**July 2022 Georgia Bar Examination Sample Answers**

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**Essay 1 — Sample Answer 1**

1. Jack and Sue were planning to commit burglary because they intended to break into a dwelling to commit a felony, larceny, therein.

2. Jack and Sue committed no crime when they discussed their intent to break into Don's home to take money from it because, though they agreed to perform a criminal act together, they took no overt action at that time to make either liable for the conspiracy.

3. In Georgia, an overt act in furtherance of the conspiracy is required in order for the defendants to be guilty of conspiracy. An act by either defendant in furtherance of the conspiracy is sufficient for both. Jack's purchasing a gun was for use in the crime he and Sue planned to commit. Because Jack committed an overt act in furtherance of the conspiracy, Jack and Sue could be properly charged with conspiracy.

4. If one party to an alleged conspiracy is acquitted of the conspiracy, the other party may still be properly convicted of conspiracy. A party may also be found guilty of a crime even if the state alleges that two parties committed the crime together and a co-defendant is found not guilty. Accordingly, Sue's acquittal will have no effect on the charges that can be brought against Jack.

5. In Georgia, person commits murder in the first degree if that person kills another human and acts with intent to kill or intent to cause serious bodily injury with malice aforethought. Malice may be implied from the circumstances. Malice is a reckless disregard of an unjustifiably high risk to human life. Pointing a gun at another poses an unjustifiably high risk to human life. And the fact that she pointed the gun at the neighbor and pulled the trigger can allow the jury to infer malice. Val could be charged with first-degree murder.

A person is entitled to use deadly force in self-defense when a trespasser in a violent a disorderly manner invades the dwelling and the victim of the trespass reasonably believes that deadly force is necessary to terminate the trespass. In Georgia, this right to use deadly force in self-defense is lost, however, when the victim of the trespass has no right to possess the deadly weapon used to terminate the trespass. In this case, the neighbor broke and entered into the house, though the facts do not indicate that he did so in a violent and disorderly manner. If the entry into the house was in a violent and disorderly manner, the fact that the man was carrying a gun and

unknown to Val would allow Val to use deadly force if she were entitled to possess a gun, because it is reasonable to fear for one's life and reasonably believe that deadly force is necessary to terminate a trespass in these circumstances. Val, however, was not entitled to possess a gun, so she would not be entitled to this defense had she survived.

6. Jack and Sue, as co-conspirators engaged in a course of action that could naturally result in the death of a human, committed both felony murder when Jack accidentally shot Val, even though Jack had no intent to shoot Val, and murder of Val's unborn child, because the force that was used against Val was a felony so the force that was used to kill Val's unborn child was also a felony.

Because, in Georgia, a criminal is responsible for all homicides that are proximately caused by the commission of an inherently dangerous felony, such as burglary, whether or not the person that actually killed the victim is an agent of the criminal, Jack and Sue committed felony murder when Val shot the neighbor in reasonable response to their crime.

7. In order to commit burglary, Jack and Sue need only break into the dwelling and enter the dwelling, with any part of their body, with intent to commit a felony therein. The felony that Jack and Sue intended to commit therein, larceny, need not be completed for liability for burglary to be established. Jack and Sue entered the home with the requisite criminal intent after Jack broke the window, so Jack and Sue can be charged with burglary. Because conspiracy merges with the completed crime in Georgia, Jack and Sue can be charged with both conspiracy to commit burglary and burglary, but may not be convicted of both.

8. Georgia allows audio recording of a phone conversation when one party to the conversation consents to the recording. By contrast, Georgia permits video or photographic recording of an individual in a non-public space only when all parties consent to the video or photo recording. Any recording in violation of this law is admissible only to prove the violation of this law. Because Jack's friend knew of and consented to the phone recording, and because the phone recording does not also capture video, the recording may be admitted as evidence against Jack.

**Essay 1 — Sample Answer 2**

1. Jack and Sue were planning to commit Burglary.

2. Under Georgia law, Jack and Sue committed Conspiracy when they discussed what they intended to do at Don's home.

3. Because Jack purchased a gun, his charge(s) could have harsher penalties. Many crimes can have harsher sentences tact on because the offender committed the crime with a deadly weapon so if Jack is found guilty of possessing a gun while also committing a crime, a judge (using the applicable statute) could apply a harsher penalty at Jack's sentencing. If Jack is ultimately convicted of possessing a gun during the commission of a felony, he would be assigned the status of "convicted felon" and not allowed to own a gun thereafter.

4. If Sue was found not guilty of all charges, it could possibly benefit Jack. Since Sue was found not guilty of Conspiracy, then Jack would not be able to be charged with Conspiracy because that crime consists of two (2) or more people planning together prior to committing a crime. On the other hand, Sue being found not guilty on all charges could possibly effect Jack in a negative way. The State (District Attorney's office) could still charge Jack with Burglary and/or Felony Murder on behalf of Val and the unborn infant and possibly the neighbor. Jack also could be charged with fleeing the scene of a crime as well. With Sue being found not guilty of everything, Jack is the only remaining offender to be tried in this incident and so the District Attorney could possibly just stick all applicable crimes onto Jack to make sure something will stick and someone will have consequences for their actions.

5. If Val had survived, she could possible be charged with Possession of a Firearm of a Convicted Felon, however she would have most likely not been charged with any type of Murder charge because she could raise self defense in this situation. Because Val was in her own home and her convicted felon status was outweighed by the feeling of threat against herself and her unborn child, she could have a legitimate self defense "leg" to stand on.

6. Jack and Sue committed Felony Murder and Fleeing the scene of a crime in connection to the shooting of Val. Jack and Sue also committed Felony Murder and Fleeing the scene of a crime in connection with Val shooting the Neighbor as well.

7. Jack and Sue could be charged with the crime that they were planning because the definition of Burglary is the breaking and entering of a dwelling at night with the intent to commit a larceny therein. Burglary only has the element of "intent to commit a larceny" therefore, the money did not have to actually be taken by Jack and Sue for them to satisfy that Burglary element. Additionally, Jack and Sue (a) broke into a residence; and (b) at night-time, which means they completed all elements required for the crime Burglary.

8. The taped phone conversation between Jack and his friend would not be admissible because the friend became an "agent" of the police when the police requested for Jack's friend to call Jack and record that conversation and since the friend was an agent of the police in this situation, a court order would be needed to allow for the recording to be admissible in court.

**Essay 1 — Sample Answer 3**

1. Jack and Sue were planning to commit a burglary by breaking and entering the dwelling of another with the intent to commit a felony or theft therein.

2. Jack and Sue did not commit any crime by merely discussing what to do at Don's house because in order to commit conspiracy to commit burglary, under Georgia law, they needed to have formed a meeting of the minds to commit the crime (which they did) but they also needed some act in furtherance of the conspiracy, and assuming this was done before Jack purchased the handgun (which would have been an act in furtherance), the conversation alone was insufficient to meet all the elements of a conspiracy.

3. The issue is what effect Jack's purchase of the handgun had on the charges that could be brought against him for planning a crime. Because this was an act in furtherance of their plan to commit burglary, this action was sufficient to satisfy the missing element of an act in furtherance of the conspiracy. Thus, because he also had an agreement with Sue to commit the crime, he could be charged with conspiracy to commit burglary at this point.

4. The issue is whether Sue being found not guilty of all charges could affect what charges could be brought against Jack. It will not affect his charges. Georgia law has adopted the unilateral conspiracy theory, meaning that even where one conspirator is found not guilty, or where one conspirator is not genuine in their agreement to commit the crime, the other conspirator may still be charged when they, independently, satisfy the elements for conspiracy, which Jack (as explained above) does, supported by the fact that he was the one that bought the gun (the act in furtherance), not Sue. Additionally, the other crimes with which he can be charged, including burglary and potentially felony murder (discussed below) will not depend on Sue's involvement like conspiracy would have had Georgia followed the common law traditional rule.

5. The issue is what crime, if any, Val could be charged with for shooting the neighbor if she survives. Donna could be charged with voluntary manslaughter, which is an intentional killing without malice aforethought and which arises in the contexts of either imperfect self-defense or adequate provocation (also called "heat of passion.") Imperfect self-defense is when the defendant honestly and reasonably believed she was in imminent danger of death or serious bodily harm and responded with deadly or disproportionate force that resulted in the victim's death. Further, Georgia is not a retreat jurisdiction and even by statute provides that one need not retreat before responding with deadly force when an intruder that is not a member of the home enters the house by force or with the apparent intent to commit a violent felony against someone in the house. Here, Val had been woken up in the middle of the night, and the neighbor opened the door and was holding a gun. This gave Val reasonable fear for her life, and thus she acted in self defense. Further, she was in the home in which she presumably resides, the

Georgia's statutory provision for self-defense in the home in this situation applies as well. She can be charged because she meets the elements for voluntary manslaughter.

6. Assuming Val died, Jack and Sue committed felony murder with respect to the shooting of Val because they were in the midst of committing an inherently dangerous felony, burglary (by virtue of their breaking the window and entering with the intent to steal money), and a death occurred as a result of, and in furtherance of (because they were trying to escape) that felony, giving rise to felony murder liability, but if she did not die then there is not attempted murder or because his shooting was accidental and thus lacked intent to kill and murder is a specific intent crime. They could be charged with battery from the contact. Further, Jack and Sue also committed felony murder with respect to the shooting of the neighbor because Georgia does not follow the agency theory or the redline limitation such that any death, whether it be another co-felon or not, committed by any person during the course of the felony, whether by another co-felon or not, gives rise to felony murder liability in Georgia, and they had not yet reached a temporary place of safety when either of the deaths occurred.

7. The issue is whether Jack and Sue could be charged with the original crime they were planning, burglary. Yes, Jack and Sue can be charged with burglary because even though they did not in fact end up taking in money before fleeing, the crime was committed when they broke the window and entered the house with the intent to do so. Upon that point, the crime was complete whether or not the intended felony was a success or ever occurred.

8. The issue is whether the taped conversation of Jack's call from his friend is admissible evidence. It was a voluntary statement obtained outside the context of a custodial interrogation and before Jack had been arrested or charged with any crime. The key to the admissibility of a confession is whether it was voluntary, judged by a totality of the circumstances. The Fifth Amendment protects a defendant's right against self-incrimination, and under the Miranda Doctrine, a person in a custodial interrogation is entitled to the right to counsel and the right to remain silent, but both must be expressly invoked. A custodial situation is one in which the average person would not feel free to leave, and an interrogation is when police ask questions that would reasonably lead to incriminating responses. But here, Jack was not talking to police at all, he was not in custody, he was merely having a voluntary conversation with a friend. His Sixth Amendment rights had not arisen because he had not yet been arrested or charged with anything, and his Fifth Amendment rights were not violated because they do not protect confidences made to a "false friend" (snitch). Jack's statement to his friend was voluntary and free from any police coercion so, regardless of the fact that his friend recorded, his constitutional rights were not infringed. Hearsay is a human-declarant's out-of-court statement offered for its truth, which both Jack's actual confession and the recording of it will be. Hearsay within Hearsay involves multiple levels of hearsay, such as Jack's statements and the recording of those statements, so both must fall within an exception or exclusion to be admissible. The statement is a statement by a party-opponent, because Jack said it, but the recording is not a business or public record because it

was not made in any course of business or under any public duty, so the recording would be inadmissible. Jack's friend may testify to Jack's statement instead.

**Essay 2 — Sample Answer 1**

**1. The issue is whether Georgia law or California law governs the substantive elements of a claim for legal malpractice that might be filed in Georgia**

Generally, Georgia will apply its own law absent an express agreement by the parties to apply the law of another state. In general, in determining which law to apply, Georgia will look to which state has the most significant connection to the parties and the claim, looking to the parties' expectations and the state's interest in the case. Here, Ed is an attorney licensed to practice in California, not in Georgia, and the conduct that gave rise to the suit occurred wholly in California. Further, the witnesses who were engaged in the settlement (if Jane wishes to pursue malpractice in this vein as well) are also in California. The contract was also executed out of the LA office to deal with California conduct and to represent in a California matter. Accordingly, as California has the strongest connection to the parties, Georgia courts will likely apply California law as it is where the tort occurred and the state with the strongest connection to the action, unless following California law would violate Georgia's public policy.

Further, in any claims Jane may raise relating to malpractice with relation to the representation, the malpractice claims would be governed by the contingency contract, not by the contract with the star's lawyers that expressly was governed by California law. As this contract was silent as to any particular jurisdiction, the default choice-of-law provisions will govern.

**2. The issue is whether a Georgia court has personal jurisdiction over Ed if the suit is brought against both Firm and Ed individually.**

Generally, Georgia has personal jurisdiction over all residents and resident entities as "at home" for the purposes of general personal jurisdiction. In addition, for partnerships generally under Georgia law, the partnership is subject to personal jurisdiction in each jurisdiction where a partner resides. Nonetheless, here, the Firm is an LLP that was formed under Georgia law. As such, it is likely "at home" in Georgia and subject to Georgia's personal jurisdiction generally. It is unclear, though, whether Ed will be subject to personal jurisdiction. Ed is not a partner at the firm, but he is associated with the firm. Further, Ed appears to practice out of California, as he is admitted in California but not in Georgia. For non-residents to be subject to personal jurisdiction in Georgia, Georgia's long-arm statute will apply. The long-arm statute will apply if (i) an individual has transacted business in Georgia, including committing a tortious act outside of the state that caused injuries within the state, (ii) if the suit in question arises from the individual's contacts with Georgia, and (iii) if the exercise of personal jurisdiction comports with due process such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *See Int'l Shoe*.

