July 2022

New York State
Bar Examination

MEE Questions & MPT Summaries

MEE QUESTION 1

Four months ago, Victim was shot and seriously wounded in City. Defendant has been charged with attempted murder. The prosecution's theory is that Victim and Defendant were both members of a criminal street gang called "The Lions," which engages in drug dealing, robbery, and murder in City. The prosecutor alleges that the shooting was the result of a gang dispute.

Defendant has brought a pretrial motion objecting to the prosecutor's introducing the following anticipated evidence:

(A) Testimony by a City detective who will be offered as an expert in gang identification, gang organizational structure, and gang activities generally and as an expert on particular gangs in City. The detective is expected to testify as follows:

> I have been a detective on the police force for six years. Throughout that time, my primary assignment has been to investigate gangs and criminal activity in City. I have also worked closely with federal drug and firearm task forces as they relate to gangs. Prior to becoming a detective, I was a corrections officer in charge of the gang unit for City's jail for three years, and my duties included interviewing, investigating, and identifying gang members.
>
> Throughout my career, I have attended training sessions providing education and information on gang structure, membership, and activities. As I've gained experience and knowledge in this area, I've frequently been asked to lead such sessions. I would estimate that I've taught more than 75 such training sessions over the past three years.
>
> Street gangs generally engage in a wide variety of criminal activities. They usually have a clear leadership structure and strict codes of behavior. Absolute loyalty is required and is enforced through violent acts. Members of particular gangs can be identified by clothing, tattoos, language, paperwork, or associations.
> I am quite familiar with "The Lions." It is one of City's most violent and feared criminal gangs. Members of The Lions can be identified by tattoos depicting symbols unique to the gang.

(B) Testimony by a former leader of The Lions concerning a photograph of Defendant's tattooed arm. After the photograph is authenticated as a photograph of Defendant's arm, the witness is expected to testify in part as follows:

> I am certain that this is a Lions tattoo. I had a similar one removed. You'll notice that it has a shield containing the numbers for the police code for homicide, and Lions' members frequently include police codes in their tattoos to indicate crimes the gang has committed. The tattoo also has a shotgun and sword crossed as an "X," and a lion. Those are symbols frequently used by The Lions. This tattoo indicates to me, based on my experience, that Defendant is a member of The Lions gang.

(C) Testimony by Victim, who is expected to testify for the prosecution in part as follows:

> I got into an argument with a gang boss at a meeting of The Lions. I said I wouldn't participate in an attack that was planned on another gang because my cousin was in that gang. The boss looked at Defendant and nodded to him. Next thing I knew, after the meeting, Defendant pulled a gun on me and shot me. I'm sure he did it because of that argument.

The jurisdiction has adopted rules of evidence identical to the Federal Rules of Evidence. Defense counsel's motion raises the following objections to the evidence described above:

> 1. The detective's anticipated testimony about gang identification, organization, and activities is improper expert testimony.
>
> 2. The photograph of Defendant's tattoo and the former gang leader's anticipated testimony about it is inadmissible character evidence.
>
> 3. Victim's anticipated testimony that Defendant shot him because of a gang dispute is irrelevant.

How should the trial court rule on each objection? Explain. (Do not address constitutional issues.)

MEE QUESTION 2

Five years ago, Seller started a small winery that catered to a regional market. The winery became wildly successful. Two years ago, Seller decided to retire and sell the winery. Seller entered into negotiations with Buyer, who was interested in buying a winery. Seller was proud that the label for her red wines bore her picture so, during the negotiations, she told Buyer that she would not sell him the winery unless he agreed to continue using that label. Seller and Buyer orally agreed that if Seller sold the winery to Buyer, he would continue to use the label for as long as he sold red wines.

Buyer and Seller agreed that Buyer would buy the winery from Seller for a purchase price of $3 million plus a "fair share" of the profits generated by the winery during the first year after it was acquired by Buyer. While they did not agree on the precise share of the first-year profits that Buyer must pay to Seller, Buyer said that 20% would be fair, while Seller said that 25% would be fair.

Buyer and Seller entered into and signed a lengthy written agreement. It stated that, in exchange for the assets of the winery, Buyer would pay Seller $3 million at the closing and, 15 months later, a "fair share of the winery's profits" during Buyer's first year of ownership. It also stated that Seller was not permitted to own or operate a winery anywhere in the United States for 10 years after the closing, a term that Seller was happy to accede to because she intended to retire. The agreement did not include any provision about future use of the red wine label with Seller's picture and did not contain an "integration" or "merger" clause.

After Seller transferred ownership of the winery to Buyer, Buyer continued to sell red wines but discontinued using the label with Seller's picture. When Seller complained about this, reminding Buyer of his oral agreement to continue using the label, Buyer said, "The agreement we both signed doesn't say anything about the label."

Fifteen months after the closing, Buyer sent Seller $10,000, which was equal to 5% of the winery's profits during the first year of his ownership. Seller emailed Buyer, complaining about the low amount of the payment and reminding Buyer that they had both understood that a "fair share" of the first-year profits would be in the 20–25% range. In response, Buyer pointed out that the agreement that they had signed did not say that a "fair share" of the profits would be that high.

Fed up with Buyer, Seller came out of retirement and opened and began operating a winery in another state in the United States far from her original winery.

In litigation between the parties:

1. Is Seller's and Buyer's oral agreement that Buyer would use Seller's picture on red wine labels enforceable even though it was not included in the written agreement? Explain. (Do not discuss any potential statute of frauds issues.)

2. Could Seller introduce evidence of the negotiations about what would constitute a fair share of the winery's first-year profits to help explain the meaning of that term? Explain.

3. Assuming that Buyer is not in breach of any of his obligations under the purchase agreement, would Buyer prevail on a claim that Seller breached her obligations under the agreement by opening her new winery? Explain.

Assume for all questions that, in the jurisdiction whose law governs the dispute, the sale of an ongoing business is governed by the common law of contracts, not Article 2 of the Uniform Commercial Code.

MEE QUESTION 3

Brian, a home builder, and Danielle, a land developer, properly formed a corporation. The articles of incorporation state that the corporation's purpose is to pursue property development opportunities and any other lawful business. Brian owns 20% of the corporation's shares, and Danielle owns 80%. Under their shareholders' agreement, Brian and Danielle serve as directors on the corporation's three-member board of directors, and Danielle selects the third director.

Shortly after the corporation's formation, the corporation (following unanimous board approval) purchased a parcel of land for $5 million for the purpose of dividing it into residential lots and constructing a single-family home on each lot. The board also decided that (1) Brian would be responsible for the construction of all homes on the parcel, (2) Danielle would be responsible for securing the financing necessary to build the homes, and (3) the proceeds from home sales would be paid to the corporation. After setting a reasonable salary for Brian during the home-construction period, the board agreed to periodically consider whether to issue dividends.

The board unanimously authorized Danielle to hire Carol, a consultant, to negotiate financing agreements on behalf of the corporation with several banks. Danielle asked Carol to act on behalf of the corporation to obtain the loans, and Carol agreed to do so.

The first bank that Carol contacted declined to provide financing to the corporation but offered instead to buy the parcel for $6 million. Without discussing any of this with any of the corporation's directors, Carol signed a written agreement with the bank on behalf of the corporation to sell the parcel to the bank for $6 million.

The next day, Carol informed Danielle about the terms of the sale agreement with the bank. Danielle agreed with Carol that the deal was in the corporation's best interest and properly called a special meeting of the board to approve it.

At the special meeting three days later, Carol described to the board the terms of the agreement. Danielle and the third director voted to approve the land sale under the terms of the written agreement signed by Carol. Brian voted against approving the sale. Danielle and the third director then voted to distribute all the sale proceeds to Danielle as a "bonus payment." Brian, who would receive no payment from the sale, properly made a request to see all accounting records related to the purchase and sale of the parcel. But the board refused Brian's request, with Danielle and the third director voting against it.

The corporation was incorporated in a jurisdiction whose corporation statute is modeled on the Model Business Corporation Act (MBCA).

1. Is the corporation bound by the land-sale agreement with the bank signed by Carol? Explain.

2. Was the bonus payment made to Danielle, which was approved by a majority of the board of directors, proper? Explain.

3. Does Brian have sufficient grounds to seek the judicial dissolution of the corporation? Explain.

MEE QUESTION 4

Ten years ago, Arlene Doe, age 34, signed and dated a "Declaration of Trust," the pertinent part of which provided as follows:

> I, Arlene Doe, do hereby create the Arlene Doe Trust (AD Trust). I name myself sole Trustee of the trust. I reserve the right to all trust income during my lifetime. Upon my death, all trust assets shall be paid in equal shares to my three nieces Carla, Donna, and Edna. I declare that this trust applies to all assets listed in Schedule A, attached hereto.

In Schedule A, Arlene wrote, "I have not transferred any assets to this trust yet, but I will before I die."

The trust instrument had no provision regarding whether it was revocable or irrevocable.

Four years ago, Arlene bought bonds with her personal funds and revised Schedule A to list them as assets of the trust.

Two years ago, Arlene wrote across the face of the Declaration of Trust for the AD Trust, "This AD Trust is revoked" and "I'm taking back the assets."

One year ago, Arlene gave her friend a package containing a valuable necklace and the bonds. As she handed her friend the package, Arlene said, "This package contains a valuable necklace and bonds. I revoked the AD Trust because I decided that I want my niece Donna to have everything I own except what I'm giving to a worthy cause in my will. Hold this package as trustee for Donna. When Donna reaches age 18, sell the necklace and bonds, use the proceeds to pay for Donna's college education, and then give her what's left over when she reaches age 22." The friend said, "Okay."

Later, Arlene properly executed a will naming a bank as executor of her estate and as trustee of a perpetual trust created under her will. This testamentary trust directed that "all of my worldly goods not otherwise validly disposed of during my life, I leave in trust for the Political Party. I direct the trustee to pay all income from this trust, annually, to the Political Party and not to any other person." The Political Party's exclusive mission is to support candidates for public office who accept its political views.

Last month, Arlene died. At Arlene's death, she owned a bank account with a balance of $300,000. The bonds in the package given to Arlene's friend were worth $200,000, and

the necklace was worth $50,000. Arlene was survived by her younger brother Bob, her three nieces Carla, Donna, and Edna (the only children of Arlene's deceased sister), and her nephew Fred (the only child of Arlene's deceased older brother). Donna is 16 years old.

The jurisdiction in which Arlene died has adopted the Uniform Trust Code. It also applies the common law Rule Against Perpetuities. Another statute in this jurisdiction provides, "If a decedent died intestate without a surviving spouse, issue, or parent, the decedent's property is distributed to the issue of his or her parents *per stirpes*."

1. (a) Was the AD Trust validly created, and if so, when was it created? Explain.

   (b) Assuming that the AD Trust was validly created, was it effectively revoked? Explain.

2. Was the trust for the benefit of Donna valid? Explain.

3. Was the testamentary trust for the benefit of the Political Party valid? Explain.

4. Assuming that the testamentary trust to Political Party is invalid, to whom should the bank account be distributed? Explain.

MEE QUESTION 5

Developer LLC is a limited liability company organized in State A, with its principal place of business in State A. Its only two members are Amy, a domiciliary of State A, and Barbara, a domiciliary of State B. Amy is the managing member of Developer.

Developer entered into a written construction contract with Builder Co., a State B corporation with its principal place of business in State B. Builder agreed to build an office building for Developer on a vacant lot owned by Developer in State A. Lender Corp., a finance company, agreed to lend Developer up to $2 million to finance the construction project. Lender is incorporated in State A with its principal place of business in State A.

Lender disbursed $250,000 of the loan amount to Builder to cover the down payment on the construction contract. The loan agreement between Developer and Lender provided that any funds disbursed by Lender under the loan agreement would be added to Developer's loan balance and repaid, with interest, over a five-year period.

As construction of the office building proceeded, Lender made disbursements to Builder pursuant to the loan agreement between Lender and Developer. But when Builder finished construction of the office building, Lender refused to make the final $100,000 disbursement to Builder even though Developer had occupied the building and had begun leasing space to tenants. Lender told Developer that it was refusing to authorize the final disbursement because Builder's construction was "substandard." Developer also has not made final payment to Builder.

Builder has sued Lender in federal district court in State A, invoking the court's diversity jurisdiction. Builder's complaint alleges that Lender's withholding of the final payment of $100,000 violated the loan agreement with Developer. Builder claims to be a third-party beneficiary of Lender's promise to Developer, entitled to payment of $100,000 from Lender.

Lender has moved to dismiss the action on the ground that Developer is a required party to the action and has not been joined as a defendant.

1. Is Developer a person "required to be joined if feasible" to the *Builder v. Lender* action under Federal Rule of Civil Procedure 19(a)? Explain.

