii) known by the Justice to have an interest that could be substantially affected by the outcome of the proceeding; or

(iv) to the Justice's knowledge likely to be a material witness in the proceeding.

(3) Upon taking office and every year thereafter, a Justice shall list as of record the personal and fiduciary financial interests of himself and his spouse and minor children residing in his household.

(4) For the purposes of this section the following words or phrases shall have the meaning indicated:

(a) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund or if the outcome of the proceedings could substantially affect the value of the fund;

(ii) an office or membership in an educational, religious, charitable, or civic organization is a "financial interest" in securities held by the organization only if the outcome of the proceeding could substantially affect the value of the securities;

(iii) the proprietary interest of a policyholder in a mutual insurance company, of a member of a cooperative association, of a depositor in a mutual savings association or credit union, or a similar proprietary interest is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of Government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(5) No Supreme Court Justice shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (2) of this section. Where the ground for disqualification arises only under subsection (1) of this section, waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(6) A party may move to disqualify a Supreme Court Justice for one or more of the reasons stated in subsections (1) or (2) of this section. Said motion shall be accompanied by an affidavit stating the reasons for the belief that grounds for disqualification exist, and shall be filed before the trial or hearing unless good cause is shown for filing it at a later time. Upon receipt of such a motion, the Justice shall rule on it before proceeding further in the matter, stating his reasons for granting or denying it on the record.

Source: PL 1-31 § 23.

Case annotation: Practical and policy considerations relating to judicial administration in the FSM could be viewed as justifying invocation of the Rule of Necessity whereby judges are obliged to hear and decide cases from which they might otherwise recuse themselves if no other judge is available to hear the case. *FSM v. Skilling*, 1 FSM R. 464, 4669-70 (Kos. 1984).

The Rule of Necessity has been held in the United States to prevail over the disqualification provisions of 28 U.S.C. § 455 and Canon 3C of the ABA Code of Judicial Conduct, both of which are nearly identical to the language of 4 F.S.M.C. 124(1) and (2). *FSM v. Skilling*, 1 FSM R. 464, 470-71 (Kos. 1984).

4 F.S.M.C. 124(6) provides that a party may move to disqualify a Supreme Court justice, and requires that such a motion be accompanied by an affidavit stating the reasons for belief that grounds for disqualification exist. Any disqualification motion must be filed before the trial or hearing, unless good cause is shown. *Hartman v. Bank of Guam*, 10 FSM R. 89, 95-96 (App. 2001).

The type of partiality at which 4 F.S.M.C. 124(1) is aimed is extrajudicial bias, or bias resulting from information received by the judge outside of the judicial proceeding or proceedings in which the judge has participated. *Hartman v. Bank of Guam*, 10 FSM R. 89, 96 (App. 2001).

It is not unusual for the same judge to hear interrelated matters involving one or more parties in common, and the fact that the same judge hears different cases involving the same party or parties and related issues does not automatically result in an appearance of partiality under 4 F.S.M.C. 124(1). *Hartman v. Bank of Guam*, 10 FSM R. 89, 97 & n.5 (App. 2001).

The recusal statute provides that a justice shall disqualify himself if a closely related person is a director of a party, not has been or was at some point in the past. Therefore when the judge's brother's board membership and the judge's assignment to the case was never concurrent, there was not a time when 4 F.S.M.C. 124(2)(e)(i) was applicable, especially when the judge was not aware that his brother had been a member of party's board until so notified by the party's advice to the court. *Adams v. Island Homes Constr., Inc.*, 12 FSM R. 181, 183 (Pon. 2003).

When the trial judge is an unnamed member of a plaintiff class in another case, represented by the same counsel as the plaintiff in this case and defendant's counsel had notice of that more than one year before making a motion to recuse under 4 F.S.M.C. 124(1), and since a basis for a motion brought under section 124(1) is subject to waiver under section 4 F.S.M.C. 124(5), the basis for the judge's recusal was waived. *Amayo v. MJ Co.*, 13 FSM R. 242, 248-49 (Pon. 2005).

