

## Question MPT-2 – July 2022 – Selected Answer 1

### MEMORANDUM

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

#### I. Questions Presented

Our client, Ms. Nina Briotti, asked for our help with an issue with client. Specifically, she seeks to record a call with her client, X, without informing X that she is recording the call. This memorandum addresses the following questions:

1. Whether, under applicable state law, Ms. Briotti may lawfully record her telephone conversation with her client, X, without informing X that she is doing so.
2. Assuming Ms. Briotti can make such a recording lawfully, whether doing so without the client's knowledge would violate the Rules of Professional Conduct.
3. Assuming recording the call without X's knowledge is lawful and does not violate the Rules of Professional Conduct, whether Ms. Briotti must inform X that she is recording if he asks.

#### II. Short Answers

1. Franklin law will govern whether Ms. Briotti can record her phone call with X. Under Franklin law, Ms. Briotti can only record her phone call with X if there is an emergency situation justifying the recording without a court order. If there is such a situation, Ms. Briotti must still seek ratification from the court afterwards.
2. Assuming that Ms. Briotti can record the phone call without violating the Franklin Criminal Code, Ms. Briotti may only record the phone call without violating the Professional Rules of Conduct if there is an exceptional circumstance, like the commission of a crime or the necessity of establishing a defense, and may only do so based on factual and well-grounded reasoning, not speculation about what the client may or may not do. Ms. Briotti must also consider whether a different method of memorialization would meet her needs, making recording unnecessary.

3. Under the ABA's interpretation of the Model Rules, which the Franklin State Bar Committee has ratified, Ms. Briotti must answer X honestly if he asks during their phone call whether she is recording their phone call.

### III. Legal Analysis

#### A. Franklin Law Governs Whether Ms. Briotti Can Lawfully Record the Phone Call with X, and Under Franklin Law, She May Only Record the Call if There Is an Emergency Situation Justifying the Recording without a Court Order

Ms. Briotti needs to know whether she can lawfully record a conversation with her client, X, under the applicable state law. To make that determination, it is first important to determine which state's law will apply. Ms. Briotti's office is located in the state of Franklin, and her client, X, is located in the state of Olympia.

##### *1. Franklin Law Will Apply to the Recording of the Phone Call*

Many states have statutes governing the recording of phone calls, and those statutes vary, with some states requiring only one party to consent, while other states require both parties to consent to be recorded. When a phone call is recorded but the parties are not located in the same state, it is important to determine which state's recording statute applies. Under Olympia law, the Olympia statute governing the lawfulness of recording a phone call without consent does not apply when the act of recording takes place outside of Olympia. *Shannon v. Spindrift, Inc.* Instead, recordings are governed by the law of the state in which they occur. *Id.* Even if a recording would be unlawful and thus inadmissible if it were made in Olympia, it may be admissible in Olympia courts if the recording were lawfully made in the jurisdiction in which recording took place. *Id.*

Here, Ms. Briotti seeks to record a phone call with her client, X, who is located in Olympia. Ms. Briotti's office is located in Franklin, and she will likely record the phone call while in her Franklin office. Thus, because the act of recording the phone call with X will take place in Franklin, Franklin law will govern, regardless of any contrary statute in Olympia.

##### *2. Under Franklin Law, Ms. Briotti May Only Record the Phone Call if There Is an Emergency Situation Justifying Recording Without a Court Order and if She Seeks Subsequent Court Ratification*

The Franklin Criminal Code makes it unlawful to record any phone call without the other party's prior consent, unless an emergency situation exists and it is impractical to get a court order. Franklin Criminal Code § 200. In situations where an emergency

exists, the party who records must subsequently get court ratification of their action. *Id.*

Here, Ms. Briotti seeks to record a phone call with X without his knowledge or consent. Thus, Ms. Briotti cannot use the prior consent exception under the Franklin Criminal Code. The question then becomes whether the situation with X qualifies as an emergency that justifies recording without a court order.

