

FILE

MULTISTATE PERFORMANCE TEST DIRECTIONS

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

Do not include your actual name anywhere in the work product required by the task memorandum.

This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

In re Nina Briotti

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MEMORANDUM

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

Nina Briotti, an attorney and sole practitioner, has asked our firm's advice concerning a matter in which she is involved. She is concerned that a client of hers might undertake an illegal and criminal action. She asks whether she may record a telephone conversation, without the client's knowledge or approval, in which she counsels the client against that course of action.

Briotti's client "X" (whom Briotti has not identified by name) is a financial adviser whom Briotti has counseled for several years as to various transactions. X has recently faced serious setbacks in investments made on behalf of his clients. In a recent telephone conversation with Briotti, X made comments that suggested that he might use funds from a trust fund he administers to cover the losses. Briotti intends to telephone X in the near future to counsel him that it would be illegal to use the trust fund for that purpose. She would like to record that telephone conversation without informing X that she is doing so.

She asks for our advice on the following three questions:

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

Please prepare an objective memorandum to me addressing these questions, stating your analysis and conclusions. Do not include a separate statement of facts, but be sure to integrate the facts into your analysis.

TRANSCRIPT OF MEETING WITH NINA BRIOTTI

Attorney Howard Zeller: Hi, Nina, great to see you again.

Nina Briotti: Likewise, Howard, thanks for seeing me. I need your advice.

Zeller: Please explain.

Briotti: I have a client—I'll just call him "X"—and my continuing representation of him poses a concern. He's a financial adviser (not an attorney), with some very rich clients, and he's one of those advisers who are prone to make risky investments on behalf of their clients in the hopes of a really big payday. In the past few months, he's told me that many of his investments on behalf of his clients have not been successful—he's lost a huge amount of his clients' money, and they know it. Now many of his clients are demanding that he liquidate their accounts and remit the balances to them in cash. He has only two weeks to pay them and sounded desperate. The problem, as he's explained it, is that so many of his clients have made that demand that, if he does as they have requested, because of the nature of the investments, he could not cover the losses, would be out of business, and would suffer personal financial ruin. In our last telephone conversation, he intimated that the only place he could get enough cash quickly would be from a trust fund he administers.

As I advised him, that would be illegal, would subject him to possible criminal charges, and could seriously damage the beneficiaries of the trust because they rely on regular income from it. He didn't respond. His silence caused me concern that there's at least a possibility that he might commit a crime. I'm going to call him in a few days, to be sure he understands that he can't invade the trust. Because I'm not sure he'll accept my advice, I'd like to record that telephone call. I want to be sure that I have evidence that I properly advised him if he ignores my advice. Obviously, I don't want him to know that I'm recording the phone call. If he asks whether I'm recording the conversation, must I tell him? I need your advice on all these points.

Zeller: I understand. Do you have notes of your conversation with him?

Briotti: Yes, I've typed up my handwritten notes, taking out any confidential information that would identify X. Here they are [typed notes attached to this transcript].

Zeller: Let me ask you a few questions. First, we have to determine if your recording of the phone conversation without his knowledge is legal. I know that your office is here in Franklin—is X located in this state as well?

Briotti: No, he's located in our neighboring state of Olympia. As you know, in addition to being an expert in financial matters, I'm a member of both the Franklin and Olympia bars, and I think that's one of the reasons he retained me.

Zeller: Then the first question we'll have to determine is whether Franklin and Olympia require the consent of one or both parties to a phone conversation for recording it to be lawful, and then we'll need to know which state's law governs a cross-border conversation.

Briotti: Whatever the state law is on the subject, I'm also concerned with whether I'm allowed to record the conversation under the Rules of Professional Conduct.

Zeller: Exactly—that's the next issue we'll have to analyze. Both Franklin and Olympia have adopted the American Bar Association's Model Rules as their own, so we'll look at that.

Briotti: If I can record the conversation, may I keep that a secret from X should he ask if I'm doing so?

Zeller: We'll look into that as well. Let me ask you this: How certain are you that he will invade the trust he administers to get the cash?

Briotti: I'm not really sure. He is desperate and might do so, but then again, he knows that it would be illegal and might not do it.

Zeller: So how do you come out on whether he will do it or not?

Briotti: I think it's possible.

Zeller: We'll get right on it, and I'll get back to you.