Here, because Ed is a California attorney only associated with the partnership and not practicing within the partnership, he is likely not subject to Georgia's general personal jurisdiction. However, he is more likely to be subject to Georgia's personal jurisdiction under the long arm statute. Ed's contacts with Jane, a Georgia resident, occurred in California in the hospital, not in Georgia. However, because Ed's improper advice cause severe adverse tax consequences in Georgia, Jane may argue that the harm arises out of Ed's contacts with her as a Georgia resident and the Firm as a Georgia corporation. Nevertheless, there is no evidence here that Ed has had any other contacts with Georgia. The contract occurred wholly in California, and there is no evidence Ed ever even sat foot in Georgia. Thus, while Georgia does have a strong interest in giving its citizens a forum in which to litigate in-state, Georgia courts may not have personal jurisdiction over Ed because exercise of personal jurisdiction over Ed would not comport with traditional notions of fair play and substantial justice as Ed has not purposefully availed himself of any of Georgia's laws or established any contacts with Georgia sufficient to exercise personal jurisdiction. Depending on the extent of Ed's contacts with Georgia, though, if he has been involved with the Firm such that he would reasonably expect to be haled into court in Georgia, and if the court finds that the tortious conduct gave rise to an injury in Georgia, the court may exercise jurisdiction over Ed in accord with Georgia's Long Arm statute.

**3. The issue is whether a court hearing Jane's claims in Georgia would be required to apply California's one-year statute of limitations on malpractice actions.**

As explained above, generally, when Georgia's conflict-of-law rules direct that the laws of another state apply, those rules will apply and take full effect in Georgia unless those rules create prejudice to a party or a claim such that it violates public policy in Georgia. In particular, Georgia has recognized some important exceptions to the statue of limitations, and that Georgia's statute is longer than California's demonstrates Georgia's committed interest in protecting longer periods of time for malpractice claims. Georgia also has strong public policy interests in protecting its citizens from out-of-state attorneys who may take advantage of them. All of this, taken together, would likely give the Georgia court sufficient justification to apply Georgia's statute of limitation. Here, if Georgia applied California's statute of limitations, the suit would have been time barred in February of 2018, as it appears that Jane thanked Ed in February of 2017 for all of the work he had completed, long before Jane had any idea that the advice was incorrect or that anything was amiss. If Georgia were to apply California's statute of limitations, Jane would be left without recourse for Ed's conduct, and Georgia has a strong interest in protecting its citizens' claims. As such, because the California statute of limitations runs contrary to Georgia public policy, a court is not likely to enforce it.

**4. The issue is whether, if Georgia's statute of limitations on a legal malpractice claim governs, the suit is time-barred or timely.**

Generally, the suit would be barred here under Georgia's statute of limitation. For most tort actions, Georgia imposes a two-year statute of limitation from the time that either the tortious act occurred or the earliest time that the tortious nature of the act could have been discovered. Georgia does impose a longer statute of limitations on legal malpractice claims (4 years), but nevertheless, in this case, because the malpractice likely occurred when Ed gave advice before 2017, the claim would still be time-barred under the plain application of the rule. However, because the malpractice was not discoverable and not obvious to Jane until 2021, when her past taxes were audited, Jane may likely be able to assert a tolled statute of limitations (i.e., that the statute was tolled until Jane could have reasonably discovered the malpractice). Jane had no reason to know that any of the advice her attorney gave her was improper prior to this time. While ordinarily malpractice may be obvious, in some cases, malpractice does not manifest until years later, such as in the case of a poorly-drafted will. Accordingly, Georgia's tolling statutes apply to malpractice claims and the time when the malpractice claim was reasonably apparent to the party who could raise it. If this tolling claim is successful, then the suit will be timely. Otherwise, the suit will be time barred as the advice occurred in 2017, over four years ago.

**Essay 2 — Sample Answer 2**

**1. California law will likely govern the substantive elements of a claim for legal practice**

California law will likely govern the substantive elements for a claim of legal malpractice because the entire injury, settlement, and tax transaction began in California. To bring a claim for malpractice, a plaintiff must show both that and attorney was negligent in advising a client, and that, but-for the attorney's negligence, the outcome of a given suit or situation would be different. This means that a plaintiff must prove both a negligence case against the attorney and the case within their case that makes up the basis of the harm that attorney caused by failing to provide competent services for their case. Choice of law in a malpractice claim is governed by the law that should govern the underlying claim at issue in the case where the attorney failed to provide competent representation. Here, the core issue of Jane's claim is the settlement agreement and how Ed advised her to invest that settlement agreement. The settlement agreement itself says it is expressly governed by California law. This means that Jane has consented to have issues surrounding the settlement agreement governed by California law. Likewise, She entered into her attorney-client agreement with Ed in California and Ed is only licensed to practice in California. This means that issues relating to this agreement are also likely governed by California law. Therefore it is likely that Jane consented to have this dispute governed by California law.

However, even if she did not consent to it, the suit has the must substantial connection to California law. Under in a choice of law dispute, both federal and state courts will apply the law of the state with the most substantial connection to the suit if there is a dispute as to which law controls. Here, California has the most substantial connection because the entire transaction at issue took place in California, the settlement is governed by California law, and Ed is only licensed to practice in California. The only connection the suit has to Georgia and Georgia law is that Jane lives in Georgia and has continued to manage the funds at issue in the suit from Georgia. However, California remains much more connected to the suit, thus a Georgia court would likely apply California law to this malpractice case because it deals with a lawyer only licensed in California and transactions governed by California law.

**2. A Georgia will likely not have personal jurisdiction over Ed**

A Georgia court will likely not have person jurisdiction over Ed personally even if the suit is brought against both Ed and the Firm. Personal jurisdiction is the power of a court to exert authority over an individual in a proceeding. There are two types of personal jurisdiction: general and specific. General jurisdiction exists when an individual or organization is at home in the given state, and the state can then always exercise jurisdiction over those parties. Specific jurisdiction exists when a party is not physically present in the state but nonetheless is sufficiently connected to the state for it to exercise jurisdiction. Specific jurisdiction has two elements, statutory and

constitutional. Georgia's longarm statute authorizes specific jurisdiction in a variety of scenarios when a party is not present in the state including when they have entered into a contract to be formed in the state, committed a tort in the state, involved in a car accident in the state, etc. If a party falls under the longarm statute, Georgia can then exercise jurisdiction if it meets the constitutional test: that the individual has sufficient minimum contacts with the state of Georgia that it does not offend the notions of fair play and substantial justice for a Georgia court to exercise jurisdiction over the out of state party. Courts look at if the suit at issue arises out of the out of state party's contacts with the state of Georgia and whether they have personally availed themselves of the protections of the law of Georgia. Lastly courts consider whether it is fair to exercise jurisdiction over an out of state defendant.

Here, a Georgia court could exercise general jurisdiction over the Firm because it is headquartered in Atlanta. A company or firm is considered at home where it has its principal place of business, and being headquartered in Georgia is likely considered at home. However, simply because a Georgia court could exercise personal jurisdiction over the Firm does not mean they could exercise jurisdiction over Ed. First, the longarm statute likely does not reach Ed. Ed did not commit a tort in Georgia and he did not enter into a contract in Georgia or was meant to be performed in Georgia. Jane could argue that the harm from Ed's breach of contract occurred in Georgia such that the longarm statute should reach Ed, but this argument is likely not valid. Likewise, a Georgia court also could not constitutionally exercise personal jurisdiction over Ed. Ed's only connections with Georgia are that he works with a firm that is headquartered in Georgia and he served a client who is a Georgia resident. The facts do not suggest that Ed has ever been to the state of Georgia, practiced law under Georgia law, or has any contact outside working for the Firm and serving as Jane's attorney. Likewise, his contacts with Georgia do not arise out of the facts of the suit at issue. The accident and settlement that make up the basis of Jane's malpractice suit occurred in California and are governed by California law. Likewise, the advice that Ed gave to Jane about how to invest her settlement was advice given in California based on the advice of a "tax-guru" also at the California office. Thus the only connection this suit has to Georgia is that Jane is a Georgia resident and the consequences of Ed's bad legal advice have played out in Georgia. That connection alone likely does not make it foreseeable that Ed could be sued in Georgia. Ed has not personally availed himself of the protections of Georgia law because he is only licensed in and appears to only practice in Georgia. Thus it is likely not foreseeable that Ed would be subject to suit in Georgia. Therefore, a Georgia court likely could not exercise personal jurisdiction over Ed.

**3. A Georgia court would be required to apply California's statute of limitations**

A Georgia court would be required to apply California's statute of limitations because statutes of limitations are considered substantive law. The issue here is whether statute's of limitations are substantive or procedural under the Erie doctrine. Under the Erie Doctrine, both federal and state courts applying a court's substantive law must apply the substantive law of the state whose

law is controlling in the action. Law is substantive if it affects the rights, remedies, and outcomes of the parties. The Supreme Court of the United States has ruled that statutes of limitations are substantive law because they control whether or not a party can even bring a claim in the first place. They are substantive because they affect the basic right to bring a claim. Thus, a Georgia court would have to apply the one year statute of limitations from California law. However, this might not terminate Jane's claim because Ed has not formally terminated their attorney-client relationship. While Ed provided legal services to Jane six years ago, Ed never formally ended their attorney-client relationship. In fact, Jane went on to thank him a year later for his legal advice and services, showing that she still considered him her attorney. Under the ABA Model Rules for Professional Responsibility, attorneys should affirmatively end their relationship with a client. Courts typically look to whether the client considers the relationship still active and whether that belief is reasonable. If it is reasonable, the court will consider the relationship still active. Here, Jane may consider the relationship still active because she is still relying on the investment advice that Ed gave her. If this is reasonable, her claim would not be extinguished by California law because there is still an active attorney client relationship and the law does not toll until one year after the relationship ends.

**4. Georgia law likely does not bar Jane's claims**

Georgia Law likely does not bar Jane's claims because she only learned she had a valid claim in 2021 so her claim is timely. Under Georgia law, the statute of limitations for malpractice claims is five years from the date the injury first occurred or from when the party should have reasonably been aware of the injury. Here, the source of the malpractice claim is that Ed advised Jane to invest her settlement claim in an illegal tax shelter and likely violated the Rules of Professional Conduct in how he executed her settlement. These actions occurred in 2016, but Jane only learned that these actions were illegal and thus caused her injury in 2021. Jane only learned of Ed's illegal advice and mishandling of her case by an IRS audit in 2021. Likewise, she had not suffered any financial injury from his investment advice until the IRS audited her as well. Because of this Jane only became reasonably aware of the issues one year ago. It is likely that Jane could not have become aware of these issues any earlier because she was relying on the legal advice of Ed which she had no reason to distrust. Due to this, her claim would likely not be time barred. However, if a court finds that should she have become aware of the issues with the investment and her settlement when she first filed her tax return in 2016, her action would be time barred as it would be more than 5 years after she should have been aware of the injury. However, a Court is likely to find that the IRS did not realize the issue for 5 years so Jane should not have reasonably found it either.

**Essay 2 — Sample Answer 3**

**1. The Issue is Whether Georgia Law or California Law Governs the Substantive Elements of Claim for Legal Malpractice Filed in Georgia**

A court generally must apply the substantive law of the state where a substantial part of events that form the basis of the claim took place. Ed discussed Jane's claims with her in California, their agreement was signed in California, and the settlement offer was entered into in California and expressly governed by California law. While Jane filed her tax return in Georgia, Ed's actions of giving her advice all occurred in California. Thus, most of the events that form the basis of the claim took place in California and California law would likely apply.

**2. The Issue is Whether a Georgia Court Will Have Personal Jurisdiction Over Ed**

Georgia has general *in personam* jurisdiction over all residents of Georgia. Georgia also may have personal jurisdiction through its long-arm statute. Georgia's long-arm statute authorizes personal jurisdiction over an out-of-state resident under a number of circumstances, including if the resident causes harm to another while in Georgia, takes actions in another state that cause harm to a person in Georgia. The exercise of jurisdiction must also comply substantial values of fairness under the Due Process clause. Generally, to have personal jurisdiction under the Due Process clause, a defendant must have certain "minimum contacts" with the forum that usually arise from the defendant's "purposeful availment" of the benefits of the forum.

Based on the facts, Ed is not a resident of Georgia because he lives in California. Thus, a Georgia court would not have personal jurisdiction over Ed. Ed did not take any action in Georgia that make up the claims. However, his actions did cause harm in Georgia by causing Jane to rely on his advice in filing her tax returns in Georgia. Thus, Jane might try to argue that Georgia has personal jurisdiction over Ed under the Georgia long-arm statute. From the facts, Ed's contacts with Georgia are that he works for a Georgia company and provided advice to Jane, a Georgia resident. Ed might argue that his contacts due not satisfy the Due Process "minimum contacts" test because he did not "purposefully avail" himself of the forum in a that would allow a Georgia court to exercise personal jurisdiction over him. Thus, a Georgia court might not have personal jurisdiction over Ed.

**3. The Issue is Whether California's Statute of Limitations Applies**

Substantive law is law that governs the substance of a claim. In determining whether a law is substantive or procedural, courts have looked to whether the law would make a plaintiff more or less likely to want to bring a claim in that forum. Courts have found that Statute of Limitations

constitute substantive law. Thus, if California law were to govern the substantive elements of the malpractice claim, then California's statute of limitations would apply.

**4. The Issue is Whether Jane's Claims Would Be Timely Under the Georgia Statute of Limitations**

The Georgia statute of limitations claim for professional malpractice is typically two years. This statute of limitations may be tolled until the plaintiff discovers the harm. The advice that Ed provided that is the basis of this malpractice claim was given six years ago, outside the two year statute of limitations. However, Jane did not discover the harm caused by this advice until 2021, when tax return was audited and the IRS began questing whether the 2016 settlement plan was taxable. Thus, if the statute of limitations was told until Jane discovered the harm, then her claim would not be barred because it was discovered less than 2 years ago.