Ms. Briotti may be able to argue that there is an emergency because X is imminently at risk for engaging in illegal action, and Ms. Briotti must protect herself from liability by recording the call to ensure that she has a record of herself advising X, her client, against taking unlawful action. Without the ability to defend herself, Ms. Briotti could face serious sanctions. If she waits for a court order prior to recording the conversation, it may be too late to avoid the harm to X's trust beneficiary clients. Given the high risk of bankruptcy that X faces and the time sensitive nature of the issue X has with his clients, Ms. Briotti could feasibly make this argument to the court when she seeks subsequent ratification. However, the court may expect that Ms. Briotti have gotten a court order before taking this action.

Whether Ms. Briotti can record her conversation with X without violating the Franklin Criminal Code depends on how exigent the situation is. If there is an emergency justifying the recording, she will have to seek subsequent ratification from the court.

### B. Recording Her Conversation with X Does Not Violate the Rules of Professional Conduct so Long as There Is an Exceptional Circumstance and the Facts Suggest that Recording Is Necessary

Even if Ms. Briotti may lawfully record her phone conversation with X under the Franklin Criminal Code, she must still abide by the Rules of Professional Conduct. Franklin has adopted the ABA's rule on recording conversations with clients.

#### *1. The ABA Only Allows Recording When There Is an Exceptional Circumstance to Justify Recording*

The ABA Rules of Professional Conduct generally prohibit lawyers from revealing information related to the representation of a client without the client's consent. ABA Model Rules of Professional Conduct Rule 1.6. There are, however, some exceptions. A lawyer may reveal such information to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests of another. *Id.* A lawyer may also reveal information relating the the representation of a client to establish a claim or defense on behalf of the lawyer to a criminal or civil charge based on conduct in which the client was involved. *Id.*

The ABA has further stated that recording a phone call with a client is not inherently deceitful. Formal Opinion 01-422. While a lawyer is generally expected to disclose if they are recording a conversation with a client, the ABA allows undisclosed recording in exceptional circumstances. *Id.* Exceptional circumstances can exist where a client plans or threatens to commit a criminal act the lawyer believes likely to result in death or substantial bodily harm. *Id.* Exceptional circumstances can also exist where the lawyer must disclose information to establish a defense to charge based on conduct in which the client is involved. *Id.*

*2. To Determine if an Exceptional Circumstance Exists, the Franklin State Bar Committee Requires Lawyers to Based Their Decision on Fact and Well-Founded Judgment and to Consider Alternative Methods of Memorializing*

The Franklin State Bar Committee has fully adopted the ABA's position on this issue and added a few comments of its own. Franklin Rules of Professional Conduct Rule 8.4. The Franklin State Bar Committee acknowledges that it can be difficult to know when an exceptional circumstance arises that might justify recording a conversation with a client. *Id.* The Franklin State Bar advises that in deciding whether to record a conversation without a client's knowledge, a lawyer should take care to act on facts and well-grounded judgment rather than speculation as to the client's intended actions. In making that determination, the lawyer should consider the client's previous statements, the client's circumstances, and alternative methods for memorializing the conversation.

*3. Ms. Briotti May Be Able to Claim an Exceptional Circumstance Under the Crime Exception to the General Rule Prohibiting Disclosure of Representational Information*

Here, Ms. Briotti may have an exceptional circumstance that would allow her to record her call with X. While X's potential action with the trust might not result in "imminent death or substantial bodily harm," the ABA states that an exceptional circumstance can arise in "circumstances such as these." Considering that the ABA Model Rules list crimes that result in "imminent death or substantial bodily harm" and crimes that results in "substantial injury to the financial interests of another" as acceptable reasons for breaching confidentiality, it is reasonable to argue that a client's contemplated crime that is reasonably likely to result in "substantial injury to the financial interests of another" is an exceptional circumstance justifying the recording of the phone call with X. ABA Model Rules of Professional Conduct Rule 1.6. X is contemplating taking funds from a trust that he oversees to pay off his other clients. This would directly harm the financial and property interests of the beneficiaries of the trust who are entitled to those payments.

