CONNECTICUT BAR EXAMINATION

26 July 2022

PERFORMANCE TEST #1

From the Multistate Performance Test

In re Marriages of Walter Hixon

FILE

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

MEMORANDUM

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

We represent Walter Hixon in connection with complications of his marital status. Mr. Hixon married Joan Prescott in 1986 in the State of Columbia. Several years later they separated. Mr. Hixon believed that Ms. Prescott died in 2001.

In 2012, he married Frances Tucker in the State of Columbia. They purchased a house together in Columbia early in the marriage. A few years ago, Mr. Hixon moved to Franklin for a job opportunity; Ms. Tucker remained in Columbia.

Last month, Mr. Hixon learned that Joan Prescott is still alive. He has informed Ms. Tucker of that fact. He wants to divorce Ms. Prescott, end his purported marriage with Ms. Tucker, and work out shares in the residential property that he and Ms. Tucker own.

I need you to write a memorandum to me addressing the following questions:

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

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?

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?

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

Do not prepare a separate statement of facts, but be sure to incorporate the relevant facts into your analysis and state the reasons for your conclusions and recommendation. Do not address either Mr. Hixon's ending his marriage to Ms. Prescott or the risks of criminal prosecution he may face for bigamy; another associate will research those issues.

Transcript of Interview with Walter Hixon, July 14, 2022

Att'y Morton: Thank you for coming in today, Mr. Hixon.

Hixon: I appreciate your making the time. I am in a real mess.

Morton: Tell me how I can help you.

Hixon: Well, to make it short, I got married twice, but I didn't divorce my first wife because I thought she had died.

Morton: Yes, that would be a problem. If you can, it would help to start at the beginning.

Hixon: All right. I married my first wife, Joan Prescott, in 1986. I was 20 years old at the time and, to be honest, I had no idea what I was doing.

Morton: We may need to look up records of that marriage. Were you married here in Franklin?

Hixon: No. We married in Sparta, Columbia.

Morton: Do you remember the date?

Hixon: Yes, June 7, 1986. We got married at City Hall.

Morton: What happened after that?

Hixon: It was clear pretty quickly that we had made a bad mistake. We just couldn't find a way to make it work. We tried for a few years, living in a rented apartment. In 1990, I just moved out and started living with a friend of mine. Then I moved several hundred miles away to Corinth, Columbia, for a job.

Morton: You said you rented together. Did you buy anything together? Share finances?

Hixon: No. We had nothing at all, both working close to minimum wage. We made ends meet and didn't get into debt.

Morton: So when you separated, did you have any arguments over anything?

Hixon: We agreed that we would each keep our own cars. That was really all we had.

Morton: Any children?

Hixon: No.

Morton: Were you in college? Did either of you have any student debt?

Hixon: No. We had both finished high school a few years before we married, but neither of us went to college.

Morton: Did either of you have family in Columbia?

Hixon: Joan did. She came from Sparta originally. My family is all from here in Franklin.

Morton: Okay. You say you moved away.

Hixon: Yes. I got a job on a construction crew based in Corinth, and they offered me another job if I would move. So I did. After that, I had no contact with Joan at all.

Morton: Did you think about filing for divorce?

Hixon: No, I didn't. I thought the marriage was over, and I didn't have any reason to think about it. Honestly, I just avoided thinking about it. And eventually, I heard that she had died.

Morton: Tell me about that.

Hixon: That was much later, I guess. Sometime in 1993, I was promoted to crew chief and decided to stay in Corinth.

Morton: Any relationships during that time?

Hixon: Nothing serious.

Morton: You say you heard that Joan had died? What did you hear?

Hixon: Well, in 2001, I ran into an old mutual friend. He told me that Joan had just died in a car accident. I was sorry to hear about it, but we had had no contact for 11 years. I just moved on.

Morton: All right. I understand. Tell me about your second marriage.

Hixon: Well, in 2011, I met Frances Tucker. We really hit it off and started going out together. Franny and I saw eye to eye on most things at that point. So I proposed. We got married in July 2012.

Morton: Where?

Hixon: We got married in Corinth, Columbia. Her mother was still alive, and Franny wanted her mother to be part of it. So we had a church wedding, the reception, the whole deal.

Morton: And after that?

Hixon: Things went well for a while. I was working up to a management position in the construction company. When I met her, Franny was training to become a radiology technician and then got a good job with a local lab. About two years after that, we bought a house together.

Morton: When was that?

Hixon: February 2015. On the outskirts of Corinth.

Morton: Who owned it? And did you take out a mortgage?

Hixon: We were both on the deed and both on the mortgage with the bank.

Morton: Did you share expenses?

Hixon: Everything went into a joint account, and we paid bills out of that.