**Essay 3 — Sample Answer 1**

To: Partner

From: Examinee

Date: July 26, 2022

Re: HCC and Sal's- Tortious interference

**I. Definition of Tortious Interference with a contract**

Tortious interference with a contract is an intentional tort that occurs when a person (including a corporation), without privilege or right, intentionally intermeddles with a contract (either by burdening performance, impermissibly causing one party to cancel, etc.) to which it is not a party, and thereby causes damage to one or more parties of of the contract

**II. If Sal's Characterization is accurate, HCC's actions likely rise to the level of tortious interference.**

As explained in Division I, tortious interference with a contract occurs when a person, lacking privilege or right, intentionally interferes with the contractual relations of other parties (e.g. impermissibly burdening the performance of one party, impermissibly negotiating with one party to encourage them to breach, etc.), and thereby causes injury to one or more parties to the contract.

Here, Sal's will make the argument that HCC both impermissibly burdened its performance, and impermissibly negotiated with the DOT in an attempt to get the DOT to cancel its contract with Sal's.

**A. Impermissible Burden**

Here, it is undisputed that HCC's actions in paving their own segment of highway created a burden on Sal's ability to perform, and that Sal's suffered damages, namely, its lost profits. At a minimum, HCC occasionally blocked access to Sal's portion of the project with its materials and equipment. The issue is thus whether HCC did so tortiously. Under HCC's characterization of the facts, HCC likely lacked the requisite intent to be liable for an intentional interference, as it intended to render its own performance, and did not intend to wrongfully place a burden on Sal's performance. Under Sal's characterization, however, HCC intentionally denied access to Sal's portion of the project to ensure that Sal's could not complete the project on time. If Sal's characterization of the facts is accurate, then it makes out a claim for tortious interference, as HCC would have intentionally placed a burden on Sal's performance, knew that Sal's had a contract to complete such performance, and lacked any privilege or right to interfere.

**B. Impermissible Negotiation/Meddling**

Here, again, it is undisputed that HCC made a call to the DOT regarding the quality of Sal's performance. While no motive is given in the facts, the clearly implied motive is that HCC made such a call in hopes that the DOT would cancel its contract with Sal's, and award the second segment to HCC as well. Here, however, it is questionable as to whether Sal's suffered any damage, as the DOT took no adverse action against Sal's as a result of the call, and ultimately canceled its contract based on Sal's failure to timely perform by the date originally contemplated in the contract. If, however, the call resulted in an unwarranted delay in Sal's performance due to an inspection, then Sal's could assert that it was damaged by HCC's phone call. If Sal's can establish damages, it would also need to prove that HCC lacked privilege or right to interfere with the contract. Ordinarily, competitors enjoy a right to compete, and thus, attempting to beat a competitor on price, or making comments that one's own work is superior, are protected. Here, however, the competitive process had already closed. HCC enjoyed a right to compete during the bidding process, did in fact compete, and was awarded one of the contracts. Once the contracts were awarded, HCC lost its ordinary competition privilege, and thus, made its call to the DOT without privilege or right. Even assuming that HCC had the right to compete, it is unclear whether its statements would qualify under such a privilege. HCC is repeating statements about the quality of work of a rival, not seeking to offer a lower price or say that its workmanship is better. Thus, if Sal's could establish that it suffered damage as a result of HCC's call, it likely makes a claim for tortious interference. Because it probably cannot establish damages, however, this claim likely fails.

**III. Defenses available to HCC**

The issue is what defenses HCC may be able to raise in response to tortious interference claims made by Sal's. Tortious interference requires that the tortfeasor lack the privilege or right to interfere, and thus, HCC may assert that it was privileged with regard to both actions.

**A. Burdening Sal's performance**

It is undisputed that HCC's conduct burdened Sal's ability to perform under its own contract to some extent. However, HCC has a strong privilege or right defense. Competitors enjoy a right to compete (ordinarily), and the parties to a contract are allowed to perform their obligations. From the facts, the burden that Sal's is alleging is that HCC blocked access to Sal's construction site with its materials and equipment. Sal's alleges that this was done intentionally, but does not provide facts supporting such an allegation. Like Sal's, HCC was also under a deadline from the DOT to complete its segment of the road. During the ordinary course of completing its required performance, it occasionally would block the road, thus limiting access to Sal's work area. Sal's however, likely similarly had to block the road on its own site in order to render performance, but no one was burdened as there was not a third segment. Because the burden on Sal's appears

to be an incidental impact of HCC's lawfully rendered and contractually required performance, any interference with Sal's contract was done with privilege or right.

**B. The Call to the DOT**

HCC is again likely to assert a privilege defense, although this time based on the First Amendment right to free speech, as it spoke about a matter of public concern and was not reckless or negligent with regard to the statement's falsity.

Indisputably, the quality of public works is a matter of public concern, regardless of whether the works are built by government employees or private contractors. Here, HCC was speaking as to the quality of Sal's work on a public highway replacement in Fulton County, a matter clearly within the concern of the general public. As such, unless Sal's can establish that HCC was at least negligent with regard to the truth or falsity of the statement, the call would not constitute slander or trade libel, and would thus be protected speech under the first amendment.

Here, HCC learned of the quality of Sal's work from comments made by one of Sal's supervisors. Admittedly, HCC took no actions to independently verify the veracity of the statement. However, it was likely not unreasonable for HCC to not independently verify the truth, as the circumstances do not evidence that Sal's supervisor lacked knowledge or was untrustworthy. There is no indication that the supervisor was disgruntled with Sal's, or looking to jump ship to HCC. Thus, there is little reason to suspect that he would make negative comments as to the quality of Sal's performance, unless he believed them to be true. Consequently, HCC did not recklessly or negligently disregard the truth of the supervisor's statement before repeating it, and the statement is unlikely to qualify as libel or slander. Thus, HCC can assert a first amendment privilege defense to an action based on its call to the DOT.

Further, as explained above, although not an affirmative defense, HCC can assert that Sal's suffered no damages as a result of the call, as damages are an essential element of the claim. There is no indication that the DOT took any immediate adverse action as a result of the call, and the DOT only canceled the contract upon non-completion by the contract date. Thus, Sal's has not alleged any non-speculative harm, and is HCC can assert that Sal's is not permitted to recover.

**Essay 3 — Sample Answer 2**

1. Tortious interference with contract is a claim one party makes against another when they believe the other party has, by fraudulent or other malicious conduct, destroyed or limited the non-interfering parties' benefit of the bargain as related to a certain contract. The elements of tortious interference with a contract are that the interfering party (1) knew or had reason to know of the contract and it's relevant terms and (2) intentionally or recklessly took positive and fraudulent or malicious steps to undermine or usurp the contract that (3) went beyond simple competition in the ordinary course of business (i.e., by lowering their prices or increasing their offerings), and (4) this malicious/tortious interference caused an actual and substantial injury to the non-interfering party.

Therefore, in order to prove tortious interference with Contract, Sal's will have to show that HCC knew about their contract, intentionally undermined said contract in a fraudulent or malicious way that went beyond competition in the ordinary course of business, and that they suffered a real injury because of the interference that is compensable through damages.

2. The issue is whether there are sufficient facts for Sal's to make a claim against HCC for tortious interference with contract. In order to state a claim in a Georgia court, a plaintiff must submit a well-pled complaint, which requires that they provide more than bare assertions -- they must provide facts that, if taken as the truth, would be sufficient to support their related claims. When the claim includes some element of fraud, such as this one does, the complaint must be particularly specific in order to pass muster with the Georgia court.

Therefore, Sal's will have to plead each claim with a high degree of specificity, and will have to prove each element in order to prevail.

The first element is knowledge; Sal's will have to show that HCC knew about Sal's contract with the GDOT. This element is easy to prove, as HCC won the bid for the first 10 mile stretch and Sal's won the bid for the second mile stretch. HCC would have known that Sal's won the bid, not only because such bids are a matter of public record, but also because the two companies worked side by side, to the point of often being in each other's way. Therefore, Sal's will be able to show that HCC knew about the contract. GDOT also made a point to both contractors that the contracts had to be completed by the same date, and were related to one another. Furthermore, because both HCC and Sal's contracts included identical GDOT General Conditions, which would include the provisions on default and re-bidding in the case of failure to complete the contract, HCC would have been well aware of the consequences of causing Sal's to default (i.e., that bidding would reopen and that HCC would likely have a leg up having already won the first contract and done the job satisfactorily). This is probably the strongest element in Sal's favor, as HCC had an unusual amount of insight into Sal's contract, and into how it might be interfered with or undermined.

The second element is malicious intent or recklessness; Sal's will have to show that HCC interference with his contract was intentional and designed to undermine the contract. Sal's has

asserted that HCC intentionally blocked and limited Sal's access to the work area so that it could not complete the work on time. Sal's has also asserted that HCC made false statements to GDOT concerning the quality of Sal's performance. HCC admits that Sal's was occasionally blocked from working, but only in the normal course of business. HCC admits to passing on incorrect information about Sal's performance to GDOT, but was only repeating the words of Sal's own supervisor, who himself was incorrect, without checking it for accuracy. Both acts were intentional in the bare sense, but arguably not in the malicious, reckless sense. Sal's argument is much stronger as the blocking of the roadway. While HCC claims this blocking was only in the ordinary course, it may be hard to explain why a separate 10-mile stretch of road would be operated in such a way that an adjoining 10-mile stretch was completely blocked off to another contractor. As to the false statements, there is no evidence that HCC acted maliciously -- they didn't lie or make up the statements about Sal's, they simply relayed information from one of Sal's own agent without independent verification. That hardly rises to the level of malice or intent required under the elements of tortious interference.

Therefore, Sal's has an arguable case that the blockages were intentional and malicious (logic and HCC's knowledge of the default provisions lead this way), possibly satisfying the second element, but the case for intentionally passing on wrong information is incredibly weak, and won't withstand scrutiny as long as HCC is telling the truth.

The third element is that the interference went beyond the ordinary scope of business (i.e., wasn't just trade custom, competition, lower prices, persuasion, advertising, etc.). Here, passing on incorrect information would arguably meet this standard, but that claim is likely fail on intentionality grounds. The claim that HCC was intentionally blocking the road is more convincing, if true. Blocking a ten-mile stretch of highway such that an adjoining 10-mile stretch stretch of highway cannot be accessed (or has its access limited) seems like the kind of interference that would require advance planning, and thus intention and activity going beyond the ordinary scope of business (i.e., activity that goes beyond the scope of HCC's contract, finishing the road, to reach into the world of Sal's contract, preventing the finishing of the road). This element will come down to a more developed record -- we need to know how long the road was blocked, how comprehensively it was blocked, how many days it was blocked, whether Sal took any steps to clear the blockage, etc. This element will be highly fact-specific, but as it stands, arguably, Sal's has a case.

The fourth element is actual injury. To prove an actual injury Sal will have to show that HCC's actions were the but-for (i.e., would not have happened but for HCC's actions) and the proximate (i.e., foreseeable and therefore legal) cause of the Sal's injuries, which are certainly real (the loss of a major contract, damage to his reputation, etc.). This will again be highly fact-specific, and Sal's will have to show that, in addition to every other element, Sal would not have defaulted without HCC's interference, and that such default was foreseeable to HCC. As discussed above, HCC had an unusually comprehensive knowledge of the terms of Sal's contract with the GDOT. Therefore, Sal's will have a good argument that, assuming all other elements are met, HCC knew that interfering with Sal in this was could foreseeably lead to Sal's going into default and losing the contract (and HCC's scooping it up). By the same token, Sal's will have to show that HCC was

the but-for cause; that, without the days and access lost to Sal's because of blockages, and without the negative comment from HCC (which, as earlier discussed, will almost certainly not be held against HCC), the contract would not have gone into default.

3. HCC will defend, as explained above, by claiming that (1) they acted in the ordinary scope of business, never completely blocking Sal's (only limited his access) and never interfering to the point that it was foreseeably leading to default, which negates elements three (ordinary course of business) and four (causation of an actual injury); (2) that nothing they did was ever intended to cause Sal's to default, or to in any way interfere with their contract.

Sal's claims are fairly thin, and HCC has a strong case that there was no intent on their part, that they acted in the ordinary course, and that it wasn't foreseeable to them that their actions (occasionally limiting access and passing on information from an agent of Sal's) would cause a default on the contract.

**Essay 3 — Sample Answer 3**

To: Partner

From: Examinee

Date: July 26, 2022

Re: Highway Construction Company

**1. The Issue is What Elements Must Be Proven to Sustain a Claim of Tortious Interference with Contract**

A claim of tortious interference with contract is an intentional tort claim that arises when a third-party interferes with the contractual rights of the plaintiff. To sustain a claim of tortious interference with contract, a plaintiff must establish that a defendant, without privilege, wrongfully and intentionally interfered the with contract rights of a third party, and that the interference caused the plaintiff's harm. The plaintiff must have been a party to the contract it is claiming defendant interfered with and defendant cannot be a party to that contract. The interference must be outside normal business competition.

**2. The Issue is Whether the Facts Here Support a Claim of Tortious Interference with Contract**

a. Equipment Blocking Access

HCC says that in the normal course of working its segment, its materials and equipment limited Sal's access. HCC also says that one of the superintendents of HCC passed on the the GDOT incorrect information about the quality of Sal's performance because they passed along information they got from one of Sal's supervisors without verifying the claim. These actions likely interfered with the contract between Sal and GDOT by making it more difficult for Sal to fulfill his contractual duties in a timely manner. Sal suffered harm because he lost the contract with GDOT when he failed to complete the project on time. To sustain a claim, however, Sal that he failed to complete the contract on time because of HCC's actions in blocking his access to the road. Sal must also show that HCC's actions in preventing him from accessing the worksite were harmful, or at least reckless. While the actions described by HCC in leaving their equipment where it limited Sal's access, negligence alone cannot sustain a claim of tortious interference with contract. The actions of HCC with regards to their equipment might not reach the level of intent required for tortious interference with contract. Thus, Sal might not be able to sustain a claim of tortious interference with contract for the loss of access caused by HCC's equipment.

b. False Statements

Sal additionally claims that HCC made false statements to GDOT concerning the quality of Sal's performance. False statements can be the basis of a claim of tortious interference with torts. However, Sal must shows that in making these statements, HCC acted with intent or recklessness.