*4. Ms. Briotti May Be Able to Claim an Exceptional Circumstance Under the Defense Exception to the General Rule Prohibiting Disclosure of Representational Information*

In the alternative, Ms. Briotti can also argue that even if she is not covered by the crimes exceptional circumstance, she is justified in recording her conversation with X because it is necessary to establish a defense by the lawyer to charges based on the client's conduct. Formal Opinion 01-422. If X does in fact take money from the trust he oversees to pay off his other clients, he could be guilty of a crime. The Rules of Professional Conduct state that it is misconduct for a lawyer to assist another in the commission of a crime. Rule 8.4. If Ms. Briotti cannot establish that she was not involved and advised her client against illegal conduct, then she will not be able to defend herself from these charges. Thus, she can arguably record under the exceptional circumstance that allows lawyers to record to establish a defense against charges arising from a client's conduct.

*5. X's Previous Conversations with Ms. Briotti and the Desperation of X's Situation Weigh in Favor of Recording the Phone Call Between Them*

The analysis, however, does not end there. Per the Franklin Rules of Professional Conduct, Ms. Briotti must make the determination about recording based on facts and well-grounded judgment, not mere speculation. Ms. Briotti seems uncertain about whether X is actually reasonably likely to unlawfully withdraw funds from the trust. She has some actions to go on: her prior conversations with X in which he repeatedly referred to the trust as a solution for his financial difficulties and the fact that he may face bankruptcy and professional ruin without a solution to his problems. These facts weigh in favor of recording, but Ms. Briotti should consider how certain she is about X's likely action before she records any phone call.

*6. The Availability of Alternative Methods of Memorialization, Like Typed Notes, Weighs Against Recording the Phone Call Between Ms. Briotti and X*

Finally, there is the issue of alternative methods of memorializing the conversation. Under the Franklin Rules of Professional Conduct, Ms. Briotti must consider if there are other ways to memorialize the conversation. Considering that Ms. Briotti has already memorialized conversations with X in a typed format like the set of notes she provided to us, there is a question of why that format will not suffice for her next conversation with X. Ms. Briotti will have to determine if a recording is truly the only format that will suffice. A court may agree if the court finds that Ms. Briotti needed a perfectly accurate record to establish her defense, but a court could also find that notes of the call would suffice as well.

## *7. Conclusion*

In conclusion, Ms. Briotti can record her conversation with X without violating the rules of professional conduct so long as doing so is necessary to prevent the commission of a crime reasonably certain to cause harm to the financial interests of another or to establish a defense for Ms. Briotti to charges arising out of X's conduct. To make that determination, Ms. Briotti should weigh her past conversations with X, X's situation, and alternative methods for memorializing the conversation before deciding if recording her phone call with X is truly necessary.

### C. Ms. Briotti Must Inform X that She Is Recording Their Conversation if X Asks

Finally, Ms. Briotti wants to know whether she must tell X she is recording the conversation if he asks whether she is recording. The ABA considered this precise question in its formal opinion on the issue of recording client phone calls. The Franklin State Bar adopted the ABA's opinion, which includes an opinion on the issue of false denial that a conversation is being recorded, in its entirety. Franklin Rules of Professional Conduct 8.4. In the ABA opinion, the ABA stated, "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." Formal Opinion 01-422. Thus, if X asks if Ms. Briotti is recording their phone call, she must answer him truthfully.

## **IV. Conclusion**

Ultimately, whether Ms. Briotti can lawfully record her conversation with X and avoid violating the Rules of Professional Conduct depend on whether an exceptional, emergency circumstance exists which justifies the recording. In making that determination, Ms. Briotti must use her judgment and apply facts and well-grounded judgments, not mere speculation. She must look to her past conversations with X and X's situation. She must also consider if an alternative method of documenting the conversation would be sufficient. Finally, if Ms. Briotti decides to record the phone call and X asks during the conversation if she is recording, Ms. Briotti must answer him honestly.

## **Question MPT-2 – July 2022 – Selected Answer 2**

## **MEMORANDUM**

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

**I. Briotti may lawfully record her telephone conversation with X without informing X she is doing so under applicable Franklin law.**

Briotti is an attorney whose office is located within the state of Franklin. Her client, X, resides in Olympia. The purported telephone conversation will take place "across the border," with Briotti calling X in Olympia from her office in Franklin.