Morton: Again, any children?

Hixon: No.

Morton: You gave a Franklin address when you called in. When did you move to Franklin?

Hixon: In 2019. My company opened an office here in Franklin City and asked me to get it started. I talked with Franny. She did not want to move, but we both knew that this would be a good opportunity for me. So we decided to live apart.

Morton: Did you sell the Columbia house?

Hixon: No, Franny still lives there. We have both continued to make payments on the mortgage.

Morton: What happened next?

Hixon: My job went really well. But the separation really took it out of both of us. Our relationship fell apart. I visited her a few times, but Franny never came here, even for a visit.

Morton: You said at the start that your first wife, Joan, is still alive. When did you learn that?

Hixon: Recently. To my shock, last month I got an email from Joan asking to talk with me by phone. When we talked, I told her that I had heard that she had died. She said that she had been in a bad accident and had almost died, but she had recovered. She said that she was thinking of getting married again and asked if I would agree to a divorce.

Morton: What did you do then?

Hixon: I didn't know what to do. I called Franny to let her know. She was upset, as you would expect. And she was clear about two things. First, that was the end for us. And second, I had to clean up the mess.

Morton: Just a few more questions. Do you and Franny still own the house in Columbia?

Hixon: Yes.

Morton: So, what do you want to happen?

Hixon: I want to figure out what I have to do about the second marriage. I want my fair share of the Columbia house. And I want to get the divorce from Joan.

Morton: Thank you. Your situation raises some complicated questions. We will have to do some research before we can let you know your options.

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

MEMORANDUM

To: Marianne Morton
From: George Dugger, investigator
Date: July 19, 2022
Re: Walter Hixon: marital records

At your instruction, I searched for records on the marriages of Walter Hixon.

Marriage to Joan Prescott

I contacted the Division of Vital Records in the State of Columbia and found a record of a marriage between Walter John Hixon and Joan Marie Prescott on June 7, 1986. Hixon is listed as age 20 and Prescott as age 21.

Marriage to Frances Tucker

I contacted the Division of Vital Records in the State of Columbia and found a record of a marriage between Walter John Hixon and Frances Frost Tucker on July 14, 2012. Hixon is listed as age 46 and Tucker as age 51.

Excerpt from *Walker's Treatise on Domestic Relations*

§ 1.7 *Annulment as distinguished from divorce*

In the preceding sections, we described the grounds for annulment under Franklin law. In general, parties to a divorce action must prove that the original marriage was valid and ask the court to end that marriage. By contrast, in an annulment case, at least one party asserts that the marriage was void and asks that the court declare that the marriage is void.

A person might seek an annulment for various reasons. For example: a party might want the finality of a judicial decree declaring the marriage annulled; an annulment may satisfy the tenets of a party's religious faith; an annulment may serve as documentation that a party can use for other purposes, such as survivors' benefits and taxation; and an annulment could determine issues relating to children or property.

In Franklin, an annulment action may address the same issues as those that arise in a divorce. Franklin Domestic Relations Code § 19-7 provides: "The provisions relating to property rights of the spouses, support, and custody of children on dissolution of marriage are applicable to proceedings for annulment." Thus, where the parties have children, the court in an annulment case may also address custody, visitation, and child support issues in the same way as it would in a divorce. Finally, provided it has jurisdiction, a Franklin court can 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.

Selected Columbia and Franklin Statutes

Columbia Revised Statutes § 718.02 – Voidable Marriages

A. A marriage is voidable if any of the following conditions existed at the time of the marriage:

(1) 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 decree is sought.

. . .

B. For a voidable marriage to be declared void, either party may seek and a court must issue an annulment decree.

Franklin Domestic Relations Code § 19-5 – Void Marriages

(a) The following marriages shall be void, without the need for any decree of divorce, annulment, or other legal proceeding:

(1) All marriages between parties where either party is lawfully married to another person.

. . .

Restatement (Second) of Conflict of Laws (1971)

§ 6 Choice-of-Law Principles

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include:

> . . .
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,
>
> . . .
>
> (f) certainty, predictability, and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.

* * *

§ 283 Validity of Marriage

(1) 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 principles stated in § 6.

(2) A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.

> **Comment to § 283**
>
> *a*. *Scope of section.* The rule of this Section is concerned with what law governs the validity of a marriage as such, namely with what law determines, without regard to any incident involving the marriage, whether [the parties are lawful spouses]. . . .

Fletcher v. Fletcher
Franklin Court of Appeal (2014)

This case began as an action for divorce brought in Franklin district court by the appellee, Richard Fletcher, against the appellant, Wendy Fletcher. Richard requested custody of the parties' children and an award of child support.

