

## MPT-1 — Sample Answer 1

### **Brief in Support of Defendant's Motion to Exclude Plaintiff's Expert and Defendant's Motion for Summary Judgment**

#### **I. Argument**

The complaint by plaintiff, Alice Lowe, alleges that Dr. Jost was negligent in performing a hip replacement. We have retained an expert witness in the matter. This court should qualify Dr. Shulman as an expert and admit her testimony. This court should also not find Dr. Ajax to be a qualified expert. Additionally, even if the court qualifies Dr. Ajax as an expert, the court should grant our motion for summary judgment.

**The Court should qualify Dr. Shulman as an expert and admit her testimony because her methods are qualified and reliable.**

In *Jacobs v. Becker*, the court ruled that expert testimony is required in a malpractice case because only expert testimony can demonstrate how the required standard of care was breached and how the breach caused the injury to the plaintiff. *Jacobs v. Becker* (Fr. Ct. App. 2020). We have retained an expert witness in this matter, Dr. Ariel Shulman. Dr. Shulman graduated from the University of Franklin Medical School in 2004.

Under the Franklin Rules of Evidence Rule 702, a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine the facts in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case. Fr. R. Ev. 702. These factors are not all inclusive and courts are regularly instructed to utilize any other factors deemed appropriate. *Smith v. McGann* (Fr. Ct. App. 2004).

Under this rule courts have held that physicians do not need to practice in, or be a specialist in every area in which she provides an opinion, but the physician must demonstrate that she is "sufficiently familiar with the standards" in that area by her "knowledge, skill, experience or training." *Smith v. McGann* (Fr. Ct. App. 2004).

In *Wyatt v. Dozier* (Fr. Sup. Ct. 2000) the court held that the testimony of a pediatrician was not qualified to give expert opinion testimony about the standards of obstetrics because she was not sufficiently familiar with the specialty through knowledge, skill, experience, training, or education. *Wyatt v. Dozier* (Fr. Sup. Ct. 2000). Here, Dr. Shulman is board certified in orthopedics and is currently a professor of orthopedics at Olympia University Medical School. Board certified means that she has finished her residency in orthopedics and she has passed the board

certification exam. Although Dr. Shulman is not currently practicing, while teaching at Olympia University, she teaches students how to do knee and hip replacements. Dr. Shulman teaches a simulated joint replacement class to medical students. This shows that Dr. Shulman is sufficiently qualified to give her expert opinion because she has obtained specific knowledge and education in the field by attending medical school. Additionally, Dr. Shulman has enough training in the field to now teach other students about the skills she has acquired, allowing them to hone these skills. Dr. Shulman has also been in private practice for roughly ten years where she worked exclusively in knee and hip replacements and conducted an average of 100 knee and hip replacements each year. Dr. Shulman's knowledge is specifically on point with the matter at hand as it related to joint replacement and thus would be helpful to the the trier of fact.

Franklin Civil Code 233 was enacted to clarify the law surrounding the introduction of expert testimony, following the Franklin Supreme Court's determination that Franklin would adopt the United States Supreme Court's approach in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (509 U.S. 579 1993) in interpreting the evidentiary rules of Franklin. Thus, the Daubert court clarified that "general acceptance" was no longer the standard for determining the reliability of expert testimony. *Smith v. McGann* (Fr. Ct. App. 2004). Now, the trial court has broader latitude to determine whether an expert's "reasoning or methodology properly can be applied to the facts at issue." *Smith v. McGann* (Fr. Ct. App. 2004). This analysis is broken into two prongs, whether a witness is qualified and reliable. *Smith v. McGann* (Fr. Ct. App. 2004).

A witness is qualified as an expert if he is the type of person who should be testifying on the matter at hand. *Smith v. McGann* (Fr. Ct. App. 2004).

