MPT-1 — Sample Answer 1

TO: Marianne Morton

FROM: Examinee

DATE: July 26, 2022

IN RE: Walter Hixon Marriages

You asked me to prepare a memorandum addressing four questions regarding Mr. Hixon's marital status and best course of action. Please find my analyses to each of those questions below.

1. Does Columbia or Franklin law govern the grounds for annulling Mr. Hixon's marriage to Ms. Tucker?

The issue before us is that our client, Mr. Hixon, wishes to annul his marriage to Ms. Tucker, his second wife, because he was still married to his former wife, Ms. Prescott, whom he thought was dead. To determine the procedural start for Mr. Hixon, it is necessary to determine the applicable state law governing his marriages, both of which occurred in the State of Columbia. When determining which law to follow, a court "will follow a statutory directive of its own state on choice of law." However, in the absence of such a statute, the validity of any given marriage is determined "by local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage." R.2d. If a state does not have such a significant relationship with the parties, the state where the suit was filed must apply the law of the state that does have such a relationship. *Fletcher.*

To determine the state that has "the most significant relationship" to the parties, the courts must look at "the relevant policies of other interested states, the protection of justified expectations, certainty, predictability, and uniformity of result, and ease in the determination and application of law to be applied." R.2d; *Fletcher*. Generally, when looking at the policies of the interested states, the court will consider the strength of the policy interest involved in the case. In particular, certain Franklin courts have recognized that all states have strong legitimate policy interests in defining relationships, and the fact that Franklin and Columbia differ shows the strength of these policy interests. *Fletcher.* In this case, those same countervailing interests apply, as Franklin's statutes still recognize a bigamous marriage as void and Columbia treats it as voidable, so the interests here remain strong.

Further, the court must protect the expectations of the parties. For example, in *Fletcher*, the petitioner and respondent were married in Franklin, lived their entire married life there, wand owned property in Franklin, where the respondent and children still resided. Under these facts, the court found that the parties had a "justified expectation" of Franklin law governing their case.

Similarly, in Mr. Hixon's case, his second wife, Ms. Tucker, was from Columbia, the parties got married in Corinth, Columbia in 2012, the parties bought a house together in Columbia in February of 2015, and the parties maintained joint accounts and a mortgage on the Columbia property for four years, until Mr. Hixon unilaterally moved in 2019. Like the wife in *Fletcher* who had a legitimate expectation that the law of the state where the marriage occurred and the marital residence was maintained would apply, Ms. Tucker likely has a strong justified expectation that Franklin law will apply to their annulment proceedings.

Similarly to the strength of the state interest, the certainty, predictability, and uniformity of the results weighs heavily in favor of establishing the system of "well-defined rules" to govern marriage, and like in *Fletcher*, each state's interest remains strong in ensuring results are consistent and consistently applied. Finally, in considering the ease of determination and application of which law to apply, a court may look at where the events in the marriage occurred and how easy it would be for a court to administer. *Fletcher.* In *Fletcher*, the court determined that a trial court erred in applying Franklin law, because the parties lived together only in Columbia and jointly owned property and incurred debts there, almost identically to the case at bar. Thus, in Mr. Hixon's case, because Ms. Tucker remains in Columbia, because the marital residence and mortgage are in Columbia,because the exercise of Columbia law would not violate the public policy of the state with the most significant relationship to the spouses, R.2d, and because Ms. Tucker has a strong justified expectation that Columbia law will apply, Columbia law likely governs the parties' annulment, and absent a statutory directive to the contrary, wherever Mr. Hixon files, the Columbia law regarding annulments will apply.

2. Must Mr. Hixon file a lawsuit to annul his second marriage, and if yes, would he be able to obtain an annulment under the applicable law

a. Necessity of a Lawsuit

As discussed above, Columbia law likely applies to the parties' marriage, regardless of where the action is filed. As such, under Columbia law, in order for a marriage to be declared void, "either party may seek and a court must issue an annulment decree. CRS § 718.02. While Franklin law treats bigamous marriages as void and makes filing suit not necessary unlike in other Franklin annulments or divorces, the Franklin courts, as discussed above, will likely apply Columbia law. Because Columbia law applies, Mr. Hixon must follow Columbia law and seek a court order for an annulment.

b. Eligibility for an Annulment

To be able to substantively obtain the annulment, Mr. Hixon must prove, consistent with the statute, (1) that at the time of his marriage to Ms. Tucker, his previous spouse was living, (2) that the marriage with that spouse (Ms. Prescott) was in force, (3) that that spouse (Ms. Prescott) was

absent and not known to Mr. Hixon to be living for a period of five successive years immediately proceeding his subsequent marriage that he seeks to annul. In this case, Mr. Hixon and Ms. Prescott were married on June 7, 1986. Consistent with the phone calls Mr. Hixon recently received, it appears that Ms. Prescott is (and ergo was) alive during all relevant periods. The marriage between Mr. Hixon and Ms. Prescott also seems to be in effect; the search for vital records by Inv. Dugger revealed no decrees of divorce or annulment, and Mr. Hixon stated that both parties seemingly just walked away from the marriage when he moved out, never seeking legal dissolution. Finally, Mr. Hixon heard that Ms. Prescott had died in 2001 from a friend. For over 11 years before, he had had no contact with her, and he had no way to confirm her death or refute it. As such, he likely had good reason to think that she had passed. In July of 2012, Mr. Hixon married Ms. Tucker, over ten years later, thus satisfying the final prong that Mr. Hixon did not know Ms. Prescott to be living for at least five years prior to his second marriage. For that reason, Mr. Hixon will likely be able to obtain an annulment under Columbia law no matter where he files.

3. If Mr. Hixon files an annulment action in Franklin, would a Franklin court have jurisdiction to annul the marriage and to dispose of the parties' property?

a. Jurisdiction to Annul the Marriage

Generally, under Franklin law, if a plaintiff "has established residency in Franklin for at least six months, [a] trial court may exercise jurisdiction over the marriage relationship." *Daniels.* The exercise of such jurisdiction does not require *in personam* jurisdiction to terminate a marriage relationship through an annulment, as Mr. Hixon seeks here. *See Carew v. Ellis*. So long as either party has been domiciled within the state for six months, a court will have jurisdiction over the *res* (i.e., the substance) of the relationship, consistent with the U.S. Supreme Court's command that "each state . . . can alter within its own borders the marriage status of the spouse domiciled there," even if the other spouse is absent, consistent with each state's large interest in the institution of marriage. *See Daniels* (citing *Williams*). Even if the Franklin Court decided to exercise jurisdiction over some of the property in a marriage, as discussed below, the presence of these issues alone would not remove the court's jurisdiction to dissolve the marriage. *See Daniels*. For example, in *Daniels*, the respondent contended that the presence of additional issues, such as attorneys' fees, did not subject her to the jurisdiction of the court. Rejecting this argument, the Franklin Supreme Court found that it had jurisdiction over the *Res* of the marriage even if it did not have jurisdiction over other issues. Similarly, in the case at bar, regardless of the availability of jursidiction over property, Franklin maintains the power to dissolve a marriage of any resident of Franklin who has been domiciled within the state for over six months. As Mr. Hixon meets this requirement, the court has such jurisdiction.