HCC claims that a supervisor passed on incorrect information about the quality of Sal's performance to GDOT after getting incorrect information from one of Sal's supervisors and failing to verify it. This conduct might not rise to the level of intent required for a claim of tortious interference with contract. Additionally, GDOT declared Sal's in default because of its failure to complete the project on time. Likely, the HCC's superintendents statements did not affect the timeliness with which Sal completed the project, and thus the element of causation is missing. Accordingly, Sal likely cannot succeed on a claim of tortious interference with contract for the false statements made to GDOT.

**3. The Issue is What Defenses are Available to HCC**

One defense to tortious interference of contracts is that a party was acting within the normal realm of business competition. HCC was a competitor of Sal's as they were in the same business and competing for the same contracts. Thus, HCC might be able to claim that they acted merely as a business competitor.

Additionally, HCC can claim that their conduct did not cause Sal's damages. HCC might be able to show that independent factors caused Sal's not to finish their contractual duties on time. If so, then Sal would not be able to sustain a claim of tortious interference with contract.

**Essay 4 — Sample Answer 1**

1. The issue is if the Band refuses to play Couple B's reception, would Couple B succeed in a breach of contract claim against the band.

A contract needs valid offer, consideration, and performance. This contract would operate under the common law since it's a contract for services (instead of the UCC Article 2 in dealing with goods.) A contract requires all essential elements for it to be enforceable; the parties, a description of the services, the payment, and how the payment is handled.

Couple A's contract with the band is valid. The parties are described (the couple and the band), the description of services includes sufficient details to include the event and location, the payment is specificed, and how it is to be paid is specified. There is a valid contract between Couple A and the Band.

A contract is freely assignable unless there is an anti-assignment provision in the contract. Assignment speaks to assigning the rights due under the contract to a third party. An assignment can be with or without consideration, but when consideration is present, it speaks to a valid contract between the assignor and the assignee. The parties could go one step further and relinquish the first party's liability by creating a novation where the other party to the contract signs a new agreement or modification agreeing to the third party's acceptance of the original party's contract.

Couple A has not revoked or repudiated their agreement with the Band. Lacking an anti-assignment provision in the contract, Couple A can freely assign the contract to a third party, which is Couple B in this situation. Since Couple B provided consideration, $500, they have a valid contract with Couple A and Couple A validly assigned them the right of the Band's performance under the contract. The Band would be in breach for not performing. Couple B becomes a party to the contract by the valid assignment and can succeed in bringing the suit against the Band for a breach of contract. There was no novation created by the Band and Couple B so this suit would rely on the valid assignment.

2. If Couple B sues the DJ for breach of contract, would the DJ succeed in her own breach of contract against the Band as an incidental or intended beneficiary.

An incidental beneficiary is not a party to a contract and has no rights under the contract. Conversely, an intended beneficiary has rights under a contract and can sue to enforce those rights. An intended beneficiaries is someone contemplated by both parties in entering the contract that benefits directly from the contract. An incidental beneficiary is someone not contemplated when entering the contract who may benefit incidentally from the contract.

The DJ would be an incidental beneficiary at best and not succeed in bringing a claim against the Band The DJ is incidentally benefiting as he repudiated his contract with Couple B and they were able to find a replacement at a lesser fee. Both the DJ and Couple B come out better financially but the Couple doesn't get the specific DJ they hired to play their wedding. They didn't assume the contract in order for the DJ to get out of the wedding or make more money. There was no intended benefit to the DJ from the contract at all. Thee Couples did not enter the contracts with the DJ in mind and the DJ only benefitted indirectly as she got a better opportunity for more money. She would not be able to bring a breach of contract claim against the band as she was only an incidental beneficiary and not an intended benficiary.

3. The issue is if the Band performs and Couple B refuses to pay, can the Band succeed in a breach of contract claim against Couple B or A.

An assignee and assignor are both parties to a contract unless there is a novation (see above). Couple A was not released from liability by receiving $500 in consideration. The Band would have needed to agree to the liability release in order for that to occur. If Couple B does not pay the payment within three business days after the reception, the Band could sue both Couple A and Couple B for breach of contract. Due to the valid assignment, if the Band sued Couple B, Couple B could not recover from couple A for indemnity purposes. However, if the Band sued Couple A and and Couple A had to pay, they could seek indemnification from Couple B due to the valid assignment.

4. The issue is if there is an anti-assignment clause, does the Band have a right to refuse to perform at Couple B's reception.

An anti-assignment clauses can limit assignment by parties to a contract. However, even with a valid anti-assignment clause, the parties can still assign the contract, they would just be in breach. The parties would still be required to perform under the K. The Band always have the right to refuse to perform, but they would be subject to a breach of contract action for failing to perform. They could in turn sue Couple A for breach of assignment.

The performance is almost what was contemplated under the contract no matter if it was for Couple A or B. The performance was for around 200 guests, at a wedding, in the same venue just a different ballroom, and the payment fee and schedule remained the same. The Band would have a hard time showing that performance was no feasible or looking for a valid performance excuse other than contesting the assignment. They could refuse to perform but they would be subject to breach (as would Couple A.)

5. Is a liquidated damages provision of $8,000 enforceable by Couple B against the DJ if he commits a material breach of contract?

In Georgia, a liquidated damages provision is enforceable unless it acts like a penalty. A liquidated damages provisions is a specific amount of damages contemplated and agreed to when contracting that would occur upon breach. The amount can be a round number when the damages are too hard to ascertain. The court will analyze the amount and weigh the damages to determine if the liquidated damages are damages or an impermissible penalty against the breaching party.

The liquidated damages provision in the DJ contract was for $8,000. The sum seems quite high given the overall contract price was $10,000 and possibly a penalty instead of damages. However, weddings are important events for people. Wedding performers are hard to find and can be difficult to replace if a DJ defaults (like the DJ DID here.) It is apparent that this DJ receives much more valuable offers and is subject to taking them when they benefit her more than her current accepted work. It would be difficult to accurately ascertain the replacement costs associating with adequately replacing the DJ in time.

Given that, it appears that $8,000 may still act like a penalty instead of damages. The couple hired a band for $3,000 including the assignment fee at the last minute to fill in. The DJ wasn't expected to be paid until after the wedding. She would be required to pay the couple $8,000 if she breached. While that could be seen as reasonable for a wedding, given these facts, the contract price for the DJ, and the price the couple eventually paid to replace her, $8,000 seems like an impermissible penalty instead of liquidated damages. As such, the court would most likely rule it as a penalty and unenforceable.

**Essay 4 — Sample Answer 2**

1. The issue is whether Couple B will succeed in a breach of contract claim against the Band if the Band refuses to play at Couple B's reception.

In Georgia, contractual rights and duties are freely assignable unless assignment materially increases the burden on the remaining original party or the contract is one involving the personal taste or skill or talent of a particular party to the contract. The assignee of a contractual right may enforce the contract the same as the original party to the contract could enforce the contract.

In this case, Couple A assigned the contract with the Band to Couple B. Couple B's obligation under the contract to pay money is not one involving personal taste or skill or talent, and the burden on the Band is not materially increased by having to play a different reception because the location of the reception for Couple A and Couple B is in the same hotel, the set-up of the reception venues is the same, the size of the reception is expected to be the same for both Couple A and Couple B, and the length of the performance from 7 p.m. to 11 p.m. is the same. Accordingly, the assignment is valid. Because the assignment was valid, Couple B will have standing to sue for breach of contract if the Band refuses to perform under the contract.

2. The issue is whether DJ has third-party standing to enforce the contract between Couple B and the Band.

In Georgia, an intended beneficiary of a contract between other parties may enforce the contract against those other parties when the beneficiary is informed of the existence of the contract and acts in reliance on the contract. An intended beneficiary is a beneficiary of the contract that is not a party to the contract that the parties to the contract intended to benefit. An incidental beneficiary, on the other hand, does not have standing to enforce a contract to which that beneficiary is not a party. An incidental beneficiary is a party that benefits from the contract that the parties to the original contract did not intend to benefit.

In this case, DJ is an incidental beneficiary of the contract between the Band and Couple B. It is true that Couple B's low cost to cover by hiring the Band benefits DJ by eliminating the possible expectation damages that Couple B might seek from DJ for having to find an alternate musical arrangement for their reception if their costs to cover end up being higher than $10,000, but this benefit is only incidental to Couple B's securing music for their reception. Because the purpose of the contract was not to benefit DJ, DJ is only an incidental beneficiary, and DJ's knowledge of the contract and reliance on the contract are insufficient to provide DJ with standing to enforce the contract.

3. The issue is whether the Band is able to pursue a breach of contract claim against Couple B and Couple A if Couple B refuses to pay the $2,500 fee owed to the Band.

A party to a contract may assign both contractual rights and obligations. When a party assigns a contract, that party remains liable on the contract unless the parties to the assigned contract effect a novation and release the assigning party from the contract.

In this case, Couple B was assigned both the right to have the Band play their reception and the obligation to pay the Band. The Band will have standing to sue Couple B for breach of contract if Couple B fails to perform this obligation. The Band will also have the right to sue Couple A, because the facts do not indicate that the Band agreed to release Couple A from liability under the contract after the contract was assigned.

4. The issue is whether the no assignment provision in the contract between Couple A and the Band, without a clause stating that all assignments are void, is sufficient to prevent Couple A from assigning the contract.

Georgia generally favors free assignment. When a contract contains a clause that prohibits assignment of contractual rights and duties, but fails to include a clause stating that all assignments are void, the contractual rights are still assignable. The non-assigning party to the original contract has a claim for breach of contract against the assigning party, but the assignment is still effective.

In this case, the only clause in the contract between Couple A and the Band provides that neither party may assign rights or obligations under the contract. But it does not include a clause stating that all assignments are void. Accordingly the contract between Couple A and the Band was validly assigned to Couple B, and the Band does not have a right to refuse to perform at Couple B's reception. The Band may pursue a claim for breach of contract against Couple A.

5. The issue is whether the liquidated damages clause in the contract between Couple B and DJ is enforceable.

The normal measure of damages is expectation damages when expectation damages are capable of reasonable proof and not too speculative. In Georgia, liquidated damages are allowed when actual damages would be difficult to calculate and the liquidated damages clause does not function as a penalty.

Here, the contract between Couple B and DJ was for DJ's particular skill and service in providing music for the reception. While Couple B may be able to cover with alternate musical entertainment, they have been deprived of the value of the particular skills of DJ. Accordingly, damages for the loss of DJ's unique skill will be difficult to calculate, even if Couple B covers music

for the reception at a lower price. Even though $8,000 is a large price, almost the value that Couple B was required to pay DJ under the contract, it is not clear that this liquidated damages clause functions as a penalty. Accordingly, the liquidated damages clause is likely enforceable.

**Essay 4 — Sample Answer 3**

**1. The issue is whether Couple B would succeed in a breach of contract claim against the Band if it refuses to play Couple B's reception**

Generally, when a contract is silent as to assignment, the right to enforce a contract may be assigned to another party gratuitously or for value. Here, Couple A assigned their rights to enforce the contract with the Band for a $500 fee. While Couple A would remain liable on their obligation if Couple B failed to perform by payment, the Band was still under an obligation to play. However, an assignee party may not unilaterally change the performance due by the other party to the contract. Here, Couple B would be suing Band for failing to play at their wedding. While Couple B's wedding is not the wedding that Band contracted to play with, absent a specific service demanded from that party, performance is freely assignable. Band's performance did not change whatsoever; Band would still be playing at the same hotel on the same date, even at the same times with the same number of guests (200), only in a different ballroom. As all that Couple A had to do under the contract was pay, the assignment of the contract to Couple B was permissible, and because Band does not have a substantial interest in Couple A's personally performing the contract (as their performance is just payment of money), Couple B will likely be able to enforce the contract and to pursue a breach of contract claim against the Band.

**2. The issue is whether DJ would succeed in her own breach of contract action against the Band as an intended or incidental third-party beneficiary if Couple B sues DJ**

If Couple B sues DJ, they may be able to recover some because DJ repudiated her duties to perform at Couple B's wedding. The recovery that Couple B could have received from DJ would have been limited, though, had they been able to secure Band to perform at their wedding. DJ would not have been able to recover any damages other than restitution damages (which there appear to be none here) as the breaching party. Because Band did not perform at Couple B's wedding, it appears that DJ is suing Band because DJ would have benefited by way of having reduced damages had Band performed. Generally, in Georgia, to recover as a third-party under a contract, a third-party beneficiary must be an intended beneficiary (i.e., one expressly contemplated by the parties) and not one whose benefit is merely incidental. Here, the contract between Couple B and Band or even Couple A and Band was not made to benefit DJ. While DJ would tangentially benefit from having damages against her limited, because DJ was not a beneficiary expressly contemplated by the parties here, DJ is not an intended beneficiary and cannot recover.

**3. The issue is whether Band would succeed in a breach of contract claim against Couple B or Couple A if Couple B refuses to pay the $2,500 fee after Band performs at Couple B's reception**

Generally, a party who assigns rights under a contract may only assign the rights under the contract, and the obligations and duties under the contract are not assigned. However, if a party expressly agrees to be liable on a contract and consideration is given for that contract, then the party to an original contract that was purchased may be an intended beneficiary of that secondary contract, and the original party may be able to recover against the assignee party. Here, the simplest discussion of liability comes with Couple A. Because Couple A contracted with the Band, they are liable to pay the Band under the contract. Even if they assign their rights to performance under the contract, they are not automatically relieved of their obligations under the contract. Absent a novation (where both parties agree and a third party is fully substituted into the contract in place of one of the original parties), the original party will remain liable on the contract. Accordingly, the band will be able to recover against Couple A.