In *Smith v. McGann* the court ruled that generally experts can testify about the standard of care for a specialist only if the experts specialize in the same or a similar specialty that includes the performance of the procedure at issue. *Smith v. McGann* (Fr. Ct. App. 2004). However, it is unnecessary for the expert witness testifying to the standard of care to have practiced in the same community as the defendant, the witness must demonstrate familiarity with the standard of care for which the injury occurred. *Smith v. McGann* (Fr. Ct. App. 2004). In *Smith v. McGann* the court ruled that a physician properly qualified as an expert in Franklin because the physician had studied the demographics of Franklin and another city, his study demonstrated that the population and the availability of medical care was quite similar, and the standard of care between Franklin and the other city were virtually the same. *Smith v. McGann* (Fr. Ct. App. 2004). Here, Dr. Shulman worked in Olympia, however this does not bar her from being able to testify on the matter at hand. She had extensive practice in the state, conducting over 100 knee and hip surgeries a year, and thus should be allowed to address the standard of care in the field for other physicians involved in orthopedics work. In her deposition testimony she revealed that the practice of orthopedics is the same in each state and thus the standard of care between Olympia and Franklin is the same. Therefore, although she did not practice in the same community her knowledge is still helpful in this case as an expert. It is not necessary that she conduct a thorough comparison of the population and availability of medical care, rather it is enough that she standard of care between the two was the same.

A witness is reliable if the opinion is based on a scientifically valid methodology. *Smith v. McGann* (Fr. Ct. App. 2004).

In *Smith v. McGann* the court ruled that a physician's testimony was reliable because he based his opinion on his many years of experience in orthopedics, the articles he read and conferences he attended, and the fact that other physicians relied on his diagnoses and fractured bones. *Smith v. McGann* (Fr. Ct. App. 2004). Here, Dr. Shulman has written articles in the medical field regarding knee replacements. She based her opinion regarding Dr. Jost's standard of care on her long experience performing hip replacements as well as all the articles on joint replacement that are in the *Journal of American Medical Association* and *The New England Journal of Medicine*. These are considered the most up to date and reliable sources of information in medicine.

One factor courts look to when assessing reliability is the degree to which the expert's opinion and its basis are generally accepted within the relevant community. *Smith v. McGann* (Fr. Ct. App. 2004). Another factor courts consider is whether experts in that field would rely on the same evidence to reach the type of opinion being offered. *Smith v. McGann* (Fr. Ct. App. 2004). In *Ridley v. St. Mark's Hospital* the court ruled that an expert's opinion was based sufficiently reliable methodology when he based his conclusions on medical records, CT scans, medical notes and deposition testimony. *Ridley v. St. Mark's Hospital* (Fr. Ct. App. 2002). Here, Dr. Shulman based her opinion on the plaintiff's medical records and surgical records as well as her own physical examination of the plaintiff. Dr. Shulman also reviewed the notes from the surgery. These methods are sufficiently similar to the methods used by the physician in *Ridley v. St. Mark's Hospital* and should thus be deemed to be reliable.

Thus, the court should qualify Dr. Shulman as an expert.

**The Court should not find Dr. Ajax to be a qualified expert, even if he is qualified, should exclude all his proffered opinion testimony**

Under the Franklin Rules of Evidence Rule 702, a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine the facts in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case. Fr. R. Ev. 702.

In *Wyatt v. Dozier* (Fr. Sup. Ct. 2000) the court held that the testimony of a pediatrician was not qualified to give expert opinion testimony about the standards of obstetrics because she was not sufficiently familiar with the specialty through knowledge, skill, experience, training, or education. *Wyatt v. Dozier* (Fr. Sup. Ct. 2000). If an expert's testimony is so fundamentally unsupported that it can offer no assistance to the jury, it must be excluded. *Park v. Green* (Fr.

Sup. Ct. 1999). In *Smith v. McGann*, the court ruled that a physician did not qualify as an expert in orthopedics because she merely testified that when looking at an x-ray there was a possibility of fracture and she testified that another physician's actions fell below the standard of care in not ordering additional x-rays. *Smith v. McGann* (Fr. Ct. App. 2004). Here, Dr. Ajax received his MD from Franklin State University in 2002. He completed his residency in Orthopedics in the state of Olympia in 2007. He has practiced orthopedics in Franklin and he is board certified in orthopedics. Additionally, Dr. Ajax has assisted in around 100 hip surgeries and performed 50 on his own. This is likely sufficient evidence of his knowledge and skill in the area of orthopedics.

