

July 2022
MPT-2
Drafters' Point Sheet

In re Nina Briotti

The MPT point sheet addresses the factual and legal points encompassed within this MPT. It presents the expected issues that might be addressed by an examinee in a thorough answer to the problem, but it should not be construed as a model answer.

In re Nina Briotti
DRAFTERS' POINT SHEET

In this performance test, the examinee works for the law firm of Zeller & Weiss LLP. An attorney outside the firm (Nina Briotti) has asked for legal and ethical advice concerning criminal actions she fears a client (“Client X”) may take. Specifically, she asks if, under applicable state law and rules of professional conduct, she may record a telephone conversation with Client X without informing him that she is doing so. The examinee is asked to analyze the issues presented and address three questions posed by Briotti: (1) May she lawfully record her telephone conversation with Client X without informing X that she is doing so? (2) Would Briotti’s recording of a telephone conversation with Client X, without X’s consent or knowledge, violate the rules of professional conduct? (3) If Client X asks Briotti if she is recording the telephone conversation, must she answer truthfully?

The File contains the instructional memorandum from the supervising partner, a transcript of the partner’s meeting with Briotti, and a typed version of Briotti’s handwritten notes of her last telephone conversation with Client X. The Library contains (1) excerpts from the Franklin and Olympia criminal codes dealing with recording of telephone conversations; (2) excerpts from the American Bar Association’s Model Rules of Professional Conduct; (3) an opinion of the ABA Standing Committee on Ethics and Professional Responsibility dealing with recordings by lawyers without the knowledge of all participants; (4) a formal commentary of the Franklin State Bar Committee on Ethics and Professional Responsibility on the same topic (noting that Franklin has adopted the ABA Rules); and (5) a 2018 Olympia District Court case (*Shannon v. Spindrift, Inc.*) bearing on the legal issue posed by recording a telephone conversation with only one party’s consent, given that the state laws of Olympia and Columbia differ (Columbia’s law is identical to Franklin’s).

The following discussion covers all the points the drafters intended to raise in the problem.

I. FORMAT AND OVERVIEW

The examinee must, first, master the facts at issue; second, master the three state laws at issue regarding recording of telephone conversations, apply the holding in *Shannon*—which dealt with the intersection of Olympia and Columbia law—to Franklin, and determine if Briotti may lawfully record a telephone conversation with Client X without X’s consent or knowledge; and

third, master the Model Rules and commentary, and apply them to the facts at issue to determine whether Briotti can record a telephone conversation with Client X without violating the Model Rules, and whether she must tell him she is doing so if he inquires.

Examinees should conclude that (1) recording of a telephone conversation with Client X without X's consent or knowledge is legal under both Franklin and Olympia law; (2) there is a possibility that such recording of a telephone conversation with Client X may be permitted by the Model Rules, but there is a much greater likelihood that it is not permitted; and (3) should Client X ask if the telephone conversation is being recorded, Briotti must answer truthfully.

II. DISCUSSION

A. Facts

Briotti is an attorney outside of the examinee's firm who has worked with a partner of the firm in the past. She has a client, identified as "X," who is a financial adviser, and whom she has counseled for several years. Briotti had a recent telephone conversation with Client X in which he informed her that he faced serious setbacks in investments he had made on behalf of his clients. Many of his clients have now demanded that he liquidate their accounts and forward the cash to them. Because of the nature of the investments, he does not have sufficient cash on hand to do so, and will face financial ruin, both professional and personal, and possible bankruptcy if he has to meet their demands.

Client X told Briotti that he was contemplating invading the principal of a trust for which he is trustee to obtain the necessary cash. Briotti warned him that to do so would be illegal and criminal. He did not respond. (She memorialized the conversation in handwritten notes.) She thinks that "there's at least a possibility" he "might" invade the trust, but "then again . . . might not"—that is, she believes it is "possible," but she is not certain, that he will do so. She will call Client X within a few days to be sure he understands that he should not invade the trust. She wishes to record the conversation without his consent or knowledge.

Briotti is admitted to practice in both Franklin and Olympia. Her law office (where the recording would take place) is in Franklin; Client X is located in Olympia.

B. Analysis

Although no specific format is given for the examinees' work product, the instructional memorandum sets out the three specific questions on which Briotti seeks advice, and it is expected that examinees will use those questions to structure their analysis.

1. Legality of Recording Telephone Conversations under State Law

Franklin and Columbia are “one-party consent” states—their criminal codes allow for recording of a telephone conversation if only one party to the conversation consents to the recording. *See, e.g.*, Fr. Crim. Code § 200. Olympia, on the other hand, is an “all-party consent” state, in that its criminal code requires the consent of all the parties to the conversation if it is to be lawfully recorded. Olym. Crim. Code § 500.4. The question posed, then, is whether the recording in Franklin of a telephone conversation between a party in Franklin and another party in Olympia without the Olympia party's consent is legal under either state's law.

