

## Checklist of Points to be Covered for Complete Answers

FSM Bar Examination, March 7, 2013

[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. (4 points) consultant's hiring
    1. propriety of hiring consultant; lawyer can employ or retain or associate with a nonlawyer [FSM MRPC R. 5.3] if lawyer
      - a. gives reasonable assurance that the person's conduct is compatible with the lawyer's professional obligations of the lawyer;
      - b. makes reasonable efforts to ensure that the person's conduct is compatible with the lawyer's professional obligations; and
      - c. lawyer is responsible for conduct of such a person that could be a violation of the rules of professional conduct if engaged in by a lawyer
    2. terms of consultant's contract; lawyer cannot practice with or in the form of a professional corporation or association authorized to practice law for a profit, if
      - a. a nonlawyer owns an interest therein [FSM MRPC R. 5.4(d)(1)]
      - b. or a nonlawyer has the right to direct or control the lawyer's professional judgment [FSM MRPC R. 5.4(d)(3)]
      - c. discuss whether the right to 3% of the gross family law practice billings, constitute part ownership? Or give consultant right to direct or control the lawyer's professional judgment?
  - B. (3 points) refusing fee for failed mediation
    1. lawyers should render public interest legal service (pro bono publico service) [FSM MRPC R. 6.1]
    2. lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means [*id.*]
    3. thus, if clients were persons of limited means, refusing fee not only okay but also satisfies lawyer's obligation to render pro bono services
    4. even if clients weren't of persons of limited means, there is nothing unethical about refusing to collect a fee owed
  - C. (4 points) contingency fees for divorce and for child support collection
    1. lawyer cannot enter into an arrangement for, charge, or collect any fee in a domestic relations matter, the payment or amount of which

- is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof [FSM MRPC R. 1.5(d)(1)]
2. contingent fee arrangements for obtaining a divorce or for obtaining any specific terms in a divorce will subject Lenny and Sally to discipline
  3. a contingent fee to collect unpaid child support payments already ordered by the court might be okay since it is only a collection matter

**EVIDENCE**  
(20 points)

- II. [not taken]
- III. [not taken]

**GENERAL**  
(70 points)

- IV. (13 points)
  - A. (9 points) Drake's statements
    1. statements at the scene of the crime
      - a. first statement – "I'm guilty. I did it. Arrest me." – Drake's initial encounter with police
        - (1) Drake was not in custody
        - (2) Drake wasn't being interrogated by police
        - (3) rights against self-incrimination & due process rights not violated
        - (4) statement was voluntary
        - (5) admissible, suppression denied
      - b. second statement made in response to officer's question – "What is it that you did?"
        - (1) Drake's answer was in response to police question
        - (2) BUT Drake still not in custody – nothing in facts indicates that Drake had an objective basis to believe that he was not free to leave at any time
        - (3) statement was voluntary & not made during a custodial interrogation
        - (4) admissible, suppression denied
      - c. third statement – "I should have killed my wife"
        - (1) also does not seem to be as the result of a custodial

- interrogation since
  - (a) it was made spontaneously (& voluntarily) &
  - (b) not in response to any coercion or improper police questioning
- (2) admissible, suppression denied
- 2. statements made in custody after being advised of his rights
  - a. for a defendant to voluntarily waive his right to silence or to counsel that he must do so knowingly and intelligently [*e.g.*, FSM v. Sam, 14 FSM Intrm. 328, 335 (Chk. 2006)]
  - b. Drake's first statement – "I messed up. I'm sorry."
    - (1) made immediately after informed of right to silence & before Drake told officer that he did not want to talk anymore
    - (2) spontaneous & not in response to any police question
    - (3) statement was voluntary
    - (4) admissible, suppression denied
  - c. Drake's full confession
    - (1) made after Drake said he didn't want to talk anymore
    - (2) made after police initiated questioning again an hour later
    - (3) did officer wait long enough before resuming questioning? & was it a valid waiver of right to silence when Drake started talking after told still subject to what was said before instead of being explicitly informed of his rights again?
      - (a) depends on totality of circumstances
      - (b) signed form acknowledging waiver before gave full confession
      - (c) questioning maybe wasn't coercive, officer used "soft technique" of commenting if Drake were "really sorry"
      - (d) examinee should argue one side or the other
  - d. examinees should not discuss whether Drake was in custody (question says he was) or Drake's right to counsel (question says he was informed of right but did not ask for an attorney)
- B. (4 points) procedure on re-trial and re-conviction
  - 1. Retrial
    - a. Constitution prohibits double jeopardy [FSM Const. art. IV,