Even after an expert is qualified based on reliable methods, the trier of fact must still determine whether the witness is credible. *Smith v. McGann* (Fr. Ct. App. 2004). Even if a court finds that an expert's qualifications satisfy the baseline for admissibility, the extent and substance of those qualifications can affect the credibility of that expert. *Smith v. McGann* (Fr. Ct. App. 2004). The only testimony Dr. Ajax has provided circles around a single x-ray that he examined. He did not discuss anything further in his expert testimony aside the fact that he believed Dr. Jost departed from good and accepted medical practice in failing to order another x-ray from a different position. As decided in *Smith v. McGann* this is an insufficient basis on it shown to state that a physician's conduct fell below the standard of care necessary. This is the only testimony plaintiff's expert has provided and it is unhelpful to the fact finder. This weighs heavily against finding Dr. Ajax as a credible witness.

Additionally, mere speculation about what might have occurred had the facts been different can never provide a sufficiently reliable basis for expert opinion. *Smith v. McGann* (Fr. Ct. App. 2004). Here, Dr. Ajax did not even confidently confirm that a second x-ray would have been helpful, he merely stated that a second x-ray "might" have shown that the prostheiss was out of place. This is not a sufficiently reliable basis for expert testimony because it is just mere speculation and nothing more.

The court should not qualify Dr. Ajax as an expert.

A party's failure to present any expert testimony on causation of the standard of care justifies an adverse ruling on summary judgment. *Jacobs v. Becker* (Fr. Ct. App. 2020). In *Jacobs v. Becker* the court ruled that because the plaintiff failed to present expert testimony in support of her claim summary judgment should have been granted for the physician. *Jacobs v. Becker* (Fr. Ct. App. 2020).

**Even if the court qualifies Dr. Ajax as an expert, the Court should grant our motion for summary judgment because the plaintiff has failed to offer any admissible evidence on the elements of her malpractice claim**

Under the Franklin Rules of Civil Procedure Rule 56, a party may move for summary judgment, identifying each claim or defense or the part of each claim and defense on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of

law. Fr. R. Civ. Pro. 56. The court must view the evidence in the light most favorable to the nonmoving party. *Jacobs v. Becker* (Fr. Ct. App. 2020).

A material fact is a fact that is essential to the establishment of an element of the case and determinative of the outcome. *Jacobs v. Becker* (Fr. Ct. App. 2020). *Alexander v. ChemoCo Ltd.* (Fr. Sup. Ct. 2003). The moving party is entitled to judgment as a matter of law because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to the which she has the burden of proof. *Alexander v. ChemoCo Ltd.* (Fr. Sup. Ct. 2003). If a plaintiff fails to produce any evidence to prove an element of the case on which the plaintiff bears the burden of proof, then the defendant is entitled to summary judgment. *Alexander v. ChemoCo Ltd.* (Fr. Sup. Ct. 2003).

Additionally, the Franklin Supreme Court has consistently held that a Rule 56 motion for summary Judgment "against a party who fails to make a showing sufficient to establish the exercise of an element essential to to that party's case, and on which that party will bear the burden of proof at trial" should not be granted. *Alexander v. ChemoCo Ltd.* (Fr. Sup. Ct. 2003).

Courts have consistently held that a plaintiff must prove three elements to establish a prima facie case for negligence: (1) that a duty existed requiring the defendant to conform to a specific standard of care for the protection of others against harm (2) that the defendant has failed to conform to that specific standard of care and (3) that the breach of the standard of care caused the harm to the plaintiff. *Jacobs v. Becker* (Fr. Ct. App. 2020). Thus, to succeed in a motion for summary judgement, we have the burden to prove that the plaintiff has failed to establish a factual basis for any of these elements. *Jacobs v. Becker* (Fr. Ct. App. 2020).