Franklin and Olympia have differing laws regarding recording telephone conversations. Under the Franklin Criminal Code, an interception of a phone call (i.e. recording) is unlawful unless made with the prior consent *of one of the parties to the communication. Sec. 200, Franklin Criminal Code.* Thus, Briotti's prior consent to the interception (recording) of the conversation would suffice and the recording would not be illegal. However, under Olympia law, the interception of a phone call is unlawful unless the interception is made with the prior consent *of all of the parties to the communication. Sec. 500.4, Olympia Criminal Code.*

This raises the issue of which state's law applies when one party is located in Franklin and the other party is located in Columbia, as is the case here. In *Shannon v. Spindthrift*, a corporation operating in the state of Columbia recorded a conversation with the plaintiff located in Olympia, where such recording with his consent was unlawful. There, the Olympia District Court held that OCC Sec. 500.4 does not apply when the act of interception takes place outside of Olympia, but rather, "interceptions and recordings occur where made." *See also Parnell v. Brant.* The court made these finds in reliance on *Parnell v. Brant*, a decision of the Olympia Supreme Court that held that evidence of a conversation was admissible in a criminal trial because it was "lawful at its inception in Columbia, as Columbia requires only that one party consent in order to allow monitoring of the communication."

Here, as long as the recording of Briotti's telephone conversation takes place at Briotti's office in Franklin it will not be unlawful. Interceptions and recordings occur where made, *see Shannon*, and the recording would take place from Briotti's office in Franklin. Secondly, such a recording would be deemed lawful in Franklin, because prior consent of only one party to the conversation is required (i.e., Briotti's consent). Thus, because the interception will be lawful at its inception in Franklin, it will be considered lawful.

## **II. Briotto's recording of the telephone conversation without her client's knowledge will not violate the Rules of Professional Conduct but is likely inadvisable.**

Both Franklin and Olympia have adopted the ABA's Model Rules of Professional Conduct, so as long as Briotti's actions are consistent with the Model Rules, she will not violate her ethical obligations required by the state bar in either Franklin or Columbia where she is a member.

Although an ABA formal opinion (Formal Opinion 337) previously established that a lawyer may not ethically record any conversation by electronic means without the prior knowledge of all parties to the conversation, the ABA Standing Committee revoked its stance in Formal Opinion 01-422 and concluded that "the mere act of secretly but lawfully recording a conversation is not inherently deceitful." Rather, the opinion states that there is a prohibition of such conduct (i.e. recording without the consent of all parties) "only where it is accompanied by other circumstances that make it unethical." 01-422. Such a circumstance would be recording a conversation in violation of a state statute. As discussed in Section I, this is not the case here.

Moreover, the opinion holds that because lawyers owe clients a duty of loyalty, 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." The opinion further elaborates that such action is "inadvisable except in circumstances where the lawyer has no reason to believe that the client might object, *or where exception circumstances exist. Id. (emphasis added).* One exception circumstance that the opinion lists is where the client has forfeited his right to confidentiality in the context that the recording of confidential attorney-client information is necessary to establish a defense by the lawyer to charges based upon conduct in which the client is involved. *Id.* This is consistent with Model Rule 1.6(5) which authorizes an attorney revealing confidential information when the lawyer reasonably believes it is necessary to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved.

Here, Briotti seeks to record her conversation with client X to ensure that she has evidence that she properly advised him if he chooses to ignore her advice and to take part in illegal conduct. Consistent with Model Rule 1.6(5) and ABA Formal Opinion 01-422, it is neither unethical or inadvisable for Briotti to record such information to ensure that she has a defense should she be implicated in her client's potential criminal conduct.



However, it is also important to note the Franklin State Bar Committee's commentary on its adoption of Formal Opinion 01-422. The state of Franklin has adopted the opinion, but advises that "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 commentary lists that the lawyer should consider previous statements made by the client, the client's circumstances, and alternative methods of memorializing the conversation when determining the need to record the conversation without the client's knowledge. *Id.*

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.