b. Jurisdiction to Dispose of Property

Under Franklin law, the provisions of law relating to divorce and to "property rights of the spouses . . . are applicable to proceedings for an annulment." Fr. Code § 19-7. Specifically, a Franklin court has the power to "issue orders dividing the property interests of the parties to an annulment, using the same rules as those governing the equitable division of property in a divorce." *See Walker's Tratise on Domestic Relations,* § 1.7. However, even if Franklin rules are applicable, the court must have jurisdiction over the property. Here, there are no facts that Ms. Tucker has any contacts with Franklin, so the Franklin trial court likely cannot assert *in personam* jurisdiction over her. Sometimes, even when there is no *in personam* jurisdiction, a trial court may assert jurisdiction *in rem* over real property located within its borders. *See Gore; Carew.* However, in the case at bar, Mr. Hixon seeks equitable division and his "fair share of the Columbia house." The Columbia house would be wholly outside the jurisdiction of the trial court, and like the issues of alimony or attorneys' fees, the trial court would be unable to exercise jurisdiction over those issues absent *in personam* jurisdiction over Ms. Tucker. While courts may exercise jurisdiction even in the absence of "minimum contacts" to a state when the property itself is the source of the suit, *Shaffer*, the property must still be located within the state. *See, e.g., Daniels.* Consequently, while a Franklin court would have jurisdiction over Mr. Hixon and the *res* of the marriage, the Franklin court will be unable to exercise such jurisdiction over property that is not located in Franklin. If, however, Mr. Hixon claimed that his Franklin house in which he resided since 2019 were marital property, then it may be subject to the court's power.

4. Should we advise Mr. Hixon to file in Columbia or in Franklin?

We should advise Mr. Hixon to file in Columbia. As discussed above, the Franklin courts would be able to exercise jurisdiction over the *res* of the marriage, but they would leave a good deal of the "mess" that he created still up in the air, including his liability on the marital home with Ms. Tucker in Columbia. In contrast, the Columbia court likely has sufficient minimum contacts with both parties, and even if it did not, it would have the power to exercise jurisdiction over the home and accounts, as property solely within its borders. *See Shaffer*. As such, if Mr. Hixon wants to resolve these issues of the annulment and the divorce with finality regarding Ms. Tucker, he should file in Columbia. In contrast, for the underlying divorce to Ms. Prescott, if Mr. Hixon wishes to divorce her, he may file in either Columbia or in Franklin, as the divorce laws of either state would require the proof of the valid original marriage. Further, because there is no property to be divided between Mr. Hixon and Ms. Prescott, Mr. Hixon would not have as many issues filing in Franklin, closer to his new home, after resolving the issues with the annulment in a Columbia court.

As always, please let me know if you have any additional questions for me in regard to this memorandum.

/s/ Examinee

MPT-1 — Sample Answer 2

MEMORANDUM

To: Marianne Morton

From: Associate

Date: July 26, 2022

RE: Walter Hixon Matter

1. Does Columbia or Franklin law govern the grounds for annulling Mr. Hixon's marriage to Ms. Tucker (the second marriage)?

In 2012, in Columbia, Mr. Hixon married Ms. Tucker. Mr. Hixon and Ms. Tucker bought a house together in Columbia in 2015, and paid all their expenses through a joint account. Neither marriage resulted in children. Mr. Hixon moved to Franklin in 2019.

The issue here is whether Columbia law (the state where the marriage took place) or Franklin law (the state in which Mr. Hixon now lives) should be controlling.

According to the Restatement (Second) of Conflict of Laws, the validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the following principles: (1) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (2) the protection of justified expectations; (3) certainty, predictability, and uniformity of result; and (4) ease in the determination and application of the law to be applied. The Franklin Court of Appeal examined these issues in 2014 in Fletcher v. Fletcher. There, the Court affirmed and applied the Restatement's principles.

The Court held that, as to the relevant policies of other interested states and the relative interests of those states in the determination of a particular issue, "all states have legitimate policy interests in defining how a relationship as fundamental as marriage can be initiated and ended. The very fact that Columbia and Franklin recognize different reasons for annulling a marriage indicates the strength of the policy interests involved." Here, Columbia's strong policy interest in determining the validity of Columbia marriages (and their annulment) indicates that Columbia law should apply.

The Court held that, as to the protection of justified expectations, where "the only connection to the [the State Husband moved to a filed in] lies in the short time during which [Husband] established a residence there," there is a strong suggestion that the "parties had a justified expectation that [the State where marriage occurred and property was held] law would govern the terms on which the marriage ended." Thus, in this case where the marriage's only connection

to Franklin is that Mr. Hixon has recently moved here, Franklin law holds that Columbia law should be applied.

As to the certainty, predictability, and uniformity of result factor the Court made no specific holding applicable to this case, but the fact that the marriage was formed in Columbia, and all property remains in Columbia, would lead to the conclusion that the most predictable and uniform law to apply would be Columbia law.

As to the final factor, ease in the determination of the particular issue, the Court held that where "all the important events in this marriage occurred in [State]...considerations of ease and administrative efficiency strongly suggest that [that same State's] as the appropriate forum."

Mr. Hixon's case is similar to Simeon v. Haynes (Fr. Sup. Ct. 2009), where an annulment action was brought in Franklin, though "the parties lived together only in Columbia, owned property there, and had incurred debts there." On those factual grounds, applying the four factors as discussed above, the Court found that Columbia law should be applied.

Therefore, considering all four factors, and because the Hixon/Tucker marriage occurred in and accumulated property only in Columbia, Columbia law should apply to the issues Mr. Hixon has raised.

2. Must Mr. Hixon file a lawsuit to annul his second marriage, and if yes, would he be able to obtain an annulment under the applicable law?

Parties to a marriage must prove the original marriage was valid and ask for a divorce; for an annulment, by contrast, only one party needs to assert that the marriage was void and ask the Court to declare the marriage void. *Walker's Treatise on Domestic Relations.*

A marriage is voidable (i.e., may be annulled) by an annulment decree in Columbia if the spouse of the party seeking an annulment was absent and not known to the party commencing the proceeding to be living for a period of five successive years immediately preceding the subsequent marriage for which the annulment decree is sought. CRS 718.02. In Franklin, a marriage is voidable without the need for any annulment decree where either party is lawfully married to another person.