For the purpose of a recusal motion, a temporary justice is considered an FSM justice to whom 4 F.S.M.C. 124 applies. *Goya v. Ramp*, 14 FSM R. 303, 304 n.1 (App. 2006).

In the absence of a showing of any actual partiality or extrajudicial bias under 4 F.S.M.C. 124(1), a judge properly meets his obligation to hear the case. The type of partiality at which 4 F.S.M.C. 124(1) is aimed is extrajudicial bias, or bias resulting from information received by the judge outside of the judicial proceeding or proceedings in which the judge has participated. *Damarlane v. Pohnpei Legislature*, 14 FSM R. 582, 584 (App. 2007).

The type of partiality at which 4 F.S.M.C. 124(1) is aimed is extrajudicial bias, or bias resulting from information received by the judge outside of the judicial proceeding or proceedings in which the judge has participated. A justice whose extrajudicial statements exhibit a bias towards a party's counsel must disqualify himself. On the other hand, while a trial judge has a range of discretion in making his determination about whether he will disqualify himself, he cannot use a standard of mere suspicion. *Berman v. Rosario*, 15 FSM R. 337, 341 (Pon. 2007).

The procedure for recusal provided in the FSM Code, whereby a party may file a motion for recusal with an affidavit, and the judge must rule on the motion, stating his reasons for granting or denying the motion, before any further proceeding is taken, allows the moving party due process. *Skilling v. FSM*, 2 FSM R. 209, 214 (App. 1986).

The bar against "public comment" by a judge regarding a case in trial, contained in 4 F.S.M.C. 122 and Canon 3A(b) of the Code of Judicial Conduct of the American Bar Association, is not violated by a trial court judge's encouraging a representative of the national official newspaper to publish his opinion on a motion for recusal, and such encouragement does not demonstrate partiality requiring recusal. *Skilling v. FSM*, 2 FSM R. 209, 215 (App. 1986).

The trial judge is justified in denying a motion for recusal on the basis of failure of the moving party to file an affidavit explaining the factual basis for the motion. *Skilling v. FSM*, 2 FSM R. 209, 216-17 (App. 1986).

The trial court judge's act of encouraging publication of his opinion on a motion for recusal in a national official newspaper, taken together with (1) the fining of defense counsel for tardiness, (2) the length of the sentence imposed, (3) the judge's comments about community support for defendant, explaining how that factor was taken into account in sentencing, and (4) the accelerated pace of sentencing proceedings, which was not contemporaneously objected to by defense counsel, do not indicate an abuse of discretion by the judge in denying the motion for recusal. *Skilling v. FSM*, 2 FSM R. 209, 217 (App. 1986).

The power of a justice to recuse himself must be exercised conscientiously and not be used to avoid difficult or controversial cases nor merely to accommodate nervous litigants or counsel. *FSM v. Skilling*, 1 FSM R. 464, 471 (Kos. 1984).

Questioning a judge's impartiality, under 4 F.S.M.C. 124(1), brings into issue possible favoritism, bias or some other interest of the judge for or against a party. This affords no basis, however, for disqualifying a judge because of his general attitudes, beliefs, or philosophy, even where it is apparent that those do not augur well for a particular litigant. *FSM v. Skilling*, 1 FSM R. 464, 472-73 (Kos. 1984).

4 F.S.M.C. 124 furnishes no grounds for disqualifying a judge on the basis of statements of rulings made by him in his judicial capacity which reflect reasoned views derived from documents submitted, arguments heard, or testimony received in the course of judicial proceedings in the same case. *FSM v. Skilling*, 1 FSM R. 464, 473 (Kos. 1984).

In order that the impartiality of a judge might reasonably be questioned there must be facts or reasons which furnish a rational basis for doubting the judge's impartiality. Reasonableness is to be considered from the perspective of a disinterested reasonable person. *FSM v. Skilling*, 1 FSM R. 464, 475 (Kos. 1984).

