Maryland State Board of Law Examiners

JULY 2022 UNIFORM BAR EXAMINATION (UBE) IN MARYLAND –
REPRESENTATIVE GOOD ANSWERS

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MPT 1

Representative Good Answer No. 1

Memorandum

To: Marianne Morton
From: Examinee
Date: July 26, 2022
Re: Walter Hixon Matter

Marianne,

First, our investigator did confirm that Walter Hixon and Joan Prescott were married in Columbia in 1986 and that Walter Hixon and Frances Tucker were married in Columbia in 2012. The rest of this memo will address the questions presented in your memo dated July 26, 2022.

Columbia Law will govern the grounds for annulling Mr. Hixon's Marriage to Ms. Tucker.

Regardless of whether Mr. Hixon brings an action for annulment in a Franklin or Columbia Court, Columbia laws will govern. According to the 2nd Restatement of Conflict Laws Sec. 283, which has been recognized by the Courts in Franklin, the validity of a marriage will be determined by the local law of the state which has the most significant relationship. Here, the overwhelming weight of the facts would support that the state of Columbia has had the most significant relationship with regard to Hixon's marriage to tucker. They were married there for a majority of their relationship, she still resides there, and he has only been living in Franklin for a short period of time.

Moreover, even if the action were brought in Franklin, the Franklin court would most likely apply the law of Columbia under the state's choice of law jurisprudence. In Fletcher v. Fletcher, Franklin Ct. (2014), the court stated that Franklin law holds that the validity of a marriage should be determined by the law of the state with the most significant relationship to the spouses and the marriage. In overturning a lower court's decision in case with similar facts, the Court held that the Franklin Court should have applied Columbia law given the significant connections between the spouses and that state. Therefore, the law that will govern for annulling the marriage to Ms. Tucker will be Columbia law.

Mr. Hixon will have to file a lawsuit in Columbia to annul his second marriage and he would be able to obtain the annulment under applicable law. Mr. Hixon does not need to file a lawsuit in Franklin.

Mr. Hixon will be able to obtain an annulment because his marriage is voidable under Columbia law. Columbia Revised Statutes 718.02 states that a marriage is voidable if the spouse of either party was alive and the marriage with that spouse was then in force and that spouse was absent and not known to the party commencing the proceeding to be living for a period of five consecutive years immediately preceding the subsequent marriage. Additionally, for a voidable marriage to be declared void, a party must seek a court issued decree. Here, the marriage between Hixon and Tucker is voidable because Hixon had a living spouse that was not known to him to be living and the statutory period had passed. Therefore, Hixon can initiate proceedings seeking a court issued decree and he will likely be successful in obtaining one.

Additionally, Mr. Hixon's marriage to Tucker is considered void under Franklin Law. In an annulment case in Franklin, at least one-party assents that the marriage was void and asks the court to declare that the marriage was void. Under FDRC 19-5, all marriages between parties where either party is lawfully married to another person are void without the need for any decree of divorce or annulment. Therefore, Mr. Hixon does not need to file a lawsuit in Franklin.
If Mr. Hixon files an annulment action in Franklin, a Franklin Court will not have jurisdiction to annul the marriage but will not have jurisdiction dispose of the parties' property.

As previously discussed, in Franklin courts, the validity of a marriage will be determined by the local law of the state which has the most significant relationship. As discussed in the relevant case law, the courts will follow the choice of law principles outlined in the Restatement Second of Conflict of Laws. The court will consider the relevant policies of other interested states and parties, the protection of justified expectations, the certainty and predictability of the result, and the ease of determination. Here, the parties were married in Columbia, lived there for most of the marriage, and the parties' property is located in Columbia. The court will not have jurisdiction over the rest of the marriage.

Mr. Hixon should file in Columbia.

Under the circumstances of this case, Mr. Hixon should file both the divorce action and the annulment action in the State Courts of Columbia. This is the state with the most significant relationship to all of the spouses and the Courts in Franklin will likely apply Columbia law in actions brough there. Therefore, Mr. Hixon should file in Columbia.