We have already determined that Columbia law will be applied to this case, whether it is filed in Franklin or in Columbia. Therefore, the Columbia rule will apply and Mr. Hixon must seek an annulment decree.

The issue is whether Mr. Hixon will be able to annul his second marriage to Ms. Tucker under Columbia law. The rule is that an annulment of a subsequent marriage may be annulled where the spouse of the party seeking an annulment was absent and not known to the party commencing the proceeding to be living for a period of five successive years immediately preceding the subsequent marriage for which the annulment decree is sought.

Mr. Hixon separated (physically, not legally) from Ms. Prescott, his first wife, in 1990, four years after getting married. In 2001, a mutual friend told him that Ms. Prescott had died in a serious car accident. Mr. Hixon did not contact Ms. Prescott or her relatives to ascertain the truth of this statement. His marriage to Ms. Tucker, the second marriage, was in 2012, 11 years after he heard Ms. Prescott was dead. From 2001, when Mr. Prescott heard from a mutual friend of his and Ms. Prescott (and, because it was a mutual friend, reasonably believed) that Ms. Prescott was dead, they had no contact (Ms. Prescott did no send him an email until 2022). Therefore, under Columbia law, Ms. Prescott was absent and not known to the party commencing the proceeding (Mr. Hixon) to be alive for at least five successive years immediately preceding his subsequent marriage to Ms. Tucker (in 2012). Therefore, under Columbia law, Mr. Hixon may (on his own, both spouses are not required) seek and receive an annulment of his marriage to Ms. Tucker.

3. If Mr. Hixon files an annulment action in Franklin, would a Franklin court have jurisdiction to annul the marriage AND to dispose of the parties' property?

Provided that a Court has jurisdiction, the Court may issue orders dividing the marital property interests of the parties to an annulment, using the same rules as those governing the equitable division of property in a divorce. *Walker's Treatise on Domestic Relations*. Therefore, a Franklin court may dispose of marital property in divorce as well as annulment actions. However, the issue is whether a Franklin court would have jurisdiction over this case, either to annul or to dispose of property.

According to Franklin law, a Franklin court need not have *in personam* jurisdiction over one of the spouses in a divorce case, as long as the Court has jurisdiction over (1) the "r*es* of the marriage relationship itself," (2) *"in rem* jurisdiction with respect to the property located within the state." Daniels v. Daniels.

As to the the first prong, jurisdiction over the *res* of the marriage relationship itself, such jurisdiction is established when "one of the parties to the marriage has been domiciled within the state for the requisite period, which in Franklin is six months." Mr. Hixon has lived in Franklin since 2019, three years, and therefore has established residency for over six months. Therefore, a Franklin Court will have jurisdiction over the *res* of the marriage relationship itself." If a court has jurisdiction over the res of the marriage, then it can grant an annulment (as discussed previously, applying Columbia law). Therefore, Franklin courts have jurisdiction such that they could grant Mr. Hixon an annulment.

However, it is doubtful that Franklin will have in rem jurisdiction over the property located within the state, and, therefore, will be able to divide the marital property of Mr. Hixon and Ms. Tucker. That is because there is no marital property located within the state of Franklin. The house that belongs to both Mr. Hixon and Ms. Tucker was purchased and is located in Columbia; Mr. Hixon still pays the mortgage, presumably to a Columbia bank. The joint accounts held by each party to the marriage, from which all their bills were paid, was also established and is maintained in Columbia.

In Daniels v. Daniels, the Court held that Franklin had jurisdiction over a spouse who lived out of state because the other spouse had established residency (prong one) and the property to be divided, "purchased real property," was located in Franklin (prong two). Here, none of the property is located in Franklin, and therefore a Franklin court will not have jurisdiction to hear the case.

4. Should we advise Mr. Hixon to file in Columbia or Franklin?

Because a Franklin court could not divide the marital property of Mr. Hixon and Ms. Tucker, which is located in Columbia and which Mr. Hixon has expressed that he wants ("I want my fair share of the Columbia house"), and because a Franklin court will be applying Columbia law in any case, Mr. Hixon should file in Columbia. Provided that a Court has jurisdiction, the Court may issue orders dividing the marital property interests of the parties to an annulment, using the same rules as those governing the equitable division of property in a divorce. *Walker's Treatise on Domestic Relations.* A Columbia Court will have jurisdiction, and will be able to both grant an annulment and divide Mr. Hixon and Ms. Tucker's property.

MPT-1 — Sample Answer 3

To: Marianne Morton

From: Examinee

Date: July 26, 2022

Re: Walter Hixon Matter

I. Columbia Law Governs the Grounds for Annulling Mr. Hixon's Marriage to Ms. Tucker Because Columbia is the State with the Most Significant Relationship to the Spouses and the Marriage

Franklin law holds that validity of marriage should be determined by the law of the state with the most significant relationship to the spouses and the marriage and that a marriage valid where contracted is valid elsewhere. *Fletcher v. Fletcher. (*Fr. Ct of Appeal 2014) (citing Restatement (Second) of Conflict Law Sect. 283 (1971)). If a state has no such significant relationship to the spouses and the marriage, the state must apply the law of the state that does. *Fletcher*. According to Franklin law, a marriage where either party is lawfully married to another person is void. Franklin Domestic Relations Code Sect. 19.5. According to Columbia law, such a marriage is not automatically void, but merely voidable. Columbia Revised Statutes Sect 718.02. In *Simeon v. Jaynes* (Fr. Sup. Ct. 2009), the court held that a trial court should have applied Columbia law with regards to whether a bigamous marriage was void because the facts that the couple had lived together only in Columbia, owned property in Columbia, and incurred debts in Columbia established a significant relationship between the spouses and that state.

A court should apply factors laid out in the Section 6 of the Restatement of Conflict of Law in determining the existence of the "most significant relationship." *Fletcher*. The first factor is "the relevant policies of the other interested states and the relative interests of those states in determination of this particular issue." According to the Franklin Court of Appeals, the "very fact that Columbia and Franklin recognize different reasons for annulling a marriage indicates the strength of the policy interest involved." *Id*. The second factor is the "protection of justified expectations." The Franklin Court of Appeals has held that where a couple lived the entirety of their married life in one state and owned property in that state, and where one spouse continues to reside in that state, facts suggested that the parties had a justified expectation that the law of that state would apply. *Id*. The third factor is the "certainty, predictability, and uniformity of results." *Id.* The final factor is the "ease in determination and application of the law to be applied." Where all important events in a marriage occurred in a state, considerations of ease and administrative efficiency suggest that state is the proper forum. *Id*.