2. Would joinder of Developer deprive the court of subject-matter jurisdiction? Explain.

3. Assuming that Developer cannot be joined, how should the court rule on the motion to dismiss? Explain.

MEE QUESTION 6

In 2015, Oscar validly conveyed an apartment building that he owned

> to my grandson Frank and his heirs so long as at least four apartments in the apartment building are rented to families with incomes below the state median income for a family of their size. If at any time fewer than four apartments are being rented to below-median-income families, the apartment building automatically reverts to Oscar.

In 2017, Oscar died owning the family home. His valid will included the following provisions:

> 1. I give my family home to my new wife, Wanda, for life, and upon her death to my daughter, Adele, and her heirs.
>
> 2. I give the entire residue of my estate to my wife, Wanda.

In 2020, Adele died. Pursuant to her valid will, Adele left her entire estate to Frank.

Before her death, Adele had regularly paid the property taxes on the family home because she believed that Wanda could not afford them. After Adele died, Frank told Wanda that he would not pay the property taxes because "they are your responsibility, Wanda."

Wanda accurately asserts that she cannot afford to pay the $6,000 annual property tax out of her limited income. Frank accurately observes, however, that if Wanda moved out of the home and rented it to another, she could generate at least $1,500 per month in rental income, more than enough to pay the property tax.

Until February 1, 2021, Frank had leased four apartments in the building to below-median-income families. On that date he validly and lawfully terminated the leases of all tenants in the building to begin his plan to convert all the apartments in the building to luxury apartments. As a result, beginning February 1, 2021, no apartments in the building were being rented to below-median-income families.

On February 7, 2021, Wanda learned what had happened and immediately told Frank, "I now own the building."

The jurisdiction has adopted the Uniform Statutory Rule Against Perpetuities.

1. As between Wanda and Frank, who is obligated to pay the property taxes on the family home? Explain.

2. Upon conveying the apartment building to Frank, what if any interest did Oscar have in the apartment building, and was that interest valid? Explain.

3. Upon Oscar's death, what if any interest does Wanda have in the apartment building, and is that interest valid? Explain.

4. After February 1, 2021, who owns the apartment building? Explain.

MPT 1 – *In re Marriages of Walter Hixon* In this performance test, the client, Walter Hixon, seeks legal advice regarding his recent discovery that his first wife, whom he had not divorced, was still living when he married a second time. Hixon wants to annul the second marriage and to resolve claims to certain real property acquired during that second marriage. The examinee's task is to prepare an objective memorandum addressing whether Columbia or Franklin law governs the grounds for annulling the second marriage, the process for obtaining an annulment, whether a Franklin court would have jurisdiction to annul the marriage and to dispose of the parties' property, and where Hixon should file an action given that the couple's real property is located in Columbia. The File contains the task memorandum, a transcript of the client interview, and an investigator's memorandum. The Library contains an excerpt from Walker's Treatise on Domestic Relations, selected Columbia and Franklin statutes dealing with void and voidable marriages, sections of the Restatement (Second) of Conflict of Laws, and two Franklin appellate cases.

MPT 2 – *In re Nina Briotti* This performance test requires the examinee to draft an objective memorandum that the supervising partner can use to advise attorney Nina Briotti, a sole practitioner, on the legal and ethical issues presented by her concern that one of her clients might commit a criminal act. Briotti fears that her client, a financial adviser, might invade a trust that he administers in order to cover investment losses in other accounts that he manages. As Briotti intends to telephone her client and counsel him that such a use of trust funds would be illegal, she wants to know whether recording the telephone call would be legal and ethical under applicable state law and the rules of professional conduct, as well as whether she must inform him that she is recording the call. The File contains the instructional memorandum from the supervising partner, a transcript of the client interview, and Briotti's notes of her last telephone conversation with her client. The Library contains excerpts from the Franklin and Olympia criminal codes dealing with recording of telephone conversations, excerpts from the American Bar Association's Model Rules of Professional Conduct, an opinion of the ABA Standing Committee on Ethics and Professional Responsibility, commentary of the Franklin State Bar Ethics Committee on Franklin Rule of Professional Conduct 8.4 (which is identical to the ABA Model Rule), and an Olympia District Court case addressing the legality of recording a telephone conversation with only one party's consent.

July 2022

New York State
Bar Examination

Sample Essay Answers

July 2022 NEW YORK STATE BAR EXAMINATION

SAMPLE ESSAY ANSWERS

The following are sample candidate answers that received scores superior to the average scale score awarded for the relevant essay. They have been reprinted without change, except for minor editing. These essays should not be viewed as "model" answers, and they do not, in all respects, accurately reflect New York State law and/or its application to the facts. These answers are intended to demonstrate the general length and quality of responses that earned above average scores on the indicated administration of the bar examination. These answers are not intended to be used as a means of learning the law tested on the examination, and their use for such a purpose is strongly discouraged.

ANSWER TO MEE 1

1. Detective's Anticipated Testimony About Gang Identification, Organization, and Activities Is Admissible

Evidence is generally admissible if it is relevant, and if it is not barred by any one of the Federal Rules. Evidence is relevant if it tends to make any fact of consequence more or less probable. Here the prosecutor's theory of the case is that the shooting was the result of a gang dispute. Testimony as to gang identification, structure, and activities is relevant because it has a tendency to make the prosecutor's theory of the case more probable (e.g., whether the Lions are a gang).

Expert testimony is one form of evidence. To determine whether expert testimony is admissible, the expert must go through a Daubert motion. An expert can testify if they use reliable methodology, that is testable, based on personal experience, the methodology is approved in the scientific community.

Here the police officer has significant experience with gangs. He was a detective on the police force for six years where he investigated gangs. He worked closely with federal officers related to gangs. He was also a corrections officer in charge of the gang unit. In addition, he has attended training sessions providing education and information on gang structure, and he has taught more than 75 training sessions. He has personal knowledge of the gang because of his experience working as a detective. Explaining how gangs operate is likely helpful to the jury. But it is not clear that the detective used reliable methodology to conclude that the Lions are in fact a gang. The evidence is based on the detective's personal interaction with the Lions.

The evidence is likely proper expert testimony.

2. Photograph of Defendant's Tattoo and the Former Gang Leader's Anticipated Testimony About It Is Admissible

As discussed above, this evidence is relevant because it has a tendency to establish that Defendant was a member of the Lions gang.

Generally, character evidence is not permitted to show that a person has a character trait and therefore he acted in propensity with that character trait and must be guilty of a crime. However, character evidence can be admissible for another purpose. For example, character evidence is admissible to prove motive, intent, lack of mistake, and identity. In a criminal case, the defendant can introduce character evidence about himself in the form of reputation or opinion. However, the defendant is not the party introducing the character evidence, the prosecution is. Evidence should be excluded under Rule 403 if its probative value is substantially outweighed by its prejudicial effect.

Here, the photo of the tattoo and the proposed testimony that based on his tattoo the defendant is a member of the lions gang is not inadmissible character evidence. The evidence is not being admitted to show that the defendant is mean, aggressive, or violent. Rather, it is to identify the defendant as a member of a group. This is permissible because the prosecution must demonstrate that the defendant is in the gang based on its theory of the case. The defendant may argue that there is a significant risk that the evidence will cause the jury to think he is a dangerous man based on his gang membership, and that therefore he committed this crime. To determine whether the evidence is admissible, the court must do a 403 analysis and consider whether the probative value of the picture and testimony- demonstrating that defendant is a member of the lions - is substantially outweighed by its prejudicial effect - that the jury will convict the defendant based on his propensity for violence. Here the probative value is not substantially outweighed by the risk of unfair prejudice, and the testimony and picture should be admitted.

3. Victim's Anticipated Testimony that Defendant Shot Him Because of a Gang Dispute Is Relevant

Evidence is generally admissible if it is relevant, and if it is not barred by any one of the Federal Rules. Relevance is a low bar, and the rule generally favors admissibility. Evidence is relevant if it tends to make any fact of consequence more or less probable. Here the victim's testimony is relevant. To prove attempted murder, the prosecution must demonstrate that the defendant intended to kill the victim. The victim's testimony that he had a fight with the boss, the boss nodded at the defendant, and the defendant shot the victim, tends to show that the defendant had a motive to kill the victim, because his boss told him based on an internal fight.

Therefore, the evidence is not irrelevant.

ANSWER TO MEE 1

I. EXPERT TESTIMONY

The issue is how the trial court should rule on the objection to the detective's anticipated testimony about gang identification, organization, and activities as improper expert testimony.

Expert testimony is admissible so long as the expert testifies about a scientific, medical, technical, or other subject for which expertise is required and to which the expert has

sufficient knowledge, the data the expert uses is reliable, the method the expert uses is reliable, and the application of the methods to the data is reliable.

The detective has a long history of dealing with and researching gangs, specifically in City. The detective worked as a detective for six years investigating gangs, he worked with a federal task force on matters related to drugs and firearms as they relate to gangs, and has taught seventy five training sessions on gang structure, membership, and activities over the past three years. Therefore, the detective has sufficient expertise to qualify as an expert with regards to his testimony about gang identification, organization, and activities. The data he is relying on is not entirely general to gangs or even general to gangs in City, but includes specific knowledge about the Lions. For example, the detective notes the Lions are one of "City's most violent and feared criminal gangs." Based on detective's background and expertise, it is likely a court will find this "data" reliable. Similarly, the method and application of the detective's knowledge about how gangs operate to the Lions will likely be found reliable based on the detective's experience with the Lions and gang structure and operation.

Therefore, the court will overrule the objection to the detective's anticipated testimony about gang identification, organization, and activities as improper expert testimony.

II. CHARACTER EVIDENCE

The issue is how the trial court should rule on the objection to the introduction of the photograph of the Defendant's tattoo and the former gang leader's anticipated testimony about it as inadmissible character evidence.

Character evidence, which includes reputation in the community, opinion of the witness, and specific acts, is generally inadmissible. However, it may be offered in certain circumstances. If proven legally relevant (the probative value of the evidence is not substantially outweighed by the danger of prejudice, confusing or misleading the jury, being unnecessarily cumulative, causing undue delay or wasting time), it may be introduced to show, among other things, motive, interest, lack of mistake, or identification. Since the objection is not based on grounds of failure to authenticate or failure to be proper lay testimony, I will not discuss these potential issues.

The tattoo's probative value is that it increases the likelihood the Defendant is a member of the gang in which the dispute is alleged to have occurred. This is a fact of consequence because if it is not true, the prosecution's theory of the attempted murder fails, and if it is true, it increases the likelihood the attempted murder took place. The danger of unfair prejudice is present because a jury might decide the gang member should be convicted regardless of the crime simply because he is a part of a dangerous gang. However, the probative value is high because the prosecution's case rests on the Defendant's membership, and the probative value is not substantially outweighed because the victim

and witness are or were members of the same gang. No other factors weigh against the probative value is a material way. Additionally, the tattoo is being used for purposes of identification, which is an exception to the rule limiting the introduction of character evidence.

Therefore, the court should overrule the objection to the introduction of the photograph of the Defendant's tattoo and the former gang leader's anticipated testimony about it as inadmissible character evidence.

III. LOGICAL AND LEGAL RELEVANCE

The issue is how the trial court should rule on the objection to the victim's anticipated testimony that Defendant shot him because of a gang dispute as irrelevant.

Relevance must be logical and legal. Logical relevance requires that the evidence affects the probative value of a fact of consequence. Legal relevance is the 403 balancing test; it requires that the probative value is not substantially outweighed by the danger of prejudice, confusing or misleading the jury, being unnecessarily cumulative, causing undue delay or wasting time.

The probative value of the victim's testimony is high because is explains why the victim was shot by the Defendant. That is, the Defendant disagreed with a gang boss's decision to attack another gang, so he was punished for it. There is no indication that the danger of unfair prejudice would be materially implicated through this testimony. As discussed earlier, all the parties were in the gang, so gang membership is not highly prejudicial. Additionally, there is no indication this testimony would cause delay, would be confusing to a jury or mislead a jury, or be unreasonably cumulative.

Therefore, the court should overrule the objection to the victim's anticipated testimony that Defendant shot him because of a gang dispute as irrelevant.

ANSWER TO MEE 2

Enforceability of the Oral Agreement to Use Seller's Picture

The oral agreement that Buyer would use Seller's picture on red wine labels is likely enforceable. The issues are whether the agreement is integrated, and whether evidence of the oral agreement can be admitted to enforce the agreement.

Parol evidence is evidence of agreements or negotiations before the contract was signed. It is generally inadmissible to contradict the terms of a final, integrated agreement. It can come in, however, to add additional terms to a partially integrated agreement. A fully integrated agreement is one that the parties intended to be a final and conclusive contract, often evidenced by an "integration" or "merger" clause. A partially integrated agreement, by contrast, is one which omits some provision that the parties would have intended to include had they considered it.

