

## Checklist of Points to be Covered for Complete Answers

FSM Bar Examination, August 6, 2015

[bracketed citations to statutes, rules, and the like are an aid to those reviewing the exam; a test taker is not expected to memorize and repeat them so long as the legal principles are cited and discussed]

### **ETHICS**

(10 points)

#### I. (10 points)

- A. Brad's mailing to Jan might violate the ethics rules [FSM MRPC R. 7.3]
1. A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in-person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain
  2. "solicit" includes contact by letter or other writing, or by other communication directed to a specific recipient
  3. but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful
  4. since letter to Jan was part of a mailing to 20 other persons it is unclear whether it complies with ethics rule
- B. Brad has probably complied with rules about fee arrangements
1. Brad explained the fee arrangement within a reasonable time after starting the representation [FSM MRPC R. 1.5(b)]
  2. Brad provided written fee agreement as required when the fee is contingent [FSM MRPC R. 1.5(c)]
  3. Brad's fee is higher than usual, but may be considered reasonable because
    - a. factors to be considered when determining a fee is reasonable include Brad's experience, reputation, and ability in performing similar services [FSM MRPC R. 1.5(a)(7)]
    - b. assuming Brad relied on some or all of these factors when explaining why his fee would be higher than normal
    - c. Brad's disclosure that other attorneys charge less
- C. Brad's offer to advance litigation expenses is okay
1. lawyer must not provide financial assistance to a client in connection with pending or contemplated litigation [FSM MRPC R. 1.8(e)]
  2. except that a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter [FSM MRPC R. 1.8(e)(1)]
  3. also, a lawyer representing an indigent client may pay court costs and expenses of litigation on the client's behalf [FSM MRPC R. 1.8(e)(2)] and Jan might be considered indigent
- D. Brad's request to Jan's mother not to speak to opposing counsel was ethical because in fairness to opposing party and counsel
1. cannot request a person other than a client to refrain from voluntarily giving relevant information to another party [FSM MRPC R. 3.4(f)]

2. unless the person is a relative or an employee or other agent or a client; and the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information
3. Jan's mother is a relative, her interests won't be adversely affected by not talking to opposing lawyer, & Brad did not ask her to lie or mislead, but Brad should keep in mind Jan's improving condition and obligation of candor to the tribunal [FSM MRPC R. 3.3]

EVIDENCE  
(20 points)

- II. (13 points)
- A. (5 points) yes, judge should have permitted Prosecutor to question Wila about Wila's written statement and admitted the copy to impeach Wila's credibility
    1. a witness's credibility may be attacked by any party including the party calling her [FSM Evid. R. 607]
    2. extrinsic evidence of a witness's prior inconsistent statement is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate her thereon, or the interests of justice otherwise require [FSM Evid. R. 613(b)]
    3. Wila was given an opportunity to explain (and defense counsel had opportunity to cross-examine any
  - B. (5 points) whether judge should admit Wila's written statement to prove that Defendant was at the waterfront and attacked Vick
    1. Defendant's objection would be that since it would be an out-of-court statement that is being offered to prove the truth of the matter asserted therein, it is hearsay [FSM Evid. R. 801(c)] & general rule is hearsay inadmissible unless falls within one of the exceptions to the hearsay rule [FSM Evid. R. 802] and there's no hearsay exception this falls within
    2. Prosecutor would contend this is because it is a prior statement of a declarant now testifying at the trial and subject to cross-examination and it was a statement of identification of a person made after perceiving the person, which is defined as non-hearsay [FSM Evid. R. 801(d)(1)(C)]
    3. if considered a statement of identification, it would be admissible to prove that Defendant was at waterfront and attacked Vick
  - C. (3 points) no; judge's exclusion of Buddy's testimony was correct
    1. evidence of an accused's character may be offered by an accused [FSM Evid. R. 404(a)(1)]
    2. proof of a person's character may be made by testimony as to reputation or by testimony in the form of an opinion [FSM Evid. R. 405(a)]
    3. Buddy's testimony was opinion testimony BUT it was about his friends' opinions & not his own personal opinion
    4. a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter [FSM Evid. R. 602]