Moreover, after Briotti informed him that such action would be illegal, he did not respond. This silence caused Briotti concern that "there is at least a possibility that he might commit a crime." X never made any statements that he was planning to or would certainly commit the crime. However, according to Briotti's notes, X "repeats that he doesn't know what to do and keeps referring to the trust he administers." Briotti indicated that "he is desperate and might do so, but then again, he knows that would be illegal and might not do it."

Furthermore, Briotti was able to memorialize her conversation with X via written notes, and would be able to do so again in her upcoming call with X. Taken together, these facts only indicate a speculation that X may commit a crime. Briotti admitted that she thinks it is possible, not certain that X will take from the trust. Furthermore, Briotti has an alternative method to memorialize the conversation through taking notes, which could be used to defend herself should there be any action against her for alleged involvement in X's crime.

Thus, although recording her conversation with X would not be unethical under the Model Rules as adopted by the state of Franklin, it is likely inadvisable considering it likely not reasonably necessary. Without Briotti's belief that it is reasonably necessary,

"a recording undermines the trust and truthful dealing that is a hallmark of the attorney-client relationship." *Franklin Commentary*.

### **III. Under the Rules of Professional Conduct, Briotti must inform X that she is recording the conversation if he asks.**

Model Rule 8.4(c) states that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Furthermore, in ABA Formal Opinion 01-422, the ABA Standing Committee explicitly stated "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.*" (*emphasis added*).

For a lawyer to falsely state to a client that she is not recording a conversation when she really is would be a clear violation of MR 8.4(c), as an untruthful statement of the kind would be dishonest and deceiving. The ABA Standing Committee has made clear that a lawyer cannot falsely state that the conversation is being recorded when it is. Thus, if Briotti chooses to record her phone conversation with X, she must disclose that she is if X asks her whether she is recording.

### **Question MPT-2 – July 2022 – Selected Answer 3**

TO: Howard Zeller  
FROM: Examinee  
DATE: July 26, 2022  
RE: Briotti request for advice

Hello Mr. Zeller,

Below please see my responses to the questions you asked. Thank you for your time!

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

**(A) Do Franklin or Olympia Law require the consent of a phone conversation for recording to be lawful?**

To begin, Franklin is a "one party consent" state and the statute only requires "prior consent of one of the parties to the communication for it's recording to be legal"

(Franklin Criminal Code (FCC) §200). In other words the statute states, "It is unlawful for any person to intercept or attempt to intercept any wire communication unless [...] (1) it was made with prior consent of *one of the parties* to the communication or (2) an emergency situation exists and it is impractical to get a court order but would need subsequent court ratification; interception of a wire communication includes recording of that communication (Franklin Criminal Code (FCC) §200)(emphasis added).

On the other hand, Olympia is an "all party consent" state, and the Olympia statute prohibits the recording of a telephone conversation without the consent of all parties to the call; civil or criminal actions may be brought if violated (OCC §500.4) (*Shannon v. Spindrift*). Put simply, "it is unlawful for any person to intercept or attempt to intercept any wire communication unless [...] it is made with prior consent *of all of the parties* or an emergency situation exists and it is impractical to get a court order but would need subsequent court ratification; interception of a wire communication includes recording of that communication" (Olympia Criminal Code (OCC) §500.4).

### **(B) Which state law's govern the cross border conversation?**

In the admissibility of evidence in a civil or criminal case, rather than the viability in a civil based on the recording itself, in a civil or criminal action OCC §500.4 does not apply when the act of interception takes place outside of Olympia; instead, interceptions and recordings occur where made (*Shannon v. Spindrift*). Although Shannon is an Olympia District Court case, it echoed the holding from *Parnell v. Brant* an Olympia Supreme Court case that held that Olympia Law allows the admission of evidence legally obtained in the jurisdiction seizing the evidence, and since evidence in that case was obtained in Columbia, they applied Columbia law (*Shannon v. Spindrift*).

In this case, Ms. Briotti's office is located in Franklin while Mr. X is located in the state of Olympia. Therefore, if she were to record him, presumably it would be from her office in Franklin. Like in Shannon, the recordings would be made in Franklin, therefore, it is likely that Franklin law would govern the the criminality of the recordings.