The test for determining if the impartiality of a judge in a proceeding might reasonably be questioned is whether a disinterested reasonable

person, knowing all the circumstances, would harbor doubts about the judge's impartiality. *FSM v Skilling*, 1 FSM R. 464, 475 (Kos. 1984).

One guide to the kinds of facts which could lead a disinterested reasonable observer to harbor doubts about a judge's impartiality is 4 F.S.M.C. 124(2). *FSM v. Skilling*, 1 FSM R. 464, 475 (Kos. 1984).

4 F.S.M.C. 124(2) prescribes a subjective test under which a judge must disqualify himself if he subjectively concludes that he falls within the statutory provisions. Section 124(1), on the other hand, provides an objective standard designed to guard against the appearance of partiality. *FSM v. Skilling*, 1 FSM R. 464, 476 (Kos. 1984).

4 F.S.M.C. 124(1) was designed to cover contingencies not foreseen by the draftsmen who set out specific grounds for disqualification in section 124(2). Despite its "catch all" nature, however, it remains necessary to show a factual basis, not just wide-ranging speculation or conclusions, for questioning a judge's impartiality. *FSM v. Skilling*, 1 FSM R. 464, 476-77 (Kos. 1984).

A party's motion to have a trial justice recuse himself is insufficient if not supported by affidavit as required by 4 F.S.M.C. 124(c). *Jonas v FSM (II)*, 2 FSM R. 238, 239 (App. 1986).

Where a trial justice is asked to recuse himself rather than continue to sit on remaining counts after receiving testimony concerning stricken counts, the issue presented is whether there exists either actual bias or prejudice, or appearance of partiality. *Jonas v. FSM (II)*, 2 FSM R. 238, 239 (App. 1986).

Recusal

No judge should sit in a case in which he is personally involved. *In re Iriarte (II)*, 1 FSM R. 255, 262 (Pon. 1983).

Determination of a judge's bias, prejudice or partiality should be made on the basis of conduct or information which is extrajudicial in nature. *FSM v. Jonas (II)*, 1 FSM R. 306, 317-18 (Pon. 1983).

A judge who, at the beginning of a trial, is so influenced by other information that he knows he will not be capable of basing his decision solely on the properly admitted evidence in the case is under an ethical obligation to disqualify himself or herself from the litigation. *FSM v. Jonas (II)*, 1 FSM R. 306, 320 n.1 (Pon. 1983).

Due process demands impartiality on the part of adjudicators. *Suldan v. FSM (II)*, 1 FSM R. 339, 362 (Pon. 1983).

There is a presumption that a judicial or quasi-judicial official is unbiased. The burden is placed on the party asserting the unconstitutional bias. The presumption of neutrality can be rebutted by a showing of conflict of interest or some other specific reason for disqualification.

Where disqualification occurs, it is usually because the adjudicator has a pecuniary interest in the outcome or has been the target of personal abuse or criticism from the party before him. *Suldan v. FSM (II)*, 1 FSM R. 339, 362-63 (Pon. 1983).

The fact that answers given by the victim-witness in response to questions posed by the judge happened to strengthen the government's case did not, by itself, indicate that the judge was impermissibly helping the prosecution, or that he was biased against the defendant. *Andohn v. FSM*, 1 FSM R. 433, 446 (App. 1984).

Canon 3C of the ABA Code of Judicial Conduct applies in the FSM by virtue of 4 F.S.M.C. 122. There is no hint that Canon 3C as incorporated by the Judiciary Act of 1979, and 4 F.S.M.C. 124, were intended by Congress to have different meanings here. *FSM v. Skilling*, 1 FSM R. 464, 471 n.2 (Kos. 1984).

Courts normally adhere to the rule that any alleged judicial bias and prejudice, to be disqualifying, must stem from an extrajudicial source. *FSM v. Skilling*, 1 FSM R. 464, 483 (Kos. 1984).

Adverse rulings by a judge in a case do not create grounds for disqualification from that case. *FSM v. Skilling*, 1 FSM R. 464, 484 (Kos. 1984).