TYPED VERSION OF NINA BRIOTTI'S NOTES

July 18, 2022

[X] calls. Tells me he has real problems. Investments for clients have tanked, and most clients are demanding immediate liquidation of accounts and cash payments. He has only two weeks to make payments. He says his investors knew the investments were risky and yet they now blame him because the investments didn't work out.

If he liquidates all accounts requested, he will be out of business, lose everything including personal wealth (possibly bankrupt?).

Doesn't know what to do. He is desperate. The only source of cash that would keep him solvent is a trust account that he administers. The trust is money left by a former client, and it pays modest monthly payments to her heirs. He says he could easily keep up with those payments to the heirs. Once he has more cash, he could pay back the money to the trust before anyone knows about it.

I tell him that invading the trust would be illegal.

He repeats that he doesn't know what to do and keeps referring to the trust he administers.

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LIBRARY

FRANKLIN CRIMINAL CODE

§ 200 Interception and attempted interception of wire communication prohibited; exceptions.

- (1) Except as provided in this Section, it is unlawful for any person to intercept or attempt to intercept any wire communication unless
- (a) the interception or attempted interception is made with the prior consent of one of the parties to the communication; or
 - (b) [an emergency situation exists and it is impractical to get a court order; subsequent court ratification needed].

As used in this Section, interception of a wire communication includes the recording of that communication.

OLYMPIA CRIMINAL CODE

§ 500.4 Interception and attempted interception of wire communication prohibited; exceptions.

- (1) Except as provided in this Section, it is unlawful for any person to intercept or attempt to intercept any wire communication unless
- (a) the interception or attempted interception is made with the prior consent of all the parties to the communication; or
 - (b) [an emergency situation exists and it is impractical to get a court order; subsequent court ratification needed].

As used in this Section, interception of a wire communication includes the recording of that communication.

ABA MODEL RULES OF PROFESSIONAL CONDUCT

Rule 1.6: Confidentiality of Information

(a) 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 is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (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 against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; . . .

...

Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice; . . .

**ABA STANDING COMMITTEE ON
ETHICS AND PROFESSIONAL RESPONSIBILITY
[EXCERPTED, FOOTNOTES OMITTED]**

Formal Opinion 01-422, June 24, 2001

Electronic Recordings by Lawyers Without the Knowledge of All Participants

1. Introduction

In Formal Opinion 337 [adopted in 1974], this Committee stated that with a possible exception for conduct by law enforcement officials, a lawyer ethically may not record any conversation by electronic means without the prior knowledge of all parties to the conversation. The position taken in Opinion 337 has been criticized by a number of state and local ethics committees, and at least one commentator has questioned whether it survives adoption of the Model Rules of Professional Conduct. The Committee has reexamined the issue and now rejects the broad proscription stated in Opinion 337. We conclude that the mere act of secretly but lawfully recording a conversation is not inherently deceitful. . . .

2. Reasons for Abandonment of the General Prohibition Stated in Opinion 337

Formal Opinion 337 was decided under the [prior] Code of Professional Responsibility, which incorporated the principle that a lawyer "should avoid even the appearance of impropriety." That admonition was omitted as a basis for professional discipline nine years later in the ABA's adoption of the Model Rules of Professional Conduct. Opinion 337 further stated, however, that "conduct which involves dishonesty, fraud, deceit or misrepresentation in the view of the Committee clearly encompasses the making of recordings without the consent of all parties." The Model Code's prohibition against conduct involving deceit or misrepresentation was preserved in Model Rule 8.4(c), and thus we must consider whether that conclusion by the Committee in Opinion 337 is correct under the Model Rules. Reception by state and local bar committees of the principle embraced by Opinion 337 has been mixed. [Review of state responses omitted.]

Criticism of Opinion 337 has occurred in three areas. First, the belief that nonconsensual taping of conversations is inherently deceitful, embraced by this

Committee in 1974, is not universally accepted today. The overwhelming majority of states permit recording by consent of only one party to the conversation. Surreptitious recording of conversations is a widespread practice by law enforcement, private investigators, and journalists, and the courts universally accept evidence acquired by such techniques. Devices for the recording of telephone conversations on one's own phone are readily available and widely used. Thus, even though recording of a conversation without disclosure may to many people "offend a sense of honor and fair play," it is questionable whether anyone today justifiably relies on an expectation that a conversation is not being recorded by the other party, absent a special relationship with or conduct by that party inducing a belief that the conversation will not be recorded.