- III. (4 points)
- A. (3 points) "best evidence" rule only covers contents of writings, recordings, and photographs not other forms of evidence; foundation was laid for admission of "pacing-off" measurement, judge can give it whatever weight he thinks appropriate
  - B. (1 point) "exceptions" do not have to be made in order to preserve issue for appeal, therefore attorney's remark is pointless
- IV. (3 points) objection denied
- A. Baker's statement was unconstitutionally obtained, and could not be used against him, but his statement is not being used – Baker is testifying personally
  - B. also right to object to unconstitutional evidence is personal only Baker could have objected to use of his statement, not Able and Charlie (Able & Charlie could have objected, if Baker had not testified, to admission of those portions of Baker's statement that referred to them on grounds they could not confront witness against them)

**GENERAL**  
(70 points)

- V. (12 points)
- A. (6 points) paint sellers' constitutional arguments
    - 1. substantive due process
      - a. sellers would argue that the ordinance is irrational over-reaction to and not reasonably related to the legitimate goal of preventing graffiti [*see Samuel v. Pryor*, 5 FSM R. 91, 102 (Pon. 1991)]
      - b. it's not the court's role to decide whether a regulation is wise
      - c. if the regulation does not infringe on fundamental rights, then it will be upheld if it is rationally related to a legitimate governmental goal
      - d. governmental regulations which do not affect fundamental rights are presumed to be valid
      - e. Port Town ordinance while probably unwise & ineffective does bear a rational relationship to legitimate purpose so would probably withstand due process challenge
    - 2. equal protection
      - a. sellers would argue that the ordinance discriminates against them in violation of equal protection clause
      - b. but since ordinance doesn't deprive sellers of a fundamental right or concern an enumerated class, the rational basis test would apply [*Kallop v. Pohnpei*, 18 FSM R. 130, 134 (Pon. 2011)]
      - c. since spray paint is the most commonly used graffiti tool, the reduction in its availability would tend to reduce its use; thus improving Port Town's look for tourism & reducing its clean up costs
      - d. Port Town ordinance therefore likely to pass rational basis test

3. foreign commerce clause
  - a. all spray paint must be imported
  - b. only nat'l gov't can regulate imports
  - c. but this is not regulation of import but of possession
- B. (6 points) Henry Knox's constitutional arguments
  1. freedom of expression
    - a. Knox's unique artistic expression is prohibited by the new ordinance since he can no longer possess spray paint – his medium of choice – outside of his home
    - b. freedom of expression is a fundamental right [Damarlane v. Pohnpei Legislature, 15 FSM R. 301, 312 (App. 2007); In re Iriarte (I), 1 FSM R. 239, 247-48 (Pon. 1983)]
    - c. Knox will argue that his art represents protected expression & that the ordinance is not a reasonable regulation on the manner of public expression
    - d. Port Town will counter that the regulation is content neutral & is not biased against & that it is aimed at conduct not pure speech
    - e. Knox will contend that ordinance is overly restrictive because it may not directly advance the governmental interest of curbing graffiti vandalism and is not narrowly tailored to achieve that purpose
    - f. Port Town's ordinance reaches well beyond its legitimate sweep of curbing graffiti vandalism to create a real & substantial infringement on the lawful expression with spray paint (when Knox is hired by property owners to paint their walls with fish) within Port Town; so ordinance may be overbroad
  2. due process & equal protection
    - a. Knox could argue for a higher level of scrutiny because his interest impaired by the ordinance is a fundamental right – freedom of expression – not a mere economic interest like the paint sellers
    - b. Section 102 may thus be invalid
- VI. (10 points)
  - A. (5 points) Deimos's property that Phobos might use to collect judgment
    1. house is probably exempt from execution & can't be sold [6 F.S.M.C. 1415(3)] as are the household goods [6 F.S.M.C. 1415(1)]
    2. Yamaha boat can be sold if Deimos's usual occupation (can't tell from facts) is not as a fisherman; if his usual occupation is as a fisherman the boat is exempt from execution because equipment necessary to enable the person against whom the attachment or execution is issued to carry on his usual occupation is exempt from execution [6 F.S.M.C. 1415(2)]
    3. escrow account can't be seized but probably could be attached so that if the property sale clears escrow and the money in the account is to go to Deimos, Phobos can then execute on it
  - B. (3 points) Phobos's legal procedures to uncover Deimos's assets
    1. judgment-creditors may, in aid of the judgment or execution, use