Here, plaintiff, Alice Lowe, is alleging that Dr. Jost was negligent in performing hip replacement surgery on her. Dr. Jost performed the hip replacement on Ms. Lowe's left hip on March 1, 2022 in Franklin. Ms. Lowe claims to have followed all post operative requirements set forth by Dr. Jost. However this is incorrect. Ms. Lowe was spotted by her neighbor on March 16, 2022 drop her purse and then bend to pick it up. The neighbor offered to assist Ms. Lowe however Ms. Lowe refused her help. Immediately when Ms. Lowe bent to pick up the purse she cried out in pain. Ms. Lowe injuries were casued by her failure to follow Dr. Jost's instruction. Ms. Lowe bent over to pick up her purse when she was told not to do this in her post operation care. Had Ms. Lowe allowed her neighbor to hellp her pick up her bad she would not have fallen over and reinjured her hip.

However, she alleges she she was walking with the aid of a cane around her condominium complex and fell to the ground. She is alleging that she was rushed to the hospital and had a small fracture in her femur. Ms, Lower had revision surgery on March 21, 2022. Ms. Lowe's actions were the direct cause of her injuries. She fialed to follow post-surgery precautions and fell as a result. Ms. Lowe has failed to show any evidence that Dr. Jost acted negligently during the surgery or in his post operation instructions to her.

In *Jacobs v. Becker* the court ruled that a physician owed a duty of care to a plaintiff when the plaintiff sued the physician for malpractice because the standard of care for physicians is to act with that degree, care, knowledge and skill ordinarily possessed and exercised in similar situations by the average member of the profession practicing in the field. *Jacobs v. Becker* (Fr. Ct. App. 2020). Here, Dr. Jost has acted with the skills an ordinary physician would have under the circumstances.

Thus, even if the court finds that Ajax qualifies as an expert they should grant our motion for summary judgment because the plaintiff has failed to offer any evidence on the elements of her malpractice claim.

### **Conclusion**

For the foregoing reasons this court should grant our motion to exclude the testimony of plaintiff's expert witness. However, if the court finds that the plaintiff's witness qualifies as an expert, the court should grant our motion for summary judgment.

## MPT-1 — Sample Answer 2

### ARGUMENT

#### **1. The Court should qualify Dr. Shulman as an expert and admit her opinion testimony because she is qualified as to the matter at hand and her testimony is reliable.**

The Franklin Supreme Court has adopted the United States Supreme Court's approach in *Daubert v. Merrell Dow Pharmaceuticals Incorporated* for determining whether a witness is fit to testify as an expert. In *Daubert*, the United States Supreme Court stated that a trial court has great discretion in determining the reliability of an expert and should act as a "gatekeeper" to determine whether the expert's testimony is admissible. In *Smith v. McGann* the Franklin Court of Appeal made clear that Franklin Code § 233 requires two separate inquiries: (1) qualifications and (2) reliability.

**First**, a witness is qualified as an expert if he is the type of person who should be testifying on the matter at hand. In *Smith v. McGann*, the Franklin Court of Appeal held that generally, experts can testify about the standard of care for a specialist only if the experts specialize in the same or a similar specialty that includes the performance of the procedure at issue. While it is not necessary for the expert witness testifying as to the standard of care to have practiced in the same community as the defendant, the witness must have demonstrated familiarity with the standard of care where the injury occurred by her "knowledge, skill, experience, training, or education." *McGann*. In *Jacobs v. Becker*, the Franklin Court of Appeal stated that expert testimony is required in a medical malpractice case because only expert testimony can demonstrate how the required standard of care was breached and how the breach caused the plaintiff's injury. The *Jacobs* court further stated that a party's failure to provide any expert testimony on causation or the standard of care justifies granting a motion for summary judgment.

In *Smith v. McGann*, the Franklin Court of Appeal held that generally, experts can testify about the standard of care for a specialist only if the experts specialize in the same or a similar specialty that includes the performance of the procedure at issue. While it is not necessary for the expert witness testifying as to the standard of care to have practiced in the same community as the defendant, the witness must have demonstrated familiarity with the standard of care where the injury occurred by her "knowledge, skill, experience, training, or education." *McGann*.