Columbia is the state with the most significant relationship to the marriage of Mr. Hixon and Ms. Tucker. Mr. Hixon and Ms. Tucker's marriage took place in Columbia. The couple only lived together while in Columbia and presently owns a house there. While Mr. Hixon moved to Franklin

in 2019, Ms. Tucker has remained in Columbia and has never visited Franklin. Mr. Hixon and Ms. Tucker incurred marital debts in Columbia through a jointly signed mortgage with the bank in the state. Like the couple in *Simeon* lived together only in Columbia, owned property in Columbia and incurred debts in Columbia, Mr. Hixon and Ms. Tucker lived together only in Columbia, owned property in Columbia, and incurred debts in Columbia. Thus, because the court in *Simeon* determined that Columbia law should apply in determining whether the couple's marriage was void because of their significant relationship with the state, the court here should apply Columbia law in determining whether Mr. Hixon and Ms. Tucker's marriage is void because of their significant relationship with the state.

The factors laid out in the Restatement of Conflicts favor applying Columbia law to the marriage of Mr. Hixon and Ms. Tucker. As noted in *Fletcher,* Columbia and Franklin recognize different reasons for annulling a marriage, which in itself indicates the strength of the policy involved. Mr. Hixon and Ms. Fletcher lived the entirety of their married live in Columbia, owned property in Columbia, and Ms. Tucker continues to reside in Columbia. This suggest that the parties has of justified expectation that the law of Columbia would apply. The certainty, predictability, and uniformity of result also suggests that Columbia law should apply. Finally, because all important events in the marriage occurred in Columbia, considerations of ease and administrative efficiency suggest that the state is the proper forum. Thus, these factors suggest that the state with the most significant relationship to Mr. Hixon is Ms. Tucker's marriage is Columbia. Because Columbia is the state with the most significant relationship to the marriage, Columbia law should apply in governing the grounds for annullment.

II. Mr. Hixon Should File a Lawsuit to Annul his Second Marriage Because Under Columbia Law The Marriage is Voidable and a Court Must Issue an Annulment Decree to be Declared Void

As discussed above, Columbia law will govern the grounds for annulment. Under Columbia law, a marriage is voidable if "the spouse of either party was living 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 successive years immediately preceding the subsequent marriage for which the annulment decrees is sought." Columbia Revised Statutes Sect 718.02. For a voidable marriage to be declared void, "either party may seek and a court must issue an annulment decree." *Id*.

Mr. Hixon's first spouse, Ms. Prescott, was still living and that marriage was in force at the time of Mr. Hixon's marriage to Ms. Tucker. Ms. Prescott was absent, and had not known to be living the Mr. Hixon's since 2001, when a friend reported that Ms. Prescott had died in a car accident. Mr. Hixon entered into a marriage with Ms. Tucker in 2012, having believed Ms. Prescott to be dead for over a decade. Because of these facts, Mr. Hixon's marriage to Ms. Tucker is voidable. Because a party must seek and a court must issue annulment decree for a marriage to be declared void, Mr. Hixon should file a lawsuit to annul his marriage to Ms. Tucker. Because the facts above make Mr. Tucker's marriage voidable, he is likely to succeed in annulling his marriage to Ms. Tucker.

III. A Franklin Court Does Have Jurisdiction to Annul the Marriage but Does Not Jurisdiction to Dispose of the Parties Property

a. A Franklin Court has Jurisdiction to Annul the Marriage Because it Has Jurisdiction Over the Res of the Marriage

In personam jurisdiction over both parties to the marriage is not required to terminate a marriage relationship in Franklin, whether by through divorce or annulment. *Daniels v. Daniels* (Fr. Ct. of App. 1997). The party seeking a dissolution of the marriage need show only that the trial court has jurisdiction over the *res* of the marriage. *Id*. A court has jurisdiction over the *res* of the marriage relationship when one of the parties to the marriage has been domiciled in the state for the requisite period, which in Franklin in six months. *Id*. Jurisdiction in proper even absent *in personam* jurisdiction because "each state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own border the marriage status of the spouse domiciled there, even though the other spouse is absent." *William v. North Carolina*, 317 U.S. 287, 298-99 (1942).

A Franklin Court would have jurisdiction to annul the marriage. Mr. Hixon has domiciled in Franklin since 2019, when he moved to the state for work. Because Mr. Hixon has been domiciled in Franklin for more than the statutory period of six months, a Franklin court would have jurisdiction over the *res* of the marriage. Because a Franklin court would have jurisdiction over the *res* of the marriage, a Franklin court would have jurisdiction to terminate the marriage through anullment.

b. A Franklin Court Would Not Have Jurisdiction Over Distribution of the Property Because It Does Not Have In Personam Jurisdiction Over Ms. Tucker or In Rem Jurisdiction Over the Property to Be Distributed

In Franklin, an annulment action may address the same issus as those that arose in a divorce. *Walker's Treatise on Domestic Relations.* A trial court with jurisdiction to grant a divorce cannot award alimony or attorney's fees unless it has *in personam* jurisdiction over both parties or *in rem* jurisdiction over the property to be distributed. *Daniels*. Assertions of *in personam* jurisdiction by a state court must satisfy the "minimum contacts" standard. *Shaffer v. Heitner,* 433 U.S. 186 (1977). Franklin has *in rem* jurisdiction over property located in Franklin, even absent *in personam* jurisdiction over a part. *Daniels.*

A Franklin Court would not have jurisdiction to distribute marital property. Ms. Tucker has never even visited Mr. Hixon in Franklin, and thus Franklin likely does not have *in personam* jurisdiction over her through minimum conducts. Additionally, the house owned by Mr. Hixon and Ms. Tucker is located in Columbia, as well as the couple's joint bank accounts. Accordingly, a Franklin court would not have *in rem* jurisdiction over this property. Thus, a Franklin court would not have jurisdiction over the distribution of Mr. Hixon and Ms. Tucker's property.

IV. Mr. Hixon Should File in Columbia because of Ease and Administrative Efficiency and Because Columbia Would Have Jurisdiction Over the Distribution of Property

Considerations of ease and administrative efficiency suggest that the proper forum for a suit is the state where all events of a marriage occurred. *Fletcher*. All events of Mr. Hixon and Ms. Tucker's marriage occurred in Columbia. As discussed above, Columbia law will apply to the annulment of Mr. Hixon and Ms. Tucker's marriage. Additionally, Columbia would likely have jurisdiction over the distribution of Mr. Hixon and Ms. Tucker's marital properly. Accordingly, Mr. Hixon should file his suit in Columbia.

MPT-2 — Sample Answer 1

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

M E M O R A N D U M

To: Howard Zeller
From: Examinee
Date: July 26, 2022
In Re: Briotti request for advice

You asked me to prepare a memorandum addressing specific questions relating to Ms. Briotti's ethical dilemma with her client. Please find my findings below relating to each question.

1. Under applicable state law, may Briotti lawfully record her telephone conversation with X without informing X that she is doing so?