The trial court awarded sole legal and physical custody of the children to Wendy. The trial court also awarded her alimony and child support. To date, Richard has paid all child support owed but has paid no alimony.

Richard moved to the State of Columbia two months after the divorce. He then filed an action in that state to annul his marriage to Wendy. He alleged for the first time that the marriage had been induced by Wendy's misrepresentations about her mental health, that he had learned of her severe mental illness only after the marriage, and thus that the marriage had been induced by fraud.

Wendy contested Richard's allegations. The Columbia trial court annulled the marriage on the ground of fraudulent inducement and noted that, by filing an appearance, Wendy had waived any objection to the court's jurisdiction. Richard then told Wendy that he would not contest custody of the children and would continue to pay child support, but that he would never pay her alimony.

Wendy then filed a motion in the Franklin court to enforce the alimony order. In his reply, Richard argued that the marriage had been invalidated by a Columbia court and that the alimony order was therefore void. The trial court terminated Richard's alimony obligation after the date of the Columbia court order, while also ordering Richard to pay all alimony due before that date. Wendy appealed, contending that the Franklin trial court had erred in giving full faith and credit to the Columbia annulment decree.

On appeal, Wendy contends that the Columbia annulment should not be given full faith and credit because the Columbia court did not apply Franklin law. Wendy correctly notes that fraudulent inducement does not constitute a ground to annul a marriage under Franklin law. By contrast, the law of the State of Columbia does permit annulment on that ground.

We must thus determine which state's law the trial court should have applied. In general, Franklin law holds that the validity of a 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 everywhere. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971). If a

state has no such relationship, that state must apply the law of the state that does.

For example, in *Simeon v. Jaynes* (Fr. Sup. Ct. 2009), one spouse sought to use a Franklin court to annul a marriage entered into in Columbia. The plaintiff spouse alleged that the marriage was bigamous because the defendant spouse had entered the marriage knowing of a previous valid marriage that had not been the subject of an annulment or a divorce. Under Franklin law, such a marriage is void from the start, without the need for any further action. By contrast, under Columbia law, such a marriage is voidable, requiring judicial action to end it. In that case, the parties had lived together only in Columbia, owned property there, and had incurred debts there. On these grounds, the Franklin Supreme Court held that the trial court should have applied Columbia law, given the significant connections between the spouses and the State of Columbia.

The Restatement advises that a court make this decision about the existence of "the most significant relationship" using the factors stated in RESTATEMENT § 6:

—*"the relevant policies of other interested states and the relative interests of those states in the determination of the 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.

—*"the protection of justified expectations":* Wendy and Richard married in Franklin, lived the entirety of their married life here, had children in Franklin, and owned property together here. Wendy and the two children continue to reside here. The only connection to the State of Columbia lies in the short time during which Richard established a residence there. These facts strongly suggest that the parties had a justified expectation that Franklin law would govern the terms on which the marriage ended.

—*"certainty, predictability, and uniformity of result":* People often move between states, creating the need for a system of well-defined rules to govern which state's laws apply to the creation and termination of marriages.

—*"ease in the determination and application of the law to be applied":* As noted above, all the important events in this marriage occurred in Franklin. Considerations of ease and administrative efficiency strongly suggest Franklin as the appropriate forum.

As a result, the Columbia trial court erred in not applying the law of the State of Franklin.

Its failure to do so resulted in an order that improperly invalidated a marriage that was validly entered into in Franklin. A marriage that is valid in Franklin should be valid everywhere "unless it violates the strong public policy of another state which has the most significant relationship to the spouses and the marriage at the time of the marriage." RESTATEMENT § 283(2). Since Columbia had only a minimal relationship to this marriage, we need not consider whether the marriage violated the strong public policy of Columbia.

We thus conclude that the Franklin trial court erred in giving full faith and credit to the Columbia annulment order.

Reversed and remanded.

Daniels v. Daniels
Franklin Court of Appeal (1997)

Elizabeth and John Daniels were married in Columbia and resided there until they separated. Mr. Daniels then moved to Franklin, purchased real property, and a year later, filed for divorce in Franklin district court. Ms. Daniels remained in Columbia and did not come to Franklin with her husband. In his complaint, Mr. Daniels requested only that he be granted a total divorce from Ms. Daniels and that the Franklin property be awarded to him.

In response, Ms. Daniels entered a special appearance solely for the purpose of challenging the court's jurisdiction. Mr. Daniels opposed that challenge. After a hearing, the trial court concluded that it had "jurisdiction over the *res* of the marriage relationship itself" and "*in rem* jurisdiction with respect to the property located within this State." We granted Ms. Daniels's application for an interlocutory appeal.