- any of the discovery procedures to obtain discovery from any person [FSM Civ. R. 69]
      - 2. most likely procedure would be to depose Deimos & anyone else who might know of Deimos's assets
      - 3. could examine debtor at order in aid of judgment hearing [6 F.S.M.C. 1410(1)]
    - C. (2 points) effect of appeal on advice to Phobos
      - 1. appeal doesn't prevent Phobos from collecting on the judgment since no stay is in effect [*see* FSM Dev. Bank v. Arthur, 16 FSM R. 132, 142 (Pon. 2008)]
      - 2. BUT if Deimos wins appeal, Phobos may have to repay whatever he has collected [*id.*]
- VII. (11 points) Bob would move to suppress his confession on the grounds that
  - A. he was not informed of rights to silence and to counsel before he was questioned
    - 1. person must be informed of rights before a custodial interrogation
    - 2. Officer Smith's questioning obviously an interrogation because it was made to elicit a confession
    - 3. but was Bob in custody? close question
      - a. Smith told Bob to join him in police car, didn't ask
      - b. Bob may have felt he had no choice; he was not free to leave; he knew he was under investigation
      - c. but conversation in many respects seemed like conversation between friends
      - d. if court considers Bob to have been in custody, confession will be suppressed for failure to inform Bob of rights
  - B. it was not voluntary
    - 1. confession was obtained by an improper promise to keep it confidential
    - 2. the use of promises by an interrogating officer will not invalidate a confession unless the promise is sufficient to "overbear the defendant's will" – the general standard of voluntariness [FSM v. Jonathan, 2 FSM R. 189, 197 (Kos. 1986)]
  - C. he was not given his right to counsel
    - 1. but not yet charged with obstructing administration of law
    - 2. Bob not entitled to counsel just because suspected of obstructing, but
    - 3. if questioning was to elicit statements tending to show guilt of sexual assault charge right to counsel had already attached on that charge
    - 4. even if right to counsel had attached for previous sexual assault charge, does not mean that Bob automatically has right to counsel when police start to investigate a new charge against him
  - D. warrantless tape recording of confession
    - 1. probably not ground for suppression since Officer Smith was in uniform in a marked patrol car and had the appearance of being on official business
    - 2. unclear if warrant would be needed even if recording was done by undercover police
- VIII. (9 points)

- A. (3 points) interpleader is an action by a stakeholder to determine the rights of various claimants to property it holds but does not claim so as not to be subject to multiple and potentially conflicting judgments – e.g., an insurance company must pay for damage its insured caused to certain property, but ownership of the property is claimed by several people; the insurance company will institute an interpleader action, name as defendants all those having a claim to the property, pay the money into court, and the court can determine who among the defendants (is) (are) entitled to the proceeds [*see* FSM Civ. R. 22]
- B. (3 points) impleader is third party practice – e.g., when a plaintiff has sued a defendant and the defendant believes that if he is liable to the plaintiff then some other person is liable to him, he will implead that other person as a third party defendant (defendant will be third party plaintiff) [*see* FSM Civ. R. 14]
- C. (3 points) nolo contendere – a no contest plea – criminal defendant, with court’s consent [FSM Crim. R. 11(b)], enters a plea not contesting the charges but also not admitting guilt, has effect of pleading guilty; generally not admissible evidence against person making plea [FSM Evid. R. 410(b)]
- IX. (6 points)
- A. (3 points) remand denied
1. civil forfeiture of vessel is admiralty and maritime case even when forfeiture is under state law [M/V Hai Hsiang #36 v. Pohnpei, 7 FSM R. 456, 463 (App. 1996)]
  2. FSM Supreme Court has exclusive jurisdiction over admiralty cases [*Id.*]
- B. (3 points) remand denied
1. corporation is owned by Philippine citizens & so is considered a foreign citizen for jurisdictional purposes regardless of where it is incorporated or its principal place of business is [Luzama v. Ponape Enterprises Co., 7 FSM R. 40, 44 (App. 1995)]
  2. since corporation is foreign citizen, diversity of citizenship exists & FSM Supreme Court has diversity jurisdiction since
    - a. one defendant is foreign citizen &
    - b. only minimal diversity is needed [Luzama v. Ponape Enterprises Co., 7 FSM R. 40, 48 (App. 1995)]
- X. (11 points) theories of recovery and defenses
- A. against Son’s Estate
1. Doctor cannot recover under contract theory
    - a. since a contract is a promise between two parties for the future performance of mutual obligations which the law will enforce in some way and since mutual assent by both parties is needed [James v. Lelu Town, 11 FSM R. 337, 339 (Kos. S. Ct. Tr. 2003)]
    - b. & since Son was unconscious the whole time he could not make a promise or assent to the treatment
  2. Doctor may be able to recover under unjust enrichment theory
    - a. doctrine of unjust enrichment generally applies [Etscheit v. Adams, 6 FSM R. 365, 392 (Pon. 1994)] when
      - (1) there is an unenforceable contract due to



