**MEMORANDUM**

To: Howard Zeller

From: Examinee

Date: July 26, 2022

Re: Nina Briotti Request for Advice

**I. Introduction**

You have asked me to research three issues relating to our client, Nina Briotti, an attorney admitted to practice in Franklin, and whether it is permissible for her to record conversations with her client, X, about the illegality of him possibly taking specific financial action in the neighboring state of Olympia. I will address each of the following issues in turn: (1) whether Briotti may lawfully record her telephone conversation with X without informing X that she is doing so; (2) whether creating this recording without X's knowledge would violate the Rules of Professional Conduct (herein "the Rules") and the ethical considerations involved; and (3) whether Briotti must inform X of her recording if he asks.

**II. Analysis**

1. **May Briotti lawfully record her conversation with X without informing X that the conversation is being recorded?**

**OR**

1. **Briotti may lawfully record her telephone conversation with X without informing X.**

Under Olympia Criminal Code (OCC) § 500.4, the “prior consent exception” requires consent from all parties to a communication before it can be recorded lawfully. In *Shannon v. Spindrift* (2018), the Olympia District Court held that OCC § 500.4 does not apply when the act of interception takes place outside of Olympia and instead notes that "interceptions and recordings occur where made," regardless of where each party to the conversation is located. Franklin, however, is a "single party consent" state because its applicable criminal statute requires only one party to the communication to provide prior consent to the interception of the conversation. Franklin Criminal Code (FCC)§ 200(1)(a). Finally, as to which law prevails, in *Shannon*, the court settled the conflict between a "single party consent" state and an "all party consent state" by dismissing the action that was based on Olympia's "all party consent law'' because the defendant recorded the plaintiff during a telephone communication from within the defendant's "single party consent" state.

Here, Briotti has her law office in Franklin and X lives in Olympia. Briotti would likely make the call to X from her office in Franklin. Therefore, under*Shannon*, if she were to record her conversation with X, the recording would occur in Franklin, even though X is taking the call from Olympia. Applying Franklin's criminal laws, Briotti would only need one party to consent to the recording.

As a party to the call, Briotti would be the consenting party and can lawfully record the call in Franklin without X’s consent.

1. **Even if the recording is legally permitted would recording the call without the client’s knowledge or permission violate the Rules of Professional Conduct?**

**OR**

**Briotti may be able to record X without his knowledge under the Rules of Professional Conduct but it is a fact-intensive assessment.**

Both Franklin and Olympia have adopted the ABA Model rules. As such, ABA Opinion 01-422 is instructive as it abandons the previous ABA position that all nonconsensual recordings are inherently deceitful. Instead, Opinion 01-422 explains that many factors should be considered in making such a determination, including that the majority of states that allow one-party consent to recordings, the presence of numerous exceptions that may necessitate the lack of disclosure of the recording, and fact that the model rules as amended and no longer includes the requirement for lawyers to "avoid even the appearance of impropriety."

Rule 1.6 generally requires that client information be kept confidential, except in circumstances where a lawyer "reasonably believes [it] necessary" to reveal information. There are two relevant exceptions to this situation: the exception "to prevent a client from committing a crime . . . that is reasonably certain to result in substantial injury to the financial interests . . . of another and in furtherance of which the client has used or is using the lawyer's services," and "to prevent . . . substantial injury to the financial interests . . . of another that is reasonably certain to result . . . from the client's commission of a crime or fraud in furtherance on which the client has used the lawyer's services."

Rule 8.4 of the ABA Model Rules states that it is misconduct to "commit a criminal act that reflects adversely on the lawyer's honesty" or "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." The Franklin Bar has stated in its commentaries that it is inadvisable to record a client without their knowledge in light of the special relationship between lawyer and client. Although Franklin has adopted the position that "the mere act of secretly but lawfully recording a conversation is not inherently deceitful" it is still inadvisable to record without client permission. Briotti would likely not violate these rules if there were exceptional circumstances (discussed above) but because such circumstances are not present in this case, Briotti may be at risk of violating the Rules if she records without X's consent.

In the Commentary published by the Franklin Bar related to Rule 8.4, the Committee stated that in deciding whether to undertake a recording of a conversation with a client without the client's knowledge, the lawyer should make a well- grounded judgment considering previous statements, client circumstances, and alternative methods of memorialization. The Committee stated further that "a recording of a conversation with a client, but without the client's knowledge, is almost always inadvisable unless the lawyer reasonably believes it necessary." *See* *id*. Together, Opinion 01-422 and the Franklin State Bar Commentary make clear that there is not a bright line prohibition on nonconsensual recordings, unless the same is outlawed by a state law.