On appeal, Ms. Daniels insists that the trial court erred in ruling that it had *in personam* jurisdiction over her. But the trial court never ruled that it had *in personam* jurisdiction over Ms. Daniels. The trial court ruled only that it had jurisdiction over the *res* of the marriage so as to determine the issue of divorce. It also ruled that it had *in rem* jurisdiction over the marital property located in Franklin. If these rulings are correct, the trial court would not need to exercise *in personam* jurisdiction over Ms. Daniels herself.

In personam jurisdiction over both parties to the marriage is not a prerequisite to the grant of a divorce by a Franklin court. The party seeking a divorce need show only that the trial court has jurisdiction over the *res* of the marriage. A court has jurisdiction over the *res* of the marriage relationship when one of the parties to the marriage has been domiciled within the state for the requisite period, which in Franklin is six months. The United States Supreme Court has stated that "each state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent." *Williams v. North Carolina*, 317 U.S. 287, 298–99 (1942).

Ms. Daniels's reliance on the Franklin Long Arm Statute is misplaced. That statute deals only with the exercise of *in personam* jurisdiction over nonresidents. The Long Arm Statute does not apply in every case in which the defendant is a nonresident. It applies only in cases in which *in personam* jurisdiction over the nonresident defendant is required. However, Franklin case law has long held that *in personam* jurisdiction is not required to terminate the marriage relationship,

whether through divorce, *Price v. Price* (Fr. Sup. Ct. 1972), or by annulment, *Carew v. Ellis* (Fr. Sup. Ct. 1957). Provided that the plaintiff has established residency in Franklin for at least six months, the trial court may exercise jurisdiction over the marriage relationship.

Ms. Daniels argues in the alternative that the presence of issues other than ending the marriage requires the trial court to have *in personam* jurisdiction over her. Ms. Daniels correctly notes that a trial court with jurisdiction to grant a divorce cannot award alimony or attorney's fees unless it has *in personam* jurisdiction. *Boyd v. Boyd* (Fr. Sup. Ct. 1977).

However, the only other issues relate to disposition of marital property located in the State of Franklin. We have long held that, even in the absence of *in personam* jurisdiction over the defendant in a case seeking to end a marriage, a Franklin court can render a valid judgment with respect to real property located in Franklin. *Gore v. Gore* (Fr. Sup. Ct. 1985) (divorce); *Carew v. Ellis*, *supra* (annulment). These cases hold that where division of the property is at issue, a Franklin court can exert *in rem* jurisdiction over the property in Franklin without establishing *in personam* jurisdiction over the defendant.

Finally, Ms. Daniels argues that due process requires that a Franklin court have *in personam* jurisdiction over her before it can dispose of property in which she has a marital interest, citing *Shaffer v. Heitner*, 433 U.S. 186 (1977). That case holds that assertions of jurisdiction by a state court must satisfy the "minimum contacts" standard. The Supreme Court in *Shaffer* held only that the mere presence of property in a state, standing alone, will not constitute sufficient "minimum contacts" to support the state's exercise of its *in rem* jurisdiction, *if* the property is unrelated to the underlying cause of action. However, the Court noted in dicta that, "when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant," a state court may properly exercise jurisdiction over the property. *Shaffer*, *supra* at 199 n. 17.

Ms. Daniels correctly notes that her only contact with this state is that her husband moved to Franklin after their separation but while they were still married. Were it not for her marriage to Mr. Daniels, a Franklin court could not exercise jurisdiction over her. But, as noted, Franklin does have jurisdiction over both the marriage and the marital property. Because Mr. Daniels's complaint addressed the division only of property located in Franklin, the trial court's exercise of jurisdiction did not violate due process.

Affirmed.

CONNECTICUT BAR EXAMINATION

26 July 2022

PERFORMANCE TEST #2

From the Multistate Performance Test

In re Nina Briotti

FILE

LIBRARY

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

MEMORANDUM

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

Nina Briotti, an attorney and sole practitioner, has asked our firm's advice concerning a matter in which she is involved. She is concerned that a client of hers might undertake an illegal and criminal action. She asks whether she may record a telephone conversation, without the client's knowledge or approval, in which she counsels the client against that course of action.

Briotti's client "X" (whom Briotti has not identified by name) is a financial adviser whom Briotti has counseled for several years as to various transactions. X has recently faced serious setbacks in investments made on behalf of his clients. In a recent telephone conversation with Briotti, X made comments that suggested that he might use funds from a trust fund he administers to cover the losses. Briotti intends to telephone X in the near future to counsel him that it would be illegal to use the trust fund for that purpose. She would like to record that telephone conversation without informing X that she is doing so.