Here, the agreement signed by Buyer and Seller was "lengthy" and written, evidence that it was intended to be exhaustive and final. However, it did not contain an integration or merger clause. It also did not include any provision about future use of the red wine label. However, there is evidence that Seller and Buyer intended for the oral agreement to be a part of their contract. Seller told Buyer she wouldn't sell him the winery unless he agreed to continue using that label. Buyer orally agreed to the condition. Therefore, the agreement is likely only partially integrated. Because the oral agreement would add an additional term to the contract, not contradict existing terms, it is admissible and enforceable.

Admissibility of Evidence of the Negotiations

Seller likely can introduce evidence of the negotiations to help explain the meaning of "fair share." The issue is whether it constitutes admissible parol evidence.

Parol evidence is generally inadmissible to contradict the terms of a final, integrated agreement. It is admissible, however, to interpret ambiguous terms, even in an integrated agreement. A term is ambiguous when it is reasonably susceptible to more than one meaning.

Here, "fair share" is ambiguous. There is no way to ascertain the amount owed under the contract by those terms. Therefore, parol evidence should be admitted to interpret the terms. The negotiations between Buyer and Seller are good evidence of the meaning of "fair share." Buyer said that 20% would be fair, and Seller said that 25% would be fair. This would indicate that the meaning of fair share is, at least, much higher than the 5% of profits that Buyer paid to seller. Therefore, such evidence can be introduced by seller to explain the meaning of "fair share."

Opening the Winery as *a Breach*

Buyer likely will not prevail on a claim that Seller breached her obligations by opening her new winery. The issue is whether the non-compete clause is enforceable.

Generally, disobeying an express provision in a contract constitutes a breach. However, not all provisions create enforceable obligations. A noncompete clause will be upheld as

valid if it is reasonable in geographic scope and time. Reaching the entire country is probably not a reasonable geographic scope. A time limit of more than a year or two is probably not a reasonable time limit.

Here, the noncompete clause stated that Seller was not permitted to own or operate a winery anywhere in the United States for 10 years after the closing. This represents a vast geographic scope and an unreasonably long time, and a court would likely find it unenforceable as against public policy. Furthermore, Seller opened her winery in another state far from her original winery, so it is unlikely that her business would be in competition with Buyer's. That Seller was happy to accede to the clause does not mean it is enforceable. A finding of unconscionability can override the intentions of the contracting parties. Therefore, Buyer likely would not prevail on a claim that Seller is in breach.

ANSWER TO MEE 2

1. Oral agreement regarding the use of Seller's picture

At issue is whether the parol evidence rule precludes Seller from enforcing the oral agreement reached with Buyer regarding the continued use of Seller's picture on red wine labels.

In principle, when there is a signed written agreement between the parties, the parol evidence rule precludes a party from relying on prior written agreements and on prior and contemporaneous oral agreements between the parties. However, the applicability of the parol evidence rule depends on whether a specific written agreement is fully integrated or partially integrated. A fully integrated written agreement is presumed to contain the entire agreement between the parties so that the inclusion of additional terms through extrinsic evidence, such as prior written agreements or prior and contemporaneous oral agreements, is forbidden. By contrast, if the written agreement is only partially integrated, the parties are generally allowed to introduce extrinsic evidence of additional terms that do not contradict the terms of the written agreement. Whether an agreement is considered as fully or partially integrated depends on the circumstances and on the terms of the agreement. Of particular relevant are (i) the length and exhaustiveness of the written agreement and (ii) the existence of an "integration" or "merger" clause.

In the present case, Buyer and Seller entered into a lengthy written agreement. The fact that the agreement was lengthy speaks in favor of finding the agreement to be fully integrated. However, the parties did not include any "integration" or "merger" clause in

their written agreement, which tends to show that the agreement was only partially integrated.

Based on the above-mentioned facts, it is difficult to reach a definitive conclusion as to whether the parties' written agreement must be considered as partially or fully integrated. That said, it cannot be disputed that the written agreement does not include any provision about future use of the red wine label with Seller's picture. Therefore, the term that Seller attempts to introduce by extrinsic evidence of the parties' oral agreement, i.e., the continued use of Seller's picture on red wine labels, is an additional term that does not contradict the written agreement.

In conclusion, if a court were to find the written agreement to be partially integrated based on the above-mentioned facts, the additional term evidenced by the parties' oral agreement regarding the use of Seller's picture would be admissible under the parol evidence rule as an additional term consistent with the terms contained in the written agreement. By contrast, if a court were to find that the above-mentioned circumstances demonstrate that the written agreement is fully integrated, the additional term regarding the use of Seller's picture would be inadmissible.

2. Evidence of the negotiations about what would constitute a fair share of the winery's first-year profits

While the parol evidence rule prohibits the inclusion of additional terms not contained in a written agreement in certain circumstances (as discussed in Section 1), the parol evidence rule generally does not apply when it comes to interpreting the meaning of ambiguous or unclear terms.

Here, and unlike the use of Seller's picture, Seller does not attempt to introduce additional terms to the written agreement signed by the parties. Rather, Seller attempts to introduce evidence of the parties' negotiations to interpret the terms "fair share of the winery's first-year profits". In this regard, there can be little doubt that the term "fair share" creates a certain ambiguity as to the specific amount of the winery's first-year profits due by Buyer to Seller. Indeed, the term "fair" does not have a clear and common meaning, but rather gives a certain discretion when it comes to determining what is fair. As a result, Seller should be allowed to bring relevant extrinsic evidence resulting from the parties' negotiations in order to demonstrate that the parties understood the term "fair share" as meaning somewhere between 20% and 25% of the profits.

In conclusion, Seller should be allowed to bring in evidence of the parties' negotiations to interpret the meaning of "fair share" as understood by the parties at the time of contracting and execution.

3. Enforceability of the non-compete clause

In principle, a non-compete clause is enforceable provided that it is reasonable as to its duration, as well as geographic and subject matter scope.

In the present case, the non-compete clause should be found to be unreasonable both as to its duration and as to its scope.

First, with regard to the geographical scope, the non-compete clause prohibits Seller from owning or operating a winery anywhere in the United States. Given that the winery appears to cater mainly the regional market, it seems unreasonable to restrict Seller's ability to compete throughout the entire United States. Indeed, a reasonable non-compete clause would have been limited to a specific state or a specific region (such as the West Coast or the East Coast).

Second, the non-compete clause is also unreasonable as to its duration. Indeed, the non-compete clause prohibits Seller from owning or operating a winery for 10 years. A 10-year period constitutes an unreasonably long period of time, even if Seller initially intended to retire. A period of a few years, i.e., around 2-3 years, might have been reasonable.

In conclusion, the non-compete clause is unreasonable as to its duration and geographic scope so that it should not be enforced.

ANSWER TO MEE 3

1. The corporation is bound by the land sale agreement because it properly ratified the sale.

a. *Carol did not have actual or apparent authority to conduct the sale.*

An agent of a corporation may conduct business on its behalf and bind the corporation to contracts entered into so long as the agent possesses either actual or apparent authority. Actual authority can be either explicit or implied. Explicit authority exists where the corporation has authorized the agent to carry out a particular task. Implied authority exists where an agent's duties or functions would ordinarily and naturally include the action undertaken as part of such duties or functions. Apparent authority is created when a principal manifests an agent's authority to a third party, who then relies upon it, or when

an agent's title or position is generally understood to encompass the kind of action the agent has attempted.

Here, Carol lacks explicit authority because she was authorized to enter into a financing agreement, not to sell the parcel. Carol lacks implied authority because the selling of the parcel was not a natural part of her duties as a consultant authorized to enter into financing agreements with banks. Finally, Carol lacks apparent authority because the facts do not indicate that the corporation represented to the bank that Carol was empowered to sell the land, and her position as a consultant could not reasonably be construed to imply authority to sell corporate land. As a result, Carol initially lacked the power to bind the corporation to the land sale.

b. The board properly ratified the sale after the fact.

Even where an agent initially lacks authority to bind a principal to a contract, the principal may nonetheless be bound by the contract if it later ratifies the agent's actions. Ratification of a corporate action conducted in the ordinary course of business requires the approval of a majority of the board of directors at a meeting where a quorum is present.

Here, two out of three directors ratified the land sale agreement at a meeting where all directors were present. Sale of the land likely constituted action in the ordinary course of business, as the purchase and sale of land is likely an ordinary part of the corporation's stated purpose of "pursuing property development opportunities." As a result, the land sale was properly ratified by the corporation, and Carol's actions as agent for the corporation became binding.

2. The bonus payment was improper as a breach of the duty of loyalty.

Generally, corporations have discretion to declare dividend payments so long as such payments are approved by the majority of the board of directors. However, directors have a duty to avoid self-dealing and, in a closely held corporation, to protect the interests of minority shareholders. The duty to avoid self-dealing may be breached when a disproportionate dividend (or salary bonus) is declared in disproportionate favor of one or more directors over the other shareholders. Such an action may nonetheless be approved by a majority of disinterested directors, or by a majority of disinterested shareholders. Failing that, a court may still uphold the self-dealing if it is found to be fundamentally fair.

Further, a director may breach their special duty to minority shareholders when declaring a dividend in a closely-held corporation that disproportionately favors the majority shareholders over the minority shareholders.

Here it is unclear whether the distribution to Danielle was a dividend or a bonus payment, but the analysis is the same in either case. The distribution to Danielle is clearly a breach of the duty of loyalty and self-dealing. Neither a majority of disinterested directors (Brian and the 3rd director voted 1-1) nor a majority of disinterested shareholders (Brian holds the only disinterested shares, at 20% of the whole) voted to ratify the transaction. Finally, the transaction is clearly not fundamentally fair. As a result, it is a breach of the duty of loyalty and self-dealing.

Last, the transaction clearly discriminates against Brian as a minority shareholder if the payment took the form of a dividend. Since the corporation is closely held (held by only two people), Danielle owed a special duty to ensure that Brian is not unduly discriminated against. This includes the duty to fairly and proportionately distribute dividends to minority shareholders. In this case, Danielle received $6 million and Brian received nothing. Thus, this duty was clearly breached.

3. Brian may seek the judicial dissolution of the corporation due to the egregious breach of the duty of loyalty perpetrated by Danielle.

A corporation may be judicially dissolved when its purpose is satisfied, when its duration expires, when directors have become incurably deadlocked, in order to avoid waste, or when the directors have breached their fiduciary duties and no other remedy is available or practicable.

Here, Danielle (and probably also the third director) have breached their duty of loyalty by distributing most or all of the corporation's assets to the majority shareholder. Further, the corporation denied Brian access to see accounting records related to the sale and purchase of the parcel, which he is entitled to as both a director and a shareholder. Since Danielle owns 80% of the stock in the corporation, she is empowered to elect herself at every board election, and so cannot be practicably removed from the directorship. As a result, Brian has sufficient grounds to seek judicial dissolution of the corporation.

ANSWER TO MEE 3

1(a). The issue is whether Carol had actual authority or apparent authority to bind the corporation to the land sale contract.

An agent, i.e. a person who acts for the benefit of a principal, another legal person such as a corporation and is controlled by the other person, binds the principal to a contract when the agent acts with authority. Authority may be actual or apparent. Actual authority

arises when the agent reasonably believes that the principal authorized the contract. It can be express, i.e. when through the principal's words or conduct, the principal explicitly instructed the agent to enter into the contract, or implied, i.e. the principal's other conduct made it reasonable for the agent to believe that the contract was authorized, such as when it is reasonably necessary to achieve a task for which the agent has explicit authorization. Apparent authority arises when the third-party reasonably believes, based on the principal's manifestations to the third-party, that the agent had authorization.

Here, Carol was an agent of the corporation because she was explicitly hired by the corporation to negotiate on behalf of the corporation, and both parties agreed. Carol was tasked to negotiate financing agreements on behalf of the corporation to obtain loans in order to build homes on the parcel of land. However, she ultimately sold the parcel of land. Carol lacked actual explicit authority to do this, because at no point did anybody at the corporation authorize her to sell the parcel of land. She lacked actual implied authority, because no reasonable agent would believe that selling the parcel of land was a necessary step towards obtaining financing to build homes on that parcel of land. She lacked apparent authority, because there is no evidence that the corporation had made any manifestations to the bank that would lead the bank to reasonably believe that Carol had the authority to sell the corporation's land to it.

Therefore, Carol lacked authority to sell the land.

1(b). The issue is whether the corporation ratified the land-sale contract.

While a principal is not bound by a contract the agent enters into without authority, a principal may become bound to the contract by ratification. Ratification occurs when 1) the principal accepts the benefits of the contract 2) with capacity 3) with knowledge of the material provisions of the contract and 4) ratifies the entirety of the contract. A corporation may enter into a contract by approving it with the board of directors, which generally requires a majority vote of the directors.