Shannon v. Spindrift, Inc. (Olympia Dist. Ct. 2018) provides the answer to that question. In *Shannon*, a telephone conversation between a party in Olympia and one in Columbia was recorded by the party in Columbia without the Olympia party's consent, and formed the basis of a civil suit in Olympia. Absent any other factors, recording in Olympia requires the consent of all parties. *Wessel v. Sykes* (cited in *Shannon*). To determine if other factors were at play, the Olympia District Court in *Shannon* looked to an earlier Olympia Supreme Court case, *Parnell v. Brant*, which determined whether a recording made in Columbia of a telephone conversation with a party in Olympia without the Olympia party's consent could be received as evidence in a criminal trial in an Olympia court. *Parnell* held that the law of the state where the recording was made governs, and so the recording made lawfully in Columbia could be received as evidence in Olympia, even though it would not have been lawfully made if it had been recorded in Olympia. *Shannon* applied that same logic to the question of civil liability and held that the recording made in Columbia by the defendant was lawfully made and so could not form the basis for civil liability in Olympia. Thus, under Olympia law, the law of the state where the recording of the conversation is made governs.

The examinee should therefore apply the same logic to the question of whether Briotti may lawfully record a telephone conversation between herself (in Franklin) and Client X (in Olympia)

without X's consent, and should conclude that she may lawfully do so under both states' laws: Franklin allows one-party consent, and an Olympia court would apply Franklin law.

2. Ethics of a Lawyer's Recording a Telephone Conversation with a Client without the Client's Knowledge

ABA Formal Opinion 01-422 states that a recording of a telephone conversation by a lawyer without the other party's consent is not an ethical violation, *as a general matter*. But it leaves open the question of whether such recording by a lawyer of a client—a different issue from a recording of a nonclient—is an ethical violation. The lawyer has duties of loyalty and of confidentiality to the client, and those duties might be compromised by recording the conversation without the client's knowledge. Model Rule 1.6(a). The ABA Committee is split on whether such recording of a client is ethical, but all would allow it where “exceptional circumstances” exist. According to the ABA Formal Opinion, such exceptional circumstances would include, *inter alia*, “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” (quoting Model Rule 1.6(b)(1)). That sort of criminal act is not involved here.

But the Franklin State Bar Committee's commentary defines those circumstances where a lawyer's duty of loyalty and confidentiality to the client is superseded by referencing Model Rule 1.6. That Rule allows the lawyer to reveal information if the lawyer “reasonably believes [it is] necessary” “to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services.” Model Rule 1.6(b)(2); *see also* Model Rule 1.6(b)(3). Such a situation *could* exist here.

Here, Briotti believes that Client X “might” undertake a criminal action that is reasonably certain to result in substantial financial injury (by invading the trust whose beneficiaries are dependent on its income) and that there is “at least a possibility” that he will do so. However, the ABA Formal Opinion (directly) and the Franklin commentary (by adopting the ABA Formal Opinion) both caution that (in the words of the Franklin commentary) “recording of a conversation with a client, but without the client's knowledge, is almost always inadvisable unless the lawyer reasonably believes it is necessary” to prevent a crime or fraud that is reasonably certain to result in injury. The Franklin commentary further notes that in deciding to make such a recording, the

lawyer must 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. Here, although Client X *speculated* on taking the illegal action that if taken would certainly result in injury, he did not commit to doing so. Hence the necessity to prevent a crime or fraud that must exist for the lawyer to ethically make the recording appears to be absent.

Thus, the examinee should advise that, although recording the conversation *might* fit an “exceptional circumstance” that would justify the recording, given that Briotti does not have a reasonable belief in the necessity for doing so—that is, a reasonable belief that Client X will indeed undertake the criminal action—Briotti’s recording of Client X would most likely not be within the bounds of ethical action.

3. Truthfully Answering Client’s Inquiry as to Recording

Briotti asks if, in the event she records her telephone conversation with Client X without his knowledge, she must tell him she is doing so if he asks. The ABA Formal Opinion is unequivocal on this point: the lawyer may not “state falsely that the conversation [with another person] is not being recorded.” As this ethical obligation applies to all third parties, it obviously applies to clients as well. Briotti must inform Client X of the recording if he asks.

C. Conclusion

The examinee’s conclusions should be as follows:

Briotti’s recording in Franklin of her telephone conversation with Client X in Olympia without his knowledge is lawful under both Franklin and Olympia law.

While there is a possibility that Briotti’s recording of a telephone conversation with Client X without his knowledge *might* be ethical under the ABA and Franklin Model Rules, it is far more likely that it is not.

Briotti must inform Client X that the conversation is being recorded if he asks.