In conclusion, it appears Franklin law would govern the criminality of the recordings. Since Franklin is a "one party consent" state and the statute only requires "prior consent of one of the parties to the communication for it's recording to be legal" (Franklin Criminal Code (FCC) §200) then if Ms. Briotti consents to the recording (which she presumably does) her actions of record

**(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? Analyze ethical considerations.**

**The General Law**

In general a lawyer may not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is implicitly authorized in order to carry out the representation, or an exception like the one listed below applies (ABA Model Rules of Professional Conduct (MRPC) Rule 1.6, adopted by Franklin). However, a lawyer may reveal information relating to the representation of a client if the lawyer reasonably believes it is necessary to [...] prevent a client from committing 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, (2) 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 sued the lawyer's legal services, (3) to secure legal advice about the lawyer's compliance with these rules, or (4) to establish a defense to a criminal charge or civil claim against the lawyer based upon the conduct which the client was involved (ABA Model Rules of Professional Conduct (MRPC) Rule 1.6, adopted by Franklin).

However, it is professional misconduct for a lawyer to (1) violate the Rules or Professional Misconduct knowingly, assist, or induce, (2) commit a criminal act that reflects adversely on the lawyer's own honesty, trustworthiness, or fitness as a lawyer in other respects (ABA Model Rules of Professional Conduct, or (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation (MRPC) Rule 1.6).

**The Law Pertaining to Undisclosed Client Recordings**

To begin, it is clear that if a lawyer violates the law in a state that prohibits nondisclosed recordings, that is a violation of the law because it is a criminal and civil offense so the law of the relevant jurisdiction is critical (ABA Standing Committee formal Opinion 01-442). This is not the case here because we are presuming that state law permits such recordings.

Next, if the law is not violated, the mere act of secretly but lawfully recording a conversation is not inherently deceitful and does not violate the code of conduct where it is accompanied by certain circumstances (ABA Standing Committee formal Opinion 01-442). However, deciding whether the recording is proper or not requires

an evaluation of several factors; for example, the balance of factors such as the harm to the client if the tape were to end up in opposing hands, versus the useful function of ensuring the accuracy of the client's statement must be taken into consideration (ABA Standing Committee formal Opinion 01-442). Franklin which has adopted ABA rule 8.4 and Formal opinion 01-422 (Franklin Rules of Professional Conduct Rule 8.4), has stated that the key question is whether such a recording will violate the lawyer's ethical duty of loyalty to the client or the breach of confidentiality (Franklin Rules of Professional Conduct Rule commentary).

Further, whether or not to disclose a recording is unethical involves evaluating if (1) the client might object or (2) if exceptional circumstances exist such as if the client has plans or threats to commit a criminal act that the lawyer believes may result in imminent death or substantial bodily harm or the lawyer believes it is necessary to establish a defense by the lawyer to charges base don the conduct the client is involved in; these exceptions would be unanimously accepted (ABA Standing Committee formal Opinion 01-442). In other words, "when deciding whether to record the client's previous statements, the lawyer should take actions on a well-grounded judgment, rather than speculation as to the client's intended actions"; a lawyer must consider the client's previous statements, circumstances, and alternative methods of memorializing the conversation (Franklin Rules of Professional Conduct Rule commentary). But beware, "a lawyer who undertakes a recording must be fully aware of the risks and reasonably believe the necessity of making the recording" (Franklin Rules of Professional Conduct Rule commentary).

Those in favor of non consensual recordings state that voluntarily recording a conversation in a non consensual way is not inherently deceitful today; in fact, it is a widespread practice of law enforcement, private investigators, and journalists and the technology is widely available (ABA Standing Committee formal Opinion 01-442). Since the technology is widely available, although it may be offensive, it is questionable if anyone relies on an expectation that a conversation is not being recorded by another party absent a special relationship (ABA Standing Committee formal Opinion 01-442).Recording a conversation may be a legitimate and necessary activity (ABA Standing Committee formal Opinion 01-442).