Here, Carol lacked authority to sell the land. However, Danielle and the third director subsequently voted to approve the land sale under the terms of the written agreement signed by Carol. Although Brian dissented, a majority of the board voted in favor of accepting the contract, and so the board of directors voted in favor and bound the company to the contract. Before the vote, Carol described the board the terms of the agreement, so the board understood the material provisions of the contract. The board agreed to the entirety of the land sale contract. Therefore, the corporation is bound by the land-sale agreement with the bank signed by Carol through ratification.

2. The issue is whether the bonus payment made by Danielle a violation of Danielle's duty of loyalty and the Danielle's and the third director's duty of care.

A board member owes the corporation a duty of loyalty, which prohibits self-dealing. Self-dealing includes approving a transaction that the director knows or should reasonably know that they stand to directly benefit from at the cost of the corporation, and which would reasonably affect their ability to act on the best interests of the company. One example of a self-dealing transaction is a direct payment to the director or an entity that the director is a shareholder of. A director that violates the duty of loyalty may be protected from liability if they can show that there is a safe harbor: 1) the director fully disclosed all material information to the other directors and a majority of the disinterested directors approved the transaction, 2) the director fully disclosed all material information to the shareholders and a majority of the disinterested shareholders approved the transaction, or 3) the transaction was fair and reasonable. Additionally, all board members owe the company a duty of care, which requires that the board member act as a reasonably prudent person in the same situation would and in good faith make decisions for the benefit of the corporation. The business judgment rule, which presumes that a board member's decision complies with the duty of care, can be rebutted by a showing a conflict of interest and gross negligence in investigating and considering a decision.

Here, the transaction in question is a direct payment of all the sale proceeds of the land - $6 million directly to Danielle as "a bonus payment" with nothing in return. This violated Danielle's duty of loyalty, because she stood to directly benefit from the transaction by being personally enriched by $6 million at the cost of the company's losing the same amount. Additionally, there were no safe harbors, because the majority of disinterested directors did not approve of the transaction; even if the third director was disinterested, which is debatable because they were personally selected by Danielle, Brian did not approve. Brian is the only disinterested shareholder, and he did not approve. The transaction was not fair and reasonable, because the company did not receive anything in return. Therefore, the bonus payment was a violation of Danielle's duty of loyalty and thus improper.

Additionally, Danielle and the third director likely violated their duty of care to the corporation. The business judgment rule is easily rebutted here, because as discussed, Danielle had a clear conflict of interest, and the third director acted with gross negligence in approving a transaction that gave away $6 million with absolutely nothing in return to the company, especially given the lack of evidence that the third director investigated the consequences and justifications for such a payment. No reasonably prudent director would ever approve such a windfall. Therefore, Danielle and the third director likely violated the duty of care and the bonus payment was thus improper.

3. The issue is whether Brian has sufficient grounds to seek the judicial dissolution of the corporation.

A shareholder has grounds to seek the judicial dissolution of the corporation when the corporation has become no longer a legitimate business that is benefiting the shareholders, but rather has instead been used by a majority shareholder to personally enrich one shareholder at the cost of the others. This may arise especially in cases of extreme violations of the duties owed to the shareholders that the corporation no longer has an interest in benefiting the shareholders at large and continuously violates the other shareholders' rights, including the right to inspection of accounting records. Another factor that courts might consider is whether the corporation has wholly abandoned its purpose stated in the articles of incorporation and is engaged in illegal activity.

Here, it is clear that based on their two votes, Danielle and the third director are interested only in enriching Danielle and not looking out for the interests of the other shareholder, Brian. By making a one-time payment of $6 million to Danielle with no benefit to the company at large, the board certainly violated its duties to the company and the shareholders. The board has also refused Brian the right to inspect the accounting records, which as a shareholder he has a right to. Additionally, the corporation seems to have abandoned its stated purpose in the corporation's articles of incorporation to pursue property development opportunities and other lawful business; the sale of the land and distribution of proceeds to Danielle indicates an abandonment of the mission to develop property, and was likely unlawful. Therefore, Brian likely has sufficient grounds to seek the judicial dissolution of the corporation.

ANSWER TO MEE 4

(1) (a) Was the AD Trust validly created and if so, when was it created?

A valid trust requires (1) a settlor with present intent to create a trust, (2) an identifiable beneficiary, (3) trust corpus and (4) a trustee (if an inter vivos trust). An inter vivos trust is a trust made during the lifetime of the settlor, the creator of the trust. An inter vivos trust is not created until funded with the trust corpus. Here, the settlor, Arlene Doe, attempted to create a trust, naming her as trustee, her as a beneficiary, and her nieces also as beneficiaries.

The first issue is whether the trust for the benefit of Donna, who was settlor, trustee, and a beneficiary, is valid. A valid trust requires complete split of legal title and equitable title. A complete split of legal and equitable title does not occur if the sole trustee is the

sole beneficiary, because then there is essentially no split of title -the legal and equitable title are in the hands of the same person. However, if there is an additional beneficiary or an additional trustee (ex. co-trustee), then this is sufficient to split the title. Here, Donna is the settlor and trustee and beneficiary during her lifetime. However, she names additional beneficiaries for when she dies. Because Donna is not the SOLE beneficiary and SOLE trustee, there is proper split of legal title and the trust for the benefit of Donna is valid.

The next issue is whether the settlor had present intent to create the trust. Although based on the express writing it seems like Arlene intended to create the trust at present, she did not intend to fund it until later, so this was not valid "present intent" to create the trust. The trust could not have been created until it was funded.

The trust was only funded when Arlene designated on Schedule A that the bonds were part of the trust. If a trust is funded at a later date, the settlor needs to demonstrate present intent to create the trust then also. Here, Arlene probably had sufficient present intent to create the trust when funding it because she listed the assets on a document attached the trust. Therefore, the trust was created 4 years ago when Arlene funded it.

(b) Assuming that the AD Trust was validly created, was it effectively revoked?

The issue is whether an inter vivos trust may be revoked. Under the traditional rule, trusts were presumed irrevocable. Under the UTC, trusts are presumed revocable unless expressly provided otherwise. Here, the trust does not expressly provide otherwise- there is no indication that the settlor wanted it to be irrevocable. This is especially so because she was the only trustee and beneficiary during her lifetime.

If a trust is revocable, it may be revoked at any time by the settlor by physical act or express writing as long as it shows intent to revoke. Here, Donna wrote across the instrument "this AD Trust is revoked" and "I'm taking back the assets" This is likely sufficient to evidence her intend to revoke the trust.

(2) Was the trust for the benefit of Donna valid?

The issue is whether the trust for the benefit of Donna was valid. A valid trust requires (1) a settlor with present intent to create a trust, (2) an identifiable beneficiary, (3) trust corpus and (4) a trustee (if an inter vivos trust). Here, the settlor has present intent to create the trust ("hold this package as trustee for Donna"). The trust has an identifiable bene - Donna and corpus- the necklace and bonds. Lastly, the trust has an identifiable trustee - friend ("hold this package as trustee for Donna"). In order for the conveyance of legal title to the trustee to be valid, the trustee must accept it. Here, the trustee said "ok" which will likely suffice. Thus, al the trust requirements have been met. Writing is not required.

(3) Was the testamentary trust for the benefit of the Political Party valid?

The issue is whether a trust to a political party is a proper charitable trust. A charitable trust must have a charitable purpose. The typical charitable purposes include alleviation of poverty, education, etc. A charitable trust can never benefit any names individual person. However, it is still valid if the trust benefits a person who is not named but ascertainable from the language of the trust (ex. all of the students who pass the NY bar exam in 2022). A charitable trust cannot be against public policy, such as being used for discriminatory purposes. Here, this trust is not of the traditional charitable type because it is political. A court would likely find that there is no charitable intent here -the purpose is not to benefit others, but rather to promote a political interest.

The next issue is whether the RAP applies to this trust. If the trust is found to be a valid charitable trust, then RAP does not apply because RAP does not invalid charitable trusts. If, however, a court determines that this trust is not charitable, then RAP would invalidate it. RAP generally applies to trusts and invalidates interests that may fail to vest within 21 years of a life in being at the time of the creation of the interest. Here, the trust is perpetual, this its interests are not sure to vest within 21 years of a life in being at the time of the creation of the interest - the trust could go on and on forever which is exactly the type of dead hand control that RAP seeks to invalidate. Here, provided that the trust is not a charitable trust, RAP would invalidate it.

(4) Assuming that the testamentary trust to Political Party was invalid, to whom should the *bank account* by distributed?

Assuming the trust is invalid, the bank should distribute the trust funds to Arlene's next of kin. The statute given says that if a decedent dies intestate (without a will) without a surviving spouse, issue, or parent, the decedent's property is distributed to the issue of his or her parents per stirpes. Here, Arlene's brother is the issue of her parents, as well as her deceased sister and older brother. Under per stirpes, the property is divided at the child level. Thus, the 300,000 is divided into 100,000 per sibling (living or dead). Then each child takes their parents share if the parent is deceased. Thus, the brother would receive his 100,000 because he's still alive. C, D, and E will receive 33,333 each (1/3 each of their mom's 100,000 share) and F will receive his dad's whole 100,000 share.

ANSWER TO MEE 4

1a) The issue here is whether Arlene created a valid private trust and when the trust was created.

A trust will be valid so long as the settlor has legal capacity (age, and of sound mind), testamentary intent, a signed writing, separation of legal and equitable title (no merger), reasonably ascertainable beneficiaries, a trustee (for an inter vivos trust, a trustee can be appointed for a testamentary trust if the settlor fails to do so), and trust res. A trust can be funded with res later, but the creation of the trust will not take place until it is funded.

Here, the trust was validly created four years ago when Arlene bought the bonds and listed them as assets of the trust. It was not created at the time she made the writing because there was no trust res at that time. However, it appears that the other requirements for a valid private trust have been met. Arlene signed the writing. Arlene was the settlor, trustee for her lifetime, and the income beneficiary; however, she was not the sole beneficiary. There was no merger between legal and equitable title because she was just one of the beneficiaries under the trust document; her nieces were remainder beneficiaries as well. She was not the sole trustee and sole beneficiary so no merger problems arose. Moreover, the beneficiaries are reasonably ascertainable (her, as income beneficiary, and her three nieces, as remainder beneficiaries). She seemed to have testamentary intent and capacity as well -- she knew the natural objects of her bounty, she understood the effect of her disposition, and she knew of her assets.

Ultimately, Arlene created a valid private trust as soon as she funded it with trust property.

1b) The issue is whether her writing on the face of the trust document effectively revoked the trust.

Under the Uniform Trust Code (UTC), a trust is presumed to be revocable unless otherwise indicated by the settlor. The revocation principles that apply to wills will apply to trust documents as well under the UTC. Revocation can be accomplished by subsequent express revocation, subsequent inconsistent writing (partial if only partially inconsistent), or physical act (e.g. writing/obliteration/canceling/tearing). Writing does not need to touch the words of the document to act as physical revocation.

Here, the jurisdiction applies the law found in the UTC. The UTC presumption for revocability will apply to Arlene's trust--making it revocable as she did not expressly state in the document or intend for it to be irrevocable. Moreover, Arlene effectively revoked the trust document by writing across the face of the AD Trust. Though the written words need not touch the document, the words did in this case offering further evidence of Arlene's intent to revoke the document.

2) The issue is whether an oral trust can be created under the UTC.

An oral trust is allowed under some circumstances within the UTC for personal property. The requirements for a valid private trust outlined in 1a remain the same other than the signed writing.

Here, the oral trust indicated that Arlene had capacity (she knew the natural objects of her bounty, she understood the effect of her disposition, and she knew of her assets) and intent to create the trust for the benefit of Donna. Donna was a reasonably ascertainable beneficiary. Arlene delivered the trust res of the necklace and the bonds to the trustee, her friend. The trust had separation of legal and equitable title as the friend was trustee and Donna was the beneficiary. The trust created appeared as a support trust for Donna's educational benefit when Donna turns 18. Upon age 22, the friend trustee can distribute the remainder of the trust res after the sale of the necklace and bonds and after the coverage of Donna's tuition. The friend accepted her role as trustee. Mere precatory words were not used either, Arlene clearly stated that the trustee should hold the property in trust for Donna.

Ultimately, the oral trust was validly created.

3) The issue is whether the trust to the benefit of the Political Party was a valid charitable trust.

Under the UTC, a charitable trust can be formed with different requirements than a private trust. Firstly, charitable trusts can be perpetual and not violate the rule against perpetuities. Secondly, the charitable trust cannot have definite beneficiaries. A charitable trust can go to specific charity, but the end user beneficiaries of the charitable trust should not be specifically identifiable. A charitable trust must have a valid purpose that is not against public policy. It must be created for the purpose of further an educational, civic, or other philanthropic goal. A political party as a whole cannot serve as the beneficiary of a charitable trust under the UTC. However, the UTC will apply the doctrine of cy pres if the grantor is found to have a general charitable intent. A general charitable intent is presumed under the UTC and cy pres application is mandatory.