Representative Good Answer No. 2

In re Marriages of Walter Hixon

To: Marianne Morton
From: Examinee
Date: July 26, 2022
Re: Walter Hixon matter

SHORT ANSWERS

You asked me to research Mr. Hixon's options with regard to ending his second divorce. In sum, these are my conclusions:

1. Columbia law governs the grounds for annulling Mr. Hixon's marriage to Ms. Tucker.
2. Mr. Hixon must file a lawsuit, but when he does, he will be able to obtain an annulment.
3. A Franklin court would have jurisdiction to annul the second marriage, but it would not have jurisdiction to dispose of the parties' property.
4. We should advise Mr. Hixon to file in Columbia.

ANALYSIS

1. Under the Restatement (Second) of Conflict of Laws, Columbia has the most significant connections to the marriage, and thus Columbia law will apply to the annulment.

Franklin law follows the Restatement (Second) of Conflict of Laws, which holds that the validity of a marriage should be determined by the law of the state with the most significant relationship to the spouses and the marriage. See Fletcher. If a state has no such relationship, the state must apply the law of the state that does. Id. The factors to be considered when analyzing the significant connections are the policies of interested states, the justified expectations of the parties, certainty, predictability, and uniformity of result, and ease in the determination and application of the law to be applied. Id. The first element, the policies of the interested states, does not weigh in favor of either state's laws. "All states have legitimate policy interests in defining how a marriage . . . can be ended." Fletcher. This is particularly true if both states have codified laws determining the outcome. The issue for Mr. Hixon is the effect of his first marriage on his ability to annul his second marriage. Columbia Revised Statute Sec. 718.02 provides that his second marriage is voidable if certain elements are met, such as whether he was unaware that the first spouse was still living for five years prior to the subsequent marriage. Franklin Domestic Relations Code Sec. 19-5, on the other hand, holds that the second marriage is void, regardless of his awareness whether the first spouse was living. Thus, because both states have statutes governing this issue, they both have legitimate policy interests with regard to this dispute.

The second element weighs heavily in favor of applying Columbia law. Parties have a justified expectation that the law of the state where most events related to the marriage occurred will apply. See Fletcher. In Fletcher, the court looked to where the parties were married, where they lived during the marriage, where they owned property together, and whether anyone involved in the marriage (including spouses and children) still lived there. Further, the Franklin Supreme Court in Simeon, in addition to where the parties lived and owned property, considered where they incurred debts together. However, one party living in a state for a short period of time is not sufficient to create the requisite justified expectation. Here, Mr. Hixon and Ms. Tucker got married in Columbia. See Transcript of Interview. They bought a house in Corinth, Columbia, with both names on the deed. Id. While living in Columbia, they had a joint bank account and paid bills out of that. Id. Thus, they were married in Columbia, owned property together there, lived there together, and incurred debts together there through their joint account. The only connection to Franklin is that Mr. Hixon's family is from there and he moved there in 2019. Id. Ms. Tucker did not move with him. Id. Though he lives there permanently now and thus has more connections to Franklin then the party in Fletcher did when temporarily moving somewhere, this connection does not arise from anything related to the partnership. Id. Thus, the parties only have a justified expectation as to Columbia, not Franklin.

The last two factors typically follow the same analysis. As to uniformity, simply moving to another state cannot be enough, because that would undermine the need for a "system of well-defined rules to govern which state's laws apply." Fletcher. And the ease of determination will follow the state with the most connections to the marriage. As the above analysis describes, all the important events in the marriage occurred in Columbia, and so ease and administrative efficiency suggests that Columbia is the appropriate forum.

Thus, Columbia law should apply.

2. Pursuant to Mr. Hixon must file a lawsuit to Columbia Revised Statute Sec. 718.02, Mr. Hixon must file a lawsuit to annul his second marriage, and this lawsuit will be successful.

Columbia law and Franklin law conflict on whether Mr. Hixon would need to file a lawsuit. Pursuant to Columbia Revised Statute Sec. 718.02, a marriage is voidable if, at the time of the second marriage, the spouse of the first marriage was living and the marriage still in force, but the party seeking annulment did not know she was still living for at least the five years before the second marriage. When a marriage is voidable under this

law, either party must seek an annulment decree from the court. Franklin law, on the other hand, holds that a second marriage is void when the first marriage was still valid, regardless of the knowledge or awareness of the parties to the second marriage. When a marriage is void, no decree of annulment is necessary.