- whether he causes harm to any legally protected interest of the other, if he (1) intentionally and without consent enters land in the possession of the other, or causes a thing or person to do so, or (2) intentionally and without consent remains on the land of the other, or (3) intentionally fails to remove from the land a thing which he is under a duty to remove
3. where the intrusion is the result of reckless or negligent conduct, or the result of an abnormally dangerous activity, liability attaches only where harm is caused to the land, to the possessor, or to a thing or a third person in whose security the possessor has a legally protected interest
- B. nuisance [Nelper v. Akinaga, Pangelinan & Saita Co., 8 FSM R. 528, 534 (Pon. 1998)]
1. generally regarded as a substantial interference with the use and enjoyment of another's land caused by intentional and unreasonable conduct, or caused unintentionally by negligent or reckless conduct, or the performance of an abnormally dangerous activity
  2. substantial interference is actual, material, physical discomfort, material annoyance, inconvenience, discomfort, or hurt, or significant harm, that affects the health, comfort, or property of those who live nearby
  3. in determining the gravity of harm, the Court will consider the extent and character of the harm, the social value and suitability to the community of the use and enjoyment involved, and the burden on the person harmed of avoiding the harm
  4. in determining the utility of the conduct, the Court will consider the social value and suitability to the community of the conduct, and the impracticability of preventing or avoiding the invasion
  5. nuisances are classified as either permanent, continuing, recurring or temporary in nature
- C. negligence [Nelper v. Akinaga, Pangelinan & Saita Co., 8 FSM R. 528, 535 (Pon. 1998)]
1. negligence is a separate tort from nuisance
  2. negligence is the failure to use such care as a reasonably prudent and careful person would use under similar circumstances
  3. elements of actionable negligence are: (1) a duty of care, (2) a breach of that duty, and (3) damages proximately caused by that breach
- D. strict liability [Nelper v. Akinaga, Pangelinan & Saita Co., 8 FSM R. 528, 535 (Pon. 1998)]
1. strict liability arises where the activity performed is not merely dangerous, but abnormally dangerous
  2. one who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm
  3. in determining whether an activity is abnormally dangerous, the following factors are to be considered: (a) the existence of a high degree of some harm to the person, land or chattels of others; (b)

the likelihood that the harm that results from it will be great; (c) the inability to eliminate the risk by the exercise of reasonable care; (d) the extent to which the activity is not a matter of common usage; (e) the inappropriateness of the activity to the place where it is carried on; and (f) the extent to which its value to the community is outweighed by its dangerous attributes

- E. infliction of emotional distress [Narruhn v. Aisek, 13 FSM R. 97, 99 (Chk. S. Ct. App. 2004)]
  - 1. must be evidence in the record of physical injury to the plaintiff or of any physical manifestation of emotional distress by the plaintiff
  - 2. otherwise, no award of damages
- F. loss of lateral support, Malaspina is entitled to lateral support for her land [*see* Setik v. Sana, 6 FSM Intrm. 549, 553-54 (Chk. S. Ct. App. 1994)]