She asks for our advice on the following three questions:

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

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

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

Please prepare an objective memorandum to me addressing these questions, stating your analysis and conclusions. Do not include a separate statement of facts, but be sure to integrate the facts into your analysis

TRANSCRIPT OF MEETING WITH NINA BRIOTTI

Attorney Howard Zeller: Hi, Nina, great to see you again.

Nina Briotti: Likewise, Howard, thanks for seeing me. I need your advice.

Zeller: Please explain.

Briotti: I have a client—I'll just call him "X"—and my continuing representation of him poses a concern. He's a financial adviser (not an attorney), with some very rich clients, and he's one of those advisers who are prone to make risky investments on behalf of their clients in the hopes of a really big payday. In the past few months, he's told me that many of his investments on behalf of his clients have not been successful—he's lost a huge amount of his clients' money, and they know it. Now many of his clients are demanding that he liquidate their accounts and remit the balances to them in cash. He has only two weeks to pay them and sounded desperate. The problem, as he's explained it, is that so many of his clients have made that demand that, if he does as they have requested, because of the nature of the investments, he could not cover the losses, would be out of business, and would suffer personal financial ruin. In our last telephone conversation, he intimated that the only place he could get enough cash quickly would be from a trust fund he administers.

As I advised him, that would be illegal, would subject him to possible criminal charges, and could seriously damage the beneficiaries of the trust because they rely on regular income from it. He didn't respond. His silence caused me concern that there's at least a possibility that he might commit a crime. I'm going to call him in a few days, to be sure he understands that he can't invade the trust. Because I'm not sure he'll accept my advice, I'd like to record that telephone call. I want to be sure that I have evidence that I properly advised him if he ignores my advice. Obviously, I don't want him to know that I'm recording the phone call. If he asks whether I'm recording the conversation, must I tell him? I need your advice on all these points.

Zeller: I understand. Do you have notes of your conversation with him?

Briotti: Yes, I've typed up my handwritten notes, taking out any confidential information that would identify X. Here they are [typed notes attached to this transcript].

Zeller: Let me ask you a few questions. First, we have to determine if your recording of the phone conversation without his knowledge is legal. I know that your office is here in Franklin—is X located in this state as well?

Briotti: No, he's located in our neighboring state of Olympia. As you know, in addition to being an expert in financial matters, I'm a member of both the Franklin and Olympia bars, and I think that's one of the reasons he retained me.

Zeller: Then the first question we'll have to determine is whether Franklin and Olympia require the consent of one or both parties to a phone conversation for recording it to be lawful, and then we'll need to know which state's law governs a cross-border conversation.

Briotti: Whatever the state law is on the subject, I'm also concerned with whether I'm allowed to record the conversation under the Rules of Professional Conduct.

Zeller: Exactly—that's the next issue we'll have to analyze. Both Franklin and Olympia have adopted the American Bar Association's Model Rules as their own, so we'll look at that.

Briotti: If I can record the conversation, may I keep that a secret from X should he ask if I'm doing so?

Zeller: We'll look into that as well. Let me ask you this: How certain are you that he will invade the trust he administers to get the cash?

Briotti: I'm not really sure. He is desperate and might do so, but then again, he knows that it would be illegal and might not do it.

Zeller: So how do you come out on whether he will do it or not?

Briotti: I think it's possible.

Zeller: We'll get right on it, and I'll get back to you.

TYPED VERSION OF NINA BRIOTTI'S NOTES

July 18, 2022

[X] calls. Tells me he has real problems. Investments for clients have tanked, and most clients are demanding immediate liquidation of accounts and cash payments. He has only two weeks to make payments. He says his investors knew the investments were risky and yet they now blame him because the investments didn't work out.

If he liquidates all accounts requested, he will be out of business, lose everything including personal wealth (possibly bankrupt?).

Doesn't know what to do. He is desperate. The only source of cash that would keep him solvent is a trust account that he administers. The trust is money left by a former client, and it pays modest monthly payments to her heirs. He says he could easily keep up with those payments to the heirs. Once he has more cash, he could pay back the money to the trust before anyone knows about it.

I tell him that invading the trust would be illegal.

He repeats that he doesn't know what to do and keeps referring to the trust he administers.

FRANKLIN CRIMINAL CODE

§ 200 Interception and attempted interception of wire communication prohibited; exceptions.

(1) Except as provided in this Section, it is unlawful for any person to intercept or attempt to intercept any wire communication unless

(a) the interception or attempted interception is made with the prior consent of one of the parties to the communication; or

(b) [an emergency situation exists and it is impractical to get a court order; subsequent court ratification needed].

As used in this Section, interception of a wire communication includes the recording of that communication.

OLYMPIA CRIMINAL CODE

§ 500.4 Interception and attempted interception of wire communication prohibited; exceptions.