Mr. Hixon meets the elements of the Columbia law. At the time of second marriage in 2012, Mr. Hixon had already marriage Ms. Prescott. See Transcript of Interview. He and Ms. Prescott never formally divorced; they simply moved apart without any formal proceedings. Id. Thus, the first marriage was still valid in 2012. However, in 2001, Mr. Hixon was told Ms. Prescott had died. Id. For the following 11 years, he believed his first wife to be dead. Id. Thus, he meets the 5-year element required by Columbia law as of the time of his second marriage in 2012. As such, his marriage is voidable under Columbia law, not void. Because it is voidable, Columbia law requires that he seek an annulment decree from the court.

As discussed in section 1 above, Columbia law applies to this matter. Thus, pursuant to Columbia Revised Statute Sec. 718.02, Mr. Hixon's marriage is voidable, and so he must file a lawsuit to seek a decree of annulment from the court. Because he believed his first wife to be dead for over five years before his second marriage, the court will grant the decree of annulment.

3. A Franklin court would have jurisdiction to annul the marriage through its res jurisdiction over the marriage, but it would not have in personam jurisdiction or in rem jurisdiction sufficient to dispose of the parties' property.

A Franklin court would apply its own personal jurisdiction rules to this controversy to determine if it has the jurisdiction to annul the marriage and dispose of property. See Daniels. As to the annulment, in Franklin, a court has jurisdiction over the res of the marriage relationship when one of the parties to the marriage has been domiciled within the state for six months. Id. In personam jurisdiction over the nonresident defendant is not required to issue a decree of annulment. Id. (citing Carew). The party seeking the annulment need only establish residency in Franklin for at least six months. Id. Mr. Hixon moved to Franklin in 2019 and has lived there ever since. See Transcript of Interview. He has thus lived there for over three years, and so easily meets the residency requirement. As such, Franklin has jurisdiction sufficient to issue the annulment, regardless of Ms. Tucker's domicile.

As to the disposition of property, however, res jurisdiction over the marriage is not enough. In order to dispose of property, the court must have either in personam jurisdiction over Ms. Tucker or in rem jurisdiction over the property. See Daniels. In personam jurisdiction required the nondefendant party to have at least minimum contacts with the forum state. See Daniels. Ms. Tucker still lives in Columbia and has lived there since at least 2012 when the parties were married. See Transcript of Interview. Thus, she does not have minimum contacts sufficient for Franklin to have in personam jurisdiction over her. In rem jurisdiction pertains to the location of the property. A court has in rem jurisdiction when the property that is the source of the controversy is located in that state. While the marital home is the main source of controversy in the disposition of property between Mr. Hixon and Ms. Tucker, the home is located on the outskirts of Corinth, in Columbia. See Transcript of Interview. Thus, Franklin does not have in rem jurisdiction over the disposition of the house.

As such, though Franklin can issue the annulment, it cannot determine the disposition of the property, including the home in Columbia.

4. Mr. Hixon should file in Columbia so that he may obtain not only an annulment but also a judgment regarding the Columbia house.

Mr. Hixon would face no downside to filing in Columbia, other than the inconvenience of traveling to Columbia to litigate the dispute. First, because Columbia law would apply pursuant to the Restatement (Second) of Conflict of Laws even if he filed in Franklin, the state that he files in gives him no advantage or disadvantage as to the substantive law the applies to the annulment decision.

Second, though the court in Franklin would have jurisdiction to issue the annulment, it would not have jurisdiction to determine the disposition of the house in Columbia. Mr. Hixon's primary goals are to figure out what to do about the second marriage, obtain a fair share of the Columbia house, and divorce Joan. See Transcript of Interview. His first goal, to sort out the second marriage, can be accomplished in Franklin court. His second goal, obtaining a fair share of the Columbia house, cannot. Thus, in order to avoid having to go to court two separate times, Mr. Hixon should pursue annulment and disposition of the Columbia house in Columbia.

MPT 2

Representative Good Answer No. 1

Zeller & Weiss LLP
Attorneys at Law
Franklin City, Franklin 33705

TO: Howard Zeller
FROM: Examinee
DATE: July 26, 2022
RE: Briotti Request for Advice

MEMORANDUM

We have been obtained to advise attorney and sole practitioner concerning a client matter. Ms. Briotti is concerned her client may undertake an illegal and criminal action and wishes to secretly record a conversation with him for her records. To determine whether such action is legally and ethically permissible, we must determine three things: first, which state laws apply to the recording of conversations and whether the action is legal in that jurisdiction; second, whether the recording of the conversation would violate the Rules of Professional Conduct; third, whether Ms. Briotti must inform her client of the fact she is recording their conversation. The applicable discussion and analysis are below.