Here, the perpetual nature of the trust was okay and did not violate the rule against perpetuities because it was an attempt to create a charitable trust. While this trust did not have issues with specific beneficiaries, the Political Party was not a valid beneficiary for a charitable trust under the UTC as it was not for a valid educational, civic or philanthropic goal as a political organization. Political party's only mission was to support public office candidates.

Ultimately, the charitable trust failed due to the Political Party serving as the beneficiary.

4) The issue is whether the court would apply the cy pres doctrine or whether the property from the failed charitable trust would flow through intestacy.

A political party as a whole cannot serve as the beneficiary of a charitable trust under the UTC. However, the UTC will apply the doctrine of cy pres if the grantor is found to have a general charitable intent. A general charitable intent is presumed under the UTC and cy pres application is mandatory if there is general charitable intent.

Here, there is an argument that there is no general charitable intent from the testamentary trust to the Political Party because it is not a charity of any kind but rather a political organization. If a general charitable intent cannot be inferred from the trust, a resulting trust will be formed in favor of the settlor and the settlor's heirs. Here, the bank account of 300,000 would flow to the resulting trust created for Arlene and her heirs. As she has already passed, the resulting trust would likely be distributed on a per stirpes (vertical equality favoring as compared to per capita by generation distribution that achieves horizontal equality for takers) basis to Bob (1/3 of the account, 100,000), her three nieces (each taking 1/9 to make up the deceased sister's 1/3 share), and to Fred (1/3- taking the full amount of her older brother's share through the per stirpes model).

ANSWER TO MEE 5

Whether Developer is a person "required to be joined if feasible" under Federal Rule of Civil Procedure 19(a)

The issue presented is whether Developer is a required party to the action who has not been joined as a defendant. The general rule is that whether a party is a required party under Rule 19(a) hinges on whether the party has a stake in the dispute, whether the party has an interest that they must defend and thus need to be party to the action, and whether failing to join the party would risk leading to inconsistent judgments in future litigation. Here, Builder sued Lender for the final payment of $100,000; this payment arises out of Lender's agreement with Developer under which Lender agreed to lend Developer financing for the construction project, and the loan agreement between Developer and Lender provided that any funds disbursed by Lender would be added to Developer's loan balance; further, the loan agreement between Lender and Developer provided that Lender's disbursements would be made directly to Builder; and lastly, Lender refused to make the final payment to Builder (though Developer now occupies and has begun leasing); Builder sue Lender claiming to be a third-party beneficiary of Lender's promise to developer; the key analysis here then is whether Developer is a required party under these set of facts. Here, Developer certainly has a stake in the

dispute. Developer has a contract with both Builder and Lender. If Lender winds up liable to Builder, Lender might seek payment from Builder. Similarly, if Lender wins, Builder might in turn seek payment from Developer. Because Developer has contracts with both Lender and Builder, if the actions between them are pursued separately, there is a real risk of inconsistent results. Moreover, if this case proceeds without Developer, there is a risk that Developer would be found liable for the payment although Developer is not a party to the suit. Thus, Developer is required to be joined if feasible under Rule 19(a).

Would joinder of Developer deprive the court of subject-matter jurisdiction

The issue presented here is whether Developer destroys subject matter jurisdiction. Here, it is stated that Builder invoked diversity jurisdiction in the suit against lender. Federal courts are not courts of general jurisdiction. Subject matter jurisdiction is required for a federal court to hear a case. Subject matter jurisdiction may be either federal question jurisdiction or diversity jurisdiction. Diversity jurisdiction requires complete diversity--that every plaintiff is a citizen of a different state than every defendant, and that the amount in controversy exceeds $75,000. Currently, there is complete diversity between Builder and Lender. A corporation is a citizen of every place where it is incorporated and the location of its principal place of business. Builder is incorporated in State B and has its principal place of business in State B, so it is a state B citizen. Lender is incorporated in State A and has its principal place of business in State A.

Thus, Lender is a state A citizen. Developer is a limited liability company. An LLC is treated like a partnership--it is considered a citizen of everywhere where its members are citizens because it is not incorporated anywhere. Here, its members are from State A and State B, and it has its principal place of business in State A. Developer is a citizen of State A and State B. Thus, if Developer were joined as a defendant, there would be a plaintiff, Builder, who is a state B citizen, and a defendant, Developer, who is a state B citizen. This deprives the court of subject matter jurisdiction because it destroys complete diversity. Supplemental jurisdiction can be invoked in the absence of diversity jurisdiction where the two claims arise out of a common nucleus of operative fact, but that is not applicable here, as supplemental jurisdiction cannot be used where it destroys subject matter jurisdiction.

How should the court rule on the motion to dismiss

The issue here is what happens when there is a required party who cannot be joined because joining them will destroy the court's subject matter jurisdiction. The general rule is that when there is a required party who must be joined under Rule 19, but that party cannot be joined because of subject matter jurisdiction issues, the court should dismiss the case. Here, that is what has occurred. While developer is a required party, joining

Developer would destroy subject matter jurisdiction. The court should grant the motion to dismiss, without prejudice, and the case may be refiled in state court.

ANSWER TO MEE 5

1. Is developer a person required to be added to the action?

Developer is likely to be a necessary party under the Federal Rules of Civil Procedure and therefore a person who must be joined if they can.

Under the FRCP, a necessary party is one who, unless they are joined, (i) relief in the case will be incomplete, (ii) their interests will be prejudiced if they are not joined or (iii) it opens up the parties in the case to subsequent potential claims or the possibility of inconsistent results.

Here, the Building Co is suing the Lender on a loan agreement between the Lender and the Developer. Were the court to find for the Builder and direct the Lender to pay $1OOk to the Builder under the loan agreement, relief would likely be incomplete because Developer is the party to the loan agreement and, as such, they have rights to relief under the loan agreement for its breach. This makes it likely that a court would consider relief to be incomplete without joinder of the Developer. In addition, these factors point towards Developer's interests being prejudiced if they are not joined, as the loan agreement states that any amounts disbursed to the Builder by the Lender would be added to the loan balance of the Developer and would accrue interest. The rights of the Developer to be involved in litigation which results in financial obligations being imposed to them would be violated if they were not included in this action -therefore the second ground of FRCP 19 is likely also met.

Finally, it is clear that if Developer is not joined to this case, then there is a strong likelihood that litigation will be initiated between Lender and Developer to agree the terms of the disbursements made to the Builder on the Developer's behalf by Lender. This opens up a party to the Builder v Lender case to further potential litigation, opening the possibility of inconsistent results.

Courts prefer judicial efficacy where possible and would likely see the Developer as an indispensable party to be joined, based on the factors set out above.

2. Would joinder of developer destroy subject matter jurisdiction?

Joining the Developer as a defendant to the action would destroy subject matter jurisdiction. When a court determines whether to join a necessary party, the first question is whether the party is indeed necessary (as discussed above, and answered in the affirmative in this case) and the second question is whether the party can be joined. A party cannot be joined if this will destroy subject matter jurisdiction.

Subject matter jurisdiction is required in federal courts over every case which they hear and is based on two grounds - (i) federal question jurisdiction (which arises where the cause of action arises under federal law) and (ii) diversity jurisdiction. No federal law is engaged on the facts, as this is a contract dispute in the form of a loan agreement. Diversity jurisdiction requires (i) complete diversity between the plaintiff and each defendant and (ii) the value of the claim to exceed $75k (excluding interest and as a good faith determination of its value).

Here, the Builder is a citizen of state Band the Lender is a citizen of state A. A corporation is a citizen of every state in which it is incorporated (which can be multiple) and the one state where it has its principal place of business (usually its headquarters). Accordingly, Builder is a citizen of state B because this is where it is incorporated and where it has its principal place of business, and Lender is a citizen of state A because this is where it is incorporated and where it has its principal place of business. As the claim brought by Builder against Lender is for $1OOk, the value requirement is met. Therefore, this action has complete diversity (it is between a citizen of A and a citizen of B) and meets the value requirement - so there is diversity jurisdiction.

However, the Developer is an LLC and, like a partnership, an LLC is a citizen of every state in which its members are citizens. The members here are citizens of state A (Amy) and state B (Barbara). By joining Developer to the case, therefore, there will be a defendant which is a citizen of state B, the state as the citizenship of the Builder. This destroys complete diversity.

It should be noted that supplemental jurisdiction is not relevant here because joinder of a necessary party as a defendant does not create a new claim between the defendants (it is not a cross-claim or an impleader claim) and thus the question is not whether there is subject matter jurisdiction in respect of the new separate claim between the defendants but rather, whether the existing subject matter jurisdiction between the plaintiff and defendant is destroyed by joinder of the new defendant.

3. Assuming developer can be joined, how should the court rule?

Where there is a necessary party, which Developer is as discussed in 01, but they cannot be joined because this will destroy diversity jurisdiction, as discussed in 02, the court has

discretion as to whether to dismiss the case or proceed without the necessary party. In using this discretion, it will tend to look to the extent of the prejudice to interests and the likelihood of further litigation and inconsistent results that were discussed in 01. Given that here these are strong factors, as Builder is suing on a contract to which it is not a party but merely a third party beneficiary, thus giving rise to substantial prejudice against Developer and a high chance of subsequent litigation, the court should dismiss the claim rather than let it proceed without the Developer.

ANSWER TO MEE 6

1. Between Wanda and Frank, who is obligated to pay the property taxes?

The issue is whether a life tenant must pay ordinary property taxes.

A life tenant is required to pay ordinary property taxes, but is only required to pay the portion represented by the fair rental value amount, not the entire value of the home. The rental value of the home is usually substantially lower than the entire property value, so the remaindermen can be required to pay the balance.

Here, Wanda has a life estate in the home per Oscar's will. Frank has a vested remainder that was passed to him under the terms of Adele's will. A vested remainder is fully devisable, alienable, and transferable. Between Wanda and Frank, Wanda has an obligation to pay the proportionate amount of the tax based on the annual fair rental value of the home. Frank would then be required to pay the balance because of his interest in the remainder of the estate.

2. Upon Conveying the apartment building to Frank, what if any interest did Oscar have in the apartment and was that interest valid?

The issue is whether Oscar was able to devise his possibility or reverter.

When a conveyance of land is granted with "durational language," the court will find that a fee simple determinable has been created. A fee simple determinable creates a possibility of reverter in the grantor. A possibility of reverter is not subject to the rule against perpetuities and may be devised. A fee simple determinable automatically reverts to the grantor and his heirs if the condition is not met. Contrast with a fee simple subject to a condition subsequent, which creates a right of reentry in the grantor.

Here, the conveyance had durational language of "as long as" the apartments are rented to low- income families, and specifically stipulated that there was a possibility of reverter. Thus, Frank was given a fee simple determinable and Oscar held a devisable possibility of reverter. The interest is valid because although it could vest far outside the Rule Against Perpetuities period, interests created in the Grantor are not subject to RAP.

Thus, Frank has a fee simple determinable.

3. What interest if any does Wanda have?

The issue is whether Oscar's possibility of reverter passed through his residuary clause.

Possibilities of Reverter are devisable and are not subject to RAP.

So, Wanda properly takes a possibility of reverter in the Apartment upon Oscar's death.

Note that even if Oscar's conveyance had not stipulated that the possibility of reverter was there, one would have been assumed because of the durational language and no reservation of a right of reentry.

4. After February 1, 2021, who own the apartment building?

As discussed above, possibilities of reverter automatically vest when the condition they were premised upon ends.

In this case, on February 1, 2021, Frank's action of not renting to any below income families automatically triggered the possibility of reverter. Thus, Wanda would be correct that she owns the building.

Note, that even in jurisdictions that do not favor fee simple determinable, if the court had found a fee simple subject to condition subsequent- the right of reentry would pass to Wanda and she would be able to exercise it by bringing action against Frank, and she clearly has the intent to do that here.

ANSWER TO MEE 6

1. Taxes on Family Home

Wanda is required to pay taxes on the family home up to the reasonable amount of income the home can receive and Frank must pay any surplus. The issue is who has to pay taxes between a life estate and a remainderman.

A life tenant owes duties to the remainderman. One of the main duties is to avoid waste of all kinds. One of the duties involved in avoiding waste is to pay the property taxes up to the amount that the land can earn in income. The remainderman is required to pay any taxes in excess of this amount. The remainderman may choose to pay taxes on their own to avoid a lien on their interest but they are entitled to reimbursement from the life tenant if they pay more than their share of the taxes.

Here, Wanda is a life tenant and Frank is the remainderman. Originally Adele was the Remainderman but she devised her interest to Frank when she died. Vested remainderman interests are freely devisable and descendible. The grant to Adele granted to her and her heirs, but given that Adele left her entire estate to Frank, Frank is her heir and the interest is not void. Since Wanda is a life tenant, she is required to pay property taxes to the amount the property can earn in income. The house could earn at least $1,500 per month which would be more than enough to cover the $6,000 annual property taxes. Wanda is required to pay those taxes. If Frank is wrong and the property earns less, he would be liable for any extra tax after the income. The remainderman is required to pay the taxes above the property's income potential.