As discussed above, though, Couple B and Couple A likely had a contract regarding the assignment of the original contract. In Georgia, a contract requires an offer, acceptance, and consideration. Here, Couples A and B each agreed to the terms of assigning the contract, and Couple A gave Couple B the right to performance while Couple B gave Couple A $500. As such, this exchange created a contract between the couples. In this contract, it was contemplated that while Couple B would get the rights to performance, Couple B would also be obligated on the new contract with Couple A to pay Band the $2,500 fee. As such, since Band is an intended third-party beneficiary of this contract, as discussed above, Band will likely be able to recover from Couple B as well.

**4. The issue is whether the provision prohibiting assignments of rights and obligations under the contract gives Band a right to refuse to perform at Couple B's reception**

Generally, contracts are freely assignable unless there is language to the contrary. However, in Georgia, language in a contract that prohibits assignments will not operate to stop an assignment, but it instead will give rise to a claim for breach of contract against the assignor party. The non-breaching party will still be obligated to perform under the contract for the assignee, though, as the assignment is still effective. If, on the contrary, the provision made all assignments void ab initio, then the assignment attempt would be treated as void, and Couple B could rightfully refuse to perform. Nevertheless, as the assignment provision only attempts to prohibit assignments, Band may file suit against Couple A for breach of this non-assignment provision, but the assignment will be effective, and Band must perform at Couple B's wedding or risk being in material breach of the contract.

**5. The issue is whether the liquidated damages clause requiring DJ to pay $8,000 is enforceable against DJ**

Generally, a liquidated damages clause will be valid if it is reasonable and if damages are difficult to calculate or were uncertain at the time of contracting. If, however, the amount of a

liquidated damages clause is unreasonable, then it may be viewed as a "penalty," and the court will strike the provision as void. It is unclear here whether this provision would be struck as a penalty. In looking to see whether an amount is a penalty or a legitimate measure of liquidated damages, a court will look at the amount in comparison to the contract as a whole. Here, the contract as a whole required payment of $10,000 to the DJ that the Couple apparently never paid or had to pay. The damages, then, are 80% of the full contract price, ordinarily an extraordinarily high proportion.

However, if Couple B had been able to secure substitute performance for DJ in like quality, they may have had to pay far over the $10,000 for a last minute famous DJ, where $8,000 might reasonably represent the increase in the amount they would have had to pay. Indeed, because DJ received a much higher fee to play in Dubai, to get an equally-famous DJ to play, the couple may have had to pay in excess of $8,000 if they wanted to get substitute performance, and it was unknown at the time of the contract whether, if DJ breached, Couple B would be able to get substitute performance. Regardless, a court will also look to see whether damages could reasonably be measured or foreseen at the time of the contract. Here, it is difficult to put a value on how much wedding music is worth or how much damage was caused by lack of music at the wedding. As such, although the amount represents 80% of the contract price, a court may find that this liquidated damages fee is reasonable due to the difficulty in measuring damages from the lack of music at a wedding where a particularly famous DJ was supposed to play. If, instead, the court found that the provision was penal in nature, though, the court has the discretion not to enforce it.

**MPT-1 — Sample Answer 1**

**TO:** Marianne Morton

**FROM:** Examinee

**DATE:** July 26, 2022

**IN RE:** Walter Hixon Marriages

You asked me to prepare a memorandum addressing four questions regarding Mr. Hixon's marital status and best course of action. Please find my analyses to each of those questions below.

**1. Does Columbia or Franklin law govern the grounds for annulling Mr. Hixon's marriage to Ms. Tucker?**

The issue before us is that our client, Mr. Hixon, wishes to annul his marriage to Ms. Tucker, his second wife, because he was still married to his former wife, Ms. Prescott, whom he thought was dead. To determine the procedural start for Mr. Hixon, it is necessary to determine the applicable state law governing his marriages, both of which occurred in the State of Columbia. When determining which law to follow, a court "will follow a statutory directive of its own state on choice of law." However, in the absence of such a statute, the validity of any given marriage is determined "by local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage." R.2d. If a state does not have such a significant relationship with the parties, the state where the suit was filed must apply the law of the state that does have such a relationship. *Fletcher.*

To determine the state that has "the most significant relationship" to the parties, the courts must look at "the relevant policies of other interested states, the protection of justified expectations, certainty, predictability, and uniformity of result, and ease in the determination and application of law to be applied." R.2d; *Fletcher*. Generally, when looking at the policies of the interested states, the court will consider the strength of the policy interest involved in the case. In particular, certain Franklin courts have recognized that all states have strong legitimate policy interests in defining relationships, and the fact that Franklin and Columbia differ shows the strength of these policy interests. *Fletcher.* In this case, those same countervailing interests apply, as Franklin's statutes still recognize a bigamous marriage as void and Columbia treats it as voidable, so the interests here remain strong.

Further, the court must protect the expectations of the parties. For example, in *Fletcher*, the petitioner and respondent were married in Franklin, lived their entire married life there, wand owned property in Franklin, where the respondent and children still resided. Under these facts, the court found that the parties had a "justified expectation" of Franklin law governing their case.

Similarly, in Mr. Hixon's case, his second wife, Ms. Tucker, was from Columbia, the parties got married in Corinth, Columbia in 2012, the parties bought a house together in Columbia in February of 2015, and the parties maintained joint accounts and a mortgage on the Columbia property for four years, until Mr. Hixon unilaterally moved in 2019. Like the wife in *Fletcher* who had a legitimate expectation that the law of the state where the marriage occurred and the marital residence was maintained would apply, Ms. Tucker likely has a strong justified expectation that Franklin law will apply to their annulment proceedings.

Similarly to the strength of the state interest, the certainty, predictability, and uniformity of the results weighs heavily in favor of establishing the system of "well-defined rules" to govern marriage, and like in *Fletcher*, each state's interest remains strong in ensuring results are consistent and consistently applied. Finally, in considering the ease of determination and application of which law to apply, a court may look at where the events in the marriage occurred and how easy it would be for a court to administer. *Fletcher.* In *Fletcher*, the court determined that a trial court erred in applying Franklin law, because the parties lived together only in Columbia and jointly owned property and incurred debts there, almost identically to the case at bar. Thus, in Mr. Hixon's case, because Ms. Tucker remains in Columbia, because the marital residence and mortgage are in Columbia,because the exercise of Columbia law would not violate the public policy of the state with the most significant relationship to the spouses, R.2d, and because Ms. Tucker has a strong justified expectation that Columbia law will apply, Columbia law likely governs the parties' annulment, and absent a statutory directive to the contrary, wherever Mr. Hixon files, the Columbia law regarding annulments will apply.

**2. Must Mr. Hixon file a lawsuit to annul his second marriage, and if yes, would he be able to obtain an annulment under the applicable law**

**a. Necessity of a Lawsuit**

As discussed above, Columbia law likely applies to the parties' marriage, regardless of where the action is filed. As such, under Columbia law, in order for a marriage to be declared void, "either party may seek and a court must issue an annulment decree. CRS § 718.02. While Franklin law treats bigamous marriages as void and makes filing suit not necessary unlike in other Franklin annulments or divorces, the Franklin courts, as discussed above, will likely apply Columbia law. Because Columbia law applies, Mr. Hixon must follow Columbia law and seek a court order for an annulment.

**b. Eligibility for an Annulment**

To be able to substantively obtain the annulment, Mr. Hixon must prove, consistent with the statute, (1) that at the time of his marriage to Ms. Tucker, his previous spouse was living, (2) that the marriage with that spouse (Ms. Prescott) was in force, (3) that that spouse (Ms. Prescott) was

absent and not known to Mr. Hixon to be living for a period of five successive years immediately proceeding his subsequent marriage that he seeks to annul. In this case, Mr. Hixon and Ms. Prescott were married on June 7, 1986. Consistent with the phone calls Mr. Hixon recently received, it appears that Ms. Prescott is (and ergo was) alive during all relevant periods. The marriage between Mr. Hixon and Ms. Prescott also seems to be in effect; the search for vital records by Inv. Dugger revealed no decrees of divorce or annulment, and Mr. Hixon stated that both parties seemingly just walked away from the marriage when he moved out, never seeking legal dissolution. Finally, Mr. Hixon heard that Ms. Prescott had died in 2001 from a friend. For over 11 years before, he had had no contact with her, and he had no way to confirm her death or refute it. As such, he likely had good reason to think that she had passed. In July of 2012, Mr. Hixon married Ms. Tucker, over ten years later, thus satisfying the final prong that Mr. Hixon did not know Ms. Prescott to be living for at least five years prior to his second marriage. For that reason, Mr. Hixon will likely be able to obtain an annulment under Columbia law no matter where he files.

**3. If Mr. Hixon files an annulment action in Franklin, would a Franklin court have jurisdiction to annul the marriage and to dispose of the parties' property?**

**a. Jurisdiction to Annul the Marriage**

Generally, under Franklin law, if a plaintiff "has established residency in Franklin for at least six months, [a] trial court may exercise jurisdiction over the marriage relationship." *Daniels.* The exercise of such jurisdiction does not require *in personam* jurisdiction to terminate a marriage relationship through an annulment, as Mr. Hixon seeks here. *See Carew v. Ellis*. So long as either party has been domiciled within the state for six months, a court will have jurisdiction over the *res* (i.e., the substance) of the relationship, consistent with the U.S. Supreme Court's command that "each state . . . can alter within its own borders the marriage status of the spouse domiciled there," even if the other spouse is absent, consistent with each state's large interest in the institution of marriage. *See Daniels* (citing *Williams*). Even if the Franklin Court decided to exercise jurisdiction over some of the property in a marriage, as discussed below, the presence of these issues alone would not remove the court's jurisdiction to dissolve the marriage. *See Daniels*. For example, in *Daniels*, the respondent contended that the presence of additional issues, such as attorneys' fees, did not subject her to the jurisdiction of the court. Rejecting this argument, the Franklin Supreme Court found that it had jurisdiction over the *Res* of the marriage even if it did not have jurisdiction over other issues. Similarly, in the case at bar, regardless of the availability of jursidiction over property, Franklin maintains the power to dissolve a marriage of any resident of Franklin who has been domiciled within the state for over six months. As Mr. Hixon meets this requirement, the court has such jurisdiction.

**b. Jurisdiction to Dispose of Property**

Under Franklin law, the provisions of law relating to divorce and to "property rights of the spouses . . . are applicable to proceedings for an annulment." Fr. Code § 19-7. Specifically, a Franklin court has the power to "issue orders dividing the property interests of the parties to an annulment, using the same rules as those governing the equitable division of property in a divorce." *See Walker's Tratise on Domestic Relations,* § 1.7. However, even if Franklin rules are applicable, the court must have jurisdiction over the property. Here, there are no facts that Ms. Tucker has any contacts with Franklin, so the Franklin trial court likely cannot assert *in personam* jurisdiction over her. Sometimes, even when there is no *in personam* jurisdiction, a trial court may assert jurisdiction *in rem* over real property located within its borders. *See Gore; Carew.* However, in the case at bar, Mr. Hixon seeks equitable division and his "fair share of the Columbia house." The Columbia house would be wholly outside the jurisdiction of the trial court, and like the issues of alimony or attorneys' fees, the trial court would be unable to exercise jurisdiction over those issues absent *in personam* jurisdiction over Ms. Tucker. While courts may exercise jurisdiction even in the absence of "minimum contacts" to a state when the property itself is the source of the suit, *Shaffer*, the property must still be located within the state. *See, e.g., Daniels.* Consequently, while a Franklin court would have jurisdiction over Mr. Hixon and the *res* of the marriage, the Franklin court will be unable to exercise such jurisdiction over property that is not located in Franklin. If, however, Mr. Hixon claimed that his Franklin house in which he resided since 2019 were marital property, then it may be subject to the court's power.

**4. Should we advise Mr. Hixon to file in Columbia or in Franklin?**

We should advise Mr. Hixon to file in Columbia. As discussed above, the Franklin courts would be able to exercise jurisdiction over the *res* of the marriage, but they would leave a good deal of the "mess" that he created still up in the air, including his liability on the marital home with Ms. Tucker in Columbia. In contrast, the Columbia court likely has sufficient minimum contacts with both parties, and even if it did not, it would have the power to exercise jurisdiction over the home and accounts, as property solely within its borders. *See Shaffer*. As such, if Mr. Hixon wants to resolve these issues of the annulment and the divorce with finality regarding Ms. Tucker, he should file in Columbia. In contrast, for the underlying divorce to Ms. Prescott, if Mr. Hixon wishes to divorce her, he may file in either Columbia or in Franklin, as the divorce laws of either state would require the proof of the valid original marriage. Further, because there is no property to be divided between Mr. Hixon and Ms. Prescott, Mr. Hixon would not have as many issues filing in Franklin, closer to his new home, after resolving the issues with the annulment in a Columbia court.

As always, please let me know if you have any additional questions for me in regard to this memorandum.

/s/ Examinee

**MPT-1 — Sample Answer 2**

MEMORANDUM

To: Marianne Morton

From: Associate

Date: July 26, 2022

RE: Walter Hixon Matter

**1. Does Columbia or Franklin law govern the grounds for annulling Mr. Hixon's marriage to Ms. Tucker (the second marriage)?**

In 2012, in Columbia, Mr. Hixon married Ms. Tucker. Mr. Hixon and Ms. Tucker bought a house together in Columbia in 2015, and paid all their expenses through a joint account. Neither marriage resulted in children. Mr. Hixon moved to Franklin in 2019.

The issue here is whether Columbia law (the state where the marriage took place) or Franklin law (the state in which Mr. Hixon now lives) should be controlling.

According to the Restatement (Second) of Conflict of Laws, the validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the following principles: (1) the relevant policies of other interested states and the relative interests of those states 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. The Franklin Court of Appeal examined these issues in 2014 in Fletcher v. Fletcher. There, the Court affirmed and applied the Restatement's principles.