Therefore, this ethical consideration will require a more fact-based assessment including the weight of the duties of loyalty and confidentiality and the alternative options for memorializing the conversation.

1. ***Briotti’s Duty of Loyalty and Confidentiality***

Lawyers have both a duty of loyalty to their clients and a duty to preserve the confidentiality of communications with that client about the matters involved in the representation. *See* Model Rules; Opinion 01-422. Although clients should assume that a lawyer will memorialize a communication in some way, a direct recording of client conversation without consent could pose other issues, including if the recording falls into the wrong hands and causes damage or embarrassment to the client. *See* Opinion 01-422.

Here, Briotti owes X a duty of loyalty and confidentiality regarding conversations about the matters in which she is acting as his lawyer. To overcome those duties, she must demonstrate that X is "reasonably certain" to commit a crime or fraud that causes harm to another person’s finances or property. Model Rules 1.6(b)(2) and (3). Briotti talked with X once about this issue and he suggested the idea of taking money from the trust account. When he suggested it, he may not have known whether it was legal or illegal. In response, Briotti explained clearly that taking the money from the trust was illegal. Although Briotti noted that X continued to return to this idea, when pressed by Briotti he remained silent. Because he did not respond that he would like to move forward with that plan regardless of its illegality or provide any indication that he was planning to ignore Briotti's advice, there is no reasonable basis for Briotti to conclude that X is "reasonably certain" to commit this crime.

ALTERNATIVELY:

Here, X has indicated to Briotti that he is contemplating illegally taking money from a

trust he administers to cover losses he accrued in his business as a financial adviser. X

has only two weeks to liquidate and pay his clients' accounts and pay them their

balance in cash (which he does not have enough of to cover). Without cash to payout

his clients, X will go out of business, and would suffer personal financial ruin. In his

conversations with Briotti, X indicated that the only place he could get cash is from

the trust he administers for a former client. These circumstances indicate that X is

reasonably likely to take illegal action and take money from the trust illegally, as

complying with the law will leave him ruined financially personally and will cause him

to go out of business.

1. ***Other Methods for Briotti to Memorialize Her Conversations with X***

There are still other means for Briotti to easily memorialize the conversation without violating the duty of loyalty and confidentiality and avoiding any appearance of impropriety. For example, Briotti could use her existing method of typing her handwritten notes following the conversation and adding them to the client file. If she does not think that is sufficient, she may take additional action such as drafting a memorandum, letter, or email that clearly outlines her concerns and reiterates the previously provided warning of illegality and send that document to X. This document would provide her cover from any future criminal actions by X, but also to possibly act as a "record" should X take action that makes it reasonably certain that he is going to commit a crime or fraud.

1. **If Briotti were to record the conversation must she inform X of the recording if he inquires?**

**OR**

**Briotti must inform X that she is recording if she asks.**

In Formal Opinion 01-422, the ABA stated that just because 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." This, in

turn, may also lead to a violation under Rule 8.4 of the Rules, as noted above, which prohibits conduct involving dishonesty and misrepresentation.

The Franklin Bar has adopted the Formal Opinion as having persuasive weight under state law, and so Briotti should likely not withhold the truth about recording the communication if she undertakes to do so and if X asks whether she is recording. Although the recording is not illegal under Franklin law and Briotti could argue that it was not unethical because it was reasonably necessary under the Rules, Briotti would violate the Rules if she falsely denied the recording of the call to X.

**III. Conclusion**

Briotti would not face criminal liability for recording the call with X because the recording

would occur in Franklin, not Olympia, and Franklin law allows for only one party to consent to the recording. Because Briotti would be the consenting party, she would not face

any criminal consequences for recording the call.

However, there is a strong ethical argument against recording the call non-consensually. Although the ABA does not treat these recordings as inherently deceitful, there is a presumption that lawyers should uphold the duty of loyalty and confidentiality to clients unless reasonably necessary based on the exclusions in the Model Rules, such as a client who is reasonably certain to commit a crime or fraud using the lawyer's advice to harm a third party financially. Here, Briotti would likely be unable to satisfy these requirements based on the limited conversation she had with X.

Finally, Briotti must disclose the recording to X if he asks about it; falsely denying the recording will almost certainly violate her ethical obligations.

Therefore, Briotti should seek to memorialize the conversation in an alternative way,

such as written notes or a written memorandum, letter, or email, instead of risking the

ethical violations and breaking her client's trust by recording the call.