2. Oscar's Interest in Apartment Building

Oscar had a possibility of reverter in the apartment building and the interest is valid because possibilities of reverter are not subject to the Rule Against Perpetuities (RAP). The Issue is what kind of conveyance did Oscar make to Frank.

A fee simple determinable includes a possibility of reverter in the grantor. The grantee has full title to the land as long as certain conditions are met. A fee simple determinable can be seen through durational language like "so long as" "until" "while" etc. If the grantee stops using the land in accordance with the grant, the interest automatically reverts to the grantor. There is no need for the grantor to exercise their right, it is automatic. Possibilities of reverter are not subject to the RAP because the interest is vested immediately upon granting.

Here, Oscar granted Frank the apartment building "so long as" at least four tenants were below median income for a family. Frank followed this interest for a while. When it was granted, Oscar had a possibility of reverter. This grant even explicitly says so

stating "the apartment building automatically reverts to Oscar." This interest is valid because it has already vested and is not a restraint on alienation.

3. Wanda's Interest in Apartment Building

Wanda owns a vested possibility of reverter because she inherited Oscar's interest. The issue here is whether Wanda inherited Oscar's interest.

Vested future interests are freely devisable and descendible. A party with a vested future interest can sell the interest, devise it in a will, or it can pass by intestacy. It can be validly devised through a residue clause.

Here, Oscar granted Wanda the residue of his estate. Nowhere else in his will did he devise his interest in the apartment building and he did not otherwise sell it while he was alive. Wanda is entitled to take the vested future interest through the will and she has the same rights as Oscar would. Wanda owns Oscar's vested possibility of reverter. This interest is valid as it is still vested in Wanda. There are no issues with the devise of the interest.

4 Who Owns the Apartment Building?

Wanda owns the apartment building in fee simple absolute because Frank's interest terminated and reverted back to Wanda when he stopped renting to below median income families. The issue here is whether Frank's fee simple determinable terminated.

When the condition in a fee simple determinable stops being followed, the property automatically reverts to the grantor or their successor in interest. The holder of the possibility of reverter does not need to exercise their rights or declare their ownership, it happens automatically by function of law.

Here, Frank stopped renting to below median income families on February 1st, 2021. At that point, his fee simple determinable was terminated because the condition was no longer being satisfied. Wanda, being the holder of the possibility of reverter, now validly owns the apartment building fee simple absolute. Frank's interest is terminated and Wanda takes as sole owner.

ANSWER TO MPT 1

MEMORANDUM

Law Office of Marianne Morton
10 Court Plaza, Suite 2000
Franklin City, Franklin 33705

To: Marianne Morton
From: Examinee
Date: July 26, 2022
Re: Walter Hixon matter

You asked me to research four distinct questions related to the complications of Walter Hixon's marital status. Below, I answer each question in tum. I do not address Mr. Hixon's ending his marriage to Ms. Prescott or the risks of criminal prosecution he may face for bigamy, as instructed.

1. Columbia law governs the grounds for annulling Mr. Hixon's marriage to Ms. Tucker.

The issue is which law governs the grounds for annulling a marriage: the state in which the marriage took place (here, Columbia) or the state in which the spouse seeking annulment resides (here, Franklin). The Restatement (Second) of Conflict of Laws provides that a marriage's validity is determined by the law of the state which has the "most significant relationship to the spouses and the marriage." A court determines which state has the "most significant relationship" to a particular issue by considering the following factors set forth in the Restatement and applied recently by the Franklin Court of Appeal in *Fletcher v. Fletcher:* (1) the relevant policies of other interested states and their relative interests in the determination of the particular issue; (2) the protection of justified expectations; (3) certainty, predictability, and uniformity of result; and (4) ease in the determination and application of the law to be applied. Here, these factors point toward the law of Columbia governing the grounds for annulment.

First , as the *Fletcher* court explained, all states have legitimate interests in defining the initiation and termination of marriage, and the fact that Columbia and Franklin have different annulment grounds underscores the strengths of the interests involved. Here, however, Columbia has a *specific* policy carveout in place for situations where someone's spouse is absent and believed to be dead for five years-in other words, precisely the kind of situation in which 1vfr. Hixon finds himself This suggests that the Columbia legislature has considered precisely the kind of situation with which 1vfr. Hixon is dealing and determined that its legislative policy is that marriages like Mr. Hixon's are to be voidable. By contrast, the relevant Franklin statute applies to *all* marriages in which

one party is lawfully married to another person; it does not contemplate specifically situations like that of 1vfr. Hixon. This may suggest that the interest in the determination of the particular issue here is especially important to the state of Columbia.

Second , the protection of justified expectations points toward applying Columbia law. Mr. Hixon and Ms. Tucker met in Columbia in 2011, married in Columbia in 2012, spent all of their time as a married couple living in Columbia from 2012 until2019, and own property together in Columbia (the house they purchased in 2015). The sole connection between their marriage and the state of Franklin is that Mr. Hixon has lived in Franklin for several years-without Ms. Tucker, however, who has never been to the state. Accordingly, it seems likely that a court would find that 1vfr. Hixon and Ms. Tucker had a justified expectation that Columbia law would govern annulment. This is the inverse of the fact pattern with which the *Fletcher* court wrestled and thus parallel reasoning.

Third , a court considering certainty, predictability, and uniformity of result would likely note, as the *Fletcher* court did, the importance of clear, established rules governing which state's law applies to initiation and termination of marriages in light of the reality that in today's day and age people often move between states. A court may reason that if 1vfr. Hixon could make Franklin law apply to the annulment of his marriage with Ms. Tucker simply by unilaterally moving to Franklin, a place she has never even visited, that would thwart the goals of certainty, predictability, and uniformity. Accordingly, this factor also points toward Columbia law applying.

Finally, ease in the determination and application of the law to be applied suggests that Columbia would be a more appropriate forum than Franklin. The real property to be distributed is located in Columbia, the marriage took place in Columbia, and both parties have a connection to the state of Columbia (even though Mr. Hixon does not reside there anymore, he did for over a decade).

Therefore, a court would likely find that Columbia has the most significant relationship to the marriage and thus would determine the marriage's validity based on Columbia law. It is worth noting also that under the Restatement, a marriage valid where it was contracted is valid everywhere "unless it violates the strong public policy of another state which has the most significant relationship to the spouses and the marriage at the time of the marriage." However, because Columbia is both the place where Mr. Hixon and Ms. Tucker's marriage was contracted and the place with the most significant relationship, a court would not even need to consider whether Mr. Hixon and Ms. Tucker's marriage violates the public policy of Franklin. In sum, just as the Franklin Supreme Court concluded in *Simeon v. Jaynes* that the court should have applied Columbia law given significant connections between the spouses and Columbia, so too here would a court conclude that Columbia law governs.

2. Mr. Hixon must file a lawsuit to annul his second marriage. He will be able to obtain an annulment decree under Columbia law (the governing law), which will declare his voidable marriage to be void.

Mr. Hixon must file an annulment action to annul his marriage to Ms. Tucker. As *Walker's Treatise on Domestic Relations* explains in section 1.7, a party seeking an annulment must file an annulment action and ask a court to declare that the marriage is void. As discussed above, a court considering this action would apply Columbia law to determine whether Mr. Hixon is able to obtain an annulment (if the court was applying Franklin law, the marriage would be void from the start without the need for any further action).

Mr. Hixon will be able to obtain an annulment as long as he seeks and a court issues an annulment decree, as is required for a voidable marriage to be declared void under Columbia Revised Statutes section 718.02. Under Columbia law, his marriage is voidable because it meets the statutory criteria. First, his spouse (Ms. Prescott) was living at the time of his subsequent marriage. Second, the marriage with Ms. Prescott was still in force at the time of his subsequent marriage; Mr. Hixon and Ms. Prescott were separated (living apart since 1990) but not divorced and there is no reason to think they were legally separated. While they likely could have filed for a no-fault divorce successfully, they didn't, and a marriage does not automatically terminate after living apart absent more. Finally, Ms. Prescott was absent and not known to Mr. Hixon to be living for "a period of five successive years immediately preceding" his marriage to Ms. Tucker. Mr. Hixon married Ms. Prescott in 1986 (as the marriage records so indicate), moved hundreds of miles away from Ms. Prescott in 1990, and heard in 2001 that she had died. Accordingly, for a period of ten years (five more than is statutorily necessary), Mr. Hixon did not know that Ms. Prescott was living. Accordingly, Mr. Hixon's marriage to Ms. Tucker satisfies the statutory criteria for a voidable marriage under Columbia Revised Statutes section 718.02, meaning he will be able to seek an annulment decree to have it declared void.

3.If Mr. Hixon files an annulment action in Franklin, a Franklin court would have jurisdiction to annul the marriage but would not have jurisdiction to dispose of the parties' property.

The issue is whether a Franklin court has jurisdiction to annul a marriage that occurred in Columbia and to dispose of real property located in Columbia. A Franklin court need not have *in personam* jurisdiction over both parties to the marriage in order to grant a divorce or annulment. For those actions, the court need only have jurisdiction over the *res* of the marriage relationship itself However, a court must have *in rem* jurisdiction with respect to property or *in personam* jurisdiction over the nonresident defendant. *Walker's Treatise* section 1.7 underscores that a Franklin court can issue orders dividing marital

property interests under the same rules governing division of property in a divorce "provided it has jurisdiction."

a. A Franklin court would have jurisdiction to annul the marriage.

A Franklin court would have jurisdiction to annul Mr. Hixon's marriage to Ms. Tucker because Mr. Hixon has been domiciled in Franklin for over six months. Long-established Franklin case law makes clear that in order to annul a marriage, a Franklin court must have jurisdiction over the *res* of a marriage. Under *Daniels v. Daniels,* a Franklin court has jurisdiction over the *res* of a marriage where one of the spouses has been domiciled within Franklin for six months. This is consistent with the U.S. Supreme Court's mandate in *Williams v. North Carolina* that states "can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent." Here, Mr. Hixon been domiciled in Franklin since 2019, for at least three years. An individual's domicile is the place where they reside and intend to remain permanently or indefinitely. Here, Mr. Hixon seems to intend to remain indefinitely in Franklin; his company opened an office there and asked him to start it and he has been living there ever since.

Ms. Tucker may argue that jurisdiction is improper because she has never been to Franklin meaning she lacks sufficient minimum contacts with the state under the Franklin Long Arm Statute, but such an argument will not prevail. The defendant in *Daniels v. Daniels* advanced a similar argument, which the court rejected because the long arm statute applies only where a court seeks to exercise *in personam* jurisdiction over *nonresidents;* here, *in personam* jurisdiction over Ms. Tucker is not necessary-only *in personam* jurisdiction over the *res* of the marriage. *Carew v. Ellis* made clear that is true for annulment actions. So, while Ms. Tucker would be correct (like Ms. Daniels in *Daniels)* that the Franklin court could not exercise jurisdiction over her were it not for her marriage to Mr. Hixon, Franklin *does* have jurisdiction to annul here even though it lacks *in personam* jurisdiction over Ms. Tucker.

b. A Franklin court would not have jurisdiction to dispose of the parties' property.

A Franklin court would not have jurisdiction to dispose of the parties' property because the real property is located in Columbia and it lacks in personam jurisdiction over Ms. Tucker. There are two ways a court could have jurisdiction over real property. First, a Franklin court has *in rem* jurisdiction over real property located within it. Daniels, *Gore v. Gore,* and *Carew v. Ellis* all explained that if division of property is at issue, a Franklin court has *in rem* jurisdiction over property located within it even if it lacks *in personam* jurisdiction over the nonresident defendant. This is how the Franklin court in *Daniels* had jurisdiction to dispose of the marital property at issue there located in Franklin, even though it did not have *in personam* jurisdiction over Ms. Daniels. However, this ground of jurisdiction is inapplicable here. The property at issue is Mr. Hixon and Ms. Tucker's

house in Columbia, not Franklin. Accordingly, the Franklin court lacks *in rem* jurisdiction over the property.

Second, a Franklin court can have jurisdiction to dispose of property if it has *in personam* jurisdiction over both parties. *In personam* jurisdiction is proper where the Franklin Long Arm Statute is satisfied and the constitutional requirements of personal jurisdiction are met. The Franklin Long Arm Statute applies where, as here, *in personam* jurisdiction over the nonresident defendant is required. Personal jurisdiction requires minimum sufficient contacts with the forum state, relatedness, and fairness. *Shaffer v. Heitner* underscored that a state court's jurisdiction must satisfy the "minimum contacts" standard in order to provide due process. Here, that standard is not satisfied because Ms. Tucker has never even visited Franklin. Accordingly, the Franklin court would find that it does not have jurisdiction to dispose of the parties' property, unless of course Ms. Tucker waives an objection to personal jurisdiction.