**Second**, an expert opinion is reliable if the opinion is based on scientifically valid methodology. Franklin Rules of Evidence Rule 702 provides that a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion if the proponent demonstrates to the court that it is more likely than not that (a) the expert's scientific, technical, or otherwise specialized knowledge will help the trier of fact to understand the evidence, (b) the testimony is based on sufficient facts or data, (c) the testimony is the product of reliable principles and methods, and (4) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

**Qualifications of Dr. Shulman:** Here, Dr. Emil Jost is a board certified orthopedic surgeon who completed his residency in orthopedic surgery at Franklin General Hospital. Dr. Jost performed a hip replacement on Ms. Lowe (Plaintiff) at Franklin Medical Center. Plaintiff had a successful hip replacement and was taken to post-operative care where Dr. Jost ordered a front to back x-ray. The x-ray was successful and Plaintiff did not request any further x-rays. Dr. Shulman should be qualified as an expert on this matter because she specializes in the same speciality (hip and knee replacements) as the matter at hand (Plaintiff's hip replacement. Like Dr. Jost, Dr. Shulman is board-certified in orthopedics and graduated from Franklin Medical School and completed a residency in orthopedic surgery. She is currently a professor of orthopedics at Olympia University Medical Center. While she does not currently practice orthopedics, Dr. Shulman teaches students how to do knee and hip replacements just like the replacement Plaintiff had done. Before turning to teaching, Dr. Shulman was in practice in Olympia where she performed an average of 100 hip replacements per year. While Dr. Shulman is concededly from Olympia where she remains as a professor, she has attested that the practice of orthopedics is virtually the same as it is in Franklin where Plaintiff's claim arose. Because it is not necessary for Dr. Shulman to have practiced in Franklin like Dr. Jost as the court in *McGann* made clear in 2020, her testimony should not be barred based on that fact alone. In fact, the Court in *McGann* found that Dr. Adams who lived more than 900 miles from the state at issue was qualified to testify as to the Franklin standard of care. Dr. Shulman's testimony is similar to Dr. Adams in *McGann* because like Dr. Adams who testified that the standard of care was virtually the same in Franklin as it was in North Brunswick and thus should not be excluded simply because she practices in Olympia, not Franklin. As such, Dr. Shulman's knowledge, skill, education, and experience as evidenced by her residency in orthopedics, her longstanding professional teaching, and participation in medical literature, make her qualified to testify as to the standard of care required for Plaintiff's claim.

**Reliability of Dr. Shulman's testimony:** Here, Dr. Jost performed a successful hip replacement on Plaintiff. Dr. Shulman is qualified to testify as to this matter as previously argued. Moreover, her testimony that Dr. Jost's care met the standard of care for an orthopedic surgeon in Franklin is reliable because of the following facts. First, Dr. Shulman based her opinion on her extended experience and knowledge performing hip replacements. Although Plaintiff will argue that Dr. Shulman has not performed a hip replacement on a human being since 2019, the facts do not allege that there has been a significant change in the way hip replacements have been done since 2019 and when Plaintiff's claim against Dr. Jost occurred. Moreover, Dr. Shulman has kept up to date with reliable medical journals and has even presented lectures at medical conferences annually discussing the appropriate procedures for joint replacements. Second, Dr. Shulman's testimony is based on sufficient facts, namely the x-ray that was taken at the end of the procedure that showed no fracture and notes from Dr. Jost's procedure that once all the prosthetic components were in place the hip was taken through range of motion testing that confirmed that the alignment of the hip was perfect. Her opinion further considered the fact that Dr. Jost ordered and reviewed an x-ray to confirm that the hip was properly positioned and ultimately, that no act by Dr. Jost proximately caused Plaintiff's injury. Most importantly, Dr. Shulman made note that Dr. Jost gave Plaintiff specific instructions to not bend or twist for six weeks after surgery, which we know Plaintiff did not abide by as her neighbor Karen Baines

testified that Plaintiff "bent forward at the waist and touched the ground with her hands... then stood back up and cried out in pain." In sum, Dr. Shulman reliably applied her knowledge and experience of hip replacements, among the facts of this case, to come to the conclusion that because Plaintiff failed to follow Dr. Jost's instructions and bent at the waist, Plaintiff's fracture did not occur in the original hip replacement.