Due process does not require that a second judge decide motions for recusal where the trial judge accepts as true all of the factual allegations in the affidavit of the party seeking recusal, and must rule only on matters of law in making the decision to recuse or not recuse himself. *Skilling v. FSM*, 2 FSM R. 209, 213 (App. 1986).

The normal situation in which recusal may be required is when a judge's extrajudicial knowledge, relationship or dealings with a party or the judge's own personal or financial interests, might be such as to cause a reasonable person to question whether the judge could preside over and decide a particular case impartiality. *In re Main*, 4 FSM R. 255, 260 (App. 1990).

Recusal of a trial judge from presiding over a criminal trial, because he has presided over a failed effort to end the case through a guilty plea, is not automatic, since bias, to be disqualifying, generally must stem from an extrajudicial source. *In re Main*, 4 FSM R. 255, 260 (App. 1990).

If a judge has participated as an advocate in related litigation touching upon the same parties, and in the course of that previous activity has taken a position concerning the issue now before him as a judge, the appearance of justice, as guaranteed by Due Process Clause, requires recusal. *Etscheit v. Santos*, 5 FSM R. 35, 43 (App. 1991).

There are certain circumstances or relationships which, as a per se matter of due process, require almost automatic disqualification, and, if a judge has a direct, personal, substantial, pecuniary interest in the outcome of the case, recusal is constitutionally mandated. *Etscheit v. Santos*, 5 FSM R. 35, 43 (App. 1991).

To prevent the "probability of unfairness," a former trial counselor or attorney must refrain from presiding as a trial judge over litigation involving his former client, and many of the same issues, and the same interests and the same land, with which the trial judge has been intimately involved as a trial counselor or attorney. *Etscheit v. Santos*, 5 FSM R. 35, 45 (App. 1991).

Where an appellate court has held that a trial judge is under a clear and non-discretionary duty to step aside from presiding over a case and the petitioner has a constitutional right to obtain compliance with that duty, all documents issued after the date of the appellate decision are null and void and shall be expunged from the record and the judge shall be enjoined from taking any further action as a judge in the case. *Etscheit v. Santos*, 5 FSM R. 111, 113 (App. 1991).

Mere argument by counsel, be it oral or set forth in a brief, is not the basis on which motions to disqualify are determined. Motions for recusal must be supported by affidavit stating the grounds for recusal. It is the movant's burden to go beyond wide-ranging speculation or conclusions and show a factual basis for recusal. *Jano v. King*, 5 FSM R. 266, 268 (Pon. 1992).

In determining whether a judge's impartiality might reasonably be questioned, the test is whither a disinterested reasonable person who knows all the circumstances would harbor doubts about the judge's impartiality. A reasonable disinterested observer would require more evidence than that one of the parties was seen at hotel with where the judge had checked in. *Jano v. King*, 5 FSM R. 266, 270 (Pon. 1992).

Even when sufficient allegations have not been made, a judge may disqualify himself if he believes sufficient grounds exist. *Jano v. King*, 5 FSM R. 266, 271 (Pon. 1992).

In order to overturn the trial judge's denial of a motion to recuse, the appellant must show an abuse of discretion by the trial judge. The appellate court will not merely substitute its judgment for that of the trial judge. *Jano v. King*, 5 FSM R. 326, 330 (App. 1992).

Even if neither party alleges or moves for disqualification a judge may disqualify himself if he believes sufficient grounds exist. *Youngstrom v. Youngstrom*, 5 FSM R. 385, 387 (Pon. 1992).

In order for a judge's personal bias or prejudice to be disqualifying it must stem from an extrajudicial source or conduct, not from information learned or events occurring during the course of a trial. *Youngstrom v. Youngstrom,* 5 FSM R. 385, 387 (Pon. 1992).

Before a judge disqualifies himself from a case he should also consider whether his disqualification will cause considerable delay, require substantial expense and effort, and cause undue disruption in the advancement of the matter. *Youngstrom v. Youngstrom*, 5 FSM R. 385, 387 (Pon. 1992).