Second, there are circumstances in which requiring disclosure of the recording of a conversation may defeat a legitimate and even necessary activity. For that reason, even those authorities that have agreed with the basic proposition of Opinion 337 have tended to recognize numerous exceptions. [Listing of exceptions omitted.]

A degree of uncertainty is common in the application of rules of ethics, but an ethical prohibition that is qualified by so many varying exceptions and such frequent disagreement as to the viability of the rule as a basis for professional discipline is highly troubling. We think the proper approach to the question of legal but nonconsensual recordings by lawyers is not a general prohibition with certain exceptions, but a prohibition of the conduct only where it is accompanied by other circumstances that make it unethical. The third major criticism of Opinion 337 has been that whatever its basis under the Canons and the Model Code, it is not consistent with the approach of the Model Rules. The Model Rules do not contain the injunction of the Model Code that lawyers "should avoid even the appearance of impropriety." . . .

The Committee believes that to forbid obtaining of evidence by nonconsensual recordings that are lawful and consequently do not violate the legal rights of the person whose words are unknowingly recorded would be unfaithful to the Model Rules as adopted.

3. Nonconsensual Recording in Violation of State Law

Federal law permits recording of a conversation by consent of one party to the conversation. Some states, however, prohibit recordings without the consent of all

parties, usually with an exception for law enforcement activities and occasionally with other exceptions. Violation of such laws is a criminal offense, and may subject the lawyer to civil liability to persons whose conversations have been recorded secretly. A lawyer who records a conversation in the practice of law in violation of such a state statute likely has violated Model Rule 8.4(b) or 8.4(c) or both. . . . A lawyer contemplating nonconsensual recording of a conversation should, therefore, take care to ensure that he is informed of the relevant law of the jurisdiction in which the recording occurs.

4. False Denial that a Conversation Is Being Recorded

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.

5. Undisclosed Recording of Conversations with Clients

When a lawyer contemplates recording a conversation with a client without the client's knowledge, ethical considerations arise that are not present with respect to nonclients. Lawyers owe to clients, unlike third persons, a duty of loyalty that transcends the lawyer's convenience and interests. The duty of loyalty is in part expressed in the Model Rules requiring preservation of confidentiality and communication with a client about the matter involved in the representation. Whether the Model Rules that define and implement these duties permit a lawyer to record a client conversation without the client's knowledge is a question on which the members of this Committee are divided. The Committee is unanimous, however, in concluding that it is almost always advisable for a lawyer to inform a client that a conversation is being or may be recorded, before recording such a conversation.

Clients must assume, absent agreement to the contrary, that a lawyer will memorialize the client's communication in some fashion. But 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. If the recording were to fall into unfriendly hands, whether by inadvertent disclosure or by operation of

law, the damage or embarrassment to the client would likely be far greater than if the same thing were to happen to a lawyer's notes or memorandum of a client conversation.

Recordings of conversations may, of course, serve useful functions in the representation of a client. Electronic recording saves the lawyer the trouble of taking notes and ensures an accurate record of the instructions or information imparted by a client. These beneficial purposes may weigh in favor of recording conversations, but they do not require that the recording be done secretly.

The relationship of trust and confidence that clients need to have with their lawyers, and that is contemplated by the Model Rules, likely would be undermined by a client's discovery that, without his knowledge, confidential communications with his lawyer have been recorded by the lawyer. Thus, whether or not undisclosed recording of a client conversation is unethical, it 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 might arise if the client, by his own acts, has forfeited the right of loyalty or confidentiality. For example, there is no ethical obligation to keep confidential plans or threats by a client to commit a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm. Nor is there an ethical obligation to keep confidential information necessary to establish a defense by the lawyer to charges based upon conduct in which the client is involved. Those members of the Committee who believe that the Model Rules forbid a lawyer from recording client conversations without the client's knowledge nonetheless would recognize exceptions in circumstances such as these.

Excerpts from the FRANKLIN RULES OF PROFESSIONAL CONDUCT

Rule 8.4 [Franklin has adopted ABA Rule 8.4.]

**Franklin State Bar Committee on Ethics and Professional Responsibility
Commentary**

Franklin has adopted ABA Formal Opinion 01-422, and it is of persuasive weight under Franklin law, as are these comments. The ABA Committee noted that it might be permissible in exceptional circumstances to record a telephone conversation with a client without the client's knowledge, including a conversation in which a client discloses a plan to commit a serious crime.