STATEMENT OF FACTS

[omitted]

DISCUSSION

I. Because Ms. Briotti is located in the jurisdiction of Franklin, the jurisdiction of Olympia will honor Franklin law on interception.

Ms. Briotti's office is located in the state of Franklin, but her client, X, is located in the neighboring state of Olympia. The two states have conflicting laws on interception of wire communications.

Franklin Criminal Code §200 provides, in relevant part, that it is unlawful for any person to intercept or attempt to intercept any wire communication unless it is made with the prior consent of one of the parties to the communication.

Conversely, Olympia Criminal Code § 500.4 provides, in relevant part, that it is unlawful for any person to intercept or attempt to intercept any wire communication unless it is made with all parties' prior consent to the communication.

In Shannon v. Spendrift, the Olympia District Court examined whether the recording of a telephone conversation at issue was lawfully made. In Shannon, the court acknowledged that Olympia is an "all-party consent" state. However, the other party to the communication at-issue was located in Columbia, which is a "one-party consent" state, similar to Franklin. The communication was made when one party was in Olympia and the other was in Franklin. The court addressed how to proceed. Citing to earlier precedent, the court held that "Olympia law allows the admission of evidence legally obtained in the jurisdiction seizing the evidence." While the earlier precedent dealt with a criminal case, Shannon applied it to civil standards. It held that in both a civil or criminal actions, Olympia statute § 500.4 does not apply when the act of interception takes place outside of Olympia. They stated expressly, "interceptions and recordings occur where made."

Applying this standard to the situation at-hand, Ms. Briotti can lawfully record her telephone conversation with X without informing X that she is doing so. Ms. Briotti's office is located in Franklin, and as previously discussed, Franklin is a "one-party consent" state, meaning only Ms. Briotti must have knowledge of the recorded conversation. Despite X being in an "all-party consent" state, the location of the interception controls.

Being that that is Franklin, Ms. Briotti is within her legal rights to record the conversation without informing X.

II. Because it is only speculation that X is going to commit a crime, Ms. Briotti's non-disclosure of the recording of her conversation with X would violate the Rules of Professional Conduct.

A. Ms. Briotti has an obligation to keep confidential her conversation with X because at this point, her suspicions are merely speculation of his intent to commit a crime.

Under The American Bar Association Rules of Professional Conduct 1.6, a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent. But, a lawyer may reveal information if the lawyer deems it reasonably necessary to prevent the client from
committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services.

This question turns on whether Ms. Briotti is reasonably certain X is going to commit a crime. In her meeting, she stated she "thinks it's possible" that X will go forward with his plan to invade a trust he administers to get money he owes clients. When asked how certain she is, she states "I'm not really sure." Though he is desperate, Ms. Briotti states that X knows it is illegal and "might not do it." The Model Rules make clear that a lawyer has a duty of confidentiality unless they believe it reasonably necessary to disclose such information and that they must be reasonably certain their clients' actions would result in substantial injury.

Under this standard, it is unlikely that Ms. Briotti's suspicions rise to the level where the duty of confidentiality can be breached.

Though Ms. Briotti is simply contemplating whether she can record her conversation with X, this should be taken into account. If Ms. Briotti were to face disciplinary action, the ABA would almost certainly use standards of attorney/client confidentiality privilege as a guidepost.

B. Ms. Briotti's disclosure would violate the Rules of Professional Responsibility because it is almost always advisable to inform a client that a recording is being taken.

The American Bar Association Standing Committee on Ethics and Professional Responsibility (herein after "the Committee") issued a formal opinion (01-422) on the matter of recordings by lawyers without the knowledge of all participants.

The formal opinion rejected former opinion (337) which originally stated that a lawyer ethically may not record any conversations with clients without their prior knowledge. In the new opinion, the Committee reasoned that the mere act of secretly but lawfully recording a conversation is not inherently deceitful. The Committee stated that surreptitious recording of conversations is a widespread practice by law enforcement and other agencies today, and the courts universally accept evidence acquired by such techniques.