The Court held that, as to the relevant policies of other interested states and the relative interests of those states in the determination of a particular issue, "all states have legitimate policy interests in defining how a relationship as fundamental as marriage can be initiated and ended. The very fact that Columbia and Franklin recognize different reasons for annulling a marriage indicates the strength of the policy interests involved." Here, Columbia's strong policy interest in determining the validity of Columbia marriages (and their annulment) indicates that Columbia law should apply.

The Court held that, as to the protection of justified expectations, where "the only connection to the [the State Husband moved to a filed in] lies in the short time during which [Husband] established a residence there," there is a strong suggestion that the "parties had a justified expectation that [the State where marriage occurred and property was held] law would govern the terms on which the marriage ended." Thus, in this case where the marriage's only connection

to Franklin is that Mr. Hixon has recently moved here, Franklin law holds that Columbia law should be applied.

As to the certainty, predictability, and uniformity of result factor the Court made no specific holding applicable to this case, but the fact that the marriage was formed in Columbia, and all property remains in Columbia, would lead to the conclusion that the most predictable and uniform law to apply would be Columbia law.

As to the final factor, ease in the determination of the particular issue, the Court held that where "all the important events in this marriage occurred in [State]...considerations of ease and administrative efficiency strongly suggest that [that same State's] as the appropriate forum."

Mr. Hixon's case is similar to Simeon v. Haynes (Fr. Sup. Ct. 2009), where an annulment action was brought in Franklin, though "the parties lived together only in Columbia, owned property there, and had incurred debts there." On those factual grounds, applying the four factors as discussed above, the Court found that Columbia law should be applied.

Therefore, considering all four factors, and because the Hixon/Tucker marriage occurred in and accumulated property only in Columbia, Columbia law should apply to the issues Mr. Hixon has raised.

**2. Must Mr. Hixon file a lawsuit to annul his second marriage, and if yes, would he be able to obtain an annulment under the applicable law?**

Parties to a marriage must prove the original marriage was valid and ask for a divorce; for an annulment, by contrast, only one party needs to assert that the marriage was void and ask the Court to declare the marriage void. *Walker's Treatise on Domestic Relations.*

A marriage is voidable (i.e., may be annulled) by an annulment decree in Columbia if the spouse of the party seeking an annulment 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. CRS 718.02. In Franklin, a marriage is voidable without the need for any annulment decree where either party is lawfully married to another person.

We have already determined that Columbia law will be applied to this case, whether it is filed in Franklin or in Columbia. Therefore, the Columbia rule will apply and Mr. Hixon must seek an annulment decree.

The issue is whether Mr. Hixon will be able to annul his second marriage to Ms. Tucker under Columbia law. The rule is that an annulment of a subsequent marriage may be annulled where the spouse of the party seeking an annulment 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.

Mr. Hixon separated (physically, not legally) from Ms. Prescott, his first wife, in 1990, four years after getting married. In 2001, a mutual friend told him that Ms. Prescott had died in a serious car accident. Mr. Hixon did not contact Ms. Prescott or her relatives to ascertain the truth of this statement. His marriage to Ms. Tucker, the second marriage, was in 2012, 11 years after he heard Ms. Prescott was dead. From 2001, when Mr. Prescott heard from a mutual friend of his and Ms. Prescott (and, because it was a mutual friend, reasonably believed) that Ms. Prescott was dead, they had no contact (Ms. Prescott did no send him an email until 2022). Therefore, under Columbia law, Ms. Prescott was absent and not known to the party commencing the proceeding (Mr. Hixon) to be alive for at least five successive years immediately preceding his subsequent marriage to Ms. Tucker (in 2012). Therefore, under Columbia law, Mr. Hixon may (on his own, both spouses are not required) seek and receive an annulment of his marriage to Ms. Tucker.

**3. If Mr. Hixon files an annulment action in Franklin, would a Franklin court have jurisdiction to annul the marriage AND to dispose of the parties' property?**

Provided that a Court has jurisdiction, the Court may issue orders dividing the marital property interests of the parties to an annulment, using the same rules as those governing the equitable division of property in a divorce. *Walker's Treatise on Domestic Relations*. Therefore, a Franklin court may dispose of marital property in divorce as well as annulment actions. However, the issue is whether a Franklin court would have jurisdiction over this case, either to annul or to dispose of property.

According to Franklin law, a Franklin court need not have *in personam* jurisdiction over one of the spouses in a divorce case, as long as the Court has jurisdiction over (1) the "r*es* of the marriage relationship itself," (2) *"in rem* jurisdiction with respect to the property located within the state." Daniels v. Daniels.

As to the the first prong, jurisdiction over the *res* of the marriage relationship itself, such jurisdiction is established when "one of the parties to the marriage has been domiciled within the state for the requisite period, which in Franklin is six months." Mr. Hixon has lived in Franklin since 2019, three years, and therefore has established residency for over six months. Therefore, a Franklin Court will have jurisdiction over the *res* of the marriage relationship itself." If a court has jurisdiction over the res of the marriage, then it can grant an annulment (as discussed previously, applying Columbia law). Therefore, Franklin courts have jurisdiction such that they could grant Mr. Hixon an annulment.

However, it is doubtful that Franklin will have in rem jurisdiction over the property located within the state, and, therefore, will be able to divide the marital property of Mr. Hixon and Ms. Tucker. That is because there is no marital property located within the state of Franklin. The house that belongs to both Mr. Hixon and Ms. Tucker was purchased and is located in Columbia; Mr. Hixon still pays the mortgage, presumably to a Columbia bank. The joint accounts held by each party to the marriage, from which all their bills were paid, was also established and is maintained in Columbia.

In Daniels v. Daniels, the Court held that Franklin had jurisdiction over a spouse who lived out of state because the other spouse had established residency (prong one) and the property to be divided, "purchased real property," was located in Franklin (prong two). Here, none of the property is located in Franklin, and therefore a Franklin court will not have jurisdiction to hear the case.

**4. Should we advise Mr. Hixon to file in Columbia or Franklin?**

Because a Franklin court could not divide the marital property of Mr. Hixon and Ms. Tucker, which is located in Columbia and which Mr. Hixon has expressed that he wants ("I want my fair share of the Columbia house"), and because a Franklin court will be applying Columbia law in any case, Mr. Hixon should file in Columbia. Provided that a Court has jurisdiction, the Court may issue orders dividing the marital property interests of the parties to an annulment, using the same rules as those governing the equitable division of property in a divorce. *Walker's Treatise on Domestic Relations.* A Columbia Court will have jurisdiction, and will be able to both grant an annulment and divide Mr. Hixon and Ms. Tucker's property.

**MPT-1 — Sample Answer 3**

To: Marianne Morton

From: Examinee

Date: July 26, 2022

Re: Walter Hixon Matter

**I. Columbia Law Governs the Grounds for Annulling Mr. Hixon's Marriage to Ms. Tucker Because Columbia is the State with the Most Significant Relationship to the Spouses and the Marriage**

Franklin law holds that validity of marriage should be determined by the law of the state with the most significant relationship to the spouses and the marriage and that a marriage valid where contracted is valid elsewhere. *Fletcher v. Fletcher. (*Fr. Ct of Appeal 2014) (citing Restatement (Second) of Conflict Law Sect. 283 (1971)). If a state has no such significant relationship to the spouses and the marriage, the state must apply the law of the state that does. *Fletcher*. According to Franklin law, a marriage where either party is lawfully married to another person is void. Franklin Domestic Relations Code Sect. 19.5. According to Columbia law, such a marriage is not automatically void, but merely voidable. Columbia Revised Statutes Sect 718.02. In *Simeon v. Jaynes* (Fr. Sup. Ct. 2009), the court held that a trial court should have applied Columbia law with regards to whether a bigamous marriage was void because the facts that the couple had lived together only in Columbia, owned property in Columbia, and incurred debts in Columbia established a significant relationship between the spouses and that state.

A court should apply factors laid out in the Section 6 of the Restatement of Conflict of Law in determining the existence of the "most significant relationship." *Fletcher*. The first factor is "the relevant policies of the other interested states and the relative interests of those states in determination of this particular issue." According to the Franklin Court of Appeals, the "very fact that Columbia and Franklin recognize different reasons for annulling a marriage indicates the strength of the policy interest involved." *Id*. The second factor is the "protection of justified expectations." The Franklin Court of Appeals has held that where a couple lived the entirety of their married life in one state and owned property in that state, and where one spouse continues to reside in that state, facts suggested that the parties had a justified expectation that the law of that state would apply. *Id*. The third factor is the "certainty, predictability, and uniformity of results." *Id.* The final factor is the "ease in determination and application of the law to be applied." Where all important events in a marriage occurred in a state, considerations of ease and administrative efficiency suggest that state is the proper forum. *Id*.

Columbia is the state with the most significant relationship to the marriage of Mr. Hixon and Ms. Tucker. Mr. Hixon and Ms. Tucker's marriage took place in Columbia. The couple only lived together while in Columbia and presently owns a house there. While Mr. Hixon moved to Franklin

in 2019, Ms. Tucker has remained in Columbia and has never visited Franklin. Mr. Hixon and Ms. Tucker incurred marital debts in Columbia through a jointly signed mortgage with the bank in the state. Like the couple in *Simeon* lived together only in Columbia, owned property in Columbia and incurred debts in Columbia, Mr. Hixon and Ms. Tucker lived together only in Columbia, owned property in Columbia, and incurred debts in Columbia. Thus, because the court in *Simeon* determined that Columbia law should apply in determining whether the couple's marriage was void because of their significant relationship with the state, the court here should apply Columbia law in determining whether Mr. Hixon and Ms. Tucker's marriage is void because of their significant relationship with the state.

The factors laid out in the Restatement of Conflicts favor applying Columbia law to the marriage of Mr. Hixon and Ms. Tucker. As noted in *Fletcher,* Columbia and Franklin recognize different reasons for annulling a marriage, which in itself indicates the strength of the policy involved. Mr. Hixon and Ms. Fletcher lived the entirety of their married live in Columbia, owned property in Columbia, and Ms. Tucker continues to reside in Columbia. This suggest that the parties has of justified expectation that the law of Columbia would apply. The certainty, predictability, and uniformity of result also suggests that Columbia law should apply. Finally, because all important events in the marriage occurred in Columbia, considerations of ease and administrative efficiency suggest that the state is the proper forum. Thus, these factors suggest that the state with the most significant relationship to Mr. Hixon is Ms. Tucker's marriage is Columbia. Because Columbia is the state with the most significant relationship to the marriage, Columbia law should apply in governing the grounds for annullment.

**II. Mr. Hixon Should File a Lawsuit to Annul his Second Marriage Because Under Columbia Law The Marriage is Voidable and a Court Must Issue an Annulment Decree to be Declared Void**

As discussed above, Columbia law will govern the grounds for annulment. Under Columbia law, a marriage is voidable if "the 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 decrees is sought." Columbia Revised Statutes Sect 718.02. For a voidable marriage to be declared void, "either party may seek and a court must issue an annulment decree." *Id*.

Mr. Hixon's first spouse, Ms. Prescott, was still living and that marriage was in force at the time of Mr. Hixon's marriage to Ms. Tucker. Ms. Prescott was absent, and had not known to be living the Mr. Hixon's since 2001, when a friend reported that Ms. Prescott had died in a car accident. Mr. Hixon entered into a marriage with Ms. Tucker in 2012, having believed Ms. Prescott to be dead for over a decade. Because of these facts, Mr. Hixon's marriage to Ms. Tucker is voidable. Because a party must seek and a court must issue annulment decree for a marriage to be declared void, Mr. Hixon should file a lawsuit to annul his marriage to Ms. Tucker. Because the facts above make Mr. Tucker's marriage voidable, he is likely to succeed in annulling his marriage to Ms. Tucker.

III. A Franklin Court Does Have Jurisdiction to Annul the Marriage but Does Not Jurisdiction to Dispose of the Parties Property

*a. A Franklin Court has Jurisdiction to Annul the Marriage Because it Has Jurisdiction Over the Res of the Marriage*

*In personam* jurisdiction over both parties to the marriage is not required to terminate a marriage relationship in Franklin, whether by through divorce or annulment. *Daniels v. Daniels* (Fr. Ct. of App. 1997). The party seeking a dissolution of the marriage need show only that the trial court has jurisdiction over the *res* of the marriage. *Id*. A court has jurisdiction over the *res* of the marriage relationship when one of the parties to the marriage has been domiciled in the state for the requisite period, which in Franklin in six months. *Id*. Jurisdiction in proper even absent *in personam* jurisdiction because "each state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own border the marriage status of the spouse domiciled there, even though the other spouse is absent." *William v. North Carolina*, 317 U.S. 287, 298-99 (1942).

A Franklin Court would have jurisdiction to annul the marriage. Mr. Hixon has domiciled in Franklin since 2019, when he moved to the state for work. Because Mr. Hixon has been domiciled in Franklin for more than the statutory period of six months, a Franklin court would have jurisdiction over the *res* of the marriage. Because a Franklin court would have jurisdiction over the *res* of the marriage, a Franklin court would have jurisdiction to terminate the marriage through anullment.

*b. A Franklin Court Would Not Have Jurisdiction Over Distribution of the Property Because It Does Not Have In Personam Jurisdiction Over Ms. Tucker or In Rem Jurisdiction Over the Property to Be Distributed*

In Franklin, an annulment action may address the same issus as those that arose in a divorce. *Walker's Treatise on Domestic Relations.* A trial court with jurisdiction to grant a divorce cannot award alimony or attorney's fees unless it has *in personam* jurisdiction over both parties or *in rem* jurisdiction over the property to be distributed. *Daniels*. Assertions of *in personam* jurisdiction by a state court must satisfy the "minimum contacts" standard. *Shaffer v. Heitner,* 433 U.S. 186 (1977). Franklin has *in rem* jurisdiction over property located in Franklin, even absent *in personam* jurisdiction over a part. *Daniels.*

A Franklin Court would not have jurisdiction to distribute marital property. Ms. Tucker has never even visited Mr. Hixon in Franklin, and thus Franklin likely does not have *in personam* jurisdiction over her through minimum conducts. Additionally, the house owned by Mr. Hixon and Ms. Tucker is located in Columbia, as well as the couple's joint bank accounts. Accordingly, a Franklin court would not have *in rem* jurisdiction over this property. Thus, a Franklin court would not have jurisdiction over the distribution of Mr. Hixon and Ms. Tucker's property.