In her desire to record the conversation with X for her protection, Briotti stated that while her office is in Franklin, X lives in Olympia. To determine whether the recording of the phone call is legal, it is necessary to determine whether the conduct would be violative of the statutes governing such recordings in either Olympia or Franklin.

Under Franklin Law, it is illegal for a person to record any wire communication unless there is an emergency or the interception is made "with the prior consent of one of the parties to the communication." FCC § 200. In Franklin, then, Briotti's proposed course of conduct would not violate the criminal code because she is consenting to the recording as a party to the conversation. The only question remaining as to the legality of the proposed action, then, is whether Olympia's Criminal Code criminalizes such recordings.

In contrast to Franklin, Olympia's criminal code criminalizes such recordings unless it is "made with the prior consent of *all* the parties to the communication" generally. OCC § 500.4 (emphasis added). However, because Briotti's conduct would be occurring at her office, located in Franklin, the proposed conduct would not be occurring in Olympia. Whether this extraterritorial recording would violate the criminal statute is unclear from the text of the OCC alone. However, case law is instructive.

Olympia Courts have determined expressly that "the recording of a telephone conversation constituted an "intercept" under the above-cited criminal code, prohibiting telephone calls being recorded only with the consent of one party. *Wessel*. Nevertheless, Olympia Courts have been more hesitant to rigidly apply this code to conduct occurring outside of Olympia. For example, the Olympia Supreme Court has decided in the past that recordings made with a person in Olympia without that person's consent may be admitted as evidence. *Parnell*. Finding that

because a recording "was lawful at its inception" in another one-party state, the court found that "even though the manner of the interception would violate Olympia law had the interception taken place in Olympia," the recording was nonetheless admissible. *Id.* By finding that the evidence was "legally obtained" in the jurisdiction where it was seized, the Court found that the recording was admissible. Basing its decision on this Olympia Supreme Court issue, a more recent decision by a Olympia District Court dealt with a similar issue. In that case, the Olympia District Court faced a fact pattern analogous to Ms. Briotti's situation: an out-of-state party recorded a telephone conversation with a party in Olympia. After finding that the out-of-state party's conduct comported with its state law, which was a one-party statute, the Olympia District court held that "in civil or criminal actions, OCC § 500.4 does not apply when the interception takes place outside of Olympia," finding that "recordings occur where made." *Shannon*. While Olympia's court structure is not entirely clear, the District Court's use of "we" as a holding seems to advise that this holding may be binding on other courts. Nevertheless, it appears that the Olympia Criminal Code will not criminalize conduct occurring outside of Olympia, even if one party to the conversation is in Olympia. As such, like the corporation Spindrift in *Shannon* that was found neither criminally or civilly liable for recording a conversation without the permission of a party located in Olympia, Briotti will likely be able to record the conversation without X's consent as she would comply with Franklin law and would not be subject to Olympia's criminal code as the recording would be made in Franklin.

2. Assuming that Briotti could make such a recording lawfully, would doing so without X's knowledge violate the Rules of Professional Conduct?

a. Recording of Conversations Generally

Because Ms. Briotti is a member of both the State Bar of Franklin and the State Bar of Olympia, Ms. Briotti must comply with both sets of ethical rules to avoid being sanction or in violation of any rule. However, because each jurisdiction has adopted the ABA's Model Rules, the analysis is uniform.

Generally, an attorney must not engage in any violation of the Rules of Professional Conduct, commit a criminal act, or engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. R. 8.4. On its face, it is not clear whether recording a conversation without someone's knowledge would be such a misrepresentation. Under the ABA's former opinions, an attorney could never record a conversation without prior knowledge of all parties; however, following much criticism, the ABA revised this rule in 2001, finding that recording a conversation with a client "is not inherently deceitful" in accordance with Rule 8.4's command that an attorney must not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." In such a finding, the ABA noted that recording today comports with the reasonable expectations of privacy one might have given the advances in technology and in recording practices, despite offending the sense of honor and fair play for some. Committee Report. The Committee further

concluded that "the proper approach to the question of legal but nonconsensual recordings by lawyers is not a general prohibition with certain exceptions, but a prohibition on the conduct only where it is accompanied by other circumstances that make it unethical.

Whether circumstances make the conduct unethical may depend on whether they are in violation of a criminal statute; the Committee Report on these ethics rules instructs that attorneys contemplating such one-arty recordings should "take care to ensure that [s]he is informed of the relevant law of the jurisdiction *in which the recording occurs.* (emphasis added). As discussed above, the recording would likely take place at Briotti's office in Franklin. The recording, again as discussed above, would not violate any criminal statute in the jurisdiction where the conduct occurred.

b. Recording of Conversations with Clients

While recording of conversations generally may be permitted as not inherently deceitful, an attorney still owes special duties to clients, such as the duty of loyalty to preserve confidentiality and communication relating to the representation, as a lawyer's duty to a client "transcends the lawyer's convenience and interests." Committee Report; R.1.6. The Committee did not say definitively, as its members were split, whether recording client conversations without the client's knowledge is permitted by the Rules of Professional Conduct. Finding that recording would undermine client confidence, the Committee advised that undisclosed recording "is inadvisable except . . . where exceptional circumstances exist," including where the client forfeits the right to loyalty or confidentiality through threats to commit a criminal act resulting in bodily harm or where the lawyer must establish a defense. *Id.*

In this case, it is not clear whether Briotti will need to record the conversation in order to establish a defense. If she is at some point in the future charged with conspiracy to defraud a beneficiary or with aiding and abetting a breach of fiduciary duty, then the conversation would be quite helpful. If, in the future conversation, X seeks advice on the issue, then he clearly would have forfeit the expectation of confidentiality by posing potential liability to Briotti. The more troublesome issue is knowing whether such conduct will occur, as the recording will be of content of a future phone call of which the attorney cannot be certain.

The committee, however, did not explicitly define what these "exceptional circumstances" could be. The committee did list that the client forfeits the expectation of confidentiality of loyalty through bodily harm or through making it necessary for the lawyer to establish a claim or defense, both of which are express exceptions to confidentiality in Rule 1.6(b)(1) and 1.6 (b)(5) respectively. However, it is not clear whether the committee's list of these exceptions was exclusive or by way of example, leaving "exceptional circumstances" still ambiguous. Whether the other exceptions to confidentiality quality as exceptional circumstances, then, is also unclear. Confidentiality has also not likely been waived under Rules 1.6(b)(2) or (3) yet, as X has not yet

used any of Briotti's services in furtherance of this crime. Whether the threat of a financial crime where the attorneys' services are not used that does not itself authorize disclosure under Rule 1.6 meets the criteria for "exceptional circumstances," then, is ambiguous.