4. We should advise Mr. Hixon to file in Columbia.

Mr. Hixon should file his lawsuit in Columbia, not Franklin, because a Franklin court would not have personal jurisdiction over Ms. Tucker and accordingly would not be able to dispose of the marital property (even though it could enter an ex parte annulment order). While Mr. Hixon could file the annulment order in Columbia and a separate lawsuit for the division of property in Franklin, that seems overly burdensome and inconvenient. The easier approach is for Mr. Hixon to file in Columbia. The Columbia court would have jurisdiction to both annul the marriage *and* dispose of the parties' property located in Columbia. It would have jurisdiction to annul the marriage because it would have *in personam* jurisdiction over both parties; Ms. Tucker obviously has sufficient minimum contacts under *Shaffer* since she lives in Columbia, and Mr. Hixon would waive any objection to personal jurisdiction by filing in Columbia. The Columbia court would have *in rem* jurisdiction to dispose of the property because the real property is located in Columbia. Once the Columbia court enters an annulment decree, the decree would be given full faith and credit in Franklin. Full faith and credit are proper where a sister court entered a valid order and had jurisdiction. Thus, a Franklin court would give full faith and credit.

ANSWER TO MPT 1

To: Marianne Morton
From: Examinee
Date: July 26, 2022
Re: Walter Hixon matter

MEMORANDUM

Introduction

This memorandum addresses questions surrounding the annulment of Mr. Hixon ("Hixon") and Ms. Tucker's ("Tucker") marriage and the division of marital property acquired during the marriage. First, this memorandum will look at whether Columbia or Franklin law governs the grounds for annulling the Hixon and Tucker's marriage. Next, this memorandum will explore if Hixon is required to file a lawsuit to annul his marriage to Tucker and his chances of prevailing on the merits. Then, this memorandum will discuss whether Franklin courts have jurisdiction to annul the marriage and dispose of the parties' marital property. Finally, this memorandum will advise which state, Columbia or Franklin, Tucker should file his suit in.

Discussion

I. Columbia law governs the grounds for annulling Mr. Hixon's marriage to Ms. Tucker because Columbia has the most significant relationship with the parties and the marriage between the parties.

Under Franklin law, the validity of marriage should be determined by the law of the state with the most significant relationship to the spouses and the marriage. Restatement (Second) of Conflict of Laws§ 283 (1971). Furthermore, under the Full Faith and Credit Clause of the United States Constitution, if a marriage is valid in the jurisdictions is contracted, then it is valid in all other jurisdictions. If a state has no relationship to the parties or the marriage, then that state should apply the law of the state with the most significant relationship. *Fletcher v. Fletcher,* (Fr. Ct. of App. 2014). To determine which state has the most significant relationship to the suit, the court will look at: "the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, the protection of justified expectations,...certainty, predictability, and uniformity of result, and ease in the determination and application of the law to be applied." Restatement (Second) of Conflict of Laws§ 6 (1971).

A. The relevant policies of other interested states and the relative interests of those states in the determination of the particular issue

All states have a policy interest in defining marriage within the states between their citizens and how a marriage can be "initiated and ended." States' policies differ on how a marriage can be validly ended; however, the state in which a marriage was entered into, where the parties lived through the duration of the marriage, and where the marital property is located as a significant interest in hearing disputes and applying their appropriate law. *Fletcher* (2014). In *Simeon v. Jaynes* (Fr. Sup. Ct. 2009), plaintiff spouse brought a suit in Franklin to annul their marriage to the defendant spouses and alleged their marriage was bigamous. The parties were married in Columbia, lived together in Columbia, owned property in Columbia, and incurred debts in Columbia. Looking at the totality of the circumstances, the court held that the appropriate law to apply was Columbia law because, Columbia had the greatest interest in the determination of the annulment proceedings. *See* a/so, *Fletcher* (2014) (holding that it was improper to apply Columbia law to an annulment proceeding between spouses who were married in Franklin and lived in Franklin, and the only connection to Columbia was the "short time" the plaintiff spouse resided there.)

Here, it is clear that both states have a policy interest in defining and creating a solid framework that governs marriage and divorce proceedings between their citizens. In fact, each state has different laws that govern annulment, which evinces the importance of the domestic relation law in each state. *See Columbia Revised Statutes§ 718.07; Franklin Domestic Relations Code§ 19-5.* However, it is clear that Columbia has a much stronger and more significant interest in determining Hixon and Tucker's annulment. Similarly, in *Simeon,* the party's grounds for annulment is bigamy. In both *Simeon* and *Fletcher,* the court applied the law of the state where the parties were married, resided, incurred debts, and bought marital property. Here, both Hixon's marriage to Tucker and his previous marriage to Ms. Prescott were in Columbia. Furthermore, the Hixon and Tucker's marital home is in Columbia, and Hixon still resides in Columbia. In *Fletcher,* the only connection the plaintiff spouse had with Columbia was the short time he resided there. Similarly, here, the only connection Franklin has with the spouses and the marriage is that Hixon has resided in Franklin for the past three years. Therefore, although both states have an interest in the domestic relations of their citizens, Columbia has a stronger interest in the annulment proceeding between Hixon and Tucker.

B. The protection of justified expectations

When determining which state law should apply to a domestic relation proceeding, in this case an annulment proceeding, the court will also look at what jurisdiction the parties had a "justified expectation" would apply or govern. In *Fletcher,* given that the couple was married in Franklin, had children in Franklin, established a life in Franklin, and owned property in Franklin, the court held that the factual considerations indicated that the

parties "had a justified expectation that Franklin law would govern the terms on which the marriage ended." In this case, Tucker and Hixon were married in Columbia in 2012, owned a house in Columbia, and both lived in Columbia until Hixon unilaterally moved away in 2019. Hixon and Fletcher have similar connections to Columbia that the spouses in *Fletcher* had to Franklin. Thus, given that the only connection the spouses have with Franklin is that Hixon moved there three years ago, the facts indicate that the parties had a justified expectation that Columbia law would govern the end of the marriage.

C. Certainty, predictability, and uniformity of result

Next, there is a need for predictability and uniformity in the creation and termination of marriages. *Fletcher* (2014). People often move between states, and the migration of people has created a need for states to create a uniform system to govern domestic relations and marriage. */d.* Here, Hixon moved to Franklin, which has a different set of laws governing annulment. The court, therefore, should follow the framework that applies a certain and predictable result to the end of the marriage.

D. Ease in the determination and application of the law to be applied

Lastly, the court consider ease and administration efficiency when choosing what state law to apply. In *Fletcher,* the court indicated that due to all of the substantial events in the marriage occurring in Franklin, it was only proper and efficient to apply Franklin law. Here, Hixon's first and second marriage happened in Columbia; thus, all necessary documentation and public records are in Columbia. Furthermore, the marital property is in Columbia, and the spouses resided in Columbia. It would be much more efficient to apply Columbia law given the substantial events giving rise to the claim occurred in Columbia.

Applying all of the factors, Columbia has the most significant relationship with Hixon and Tucker and their marriage, and therefore, Columbia law should govern the annulment.

II. Mr. Hixon must file a lawsuit because under Columbia law, because for a voidable marriage to be declared void, a party must seek a court order, and Mr. Hixon will be able to obtain an annulment.

Under Columbia Revised Statutes§ 718.02, a marriage is voidable if "[t]he spouse of either party was living and the marriage with that spouse was then in force and that spouse was absent and not known to the party commencing the proceeding to be living for a period of five successive years immediately preceding the subsequent marriage for which the annulment decree is sought." Furthermore, unlike other jurisdictions where an invalid marriage is automatically void, in Columbia, a party must seek an annulment decree to void a voidable marriage. Columbia Revised Statutes§ 718.02.

A. Mr. Hixon must file a suit and the court must issue an annulment decree for Mr. Hixon's marriage to Ms. Tucker to be void.

As stated above, Columbia law will apply, and Columbia requires that a party must seek an annulment decree from the court to void a voidable marriage. Columbia Revised Statutes § 718.02. Therefore, Hixon's marriage to Tucker is not automatically void. He must seek an annulment decree by petitioning the state court in Columbia. Then, the Columbia state court will enter an annulment decree, and the marriage will be annulled.

B. Mr. Hixon will be successful in obtaining an annulment decree in Columbia because he believed Ms. Prescott was dead for at least five years before marrying Ms. Tucker.

Columbia law holds that a marriage is voidable if either party entered the marriage and believed that their previous spouse was not living for "a period of five successive years immediately preceding the subsequent marriage for which the annulment decree is sought." Here, Hixon believed that Prescott was dead since 2001. In 2001, an old mutual friend told Hixon that Prescott was killed in a car accident. Hixon did not meet Tucker, and the two were married on July 14, 2001. Therefore, there were twelve years between the time that Hixon first believed that Prescott was killed in a car accident and his marriage with Tucker. Thus, the marriage is voidable under Columbia law, and Hixon will prevail in obtaining an annulment decree for his marriage to Tucker.

III. Franklin courts will have jurisdiction over the annulment proceedings; however, Franklin courts will not have jurisdiction to dispose of the parties' property

A court must have personal jurisdiction over any suit. *In personam* jurisdiction, which means jurisdiction of the parties themselves, over both parties in a divorce or annulment proceeding is not necessary-instead, the forum court only needs to have jurisdiction over the res of the marriage. *Daniels v. Daniels* (Fr. Ct. of App. 1997); *Price v. Price* (Fr. Sup. Ct. 1972); *Carew v. Ellis* (Fr. Sup. Ct. 1957). A court has jurisdiction over the res of the marriage relationship when one of the spouses has been domiciled within the state for six months. */d.* Furthermore, the Supreme Court has held that a state can alter marriages within the state, "even though the other spouse is absent." *Williams v. North Carolina,* 317 U.S. 287,298-99 (1942).

A state has *in rem* jurisdiction over property within the state's borders, and therefore, has the power to divide and dispose of marital property within the state, because it is related to the underlying action. *Shaffer v. Heitner,* 433 U.S. 186 (1977). However, a state must have jurisdiction over both the parties to divide the marital property located outside of the state. The court will determine if it has jurisdiction over the parties by looking at the parties "minimum contacts" with the forum state.

A. The Franklin courts have jurisdiction to annul the marriage because Hixon is domiciled in the state

If the plaintiff spouse is domiciled the state, then the court has jurisdiction to hear divorce and annulment proceedings. In *Daniels,* the plaintiff spouse moved to Franklin from Columbia and purchased real property in the state. A year after her became a domiciliary of Franklin he filed for divorce from his wife in Franklin courts. His wife argued that the court did not have jurisdiction to enter a valid divorce decree, because the parties were married in Columbia, resided in Columbia, and she still was domiciled in Columbia. The court rejected this argument, and held that as long as the plaintiff spouse establishes residency in Franklin for at least six months, then the court may exercise jurisdiction over the divorce proceedings. The court does not need *in personam* jurisdiction over both parties to enter a divorce decree.

Here, Hixon moved to Franklin in 2019-over three years ago. He has a new job in Franklin and does not intend to leave. He is now a domiciliary of Franklin, and as seen in *Daniels,* if the plaintiff spouse establishes residency for at least six months, then Franklin courts have jurisdiction over a divorce or annulment proceeding. Therefore, Franklin courts have annulled the marriage.

B. The Franklin courts do not have jurisdiction to dispose of the marital property

The next issue is whether Franklin courts can dispose of the marital property. In *Daniels,* the court was able to dispose of the marital property even though the other spouse was not a resident of the state because the martial property was located in Franklin. However, if the property is located outside of the forum state, then the state has to have jurisdiction over both parties to divide marital property. A state has jurisdiction over a party such that the party has minimum contacts with the state such that it will not offend the notions of fair play and substantial justice. Here, the marital property is located in Columbia. Tucker has never been to Franklin and still resides in Columbia. She likely does not have minimum contacts with the Franklin, and therefore, Franklin cannot dispose of the marital property located in Columbia.

IV. Mr. Hixon should file in Columbia

Mr. Hixon should file in Columbia. It would be much more efficient for Mr. Hixon to file in Columbia because the marital property is located in Columbia and Columbia state law is going to be applied. Columbia courts are better situated to apply Columbia law and well-versed in Columbia law. There will be more predictability if he chooses to file in Columbia. Franklin courts are not as familiar with Columbia law. Furthermore, if he were to file suit in Franklin, he would also have to file suit in Columbia, which is inefficient and expensive. All of the events giving rise to the claim happened in Columbia,

Columbia law will be applied, and Columbia has jurisdiction to hear all of the suits, and therefore, Columbia is the proper forum to file his suit in.