**IV. Mr. Hixon Should File in Columbia because of Ease and Administrative Efficiency and Because Columbia Would Have Jurisdiction Over the Distribution of Property**

Considerations of ease and administrative efficiency suggest that the proper forum for a suit is the state where all events of a marriage occurred. *Fletcher*. All events of Mr. Hixon and Ms. Tucker's marriage occurred in Columbia. As discussed above, Columbia law will apply to the annulment of Mr. Hixon and Ms. Tucker's marriage. Additionally, Columbia would likely have jurisdiction over the distribution of Mr. Hixon and Ms. Tucker's marital properly. Accordingly, Mr. Hixon should file his suit in Columbia.

**MPT-2 — Sample Answer 1**

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

**M E M O R A N D U M**

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

You asked me to prepare a memorandum addressing specific questions relating to Ms. Briotti's ethical dilemma with her client. Please find my findings below relating to each question.

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

In her desire to record the conversation with X for her protection, Briotti stated that while her office is in Franklin, X lives in Olympia. To determine whether the recording of the phone call is legal, it is necessary to determine whether the conduct would be violative of the statutes governing such recordings in either Olympia or Franklin.

Under Franklin Law, it is illegal for a person to record any wire communication unless there is an emergency or the interception is made "with the prior consent of one of the parties to the communication." FCC § 200. In Franklin, then, Briotti's proposed course of conduct would not violate the criminal code because she is consenting to the recording as a party to the conversation. The only question remaining as to the legality of the proposed action, then, is whether Olympia's Criminal Code criminalizes such recordings.

In contrast to Franklin, Olympia's criminal code criminalizes such recordings unless it is "made with the prior consent of *all* the parties to the communication" generally. OCC § 500.4 (emphasis added). However, because Briotti's conduct would be occurring at her office, located in Franklin, the proposed conduct would not be occurring in Olympia. Whether this extraterritorial recording would violate the criminal statute is unclear from the text of the OCC alone. However, case law is instructive.

Olympia Courts have determined expressly that "the recording of a telephone conversation constituted an "intercept" under the above-cited criminal code, prohibiting telephone calls being recorded only with the consent of one party. *Wessel*. Nevertheless, Olympia Courts have been more hesitant to rigidly apply this code to conduct occurring outside of Olympia. For example, the Olympia Supreme Court has decided in the past that recordings made with a person in Olympia without that person's consent may be admitted as evidence. *Parnell*. Finding that

because a recording "was lawful at its inception" in another one-party state, the court found that "even though the manner of the interception would violate Olympia law had the interception taken place in Olympia," the recording was nonetheless admissible. *Id.* By finding that the evidence was "legally obtained" in the jurisdiction where it was seized, the Court found that the recording was admissible. Basing its decision on this Olympia Supreme Court issue, a more recent decision by a Olympia District Court dealt with a similar issue. In that case, the Olympia District Court faced a fact pattern analogous to Ms. Briotti's situation: an out-of-state party recorded a telephone conversation with a party in Olympia. After finding that the out-of-state party's conduct comported with its state law, which was a one-party statute, the Olympia District court held that "in civil or criminal actions, OCC § 500.4 does not apply when the interception takes place outside of Olympia," finding that "recordings occur where made." *Shannon*. While Olympia's court structure is not entirely clear, the District Court's use of "we" as a holding seems to advise that this holding may be binding on other courts. Nevertheless, it appears that the Olympia Criminal Code will not criminalize conduct occurring outside of Olympia, even if one party to the conversation is in Olympia. As such, like the corporation Spindrift in *Shannon* that was found neither criminally or civilly liable for recording a conversation without the permission of a party located in Olympia, Briotti will likely be able to record the conversation without X's consent as she would comply with Franklin law and would not be subject to Olympia's criminal code as the recording would be made in Franklin.

2. Assuming that Briotti could make such a recording lawfully, would doing so without X's knowledge violate the Rules of Professional Conduct?

a. Recording of Conversations Generally

Because Ms. Briotti is a member of both the State Bar of Franklin and the State Bar of Olympia, Ms. Briotti must comply with both sets of ethical rules to avoid being sanction or in violation of any rule. However, because each jurisdiction has adopted the ABA's Model Rules, the analysis is uniform.

Generally, an attorney must not engage in any violation of the Rules of Professional Conduct, commit a criminal act, or engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. R. 8.4. On its face, it is not clear whether recording a conversation without someone's knowledge would be such a misrepresentation. Under the ABA's former opinions, an attorney could never record a conversation without prior knowledge of all parties; however, following much criticism, the ABA revised this rule in 2001, finding that recording a conversation with a client "is not inherently deceitful" in accordance with Rule 8.4's command that an attorney must not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." In such a finding, the ABA noted that recording today comports with the reasonable expectations of privacy one might have given the advances in technology and in recording practices, despite offending the sense of honor and fair play for some. Committee Report. The Committee further

concluded that "the proper approach to the question of legal but nonconsensual recordings by lawyers is not a general prohibition with certain exceptions, but a prohibition on the conduct only where it is accompanied by other circumstances that make it unethical.

Whether circumstances make the conduct unethical may depend on whether they are in violation of a criminal statute; the Committee Report on these ethics rules instructs that attorneys contemplating such one-arty recordings should "take care to ensure that [s]he is informed of the relevant law of the jurisdiction *in which the recording occurs.* (emphasis added). As discussed above, the recording would likely take place at Briotti's office in Franklin. The recording, again as discussed above, would not violate any criminal statute in the jurisdiction where the conduct occurred.

b. Recording of Conversations with Clients

While recording of conversations generally may be permitted as not inherently deceitful, an attorney still owes special duties to clients, such as the duty of loyalty to preserve confidentiality and communication relating to the representation, as a lawyer's duty to a client "transcends the lawyer's convenience and interests." Committee Report; R.1.6. The Committee did not say definitively, as its members were split, whether recording client conversations without the client's knowledge is permitted by the Rules of Professional Conduct. Finding that recording would undermine client confidence, the Committee advised that undisclosed recording "is inadvisable except . . . where exceptional circumstances exist," including where the client forfeits the right to loyalty or confidentiality through threats to commit a criminal act resulting in bodily harm or where the lawyer must establish a defense. *Id.*

In this case, it is not clear whether Briotti will need to record the conversation in order to establish a defense. If she is at some point in the future charged with conspiracy to defraud a beneficiary or with aiding and abetting a breach of fiduciary duty, then the conversation would be quite helpful. If, in the future conversation, X seeks advice on the issue, then he clearly would have forfeit the expectation of confidentiality by posing potential liability to Briotti. The more troublesome issue is knowing whether such conduct will occur, as the recording will be of content of a future phone call of which the attorney cannot be certain.

The committee, however, did not explicitly define what these "exceptional circumstances" could be. The committee did list that the client forfeits the expectation of confidentiality of loyalty through bodily harm or through making it necessary for the lawyer to establish a claim or defense, both of which are express exceptions to confidentiality in Rule 1.6(b)(1) and 1.6 (b)(5) respectively. However, it is not clear whether the committee's list of these exceptions was exclusive or by way of example, leaving "exceptional circumstances" still ambiguous. Whether the other exceptions to confidentiality quality as exceptional circumstances, then, is also unclear. Confidentiality has also not likely been waived under Rules 1.6(b)(2) or (3) yet, as X has not yet

used any of Briotti's services in furtherance of this crime. Whether the threat of a financial crime where the attorneys' services are not used that does not itself authorize disclosure under Rule 1.6 meets the criteria for "exceptional circumstances," then, is ambiguous.

In light of this ambiguity, the Franklin State Bar Committee's commentary on the topic is instructive. The Franklin Committee found that in determining whether there is an exceptional circumstance, "the key question is whether such a recording will violate the lawyer's duty of loyalty to the client. Noting the dangers of inadvertent disclosure and breach of confidentiality absent exceptional circumstances, the Franklin Committee advised that "the lawyer should take care to act on facts and well-grounded judgment, rather than speculation, as to the client's intended actions," considering the clients' previous statements, circumstances, and alternate methods of memorializing the conversation.

In this case, the client's rantings about how he has made unsuccessful investments and would be in financial ruin pose a high likelihood of harm to him should there be any inadvertent disclosure. Particularly, as Briotti noted, if X is bankrupt and admits that he is bankrupt, his reputation would likely be irreparably tarnished. If the future conversation is anything like the past conversation, then the client may say how he is in financial ruin, which may spoil his reputation as an investor. At the same time, though, upon consideration of X's past statements about how he kept "referring to the trust he administers" during the conversation with Briotti. This, coupled with the circumstances of the investor's potential ruin, may demonstrate to a reasonable attorney that the client was seriously considering undertaking the illegal activity. Should he choose to do this, he may potentially claim that Briotti advised him that it was acceptable. In such a circumstance, a mere memorandum of the conversation by Briotti likely has far less probative value than a recording should Briotti need to defend herself against potential future criminal charges. Briotti seems unclear whether X will actually undertake the course of conduct, despite his listing specific confidences that he could "keep up the trust payments" and pay it back later. She says that it is "possible," but she does not indicate whether she thinks that it is probable, because he "might not do it," knowing that such siphoning of trust funds is illegal.

Finally, the attorney must be fully aware of all of these risks, reasonably believing it to be necessary to make such a recording, as it is "almost always inadvisable [to make such a recording] unless the lawyer reasonably believes it necessary," as it would otherwise undermine the trust in the attorney-client relationship. As discussed above, to defend herself if she believes that X might try to implicate her in a crime or say that she aided him in the crime, Briotti may believe that it is necessary and may proceed in the exceptional circumstance to establish a defense. Nevertheless, because Briotti has stated that the future crime is only "possible" and not probable, without more, I would advise Briotti to be cautious in making the recording unless she believes that the course of criminal conduct for X becomes more likely than mere speculation or possibility, even with his suspicious behavior. While the recording may not be a per se violation of an ethics rule, it carries a high risk of breaching Briotti's duty of confidentiality and loyalty to

X. the ABA Ethics Committee, who drafted the rules that Olympia and Franklin adopted, unanimously found that "it is almost always advisable for a lawyer to inform a client that a conversation is being recorded." Because recordings capture verbatim any of the client's statements in a less formal way than a memorandum, such recordings carry a high risk of potential damage to the client. *Id.* Because of this high risk and potential to violate confidentiality and loyalty, it may be a violation of the Rules of Professional Conduct, at least under the Franklin Committee guidance, to make such a recording absent a more definite circumstance or threat of certain conduct given the high risk for damage this recording would involve. Given the risk of a violation of a Rule of Professional Conduct due to the ambiguity of "exceptional circumstances" in Franklin and lack of guidance in Olympia, the safer course of action would be for Briotti to use an alternate method of preserving the conversation, such as a memorandum, that minimize the risks that go with potential inadvertent disclosure unless X gives more definite indications of his intentions to commit such a crime.

3. Assuming state law allows such a recording and that the recording does not violate the Rules of Professional Conduct, must Briotti inform X if he asks whether the conversation is being recorded?

Under the ABA Ethics Committee's report that permitted one-party recordings as not per-se ethics violations, the committee did expressly note that the absence of such a ban "does not mean that a lawyer may falsely state that the conversation is *not* being recorded. (emphasis added). As stated above, under ABA Rule 8.4, "it is processional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." By stating to a client who asks that the conversation is not being recorded, then, Briotti would engage in a violation of Rule 8.4. Further, if Briotti chose to remain silent or to change the topic by telling X not to worry, she may be engaged in conduct that may rise to the level of misrepresentation or dishonesty, even if not express. As such, due to the loyalty that an attorney owes a client, and due to Briotti's duty not to engage in such dishonest conduct, if X asks, Briotti likely will have to inform X that the conversation is being recorded, even though Briotti does not want X to know that the phone call is being recorded.

As always, please let me know if you have any additional questions or concerns.

/s/ Examinee

**MPT-2 — Sample Answer 2**

**Memorandum**

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

## I. Introduction

The purpose of this memorandum is to analyze the legal and ethical issues surrounding Ms. Briotti recording a conversation with one of her client's without that client's consent. While it is likely permissible under the law and rules of professional conduct to record the conversation, it could still result in professional discipline and is likely not advisable. Lastly, Briotti likely must tell her client, X, that she recorded the conversation with him if asked.

## II. Discussion

1. Under Franklin and Olympia law, Briotti can record the conversation without X's consent

Briotti can likely record the conversation under the governing law because she is located in Franklin. The issue here is whether Briotti can legally record the conversation without X's consent when Franklin law allows one party consent recordings and Olympia does not. Under Franklin Criminal Code § 200, any party can record communications so long as one party to the conversation consents. However, under Olympia Criminal Code (OCC) § 500.4, both parties must consent to the recording of any conversation or it can lead to criminal and civil liability for the recording party. Despite this conflict, Briotti can likely record the conversation because her offices are located in Franklin where it is legal to record a conversation with only one party's consent. The Olympia District Court ruled that the law of the state where the conversation is being recorded governs whether or not the recording is legal. *See Shannon v. Spindrift*. In *Shannon*, a corporation in Columbia recorded a conversation with a person in Olympia without that persons's consent. The court ruled that the law of the state where the recording occurred controlled. The court ruled that since one party consent recording was legal in Columbia, it did not violate OCC § 500.4. The Court looked to the Olympia Supreme Court and noted that Olympia law allows criminal evidence legally gathered under the law of one state to be admitted in Olympia even if that evidence could not be lawfully gathered in Olympia. *Parnell v. Brant*. The Court held that this meant recording a conversation in a state where it is legal does not subject the recording party to liability under OCC § 500.4 even if the other party is in Olympia.