In light of this ambiguity, the Franklin State Bar Committee's commentary on the topic is instructive. The Franklin Committee found that in determining whether there is an exceptional circumstance, "the key question is whether such a recording will violate the lawyer's duty of loyalty to the client. Noting the dangers of inadvertent disclosure and breach of confidentiality absent exceptional circumstances, the Franklin Committee advised that "the lawyer should take care to act on facts and well-grounded judgment, rather than speculation, as to the client's intended actions," considering the clients' previous statements, circumstances, and alternate methods of memorializing the conversation.

In this case, the client's rantings about how he has made unsuccessful investments and would be in financial ruin pose a high likelihood of harm to him should there be any inadvertent disclosure. Particularly, as Briotti noted, if X is bankrupt and admits that he is bankrupt, his reputation would likely be irreparably tarnished. If the future conversation is anything like the past conversation, then the client may say how he is in financial ruin, which may spoil his reputation as an investor. At the same time, though, upon consideration of X's past statements about how he kept "referring to the trust he administers" during the conversation with Briotti. This, coupled with the circumstances of the investor's potential ruin, may demonstrate to a reasonable attorney that the client was seriously considering undertaking the illegal activity. Should he choose to do this, he may potentially claim that Briotti advised him that it was acceptable. In such a circumstance, a mere memorandum of the conversation by Briotti likely has far less probative value than a recording should Briotti need to defend herself against potential future criminal charges. Briotti seems unclear whether X will actually undertake the course of conduct, despite his listing specific confidences that he could "keep up the trust payments" and pay it back later. She says that it is "possible," but she does not indicate whether she thinks that it is probable, because he "might not do it," knowing that such siphoning of trust funds is illegal.

Finally, the attorney must be fully aware of all of these risks, reasonably believing it to be necessary to make such a recording, as it is "almost always inadvisable [to make such a recording] unless the lawyer reasonably believes it necessary," as it would otherwise undermine the trust in the attorney-client relationship. As discussed above, to defend herself if she believes that X might try to implicate her in a crime or say that she aided him in the crime, Briotti may believe that it is necessary and may proceed in the exceptional circumstance to establish a defense. Nevertheless, because Briotti has stated that the future crime is only "possible" and not probable, without more, I would advise Briotti to be cautious in making the recording unless she believes that the course of criminal conduct for X becomes more likely than mere speculation or possibility, even with his suspicious behavior. While the recording may not be a per se violation of an ethics rule, it carries a high risk of breaching Briotti's duty of confidentiality and loyalty to

X. the ABA Ethics Committee, who drafted the rules that Olympia and Franklin adopted, unanimously found that "it is almost always advisable for a lawyer to inform a client that a conversation is being recorded." Because recordings capture verbatim any of the client's statements in a less formal way than a memorandum, such recordings carry a high risk of potential damage to the client. *Id.* Because of this high risk and potential to violate confidentiality and loyalty, it may be a violation of the Rules of Professional Conduct, at least under the Franklin Committee guidance, to make such a recording absent a more definite circumstance or threat of certain conduct given the high risk for damage this recording would involve. Given the risk of a violation of a Rule of Professional Conduct due to the ambiguity of "exceptional circumstances" in Franklin and lack of guidance in Olympia, the safer course of action would be for Briotti to use an alternate method of preserving the conversation, such as a memorandum, that minimize the risks that go with potential inadvertent disclosure unless X gives more definite indications of his intentions to commit such a crime.

3. Assuming state law allows such a recording and that the recording does not violate the Rules of Professional Conduct, must Briotti inform X if he asks whether the conversation is being recorded?

Under the ABA Ethics Committee's report that permitted one-party recordings as not per-se ethics violations, the committee did expressly note that the absence of such a ban "does not mean that a lawyer may falsely state that the conversation is *not* being recorded. (emphasis added). As stated above, under ABA Rule 8.4, "it is processional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." By stating to a client who asks that the conversation is not being recorded, then, Briotti would engage in a violation of Rule 8.4. Further, if Briotti chose to remain silent or to change the topic by telling X not to worry, she may be engaged in conduct that may rise to the level of misrepresentation or dishonesty, even if not express. As such, due to the loyalty that an attorney owes a client, and due to Briotti's duty not to engage in such dishonest conduct, if X asks, Briotti likely will have to inform X that the conversation is being recorded, even though Briotti does not want X to know that the phone call is being recorded.

As always, please let me know if you have any additional questions or concerns.

/s/ Examinee

MPT-2 — Sample Answer 2

Memorandum

To: Howard Zeller
From: Examinee
Date: July 26, 2022
Re: Briotti Request for Advice

I. Introduction

The purpose of this memorandum is to analyze the legal and ethical issues surrounding Ms. Briotti recording a conversation with one of her client's without that client's consent. While it is likely permissible under the law and rules of professional conduct to record the conversation, it could still result in professional discipline and is likely not advisable. Lastly, Briotti likely must tell her client, X, that she recorded the conversation with him if asked.

II. Discussion

1. Under Franklin and Olympia law, Briotti can record the conversation without X's consent

Briotti can likely record the conversation under the governing law because she is located in Franklin. The issue here is whether Briotti can legally record the conversation without X's consent when Franklin law allows one party consent recordings and Olympia does not. Under Franklin Criminal Code § 200, any party can record communications so long as one party to the conversation consents. However, under Olympia Criminal Code (OCC) § 500.4, both parties must consent to the recording of any conversation or it can lead to criminal and civil liability for the recording party. Despite this conflict, Briotti can likely record the conversation because her offices are located in Franklin where it is legal to record a conversation with only one party's consent. The Olympia District Court ruled that the law of the state where the conversation is being recorded governs whether or not the recording is legal. *See Shannon v. Spindrift*. In *Shannon*, a corporation in Columbia recorded a conversation with a person in Olympia without that persons's consent. The court ruled that the law of the state where the recording occurred controlled. The court ruled that since one party consent recording was legal in Columbia, it did not violate OCC § 500.4. The Court looked to the Olympia Supreme Court and noted that Olympia law allows criminal evidence legally gathered under the law of one state to be admitted in Olympia even if that evidence could not be lawfully gathered in Olympia. *Parnell v. Brant*. The Court held that this meant recording a conversation in a state where it is legal does not subject the recording party to liability under OCC § 500.4 even if the other party is in Olympia.

Here, Briotti will likely be in Franklin because her offices are in Franklin, and the Franklin Criminal Code allows for one party consent recording. This means that Briotti can likely record a conversation with X while he is in Olympia so long as she makes the recording while she is in

Franklin. Under *Shannon,* this will not violate Olympia law. Therefore, Briotti can likely record the conversation from her office in Franklin without violating any criminal or civil law.