(1) Except as provided in this Section, it is unlawful for any person to intercept or attempt to intercept any wire communication unless

(a) the interception or attempted interception is made with the prior consent of all the parties to the communication; or

(b) [an emergency situation exists and it is impractical to get a court order; subsequent court ratification needed].

As used in this Section, interception of a wire communication includes the recording of that communication.

ABA MODEL RULES OF PROFESSIONAL CONDUCT

Rule 1.6: Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(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 against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; . . .

. . .

Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice; . . .

ABA STANDING COMMITTEE ON
ETHICS AND PROFESSIONAL RESPONSIBILITY
[EXCERPTED, FOOTNOTES OMITTED]

Formal Opinion 01-422, June 24, 2001

Electronic Recordings by Lawyers Without the Knowledge of All Participants

1. Introduction

In Formal Opinion 337 [adopted in 1974], this Committee stated that with a possible exception for conduct by law enforcement officials, a lawyer ethically may not record any conversation by electronic means without the prior knowledge of all parties to the conversation. The position taken in Opinion 337 has been criticized by a number of state and local ethics committees, and at least one commentator has questioned whether it survives adoption of the Model Rules of Professional Conduct. The Committee has reexamined the issue and now rejects the broad proscription stated in Opinion 337. We conclude that the mere act of secretly but lawfully recording a conversation is not inherently deceitful. . . .

2. Reasons for Abandonment of the General Prohibition Stated in Opinion 337

Formal Opinion 337 was decided under the [prior] Code of Professional Responsibility, which incorporated the principle that a lawyer "should avoid even the appearance of impropriety." That admonition was omitted as a basis for professional discipline nine years later in the ABA's adoption of the Model Rules of Professional Conduct. Opinion 337 further stated, however, that "conduct which involves dishonesty, fraud, deceit or misrepresentation in the view of the Committee clearly encompasses the making of recordings without the consent of all parties." The Model Code's prohibition against conduct involving deceit or misrepresentation was preserved in Model Rule 8.4(c), and thus we must consider whether that conclusion by the Committee in Opinion 337 is correct under the Model Rules. Reception by state and local bar committees of the principle embraced by Opinion 337 has been mixed. [Review of state responses omitted.]

Criticism of Opinion 337 has occurred in three areas. First, the belief that nonconsensual taping of conversations is inherently deceitful, embraced by this Committee in 1974, is not universally accepted today. The overwhelming majority of states permit recording by consent of only one party to the conversation. Surreptitious recording of conversations is a widespread practice by law enforcement, private investigators, and journalists, and the courts universally

accept evidence acquired by such techniques. Devices for the recording of telephone conversations on one's own phone are readily available and widely used. Thus, even though recording of a conversation without disclosure may to many people "offend a sense of honor and fair play," it is questionable whether anyone today justifiably relies on an expectation that a conversation is not being recorded by the other party, absent a special relationship with or conduct by that party inducing a belief that the conversation will not be recorded.

Second, there are circumstances in which requiring disclosure of the recording of a conversation may defeat a legitimate and even necessary activity. For that reason, even those authorities that have agreed with the basic proposition of Opinion 337 have tended to recognize numerous exceptions. [Listing of exceptions omitted.]

A degree of uncertainty is common in the application of rules of ethics, but an ethical prohibition that is qualified by so many varying exceptions and such frequent disagreement as to the viability of the rule as a basis for professional discipline is highly troubling. We think the proper approach to the question of legal but nonconsensual recordings by lawyers is not a general prohibition with certain exceptions, but a prohibition of the conduct only where it is accompanied by other circumstances that make it unethical. The third major criticism of Opinion 337 has been that whatever its basis under the Canons and the Model Code, it is not consistent with the approach of the Model Rules. The Model Rules do not contain the injunction of the Model Code that lawyers "should avoid even the appearance of impropriety." . . .

The Committee believes that to forbid obtaining of evidence by nonconsensual recordings that are lawful and consequently do not violate the legal rights of the person whose words are unknowingly recorded would be unfaithful to the Model Rules as adopted.

3. Nonconsensual Recording in Violation of State Law

Federal law permits recording of a conversation by consent of one party to the conversation. Some states, however, prohibit recordings without the consent of all parties, usually with an exception for law enforcement activities and occasionally with other exceptions. Violation of such laws is a criminal offense, and may subject the lawyer to civil liability to persons whose conversations have been recorded secretly. A lawyer who records a conversation in the practice of law in violation of such a state statute likely has violated Model Rule 8.4(b) or 8.4(c) or both. . . . A lawyer contemplating nonconsensual recording of a conversation should, therefore, take care to ensure that he is informed of the relevant law of the jurisdiction in which the recording occurs.