Further, and of particular importance to Ms. Briotti's inquiry, there are circumstances in which requiring disclosure of the recording of a conversation may defeat a legitimate and even necessary activity. The Committee sets a prohibition on secretly recording a conversation only where it is accompanied by other circumstances that would make it unethical. The Committee takes into account reasons why is is advisable for lawyers to inform their clients of recordings. Most importantly, lawyers owe their clients a duty of loyalty that transcends the lawyer's convenience and interests. As a result, the Committee unanimously advises a lawyer almost always inform a client that a conversation is being or may be recorded before doing so.

The Committee provides factors for a lawyer's consideration when contemplating whether to record a conversation with a client without the client's knowledge. Of particular relevance, the Committee states recording a conversation without a client's knowledge is inadvisable except in circumstances where the lawyer has no reason to believe that the client might object, or where exceptional circumstances exist. Exceptional circumstances include if a client has forfeited the right of loyalty or confidentiality. The Committee specifically cites a situation where a lawyer believes it is likely to result in imminent death or substantial bodily harm, or where a client plans or threatens to commit a criminal act.

Bouncing off of ABA Formal Opinion 01-422, the Franklin Bar Committee (herein after "Franklin Committee") issued a commentary reflecting on the rule. In it, the Franklin Committee adopts ABA Formal Opinion 01-422 and provides further context. The Franklin Committee recognizes that it may be difficult to predict whether a future conversation will meet the requirements of such an exceptional circumstance. It states the standard of decision is whether such a recording will violate the lawyer's duty of loyalty to the client. In this decision, "a lawyer should take care to act on facts and well-grounded judgment, rather than speculation, as to a client's intended actions."

Further, the Franklin Committee instructs lawyers to consider the client's previous statements, client's circumstances, and alternative methods of memorializing the conversation when determining the need to record a conversation without the client's knowledge.

As a result, the Franklin Committee concludes that recording a conversation without client knowledge is "almost always inadvisable unless the lawyer reasonably believes it necessary."

Here, as previously mentioned, Ms. Briotti has stated she is "not really sure," as to whether X will go through with his intention to remove funds from the trust to pay debts and said she "thinks it's possible. " She stated that there is "at least a possibility that he might commit a crime."

Because it is questionable, Ms. Briotti's suspicions -- though well-founded -- likely do not rise to the reasonable certainty needed to justify a secretly recorded conversation with a client. This is especially true considering she has memorialized their conversations beforehand via notes and can continue to do so.

The duty of confidentiality and loyalty are hallmarks of the client/lawyer relationship and are not to be taken lightly, as expressed by both the Committee and the Franklin Committee's opinions and commentary.

Before Ms. Briotti should secretly record a client conversation, she must be reasonably certain he is going to commit a crime.

III. Ms. Briotti must inform X that she is recording the conversation if he asks, as there is no exception that would allow for a lawyer to lie to a client about such an issue.

ABA Formal Opinion 01-422, which addressed the ethics of electronic recordings by lawyers without the knowledge of all participants expressly states in Subsection 4 that a lawyer must inform their client if the client inquires as to if the conversation is being recorded. It expressly states, "That a lawyer may record a conversation with another person without that person's knowledge and consent does not mean that a lawyer may state falsely that the conversation is not being recorded."

As such, if Ms. Briotti does record the conversation and X inquires as to if she is doing so, she must be honest and inform him that she is.

CONCLUSION

Legally, Ms. Briotti is within her right to record a conversation with X and be free from criminal or civil liability. However, ethically, the matter is much closer of a call. Ms. Briotti must be reasonably certain that a crime is going to be committed. Because Ms. Briotti does not appear to be certain, and merely thinks it as a possibility, she should not record the conversation without X's knowledge. There are alternatives, such as handwriting her notes, that are still available. If the next conversation gives further evidence that X will commit a crime regardless of her advice, Ms. Briotti can revisit the topic and potentially record a subsequent conversation.

Representative Good Answer No. 2

TO: Howard Zeller
FROM: Examinee
DATE: July 26, 2022
RE: Briotti Request for Advice

1. May Briotti lawfully record her telephone conversation with X without informing X?

Briotti can likely lawfully record her telephone conversation with X without informing him, because the law to be applied is Franklin law.