2. Recording the conversation likely will not violate the Rules of professional conduct, but could lead to a violation

Despite the fact that Briotti could lawfully record the conversation, it does not mean it is advisable to record it under the rules of Professional Conduct. In ABA Opinion 01-422, the Ethics Committee ruled that recording a client conversation alone without consent does not violate the ABA Model rules of professional conduct. The Franklin state bar adopted this opinion and its conclusions. However, both the ABA and the Franklin state bar have ruled that it is not advisable to record client's without their consent. They have both ruled that this act alone may not violate the rules, but it could lead to violations of the rules. The ABA committee recognized that recording could lead to a violation of the duty of loyalty because the lawyer is taking an action against their client without their consent. The committee also recognized that recording a conversation could lead to a breach of the duty of confidentiality under Model Rule 1.6 because the recording could fall into the hands of third parties and expose confidential client information. The committee noted that a recording of the exact words a client said could be more damaging that an attorneys notes because it exposes the exact confidential information communicated by the client.

Because of these concerns, the ABA committee recognized it is likely only advisable to record a client conversation without their consent in exceptional circumstances. The committee considered those circumstances to include when a lawyer reasonably believes a client is going to commit a criminal act that is reasonably certain to result in death or substantial bodily harm. *See* MR 1.6(b)(1). The committee also recognized that it might be permissible to record to establish a defense for a lawyer if charges could result against the lawyer for the conduct of a client. Lastly, the Franklin state bar advised that lawyers consider the necessity of recording by considering following before recording a client conversation: the client's previous statements, the client's circumstances, and the alternative methods of memorializing the conversation.

Here, it is likely not a violation of the rules of either Olympia or Franklin to record a conversation. Both states have adopted the ABA model rules, and MR 8.4 states that it is a violation of the rules to violate a criminal law that calls into question the lawyer's fitness to practice law. Here, it is legal under Franklin and Olympia law to record the conversation, so it does not violate MR 8.4 to record it without X's consent. However, this does not mean that it is advisable to do so. As the ABA committee recognized, a recording is permanent and Briotti could violate MR 1.6 and her duty of confidentiality if she records the conversation and then that recording is inadvertently exposed. However, Briotti's situation could intentionally expose the recording to protect the members of the trust if she is reasonably certain that X will violate the trust. *See* MR 1.69(b)(2). Despite this, Briotti's situation does fall under the situations described by the ABA to be

exceptional situations because Briotti may need to use the recording as a defense for herself. There is no risk of bodily harm from X's proposed violation of the trust. However, there is a likelihood Briotti will need to defend herself against charges if X decides to violate the trust as she has been serving as his counsel during this period. In that instance, she may have good reason to record a conversation. However, protecting the financial interests of the beneficiaries alone may not be enough to record under the ABA committee opinion.

In deciding whether to record, Briotti should look to the factors discussed by the Franklin state bar. Currently, her client has said he is thinking about violating the trust but has not said he will violate it. However, his situation is desperate enough to motivate him to violate the trust to solve his problems. Despite this, there are likely alternative methods available that Briotti could take to protect herself in the event that X does violate the trust. Briotti's current memo on file demonstrates that she has advised him it would be illegal to violate the trust. This is likely sufficient evidence to provide a defense if she is implicated in any of X's actions. Likewise, she could call X as she is planning to do and take notes to memorialize that she has directly told him not to violate the trust. This too would likely be sufficient without recording the call. Thus, because there is another sufficient means of protecting herself and the trust beneficiaries, Briotti likely does not need to record the conversation and will put herself at more risk if she records it than if she merely takes another memo memorizing her advice to X.

3. Briotti likely must inform X she recorded the conversation if asked

Although it is permissible under the law and rules of professional conduct for Briotti to record the conversation, she must tell X she has done so if asked. Both the ABA committee and the Franklin state bar have recognized that the right to record a client without their consent does not reach so far as to allow a lawyer to deceive their client. The ABA committee recognized that the duty of loyalty prevents lawyers from actively deceiving their clients. Likewise, MR 8.4(c) forbids a lawyer from engaging in conduct involving dishonesty or deceit. Here, if Briotti told X that she had not recorded the conversation when she did, she would likely violate MR 8.4(c) and subject herself to professional discipline despite the fact that this would not violate state law.

III. Conclusion

Briotti can legally record a conversation with X without first getting X's consent because it is legal under the Franklin Criminal Code for one party to record another without that party's consent. As long as she records the conversation in the state of Franklin and not in the state of Olympia she will not violate either state's laws. Likewise, it will not violate either state's rules of professional conduct because there are exceptional circumstances here that allow her to record her client to raise a defense to any liability that could result from X's violation of the trust. However, it is likely not advisable for Briotti to record the conversation because memorializing a conversation like she has done in the case file likely provides sufficient defense if charges should

arise. Likewise, recording presents additional risks that could lead to violations of the duty of loyalty and confidentiality under the model rules. Lastly, if Briotti records and X asks if she has recorded the conversation, Briotti must tell the truth and admit she recorded the conversation or she will violation MR 8.4(c).

MPT-2 — Sample Answer 3

1. Under applicable state law, may Ms. Briotti lawfully record her telephone conversation with X without informing X that she is doing so?

The issue is whether Franklin or Olympia require the consent of one or both parties to a phone conversation for recording to be lawful. The rule in Franklin is that a wire communication (which includes phone calls) can only be recorded with the prior consent of one party to the call, or, in criminal cases, where there is an emergency situation and getting a court order would be impractical (though the call would still have to be ratified by a Court after the recording occurred). The rule in Olympia is that both parties must give prior consent to a recording unless, as in Franklin, there is an emergency situation exists under the same parameters and with the same requirements as in Franklin.

Therefore, under Franklin law one-party consent is legal, while in Olympia it is not; both parties must consent. Briotti has no intention of seeking the permission of X to record their conversation, and therefore she cannot secretly record the conversation under Olympia law. She can only record the conversation secretly under Franklin law, as she will be the single party giving consent. This is a problem, however, because X is a citizen of Olympia, and the phone call which Briotti wishes to record would be crossing state lines (because Briotti lives and has an office in Franklin).

Therefore, a further issue is whether Franklin or Olympia law governs cross-border conversations.

The rule, established by the Olympia District Court in Shannon v. Spindrift (affirming Parnell v. Brant, an Olympia Supreme Court Decision), that that "interceptions and recordings occur where made." Parnell. According to the Court Olympia law allows the admission of evidence legally obtained in the jurisdiction seizing the evidence. Here, that would be Franklin, where Briotti will place and record the phone call. Under Shannon (and Parnell), so long as a recording is permissible in the jurisdiction where it is made, it will be admissible as evidence in Olympia even though it would be illegal to make the recording under Olympia law. The Parnell decision was based on criminal evidence rules, but in Shannon the court expanded the holding to incorporate civil actions as well.

