

*July 2022*  
*MPT-2 File*

*In re Nina Briotti*

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

**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.