Pursuant to Kosrae statute, judges of the Kosrae State Court are subject to the standards of the Code of Judicial Conduct approved by the American Bar Association. A trial judge who owns one or two shares in the plaintiff credit union must follow these standards in deciding whether to recuse himself. *Waguk v. Kosrae Island Credit Union*, 6 FSM R. 14, 16-17 (App. 1993).

A justice who was a member of a body that negotiated the Compact and related agreements and who was the one member that signed the Compact and Extradition Agreement is not disqualified from presiding over an extradition proceeding by the circumstance of that participation on the ground that his impartiality might reasonably be questioned. *In re Extradition of Jano*, 6 FSM R. 93, 97-98 (App. 1993).

Even where the circumstance does not give rise to a reasonable person questioning the justice's impartiality, if there is evidence of actual partiality disqualification would follow. *In re Extradition of Jano*, 6 FSM R. 93, 98 (App. 1993).

The court is required by statute to rule on a motion to disqualify the sitting justice before proceeding further on the matter. *Nahnken of Nett v. United States (I)*, 6 FSM R. 318, 320 n.1 (Pon. 1994).

In order for a justice to be recused for an interest in the subject matter in controversy not only must the justice have an interest, but also it must be such that the interest could be substantially affected by the outcome of the proceeding. *Nahnken of Nett v. United States (I)*, 6 FSM R. 318, 321 (Pon. 1994).

A litigant's unsupported allegations that the trial judge may have subconscious misgivings is speculation and is insufficient to support the judge's disqualification. *Nahnken of Nett v. United States (I)*, 6 FSM R. 318, 322 (Pon. 1994).

A judge has a duty to disqualify himself from presiding in a proceeding in which he entertains a bias or prejudice against a party. *Andohn v. FSM*, 1 FSM R. 433, 444 (App. 1984).

Where the trial justice resides in housing provided for him by the national government by statute and is not an intended third-party beneficiary to the government's lease of the land and the action is only for money damages concerning the land the trial justice has no financial or other interest in the matter that may serve to disqualify the justice. *Nahnken of Nett v. United States (I)*, 6 FSM R. 318, 322 (Pon. 1994).

Given the social and geographical configuration of Micronesia the Rule of Necessity may oblige judges to hear and decide cases from which they would otherwise recuse themselves. Factors to be considered include delay, expense, and impact on other cases. *Nahnken of Nett v. United States (I)*, 6 FSM R. 318, 323-24 (Pon. 1994).

In order to overturn the trial judge's denial of a motion to recuse an appellant must show an abuse of the trial judge's discretion. The same standard of review applies to a petition for a writ of prohibition ordering a judge to recuse himself. *Nahnken of Nett v. Trial Div.*, 6 FSM R. 339, 340 (App. 1994).

Where trial justice resides in housing rented by the national government and assigned to the trial justice as a statutory part of his

compensation and the party before the court only seeks a monetary award for the alleged loss of the land upon which the trial justice resides the trial justice has no interest which might be substantially affected by any of the relief requested. It is therefore not an abuse of the trial justice's discretion to deny a motion to recuse for interest or bias. *Nahnken of Nett v. Trial Div.*, 6 FSM R. 339, 340 (App. 1994).

A person who is not a party cannot move for the disqualification of the trial judge because persons who are not parties of record to a suit have no standing which will enable them to take part in or control the proceedings. *Shiro v. Pios*, 6 FSM R. 541, 543 (Chk. S. Ct. App. 1994).

The standard to be applied in reviewing a request for disqualification under 4 F.S.M.C. 124(1) is whether a disinterested reasonable observer who knows all the circumstances would harbor doubts about the judge's impartiality. A motion for disqualification must be supported by an affidavit which clearly sets forth the factual basis for the belief that grounds for disqualification exist. *Fu Zhou Fuyan Pelagic Fishery Co. v. Wang Shun Ren*, 7 FSM R. 601, 605 (Pon. 1996).

§ 125. Disposition of fines and fees.

The Clerk of the Supreme Court shall periodically transmit to the Treasury of the Federated States of Micronesia all fines and fees collected in the Supreme Court.

Source: PL 1-31 § 24.