4. False Denial that a Conversation Is Being Recorded

That a lawyer may record a conversation with another person without that person's knowledge and consent does not mean that a lawyer may state falsely that the conversation is not being recorded.

5. Undisclosed Recording of Conversations with Clients

When a lawyer contemplates recording a conversation with a client without the client's knowledge, ethical considerations arise that are not present with respect to nonclients. Lawyers owe to clients, unlike third persons, a duty of loyalty that transcends the lawyer's convenience and interests. The duty of loyalty is in part expressed in the Model Rules requiring preservation of confidentiality and communication with a client about the matter involved in the representation. Whether the Model Rules that define and implement these duties permit a lawyer to record a client conversation without the client's knowledge is a question on which the members of this Committee are divided. The Committee is unanimous, however, in concluding that it is almost always advisable for a lawyer to inform a client that a conversation is being or may be recorded, before recording such a conversation.

Clients must assume, absent agreement to the contrary, that a lawyer will memorialize the client's communication in some fashion. But 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. If the recording were to fall into unfriendly hands, whether by inadvertent disclosure or by operation of law, the damage or embarrassment to the client would likely be far greater than if the same thing were to happen to a lawyer's notes or memorandum of a client conversation.

Recordings of conversations may, of course, serve useful functions in the representation of a client. Electronic recording saves the lawyer the trouble of taking notes and ensures an accurate record of the instructions or information imparted by a client. These beneficial purposes may weigh in favor of recording conversations, but they do not require that the recording be done secretly.

The relationship of trust and confidence that clients need to have with their lawyers, and that is contemplated by the Model Rules, likely would be undermined by a client's discovery that, without his knowledge, confidential communications with his lawyer have been recorded by the lawyer. Thus, whether or not undisclosed recording of a client conversation is unethical, it is inadvisable except in circumstances where the lawyer has no reason to believe that the client might

object, or where exceptional circumstances exist. Exceptional circumstances might arise if the client, by his own acts, has forfeited the right of loyalty or confidentiality. For example, there is no ethical obligation to keep confidential plans or threats by a client to commit a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm. Nor is there an ethical obligation to keep confidential information necessary to establish a defense by the lawyer to charges based upon conduct in which the client is involved. Those members of the Committee who believe that the Model Rules forbid a lawyer from recording client conversations without the client's knowledge nonetheless would recognize exceptions in circumstances such as these.

Excerpts from the FRANKLIN RULES OF PROFESSIONAL CONDUCT

Rule 8.4 [Franklin has adopted ABA Rule 8.4.]

Franklin State Bar Committee on Ethics and Professional Responsibility Commentary

Franklin has adopted ABA Formal Opinion 01-422, and it is of persuasive weight under Franklin law, as are these comments. The ABA Committee noted that it might be permissible in exceptional circumstances to record a telephone conversation with a client without the client's knowledge, including a conversation in which a client discloses a plan to commit a serious crime.

However, it may be difficult to predict whether a future conversation will meet the requirements of such an exceptional circumstance. The key question is whether such a recording will violate the lawyer's duty of loyalty to the client. That duty governs both the lawyer's actual behavior and the results of that behavior—the dangers of inadvertent or intentional disclosure of the client's confidences. As the Formal Opinion notes, another important danger of such recording is the breach of confidentiality that might ensue absent those exceptional circumstances. *See* Model Rule 1.6. In deciding whether to undertake a recording of a conversation with a client without the client’s knowledge, the lawyer should take care to act on facts and well-grounded judgment, rather than speculation, as to the client's intended actions. The lawyer should consider the client's previous statements, the client's circumstances, and alternative methods of memorializing the conversation when determining the need for recording the conversation without the client's knowledge. Hence, a lawyer who undertakes such recording of a client must be fully aware of these risks and must reasonably believe in the necessity of making such a recording.

We therefore echo the ABA Committee's conclusion that recording of a conversation with a client, but without the client's knowledge, is almost always inadvisable unless the lawyer reasonably believes it necessary. Without such necessity, a recording undermines the trust and truthful dealing that is a hallmark of the attorney-client relationship.

Shannon v. Spindrift, Inc.
Olympia District Court (2018)

Plaintiff Mark Shannon is a resident of Olympia, and claims that defendant Spindrift Inc., a corporation formed and operating in our neighboring state of Columbia, violated his rights by recording his telephone conversation with Spindrift's customer call center, located in Columbia, without informing him of the recording and without his consent. Shannon brought a civil action claiming that Spindrift's recording was unlawful and hence caused him damage. Spindrift, in turn, brought this motion to dismiss, arguing that, as a matter of law, the recording was lawful and hence Spindrift was not liable for any claimed damage resulting from the mere fact of the recording.