However, it may be difficult to predict whether a future conversation will meet the requirements of such an exceptional circumstance. The key question is whether such a recording will violate the lawyer's duty of loyalty to the client. That duty governs both the lawyer's actual behavior and the results of that behavior—the dangers of inadvertent or intentional disclosure of the client's confidences. As the Formal Opinion notes, another important danger of such recording is the breach of confidentiality that might ensue absent those exceptional circumstances. See Model Rule 1.6. In deciding whether to undertake a recording of a conversation with a client without the client's knowledge, the 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 the client's previous statements, the client's circumstances, and alternative methods of memorializing the conversation when determining the need for recording the conversation without the client's knowledge. Hence, a lawyer who undertakes such recording of a client must be fully aware of these risks and must reasonably believe in the necessity of making such a recording.

We therefore echo the ABA Committee's conclusion that recording of a conversation with a client, but without the client's knowledge, is almost always inadvisable unless the lawyer reasonably believes it necessary. Without such necessity, a recording undermines the trust and truthful dealing that is a hallmark of the attorney-client relationship.

Shannon v. Spindrift, Inc.
Olympia District Court (2018)

Plaintiff Mark Shannon is a resident of Olympia, and claims that defendant Spindrift Inc., a corporation formed and operating in our neighboring state of Columbia, violated his rights by recording his telephone conversation with Spindrift's customer call center, located in Columbia, without informing him of the recording and without his consent. Shannon brought a civil action claiming that Spindrift's recording was unlawful and hence caused him damage. Spindrift, in turn, brought this motion to dismiss, arguing that, as a matter of law, the recording was lawful and hence Spindrift was not liable for any claimed damage resulting from the mere fact of the recording.

Therefore, the court is asked to decide whether the recording of the telephone conversation at issue was lawfully made.

Olympia is an "all-party consent" state, in that our statute prohibits the recording of a telephone conversation without the consent of all parties to the call. OLYMPIA CRIM. CODE (OCC) § 500.4. Columbia, on the other hand, is a "one-party consent" state, in that its statute requires only "prior consent of one of the parties to the communication" for its recording to be legal. COLUMBIA CRIM. CODE § 440.7. (Both statutes allow for civil and criminal actions to be brought if they are violated.)

Thus, the question posed is whether Olympia's statute applies to recording of a telephone conversation with a person in Olympia without that person's consent when the recording is made by a party who is located and uses recording equipment outside of Olympia.

Our courts have repeatedly concluded that, under our statute, "the recording of a telephone conversation constitutes an 'intercept' under OCC § 500.4(a), and thus that statute prohibits the recording of telephone conversations with the consent of only one party." See, e.g., *Wessel v. Sykes* (Olympia Sup. Ct. 2014).

The crux of Spindrift's argument is that OCC § 500.4 does not apply because the allegedly prohibited conduct—the interception of the telephone call—took place outside of Olympia. Shannon, on the other hand, argues that OCC § 500.4 applies because the statute contains no location-based limitations and Spindrift's actions caused harm in Olympia.

Here, *Parnell v. Brant*, a 2004 decision of the Olympia Supreme Court, is instructive. That case addressed whether a recording made in Columbia of a conversation with a person in Olympia, made without that person's consent, could be admitted as evidence in their criminal trial. The court held that "Olympia law allows the admission of evidence legally obtained in the jurisdiction seizing the evidence." The court noted that the interception "was lawful at its inception in Columbia, as Columbia requires only that one party consent in order to allow monitoring of the communication." Accordingly, our court concluded that, because the recording was permissible in Columbia, it was admissible as evidence in the Olympia criminal trial "even though the manner of interception would violate Olympia law had the interception taken place in Olympia."

While the central issue in *Parnell* concerned admissibility of evidence in a criminal case, rather than the viability of a civil action based on the act of recording itself (as is the case here), consistent with the court's analysis in *Parnell*, we hold that in civil or criminal actions, OCC § 500.4 does not apply when the act of interception takes place outside of Olympia. Instead, "interceptions and recordings occur where made." *Parnell*. Accordingly, on these facts, the recording of which plaintiff Shannon complains was lawfully made, and hence there is no basis for his civil action.

Motion to dismiss granted.