Those opposed to non consensual recordings argue that a lawyer owes to clients a duty of loyalty that transcend the lawyer's convenience and interests which requires a preservation of the confidentiality and communication with a client about the matter involved in the representation; the committee is divided (ABA Standing Committee formal Opinion 01-442). Additionally, many argue that the client-attorney relationship would likely be undermined if the client discovered that the lawyer was taking a

recording (ABA Standing Committee formal Opinion 01-442). This is an important consideration in Franklin.

### **Advise for Ms. Briotti**

In this case, it is clear that if a lawyer violates Ms. Briotti has not violated the law in the state so the rules do not unequivocally forbid her from record the conversation. However, there are many other strong factors to consider such as (1) the certainty of the outcome of his deceit, (2) the client-lawyer confidentiality relationship, and (3) balancing her interests versus her clients interest for the recording.

To begin, Ms. Briotti states that Mr. X a financial advisor and has been her client for a few years, the clearly have an established confidential, client-attorney relationship. However, the current circumstances are that client is prone to making risky investments on behalf of their client and many of his recent investments haven't been successful and he has lost a lot of his money and they now know; he only has two weeks to pay them and sounds desperate and may be worried bout bankruptcy. Mr. X is fearful of financial ruin, possibly bankruptcy, and other consequences if he does not obtain money from the trust he administers. When informed of the illegality he was also silent. However, when asked about whether he will commit the Ms. Briotti states that she is not certain that he would invade the trust he administers to get cash, she is just concerned that he is desperate and might do so; she thinks "it is possible." Therefore, this does not appear to rise to the high level of an action "on a well-grounded judgment, rather than speculation as to the client's intended actions" mentioned in the Franklin Code, although there may be some concerning red flags in Mr. X's behavior.

Given the strength placed in the client-lawyer relationship in the Franklin Code this is a difficult burden to overcome. Ms. Briotti states that she wants to record the call as evidence that she informed him of the illegality if he ignores her advice, however, there may be other ways to demoralize this in the even that she has to prove this. Additionally, when balancing the factors, her client could suffer great reputational or criminal harm if the recording ended up "in the wrong hands." Further, since Ms. Briotti states that she is a member of both the Franklin and Olympia bar, she may have Olympia bar considerations to consider as well.

Finally, Ms. Briotti states that she doesn't want him to know she is recording the phone call and asks if she has to tell him, it is possible. Despite this, my recommendation would be that she first inform him that she may be recording any conversation because she can still support her claim that she has informed him of the illegality even if he is quiet on the recording and refuses to speak. This is supported by

the committee which states that it is unanimous that it is almost always advisable for a lawyer to inform a client that a conversation is begin or may be recorded before recording such conversation (ABA Standing Committee formal Opinion 01-442).

In conclusion, since in Franklin, the recording without a client's consent is almost always inadvisable because the hallmark of the attorney-client privilege should be preserved (Franklin Rules of Professional Conduct Rule commentary), I would not recommend recording the client without the client's permission due to do so.

**(3) Assuming 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?**

Finally, it is clear from the ABA standard, adopted by Franklin, that a lawyer may not falsely deny that the conversation is being recorded when asked (ABA Standing Committee formal Opinion 01-442). This likely derives from the statement that, "it is professional misconduct for a lawyer to (1) violate the Rules or Professional Misconduct knowingly, assist, or induct, (2) commit a criminal act that reflects adverse on the lawyer's own honesty, trust worthiness, or fitness as a lawyer in other respects (ABA Model Rules of Professional Conduct, or (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation (MRPC) Rule 1.6)."

Therefore, in the event that the client asks about whether he is being recorded, it is advisable that the client informs Mr. X of the fact that she is being recorded because she would be acting dishonestly if she denied that she was recording. This act of dishonesty, fraud, or deceit will almost certainly violate the Model Rules of Professional Misconduct, especially in Franklin.

In conclusion, my advice would be that our client should first inform Mr. X that she may be recording, but if she declines that option, she may legally record him in the state of Franklin provided that she is prepared to accept the consequences if the Franklin Bar finds that she violated her attorney-client relationship.

Thank you for your time!

Applicant