Therefore, the court is asked to decide whether the recording of the telephone conversation at issue was lawfully made.

Olympia is an "all-party consent" state, in that our statute prohibits the recording of a telephone conversation without the consent of all parties to the call. OLYMPIA CRIM. CODE (OCC) § 500.4. Columbia, on the other hand, is a "one-party consent" state, in that its statute requires only "prior consent of one of the parties to the communication" for its recording to be legal. COLUMBIA CRIM. CODE § 440.7. (Both statutes allow for civil and criminal actions to be brought if they are violated.)

Thus, the question posed is whether Olympia's statute applies to recording of a telephone conversation with a person in Olympia without that person's consent when the recording is made by a party who is located and uses recording equipment outside of Olympia.

Our courts have repeatedly concluded that, under our statute, "the recording of a telephone conversation constitutes an 'intercept' under OCC § 500.4(a), and thus that statute prohibits the recording of telephone conversations with the consent of only one party." *See, e.g., Wessel v. Sykes* (Olympia Sup. Ct. 2014).

The crux of Spindrift's argument is that OCC § 500.4 does not apply because the allegedly prohibited conduct—the interception of the telephone call—took place outside of Olympia. Shannon, on the other hand, argues that OCC § 500.4 applies because the statute contains no location-based limitations and Spindrift's actions caused harm in Olympia.

Here, *Parnell v. Brant*, a 2004 decision of the Olympia Supreme Court, is instructive. That case addressed whether a recording made in Columbia of a conversation with a person in Olympia, made without that person's consent, could be admitted as evidence in their criminal trial. The court

held that "Olympia law allows the admission of evidence legally obtained in the jurisdiction seizing the evidence." The court noted that the interception "was lawful at its inception in Columbia, as Columbia requires only that one party consent in order to allow monitoring of the communication." Accordingly, our court concluded that, because the recording was permissible in Columbia, it was admissible as evidence in the Olympia criminal trial "even though the manner of interception would violate Olympia law had the interception taken place in Olympia."

While the central issue in *Parnell* concerned admissibility of evidence in a criminal case, rather than the viability of a civil action based on the act of recording itself (as is the case here), consistent with the court's analysis in *Parnell*, we hold that in civil or criminal actions, OCC § 500.4 does not apply when the act of interception takes place outside of Olympia. Instead, "interceptions and recordings occur where made." *Parnell*. Accordingly, on these facts, the recording of which plaintiff Shannon complains was lawfully made, and hence there is no basis for his civil action.

Motion to dismiss granted.

CONNECTICUT BAR EXAMINATION
26 July 2022

ESSAY QUESTION #1
From the Multistate Essay Examination

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

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

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

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

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

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

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

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

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

1. The detective's anticipated testimony about gang identification, organization, and activities is improper expert testimony.

2. The photograph of Defendant's tattoo and the former gang leader's anticipated testimony about it is inadmissible character evidence.

3. Victim's anticipated testimony that Defendant shot him because of a gang dispute is irrelevant.

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

CONNECTICUT BAR EXAMINATION

26 July 2022

ESSAY QUESTION #2

From the Multistate Essay Examination

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

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

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

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

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

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

In litigation between the parties:

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

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

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

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

CONNECTICUT BAR EXAMINATION

26 July 2022

ESSAY QUESTION #3

From the Multistate Essay Examination

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

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

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

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

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

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

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

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

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

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

CONNECTICUT BAR EXAMINATION
26 July 2022

ESSAY QUESTION #4
From the Multistate Essay Examination

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

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

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

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

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

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

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

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

Last month, Arlene died. At Arlene's death, she owned a bank account with a balance of $300,000. The bonds in the package given to Arlene's friend were worth $200,000, and the necklace was worth $50,000. Arlene was survived by her younger brother Bob, her three nieces Carla, Donna,

and Edna (the only children of Arlene's deceased sister), and her nephew Fred (the only child of Arlene's deceased older brother). Donna is 16 years old.

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

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

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

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

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

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

CONNECTICUT BAR EXAMINATION

26 July 2022

ESSAY QUESTION #5

From the Multistate Essay Examination

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

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

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

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

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

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

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

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

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

CONNECTICUT BAR EXAMINATION
26 July 2022

ESSAY QUESTION #6
From the Multistate Essay Examination

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

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

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

1. I give my family home to my new wife, Wanda, for life, and upon her death to my daughter, Adele, and her heirs.

2. I give the entire residue of my estate to my wife, Wanda.

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

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

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

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

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

The jurisdiction has adopted the Uniform Statutory Rule Against Perpetuities.

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

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

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

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