Conclusion

Due to the fact that Columbia has the most significant relationship with the parties and the marriage, Columbia law will apply. Moreover, Columbia law does not automatically recognize that a marriage is void, instead a party must file a suit for a decree of annulment. However, Hixon will be able to successfully file a suit for a decree of annulment in Columbia because he entered into a subsequent marriage when he believed Prescott was dead for twelve years. Next, although Franklin courts may properly enter a decree of annulment because Hixon is domiciled in Franklin, Franklin does not have jurisdiction to dispose of the property in Columbia. Because substantial events giving rise to the claim happened in Columbia, the martial property is in Columbia, Tucker is in Columbia, and Columbia law will be applied to the claim, Hixon should file suit in Columbia.

ANSWER TO MPT 2

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

Nina Briotti, an attorney seeks our advice regarding her potential civil and criminal liability as well as her ethical obligations in recording the conversation of her client X who she believes may commit a crime by invading a trust that he administers to cover his losses from risky investments. This memorandum will discuss below: (1) whether Briotti may lawfully record the telephone conversation with X without informing him; (2) whether to record him in secret would violate the Rules of Professional Conduct; and (3) whether she must inform X that she is recording the conversation if he asks her.

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

Briotti may lawfully record the phone conversation with X and avoid criminal or civil liability under applicable law. Briotti has her law office in Franklin and X has his financial advising offices in Olympia. Franklin law will apply to the conversation if Briotti records from her office (or anywhere else in Franklin) and a civil action or criminal action in Olympia will look to Franklin regarding the lawfulness of the conduct.

First, Franklin's criminal law regarding conversation recording consent will apply because Olympia only applies its own criminal code on the subject when the act of interception takes place inside Olympia. *Shannon v. Spindrift* (Olympia DC 2018) (citing *Parnell v. Brant* (Olympia Sup. Ct. 2014)). The "interceptions and recordings occur where made," regardless of where each party to the conversation is located. Olympia law is an "all-party consent" state based on its criminal code requiring all parties to the recorded communication to consent to the communication before it is intercepted. *Shannon;* Olympia Criminal Code (OCC) § 500.4(1)(a). Franklin, however, is a "single party consent" state because its applicable criminal statute requires only on party to the communication to provide prior consent to the interception of the conversation. Franklin Criminal Code (FCC)§ 200(1)(a). Under both codes, an interception includes the recording of the communication. In Olympia, the courts have interpreted this to apply to recording phone conversations and it would likely be the same in a Franklin court. But 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 plans to call X from her office in Franklin and wants to record the phone call when she provides him legal advice regarding his potential criminal conduct. Although X is located in Olympia, Olympia courts will not most likely not apply the applicable OCC provision to any case brought against Briotti, who would be recording the conversation from her office in Franklin. Because in such a scenario Franklin would be the place where the interception and recording occurred and Olympia law would not apply. Thus, Briotti would not need X's consent. Franklin's law only requires that one party to the conversation consents, and because Briotti would be willfully recording the conversation and consenting to such a recording, this would suffice under Franklin's "single party consent" regime. Thus, Briotti can lawfully record any conversation with X without informing him and receiving his consent.

(2) Briotti may record X without his knowledge under the Rules of Professional Conduct

Briotti may ethically record the conversation with X without X's knowledge. Although ABA Formal Opinion 01-422 (Opinion 422) and the Franklin State Bar Committee on Ethics and Professional Responsibility both have published that it would be "inadvisable" to record a client without the client's knowledge regardless of whether it is unethical outright, there are several exceptions that may apply here to allow Briotti do so within the bounds of ethical conduct. Because the ABA rules have been adopted by Franklin and Olympia alike, analysis of the ABA rules will be sufficient for both states of Briotti's legal licenses. And in particular Opinion 422 has persuasive weight under Franklin law and its guidance is highly relevant in interpreting the Rules of Professional Conduct.

Under Rule 8.4(b) and (c), it is professional misconduct for a lawyer to engage in dishonesty, fraud, deceit, or misrepresentation or commit a criminal act that reflects adversely on lawyer's honesty, trustworthiness or fitness as a lawyer. First, Briotti is covered under Rule 8.4(b) because as discussed above, her act of recording the conversation with only her consent is lawful under the applicable law and would not be a criminal act. Second, under Model Rule 8.4(c), Opinion 422 discusses that nonconsensual taping of conversations is no longer considered inherently deceitful such that it would be automatically covered under the rule for misconduct. Instead, the opinion provides that under some circumstances requiring disclosure of the recording of a conversation may defeat a legitimate and necessary act of recording. That would certainly apply where lawyers are attempting to gather evidence against adverse parties, but does not clearly apply to where a lawyer seeks to record her own client--to whom she owes duties of loyalty and confidentiality. Thus, Opinion 422 provides that it is almost always advisable for a lawyer to obtain informed consent from a client before recording a communication because most clients would not assume that their voice and tone are being recorded completely accurately, even if they expect that lawyers memorialize conversations.

Instead, the Opinion 422 and Franklin's Bar Committee both advises that lawyers should only record clients without their consent when the lawyer reasonably believes that the client would not object or if the client has forfeited in some manner the right of loyalty or confidentiality. First, Briotti likely could not argue in any scenario that she reasonably believes that X would not object to be recording. Nothing that Briotti has told the firm would provide grounds for her to believe that X would not object. She has not tried to record X in the past with X's consent nor has she obtained any agreement, express or implied, that he would consent or would not object. That she has come to the firm with these questions also implies that she does not reasonably believe that he would not consent. Under the exceptional circumstances where a client forfeits duties owed to the client would make it so that the lawyer has no ethical obligation to keep confidential (1) plans or threats to commit criminal act to cause imminent death or substantial bodily harm or (2) information necessary to establish defense by lawyer to charges based upon conduct in which the client is involved. These scenarios are scenarios that under Rule 1.6(b)(2) and (5), the lawyer would be permitted to disclose client confidences that might be contained in such a recording. But as Franklin's Bar Committee expounded, it can be difficult to determine when a future conversation might meet these exceptional circumstances. The Franklin Bar Committee in its relevant opinion to violations of Rule 8.4 advises that lawyers who would seek to record a future conversation--unknowing of whether a conversation might include the client disclosing a criminal plan--should use their factual knowledge of the circumstances and "well- grounded judgment" to determine the client's intended actions. The opinion advises that rather than engage in speculation, lawyers should consider the client's previous statements, the client's circumstances, and any alternative methods of memorializing the conversation when determining the need for recording the client without the client's knowledge.

Here, Briotti has legitimate concerns based on financial adviser X's previous statements and circumstances. First, X has told her the only option is to illegally invade the trust that he administers to cover his investing losses and he has repeatedly referred to this option despite legal advice to the contrary. X is advising rich clients and is known to Briotti to be prone to making risky investments in order to get big paydays. Briotti knows that these investments have not panned out and that X is now facing demands from many clients to liquidate their assets immediately after they learned he lost a huge amount of his clients' money. X has two weeks to pay the money and would be in personal financial ruin and would go out of business if he does not somehow pay back his clients and still cover the losses. Because his only option that he has thought of is to illegally invade the trust and Briotti believes that it is possible that he follows through because of his silence in the face of advice not to do so, Briotti has reasonable grounds to believe that the next phone conversation might concern illegal conduct of X. The risk is high that X might take desperate action such as the crime in question and Briotti wants to have evidence that she advised him that this conduct would be illegal for her own defense--an ethical purpose under Rule 1.6(b). But because Briotti has already memorialized in writing her advice and X's reaction, it might be an alternative to nonconsensual recording for Briotti to consider using the same method, such that multiple written recordings of the same response to the same legal advice might be adequate evidence in her legal defense if X actually invades the trust to cover his losses. But this of course would not provide the same evidence of a recorded conversation and if she seeks consent, X may not consent and no evidence could be obtained. X may also seek to terminate her as counsel.

(3) Briotti must inform X that she is recording if she asks.

Opinion 422 and rule 8.4(c) are clear on this issue. Being able to conduct a nonconsensual recording does not mean that a lawyer can falsely state that the conversation is not being recorded, especially in the face of a direct question. This would be deceitful conduct covered under the rules as misconduct under Rule 8.4(c). Thus, if X asks, Briotti must inform him that she is recording the conversation.

Conclusion:

Briotti will not be criminally or civilly liable for conducting a "single party consent" recording and she is likely permitted under the ethical rules to non-consensually record. But if asked by X, she must disclose that she is recording.

ANSWER TO MPT 2

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

Memorandum

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

Our client, Nina Briotti, is in a position where she is concerned about the personal legal ramifications of possible future crimes committed by her client, X. Although she has advised him against committing the unlawful acts, she thinks there is a possibility he may do so anyways. Briotti is interested in potentially recording a conversation between her and client X in order to protect herself from liability for his potential bad acts down the line. There are questions of legality and ethics at play here, and are addressed below in response to the questions you provided me.

1. The issue is whether Briotti may lawfully record her telephone conversation with X without informing him she is doing so.

Briotti would like to record the conversation with X without informing him she is doing so. Whether this is lawful depends on the state law that applies to the situation. Under the Franklin Criminal Code Section 200, "the interception or attempted interception [of wire communications, including recordings of that communication is unlawful if it] is made with the prior consent of one of the parties to the communication. On the other hand, the Olympia Criminal Code Section 500.4 states that such an interception would be unlawful if made without "the prior consent of *all* the parties to the communication" (emphasis added). Additionally, both statutes provide for an exception to the prohibitions on recordings in the event of an emergency situation, but no such emergency seems to exist here. Because of this tension between the law of Franklin and that of Olympia, it is critical to determine which applies (see also Formal Opinion 01-422). In *Shannon v. Spindrift,* the Olympia Supreme Court extended the holding of *Parnell v. Brant* to civil cases. Under *Parnell,* the court held that "Olympia law allows the admission of evidence legally obtained in the jurisdiction seizing the evidence," and accordingly that a recording made in Columbia of a person in Olympia was admissible. *Shannon* applied this holding to civil cases, stating that "OCC 500.4 [the "all party consent rule"] does not apply when the act of interception takes place outside of Olympia." As a result, the recording made in *Shannon* that would have been unlawful

under Olympia law was instead deemed lawful pursuant to Columbia's "one party consent" rule.

Consistent with the outcome of *Shannon,* if Briotti made a recording of a conversation with X, it would likely be done at her office in Franklin. Although she states in the transcript that she is barred in both Franklin and Olympia, assuming she will make the recording Franklin, even though X is in Olympia, it will likely be lawful under Franklin's "one party consent" rule. Briotti will be the consenting party in this case, and she can lawfully make such a recording in Franklin. As a result, Briotti may lawfully record her telephone conversation with X without his consent under the law of Franklin, which will apply pursuant to *Shannon.*

2. The issue is whether, assuming Briotti could make such a recording lawfully under state law, if doing so without the client's knowledge would violate the Rules of Professional Conduct ("Rules").

Assuming the lawfulness of the recording under Franklin law, as discussed above, Briotti may still be subject to some ethical issues if she takes the recording without X's knowledge. As an initial matter, you note in the transcript that both Olympia and Franklin have adopted the ABA Model Rules. This is relevant to the extent that Briotti is barred by both states, so should be aware of the ethical requirements for each.

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 exceptions that bear the most relevance 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." In the Commentary published by the Franklin Bar related to Rule 8.4, the committee states 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.

These exceptions are unlikely to control here, because Briotti does not seem to have a basis to reasonably believe it "necessary" to collect and potentially reveal communications with X under these facts. Briotti states that, although invading the trust would "seriously damage" the beneficiaries, there is only a "possibility" he might commit a crime. He was silent on the phone when Briotti pressed him on the illegality of the issue, and he did not say anything that would create a situation where disclosing client communications would become necessary under Rule 1.6 exceptions. Although he is

desperate, he knows that his actions would be illegal and has been warned of the danger. Perhaps he would be more likely to do it because, based on Briotti's notes, X thinks he can keep up with the payments to beneficiaries. But, he has not evinced an actual intent or states that he intends to undertake the crime. X did state that he has only two weeks before his payments to his own clients become due, but that still seems like it would be ample time for him to find another means of making distributions rather than invading the trust and does not make it that much more likely he would commit the crime. Furthermore, the written notes provided by Briotti described the situation clearly and reflected that she advised him properly, so it may be possible for her to use this method alternatively to recording him going forward. The possibility that he may commit a crime out of desperation like will not rise to the level needed to meet an exception to Rule 1.6

Rule 8.4 governs misconduct. Of most relevance in these circumstances are the rules that 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 adopts the notion 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), in this case, but because such circumstances are not present, Briotti may be at risk if violating the Rules, and should not record without X's consent, unless the facts come to support an inference that he is very likely to commit the crime of invading the trust and has thusly forfeited his right of loyalty and confidentiality under the special relationship.

3. The issue is whether, assuming that state law and the Rules would allow Briotti to make the recording, she must inform X that she is doing so if he asks.

In Formal Opinion 01-422, the ABA states 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 or not she is recording.