Therefore, so long as Briotti makes the recoding in Franklin, where one-party consent is legal, the recording she makes will be admissible in any future proceeding in Olympia, even though Olympia does not have one-party consent. Briotti may record her conversation with X without informing him that she is doing so, so long as the recording is made in Franklin. The recording will not violate state law.

2. Assuming that Briotti could make such a recording lawfully under state law, would doing so without the client's knowledge violate the Rules of Professional Conduct?

Both Franklin and Olympia have adopted the ABA Model Rules as their own. The issue is whether this recording, even if lawful, violates those rules.

ABA Rule 8.4(c), adopted by Franklin and Olympia, holds that it is "professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Arguably, recording a client's phone call without their permission is a violation of this covenant. However, a recent formal opinion from the ABA (which itself was formally adopted by the state of Franklin) states that "to forbid obtaining evidence by nonconsensual recordings that are lawful and consequently to not violate the legal rights of the person who words are unknowingly record would be unfaithful to the Model Rules." While "it is almost always advisable for a lawyer to inform a client that a conversation is...being recorded," the Model Rules do not ban the practice, and no longer consider it to be per se deceitful.

However, while the practice is not outright forbidden, the practice is not universally approved, either. Instead, the ABA states that "the proper approach [is a]...prohibition of the conduct only where it is accompanied by other circumstances that make it unethical."

One such circumstance is a violation of state law ("a lawyer who records a conversation in the practice of law in violation of such a state statue likely has violated Model Rule 8.4"). The ABA states that where state law requires two-party consent (as in Olympia), to violate that state law would be a violation of ABA Rule 8.4(c), and professional misconduct. Therefore, Briotti has an ethical obligation not to record the phone call in Olympia.

Another such circumstance would be deceitfulness. Lawyers are not allowed to lie to their clients, or to mislead them. However, the ABA has stated that "the mere act of secretly but lawfully recording a conversation is not inherently deceitful." Furthermore, the ABA no longer requires attorney's to forgo "even the appearance of impropriety," as they once did. Therefore, mere recording in secret is not likely to be found deceitful by the ABA.

Another such circumstance would be a violation of the attorney's duty of loyalty, which transcends the lawyer's interests and convenience. One of the duties of loyalty is maintain the confidentiality of the clients' confidential information. It is a potential violation of Briotti's duty of loyalty to make a recording that could, at some later date, be used to divulge X's confidences (both to his clients, to us as her representatives, and to the state). However there are exceptions to the duty of loyalty/confidentiality, including the exceptions in Rule 1.6: "(2) 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; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services; (4) to secure legal advice about the lawyer's compliance with these rules; (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim agains the lawyer based upon conduct in which the client was involved..."

Here, the first couple of exceptions are not likely to apply, because the fraud or harm to financial interests would be substantial if X invaded the trust, those damages are not reasonably certain

(Briotti has continually said she's not certain a crime will be committed, she's just concerned that one will be). Furthermore, Briotti's services have not been used to further these or any future claims. To the contrary, Briotti has unequivocally told the client that he may not invade the trust and that to do so would be a criminal act. She has not helped him in any way (except by telling him not to commit a crime). Therefore, she these two exceptions are unavailing.

However, Briotti has not violated her ethical duty by coming to us for advice (as allowed by 1.6(4)), and in fact has fulfilled her ethical duty to seek counsel when she's unsure about an ethical question that could have serious consequences for her and her client. Therefore she won't face any ethical issues based on her divulgence to our firm.

Arguably, Briotti would not violate her ethical duty of loyalty by recording the phone conversation without the client's consent under 1.6(5), which allows lawyers to breach confidentiality to prepare a defense against their client or their client's victims if they anticipate the commission of a crime or a tort. The purpose of recording this phone call, according to Briotti, is to prove in any future proceeding that she advised her client not to invade the trust, and never helped him or encouraged him to do so. On the other hand, recording a phone call may not be necessary to achieve this goal -- Briotti's handwritten notes, as well as this memo and any other memorializations that are more typical of attorney-client relationships could suffice. According to the Franklin State Bar Committee, when considering one-way secret recording, a "lawyer should take care to act on facts and well-grounded judgment, rather than speculation, as to the client's intended actions. The lawyer should consider...alternative methods of memorializing the conversation when determining the need for recording the conversation without the client's knowledge."

Therefore, while under the Model Rules Briotti has an argument for recording a conversation with a client secretly and without their knowledge, it's not a very strong case. Both the ABA and the State of Franklin urge her to consider alternate methods of memorialization in the absence of any reasonable certainty that her client is actually going to commit a crime, and to avoid secret recordings unless "the lawyer reasonably believes it necessary." The risk of divulging highly damaging confidential information is very high when a recording is made, rather than simply notes ("a recording that captures the client's exact words, no matter how ill-considered, slanderous, or profane, differs from a lawyer's notes or dictated memorandum of the conversation...the damage or embarrassment to the client would like be far greater"). While clients probably expect their confidential conversations to be memorialized by their attorney in some way, recording is a different animal that she have no reason to suspect. Which is not to say that recording is not beneficial; in some circumstances (saving money because the lawyer doesn't have to take notes, accuracy) they're very beneficial. But those circumstances should't require any deceitfulness or breach of loyalty on the part of the attorney, as this recording likely would.

Therefore, while the Model Rules arguably allow Briotti to engage in one-way secret recording of her client, we should probably advise her to simply memorialize the conversations in a different way (or even ask the client if she may record him beforehand). These should be adequate to

protect her in any future claim, and neither Franklin nor Olympia would be likely to find that it would violate her Rule 8.4 duties of loyalty and confidentiality.

3. Further assuming that state law would allow Briotti to make such a recording and that doing so would not violate the Rules of Professional Conduct, must she inform X that she is doing so if he asks?

The issue is whether, even if secret recording is both legal and ethical, Briotti must affirm that she is recording the conversation if X asks her whether or not she is.

According to the ABA formal opinion, just because a state allows one-party consent "does not mean that a lawyer may state falsely that the conversation is not being recorded." Furthermore, a lawyer, as discussed above, has a duty to tell the truth to their clients, and not deceive them. While secret recording, if lawful, is not inherently deceitful, flatly lying to a client when they ask whether they are being recorded probably is. The ABA states that while "it is questionable whether anyone today justifiably relies on an expectation that a conversation is not being recorded by the other party," that expectation is not justifiable if there is a "special relationship with or conduct by [a] party inducing belief that the conversation will not be recorded." The client-lawyer relationship is the classic special relationship paradigm, and clients certainly are not on any kind of reasonable notice that their lawyer may be recording them. The lawyer's duty of confidentiality and loyalty is certainly an inducement to so believe. Secretly recording a client is already putting a lawyer on thin ice -- lying about it is unlikely to be approved by an ethics board.

Therefore, mindful of her ethical duty of truthfulness, Briotti would do well not to lie to X if he asks whether or not he is being recorded.