§ 7]

- b. jeopardy attached when the first witness was sworn in at the trial [Kosrae v. George, 17 FSM Intrm. 5, 7 n.1 (App. 2010)]
  - c. Drake was convicted of aggravated assault after trial; if reversed on appeal can be re-tried for aggravated assault unless reversal was for insufficiency of the evidence
  - d. Drake was acquitted of attempted murder charge; Drake cannot be retried for attempted murder even if aggravated assault charge is reversed & Drake is retried for that [*see* Kosrae v. Benjamin, 17 FSM Intrm. 1, 3 (App. 2010)]
2. Re-conviction; examinees should discuss
- a. whether due process protections protect criminal defendant from prosecutorial vindictiveness
  - b. whether due process protections protect criminal defendant from higher sentence if re-convicted on same offense that was previously convicted

V. (8 points)

- A. (3 points) state statute constitutional since
- 1. although income taxes can only be levied by nat'l gov't [FSM Const. art. IX, § 2(e)]
  - 2. it levies annual flat-rate tax on hotel rooms is not an income tax since it isn't based on a percentage of the hotel room's earnings
  - 3. also, although states prohibited from imposing taxes that restrict interstate commerce [FSM Const. art. VIII, § 3] tax on hotel rooms likely not such a tax
- B. (2 points) nat'l \$2 tax on luggage probably constitutional
- 1. appears to be import tax (on luggage brought into FSM by airline passengers)
  - 2. only nat'l gov't can impose import taxes, duties, & tariffs [FSM Const. art. IX, § 2(d)]
- C. (3 points) state law probably unconstitutional
- 1. appears to set up classification based on ancestry or national origin or social status
  - 2. sets up two classes of state citizens, one less equal than the other
  - 3. since equal protection of the laws may not be denied or impaired on account of sex, race, ancestry, national origin, language, or social status [FSM Const. art. IV, § 4], state law violates FSM Constitution equal protection clause

VI. (9 points)

- A. (3 points) motion to remand denied
- 1. case is between two different state gov'ts – Pohnpei & Chuuk

2. FSM Supreme Court has exclusive jurisdiction over disputes between states [FSM Const. art. XI, § 6(a)]
- B. (3 points) motion to remand granted
1. breach of contract is state law claim
  2. citizenship of business entities is citizenship of shareholders [*see Luzama v. Ponape Enterprises Co.*, 7 FSM Intrm. 40, 44 (App. 1995)]
  3. so construction company is Japanese citizen & employee is Philippines citizen
  4. FSM Supreme Court doesn't have diversity jurisdiction when all parties are foreign citizens even though they are citizens of different foreign nations [*Trance v. Penta Ocean Constr. Co.*, 7 FSM Intrm. 147, 148 (Chk. 1995)]
- C. (3 points) motion to remand probably denied
1. although all parties are foreign citizens so the FSM Supreme Court doesn't have diversity jurisdiction [*Trance v. Penta Ocean Constr. Co.*, 7 FSM Intrm. 147, 148 (Chk. 1995)]
  2. the case is a civil rights claim – racial discrimination – which if brought under 11 F.S.M.C. 701(3) or as a case that the defendant company violated the FSM Constitution equal protection clause is a case arising under national law or Constitution over which the FSM Supreme Court has concurrent jurisdiction [FSM Const. art. XI, § 6(b)]
  3. BUT if case was plead as only a violation of the Pohnpei Constitution or Pohnpei civil rights law then not a case arising under national law and FSM court doesn't have jurisdiction & will remand the case
- VII. (13 points)
- A. (5 points) success in obtaining judicial review
1. usually plaintiff must exhaust administrative remedies before can seek judicial review [*Weriey v. Chuuk*, 16 FSM Intrm. 329, 332 (Chk. 2009)]
  2. an exception to the requirement of exhausting administrative remedies first is if to do so would be futile [*Pohnpei v. Ponape Constr. Co.*, 7 FSM Intrm. 613, 618 (App. 1996)]
  3. Mayor has already predetermined issue so to pursue further administrative remedies is futile
  4. other requirements for judicial review also satisfied
    - a. Roberta has standing because her property is involved
    - b. Roberta's case is ripe because her sign was confiscated & final decision made
- B. (4 points) claim(s) Roberta can raise – constitutional due process