The first question to address is which law governs, Franklin or Olympia law. When conversation occurred between Briotti and X occurred, Briotti was in Franklin, and X was in Olympia. Under the Franklin Criminal Code, recording a telephone conversation is permissible as long as only one of the parties consents. Under the Olympia

Criminal Code, recording a telephone conversation is only permissible if all parties consent. Thus, we must determine which law governs.

Here, Franklin law likely governs. In Shannon v. Spendrift, the Olympia District Court held that the Olympia Criminal Code does not apply when the act of interception took place outside of Olympia. In that case, a company located in Columbia secretly recorded a telephone conversation with a resident of Olympia. There, the court, interpreting the Olympia Supreme Court's opinion in Parnell v. Brant, held that if the act of "interception," that is the act of recording, takes place outside of Olympia, the law of the other state applies. Per Parnell, "[I]nterception and recordings occur where made." Thus, the court applied Columbia state law governing secret recordings and held that such recordings were permissible.

Here, the act of interception would occur in Franklin, not Olympia, because Briotti would record the conversation from her office in Franklin. Because the act of interception would occur in Franklin, the law to be applied is Franklin law, not Olympia law. Shannon. Under Franklin law, to be valid, the act of recording would require the consent of only one of the parties to the conversation. Thus, because Briotti would consent to the recording, the recording would not violate either Franklin or Olympia law.

2. Would doing so violate the Rules of Professional Conduct?

Assessing all of the ethical considerations laid out in the Rules of Professional Conduct, it is more likely than not that Briotti does not have a valid basis to secretly record a conversation with X.

In making this determination, we must look to the ABA Model Rules of Professional Conduct, any ABA Formal Opinions that have been adopted by Franklin, as well as the Franklin Rules of Professional Conduct. Starting with the Model Rules, the rules state that a lawyer shall not reveal information relating to the representation of a client unless "the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation" or the disclosure falls into a number of exceptions. One such exception, exception (2), allows a lawyer to reveal information related to the representation of a client "to prevent the client from committed a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services." In addition, the Rules state that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

In ABA Formal Opinion 01-422, the Committee abandoned the previous standard, established in Opinion 337, regarding electronic recordings by lawyers. The Committee held in Opinion 01-422 that "the act of secretly but lawfully recording a conversation is not inherently deceitful." However, the Committee's holdings were more equivocal as they relate to the lawyer's recording of a client. The Committee was divided as to whether a lawyer secretly recording a client violated professional ethics standards. The Committee noted that lawyers owe to clients a duty of loyalty. Secretly recording a conversation "likely would undermine[]" a lawyer's relationship of trust and confidence with their client. Thus, the committee held that such recordings were inadvisable unless there are exceptional circumstances. One such circumstance is if the lawyer intends to use the recording as a defense if charges are brought related to her representation of her client. ABA Formal Opinion 01-422 has been adopted by Franklin, and so it is persuasive authority in Franklin.

The last rule to examine is that of the Franklin's Rules of Professional Conduct and Comments, which are

also persuasive authority. In a comment to the Rules of Professional Conduct, Franklin's State Bar Committee on Ethics and Professional Responsibility explained that the "key question" to ask when contemplating a secret recording is whether the recording would violate a lawyer's duty of loyalty to the client, which includes a duty of confidentiality. In circumstances in which a lawyer believes their client might commit a crime that would result in the financial harm to others or where she records a conversation in anticipation of a future defense, the lawyer's belief regarding the client's intentions must be more than mere speculation. The lawyer must examine the client's previous statements, their circumstances, and alternative methods of memorializing the conversation. Overall, the Committee states that secret recordings of a client are "almost always inadvisable unless the lawyer reasonably thinks it's necessary.

Here, Briotti wishes to secretly record a conversation with her client X. X works as both a trustee and an investment manager. Briotti believes that X is likely to commit a crime by using trust assets in order to be able to make payments to their personal investment clients. A secret recording is likely to undermine Briotti's duty of loyalty to X, because if X learned of the recording, it would likely violate X's expectation's regarding their relationship of "trust and confidence." As explained by both Formal Opinion 01-422 as well as the comments to the Franklin Rules of professional conduct, a lawyer's duties of loyalty to their client are crucial duties owed to a client, indeed they are the "hallmark of the attorney-client relationship." Franklin Comment. Thus, only in rare cases may these duties give weigh to exceptional circumstances.