Here, Briotti will likely be in Franklin because her offices are in Franklin, and the Franklin Criminal Code allows for one party consent recording. This means that Briotti can likely record a conversation with X while he is in Olympia so long as she makes the recording while she is in

Franklin. Under *Shannon,* this will not violate Olympia law. Therefore, Briotti can likely record the conversation from her office in Franklin without violating any criminal or civil law.

2. Recording the conversation likely will not violate the Rules of professional conduct, but could lead to a violation

Despite the fact that Briotti could lawfully record the conversation, it does not mean it is advisable to record it under the rules of Professional Conduct. In ABA Opinion 01-422, the Ethics Committee ruled that recording a client conversation alone without consent does not violate the ABA Model rules of professional conduct. The Franklin state bar adopted this opinion and its conclusions. However, both the ABA and the Franklin state bar have ruled that it is not advisable to record client's without their consent. They have both ruled that this act alone may not violate the rules, but it could lead to violations of the rules. The ABA committee recognized that recording could lead to a violation of the duty of loyalty because the lawyer is taking an action against their client without their consent. The committee also recognized that recording a conversation could lead to a breach of the duty of confidentiality under Model Rule 1.6 because the recording could fall into the hands of third parties and expose confidential client information. The committee noted that a recording of the exact words a client said could be more damaging that an attorneys notes because it exposes the exact confidential information communicated by the client.

Because of these concerns, the ABA committee recognized it is likely only advisable to record a client conversation without their consent in exceptional circumstances. The committee considered those circumstances to include when a lawyer reasonably believes a client is going to commit a criminal act that is reasonably certain to result in death or substantial bodily harm. *See* MR 1.6(b)(1). The committee also recognized that it might be permissible to record to establish a defense for a lawyer if charges could result against the lawyer for the conduct of a client. Lastly, the Franklin state bar advised that lawyers consider the necessity of recording by considering following before recording a client conversation: the client's previous statements, the client's circumstances, and the alternative methods of memorializing the conversation.

Here, it is likely not a violation of the rules of either Olympia or Franklin to record a conversation. Both states have adopted the ABA model rules, and MR 8.4 states that it is a violation of the rules to violate a criminal law that calls into question the lawyer's fitness to practice law. Here, it is legal under Franklin and Olympia law to record the conversation, so it does not violate MR 8.4 to record it without X's consent. However, this does not mean that it is advisable to do so. As the ABA committee recognized, a recording is permanent and Briotti could violate MR 1.6 and her duty of confidentiality if she records the conversation and then that recording is inadvertently exposed. However, Briotti's situation could intentionally expose the recording to protect the members of the trust if she is reasonably certain that X will violate the trust. *See* MR 1.69(b)(2). Despite this, Briotti's situation does fall under the situations described by the ABA to be

exceptional situations because Briotti may need to use the recording as a defense for herself. There is no risk of bodily harm from X's proposed violation of the trust. However, there is a likelihood Briotti will need to defend herself against charges if X decides to violate the trust as she has been serving as his counsel during this period. In that instance, she may have good reason to record a conversation. However, protecting the financial interests of the beneficiaries alone may not be enough to record under the ABA committee opinion.

In deciding whether to record, Briotti should look to the factors discussed by the Franklin state bar. Currently, her client has said he is thinking about violating the trust but has not said he will violate it. However, his situation is desperate enough to motivate him to violate the trust to solve his problems. Despite this, there are likely alternative methods available that Briotti could take to protect herself in the event that X does violate the trust. Briotti's current memo on file demonstrates that she has advised him it would be illegal to violate the trust. This is likely sufficient evidence to provide a defense if she is implicated in any of X's actions. Likewise, she could call X as she is planning to do and take notes to memorialize that she has directly told him not to violate the trust. This too would likely be sufficient without recording the call. Thus, because there is another sufficient means of protecting herself and the trust beneficiaries, Briotti likely does not need to record the conversation and will put herself at more risk if she records it than if she merely takes another memo memorizing her advice to X.

3. Briotti likely must inform X she recorded the conversation if asked

Although it is permissible under the law and rules of professional conduct for Briotti to record the conversation, she must tell X she has done so if asked. Both the ABA committee and the Franklin state bar have recognized that the right to record a client without their consent does not reach so far as to allow a lawyer to deceive their client. The ABA committee recognized that the duty of loyalty prevents lawyers from actively deceiving their clients. Likewise, MR 8.4(c) forbids a lawyer from engaging in conduct involving dishonesty or deceit. Here, if Briotti told X that she had not recorded the conversation when she did, she would likely violate MR 8.4(c) and subject herself to professional discipline despite the fact that this would not violate state law.

**III. Conclusion**

Briotti can legally record a conversation with X without first getting X's consent because it is legal under the Franklin Criminal Code for one party to record another without that party's consent. As long as she records the conversation in the state of Franklin and not in the state of Olympia she will not violate either state's laws. Likewise, it will not violate either state's rules of professional conduct because there are exceptional circumstances here that allow her to record her client to raise a defense to any liability that could result from X's violation of the trust. However, it is likely not advisable for Briotti to record the conversation because memorializing a conversation like she has done in the case file likely provides sufficient defense if charges should

arise. Likewise, recording presents additional risks that could lead to violations of the duty of loyalty and confidentiality under the model rules. Lastly, if Briotti records and X asks if she has recorded the conversation, Briotti must tell the truth and admit she recorded the conversation or she will violation MR 8.4(c).

**MPT-2 — Sample Answer 3**

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

The issue is whether Franklin or Olympia require the consent of one or both parties to a phone conversation for recording to be lawful. The rule in Franklin is that a wire communication (which includes phone calls) can only be recorded with the prior consent of one party to the call, or, in criminal cases, where there is an emergency situation and getting a court order would be impractical (though the call would still have to be ratified by a Court after the recording occurred). The rule in Olympia is that both parties must give prior consent to a recording unless, as in Franklin, there is an emergency situation exists under the same parameters and with the same requirements as in Franklin.

Therefore, under Franklin law one-party consent is legal, while in Olympia it is not; both parties must consent. Briotti has no intention of seeking the permission of X to record their conversation, and therefore she cannot secretly record the conversation under Olympia law. She can only record the conversation secretly under Franklin law, as she will be the single party giving consent. This is a problem, however, because X is a citizen of Olympia, and the phone call which Briotti wishes to record would be crossing state lines (because Briotti lives and has an office in Franklin).

Therefore, a further issue is whether Franklin or Olympia law governs cross-border conversations.

The rule, established by the Olympia District Court in Shannon v. Spindrift (affirming Parnell v. Brant, an Olympia Supreme Court Decision), that that "interceptions and recordings occur where made." Parnell. According to the Court Olympia law allows the admission of evidence legally obtained in the jurisdiction seizing the evidence. Here, that would be Franklin, where Briotti will place and record the phone call. Under Shannon (and Parnell), so long as a recording is permissible in the jurisdiction where it is made, it will be admissible as evidence in Olympia even though it would be illegal to make the recording under Olympia law. The Parnell decision was based on criminal evidence rules, but in Shannon the court expanded the holding to incorporate civil actions as well.

Therefore, so long as Briotti makes the recoding in Franklin, where one-party consent is legal, the recording she makes will be admissible in any future proceeding in Olympia, even though Olympia does not have one-party consent. Briotti may record her conversation with X without informing him that she is doing so, so long as the recording is made in Franklin. The recording will not violate state law.

**2. Assuming that Briotti could make such a recording lawfully under state law, would doing so without the client's knowledge violate the Rules of Professional Conduct?**

Both Franklin and Olympia have adopted the ABA Model Rules as their own. The issue is whether this recording, even if lawful, violates those rules.

ABA Rule 8.4(c), adopted by Franklin and Olympia, holds that it is "professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Arguably, recording a client's phone call without their permission is a violation of this covenant. However, a recent formal opinion from the ABA (which itself was formally adopted by the state of Franklin) states that "to forbid obtaining evidence by nonconsensual recordings that are lawful and consequently to not violate the legal rights of the person who words are unknowingly record would be unfaithful to the Model Rules." While "it is almost always advisable for a lawyer to inform a client that a conversation is...being recorded," the Model Rules do not ban the practice, and no longer consider it to be per se deceitful.

However, while the practice is not outright forbidden, the practice is not universally approved, either. Instead, the ABA states that "the proper approach [is a]...prohibition of the conduct only where it is accompanied by other circumstances that make it unethical."

One such circumstance is a violation of state law ("a lawyer who records a conversation in the practice of law in violation of such a state statue likely has violated Model Rule 8.4"). The ABA states that where state law requires two-party consent (as in Olympia), to violate that state law would be a violation of ABA Rule 8.4(c), and professional misconduct. Therefore, Briotti has an ethical obligation not to record the phone call in Olympia.

Another such circumstance would be deceitfulness. Lawyers are not allowed to lie to their clients, or to mislead them. However, the ABA has stated that "the mere act of secretly but lawfully recording a conversation is not inherently deceitful." Furthermore, the ABA no longer requires attorney's to forgo "even the appearance of impropriety," as they once did. Therefore, mere recording in secret is not likely to be found deceitful by the ABA.

Another such circumstance would be a violation of the attorney's duty of loyalty, which transcends the lawyer's interests and convenience. One of the duties of loyalty is maintain the confidentiality of the clients' confidential information. It is a potential violation of Briotti's duty of loyalty to make a recording that could, at some later date, be used to divulge X's confidences (both to his clients, to us as her representatives, and to the state). However there are exceptions to the duty of loyalty/confidentiality, including the exceptions in Rule 1.6: "(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services; (4) to secure legal advice about the lawyer's compliance with these rules; (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim agains the lawyer based upon conduct in which the client was involved..."

Here, the first couple of exceptions are not likely to apply, because the fraud or harm to financial interests would be substantial if X invaded the trust, those damages are not reasonably certain

(Briotti has continually said she's not certain a crime will be committed, she's just concerned that one will be). Furthermore, Briotti's services have not been used to further these or any future claims. To the contrary, Briotti has unequivocally told the client that he may not invade the trust and that to do so would be a criminal act. She has not helped him in any way (except by telling him not to commit a crime). Therefore, she these two exceptions are unavailing.

However, Briotti has not violated her ethical duty by coming to us for advice (as allowed by 1.6(4)), and in fact has fulfilled her ethical duty to seek counsel when she's unsure about an ethical question that could have serious consequences for her and her client. Therefore she won't face any ethical issues based on her divulgence to our firm.

Arguably, Briotti would not violate her ethical duty of loyalty by recording the phone conversation without the client's consent under 1.6(5), which allows lawyers to breach confidentiality to prepare a defense against their client or their client's victims if they anticipate the commission of a crime or a tort. The purpose of recording this phone call, according to Briotti, is to prove in any future proceeding that she advised her client not to invade the trust, and never helped him or encouraged him to do so. On the other hand, recording a phone call may not be necessary to achieve this goal -- Briotti's handwritten notes, as well as this memo and any other memorializations that are more typical of attorney-client relationships could suffice. According to the Franklin State Bar Committee, when considering one-way secret recording, a "lawyer should take care to act on facts and well-grounded judgment, rather than speculation, as to the client's intended actions. The lawyer should consider...alternative methods of memorializing the conversation when determining the need for recording the conversation without the client's knowledge."

Therefore, while under the Model Rules Briotti has an argument for recording a conversation with a client secretly and without their knowledge, it's not a very strong case. Both the ABA and the State of Franklin urge her to consider alternate methods of memorialization in the absence of any reasonable certainty that her client is actually going to commit a crime, and to avoid secret recordings unless "the lawyer reasonably believes it necessary." The risk of divulging highly damaging confidential information is very high when a recording is made, rather than simply notes ("a recording that captures the client's exact words, no matter how ill-considered, slanderous, or profane, differs from a lawyer's notes or dictated memorandum of the conversation...the damage or embarrassment to the client would like be far greater"). While clients probably expect their confidential conversations to be memorialized by their attorney in some way, recording is a different animal that she have no reason to suspect. Which is not to say that recording is not beneficial; in some circumstances (saving money because the lawyer doesn't have to take notes, accuracy) they're very beneficial. But those circumstances should't require any deceitfulness or breach of loyalty on the part of the attorney, as this recording likely would.

Therefore, while the Model Rules arguably allow Briotti to engage in one-way secret recording of her client, we should probably advise her to simply memorialize the conversations in a different way (or even ask the client if she may record him beforehand). These should be adequate to

protect her in any future claim, and neither Franklin nor Olympia would be likely to find that it would violate her Rule 8.4 duties of loyalty and confidentiality.

**3. Further assuming that state law would allow Briotti to make such a recording and that doing so would not violate the Rules of Professional Conduct, must she inform X that she is doing so if he asks?**

The issue is whether, even if secret recording is both legal and ethical, Briotti must affirm that she is recording the conversation if X asks her whether or not she is.

According to the ABA formal opinion, just because a state allows one-party consent "does not mean that a lawyer may state falsely that the conversation is not being recorded." Furthermore, a lawyer, as discussed above, has a duty to tell the truth to their clients, and not deceive them. While secret recording, if lawful, is not inherently deceitful, flatly lying to a client when they ask whether they are being recorded probably is. The ABA states that while "it is questionable whether anyone today justifiably relies on an expectation that a conversation is not being recorded by the other party," that expectation is not justifiable if there is a "special relationship with or conduct by [a] party inducing belief that the conversation will not be recorded." The client-lawyer relationship is the classic special relationship paradigm, and clients certainly are not on any kind of reasonable notice that their lawyer may be recording them. The lawyer's duty of confidentiality and loyalty is certainly an inducement to so believe. Secretly recording a client is already putting a lawyer on thin ice -- lying about it is unlikely to be approved by an ethics board.

Therefore, mindful of her ethical duty of truthfulness, Briotti would do well not to lie to X if he asks whether or not he is being recorded.