1. Roberta has property interest in her neon sign
  2. Roberta has right not to be deprived of her property without notice & an opportunity to be heard
  3. Roberta received notice but did not have a meaningful opportunity to be heard
  4. was not an emergency situation such as where gov't had to act quickly to protect public from immediate threat to public health or safety
- C. (4 points) Roberta's remedies
1. ordinance apparently provides for a hearing, which was never held
  2. so court that BTEA hold the required hearing to determine if illuminated sign was a prohibited sign; or
  3. court could hold a trial de novo; and
  4. sign could be ordered returned pending outcome
- VIII. (13 points)
- A. (4 points) yes, enforceable
1. Peter made an offer in his Feb. 1, 2012 letter which can be accepted by David within a reasonable time (By Feb. 15th according to letter)
  2. David accepted on Feb. 3 when sent David sent letter back to Peter
  3. enforceable contract formed – was offer, acceptance, definite terms & consideration
- B. (5 points) no, contract is unenforceable
1. sale of apartment bldg. is sale of interest in land
  2. Betty is an Australian & foreigners barred from acquiring interest in land [FSM Const. art. XIII, § 4]
  3. contract therefore illegal and unenforceable [bonus points if examinee also mentions contract also unenforceable because Pohnpei has a statute of frauds requiring such contracts to be in writing]
- C. (4 points) yes
1. Betty can recover her \$1,000 deposit to extent necessary to prevent injustice under promissory estoppel
  2. to claim promissory estoppel [*see John v. Chuuk Public Utility Corp.*, 16 FSM Intrm. 226, 228 (Chk. 2008)] Betty must prove that
    - a. a promise was made;
    - b. the promisor should reasonably have expected the promise to induce actions of a definite and substantial character
    - c. the promise did in fact induce such action; and
    - d. the circumstances require the enforcement of the promise to avoid injustice
    - e. [c and d are sometimes referred to collectively as

"detrimental reliance"] detrimental reliance requires, at the very least, that a party has changed its position for the worse as a consequence of the defendant's purported misconduct

3. Peter made promise to sell to Betty & should have reasonably expected that would induce Betty to pay & Betty paid \$1,000 to Peter
4. Peter must refund the \$1,000 to Betty

IX. (9 points) causes of action against Sal

A. strict liability

1. strict liability arises where the activity performed is not merely dangerous, but abnormally dangerous [Nakamura v. Mori, 16 FSM Intrm. 262, 269 (Chk. 2009)]
2. one who carries on an abnormally dangerous activity is subject to liability for harm to the person or property of another resulting from the activity, although he has exercised the utmost care to prevent the harm [Nelper v. Akinaga, Pangelinan & Saita Co., 8 FSM Intrm. 528, 535 (Pon. 1998)]
3. the factors to be considered in determining whether an activity is abnormally dangerous are:
  - a. the existence of a high degree of some harm to the person or property 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
4. whether the activity is an abnormally dangerous one is determined by the court [examinee should argue one way or another whether shipment of high explosives on a vessel is abnormally dangerous in this case]

B. negligence

1. elements of actionable negligence are [Kileto v. Chuuk, 15 FSM Intrm. 16, 17 (Chk. S. Ct. 2007)]
  - a. the breach of a
  - b. duty of care on the part of one person to protect another from injury
  - c. that breach is the proximate cause

- d. of an injury to the person to whom the duty is owed
    - 2. Sal owed a duty to others not to harm them with his shipping activity
    - 3. Sal breached duty when he neglected to follow Blastco's special instructions on how to care for the cargo it was shipping to the outer island
    - 4. this neglect was likely the proximate cause of the explosion that damaged the *Bison* and the state's port facilities
  - C. gross negligence
    - 1. requires willful, wanton, or reckless misconduct, or such utter lack of care as will be evidence thereof [Hauk v. Lokopwe, 14 FSM Intrm. 61, 65 (Chk. 2006)]
    - 2. does Sal's disregard of Blastco's special instructions constitute wanton, or reckless misconduct, or such utter lack of care as to constitute gross negligence? examinee should argue one way or the other
  - D. breach of contract claim by port operator may be possible depending on what the terms of their agreement allowing the *Auroch* to dock at the port
- X. (5 points)
- A. Dan needs to be informed of his rights if he is subject to custodial interrogation; Dan was in custody (under arrest) & was asked questions
  - B. Dan was properly informed of his rights
  - C. Dan invoked his right to counsel so any interrogation had to stop right there
  - D. Dan only asked for a light for his cigarette; he did not initiate a general discussion about the investigation
  - E. Dan likely under apprehension or coercion because Detective Caine laid his gun on the seat & said they weren't going anywhere until Dan confessed
  - F. Dan's confession was involuntary & can't be used regardless of whether Dan testifies [12 F.S.M.C. 220]