Briotti has asked us whether her good faith belief that X is likely to commit a crime that would financially harm others is a basis to make the recording. While a belief that a client will commit such a crime may be a basis for making a secret recording, this belief must be a reasonable one, not based on mere speculation. Here, the circumstances do not indicate that it is substantially likely that X will in fact commit the crime. When Briotti mentioned the illegality of X's scheme to him, he merely didn't respond. His silence caused Briotti to become worried of his intentions, but such silence is likely not enough to indicate to a reasonable certainty X's criminal intent. Further when asked how certain she was that X would commit the crime, Briotti stated that she's "not really sure." In addition, Briotti mentioned that X was "desperate." While X's desperate condition might suggest a criminal intent, without more, it is likely insufficient. People are oftentimes put in desperate situations, but that does not mean that it is reasonably certain that those people will commit a crime. In order to validly, secretly record X, Briotti must have more than a mere speculation regarding X's intentions. Here the facts indicate that Briotti has little more than speculation as to X's intent.

Further, it is unclear why taking notes of any such recording would be inadequate. Secret recordings of conversations are much more likely to upset a client's expectations of loyalty than merely taking notes. Here it appears that taking notes would be a viable alternative to recording the conversation. Taking notes seems to be Briotti's normal practice, and although contemporaneous notes might not have the same evidentiary effect as a recording, notes are still likely be a useful defense if litigation should result from her representation of X.

Taking all of the ethical considerations together, it appears more likely than not that Briotti does not have a valid basis to secretly record a conversation with X.

As an additional note, Briotti's explanation of the situation to us would likely not violate any ethical rules, because she did so "to secure legal advice about the lawyer's compliance with the Rules [of Professional Conduct]." See ABA Model Rules 1.6(b)(2).

Finally, we should note that Briotti is also licensed to practice law in Olympia. If the Olympia Committee on Ethics follows a similar standard to that of Franklin, her recording of a conversation with X would also likely violate that state's Rules of Professional Conduct.

3. Must she inform X that she is doing so if he asks?

If Briotti decides to secretly record a conversation with X, she must likely disclose that she is making the recording if X asks.

Per Rule 8.4 of the ABA Model Rules of Professional Conduct, it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Further, according to Formal Opinion 01-422, a lawyer cannot falsely represent that they are not recording a conversation when they actually are. In essence, the rules draw a distinction between making a secret recording and proactively misrepresenting whether you are making a recording when asked.

Applying these standards here, Briotti would likely be required to disclose that she is recording the conversation if X asks her. If X asks her whether the conversation is being recorded, and she denies it, she would be actively and dishonestly misrepresenting the confidentiality of the conversation to X. To make such a false denial would very likely violate the Rules of Professional conduct. Thus, she must tell X that she is recording the conversation is he asks.

MEE 1
Representative Good Answer No. 1

Expert Testimony by City Detective

The objection to City Detective's testimony should be overruled. The issue is whether City Detective is providing proper expert testimony pursuant to Rule 702. Expert testimony that aids the trier of fact in determining an issue is admissible pursuant to Federal Rule of Evidence 702 if four prongs are met: (1) the witness must possess skill, education, training, or experience that qualifies them to provide an opinion, (2) the witness must rely on sufficient facts and data in forming their opinion, (3) the witness must have used reliable principles and methods in coming to their conclusions, and (4) the principles and methods employed must have been reliably applied to the facts of the case. Expert testimony is not inadmissible solely because it goes to an ultimate issue of the case. The reliability of a witness's principles and methods can be shown through whether those principles and methods were peer reviewed, whether there is a known error rate, or whether it is standard practice in the field.

In this case, the City Detective is relying on his experience being a detective on the police force for six years, during which time his primary assignment has been to investigate gangs and criminal activity in the city. Prior to becoming a detective, he worked as a corrections officer where his duties included interviewing, investigating, and identifying gang members. Additionally, he has attended training sessions in gang structure, membership, and activities. City detective has even lead multiple sessions. Based on the city detective's prior experience and training, it is clear that he possesses the requisite expertise to provide expert testimony.