**Therefore, the Court should qualify Dr. Shulman as an expert and admit her opinion testimony because she is qualified as to the matter at hand and her testimony is reliable.**

**2. The Court should not find Dr. Ajax to be a qualified expert, but even if he is qualified, the Court should exclude all of his proffered opinion testimony because it is not based on reliable principles nor is it helpful to a jury.**

In *Smith v. McGann* the Franklin Court of Appeal made clear that Franklin Code § 233 requires two separate inquiries: (1) qualifications and (2) reliability. A witness is qualified as an expert if he is the type of person who should be testifying on the matter at hand. An expert opinion is reliable if the opinion is based on scientifically valid methodology. Again, Franklin Rule of Evidence 702 provides that a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion if the proponent demonstrates to the court that it is more likely than not that (a) the expert's scientific, technical, or otherwise specialized knowledge will help the trier of fact to understand the evidence, (b) the testimony is based on sufficient facts or data, (c) the testimony is the product of reliable principles and methods, and (4) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case. While it is not necessary for the expert witness testifying as to the standard of care to have practiced in the same community as the defendant, the witness must have demonstrated familiarity with the standard of care where the injury occurred by her "knowledge, skill, experience, training, or education." *McGann*.

Franklin courts review many factors when assessing the reliability of expert testimony. One of the factors is the degree to which the expert's opinion and its basis are generally accepted within the relevant community. In *Ridley v. St. Mark's Hospital*, the Franklin Court of Appeal expanded on this view when it considered whether experts in the relevant field would rely on the same evidence to reach the type of conclusion being offered. In *Ridley*, the expert's opinions were based on sufficiently reliable methodology, namely medical records, CT scans, medical notes, and deposition testimony. Moreover, the *McGann* court clearly stated that speculation about what might have occurred if the circumstances were different can--never--provide a sufficiently reliable basis for an expert opinion. In *Park v. Green*, the court stated that although the opposing party must assess the expert witness's credibility on cross examination, "if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury, it must be excluded." An expert's opinion is fundamentally unsupported where it fails to consider the relevant facts of the case. Even if an expert witness is admitted at trial, it is still up for the jury to determine the expert's credibility.

**Qualifications of Dr. Ajax:** Here, concededly, Dr. Ajax is qualified as an expert witness because he like, Dr. Jost, graduated from Franklin Medical School and completed a residency in orthopedics. Dr. Ajax currently practices in Franklin and is familiar with hip replacements as he has completed around 50 hip replacements in residency and 20 replacements on his own. Therefore, Dr. Ajax is qualified as an expert because he is the type of person who should be testifying on the matter at hand as evidenced by his familiarity with hip replacements via his education, training and experience.

**Reliability of Dr. Ajax's testimony:** Here, even if Dr. Ajax is qualified as an expert, his testimony should be excluded because it is not reliable. Dr. Ajax's testimony is not reliable because it is not based on sufficient facts in the record, is not reliably applied to the matter at hand, and importantly is not helpful to the trier of fact. Dr. Ajax merely testifies that the front to back x-ray does not comport with the standard of care in Franklin--he does not explain why nor does he give a sufficient basis for his opinion. Rather, Dr. Ajax's testimony is clear that all Dr. Ajax reviewed was the x-ray from Dr. Jost's procedure. Dr. Ajax's testimony relies on no facts other than the x-ray and contends that an additional x-ray-- might--have shown that the prosthesis was out of place or that there was a broken bone. Dr. Ajax did not rule out any other cause of Plaintiff's injury or address the fact that Plaintiff did not follow Dr. Jost's directions to not bend at the waist following surgery. He did not consider the possibility that by bending at the waist to pick up her purse, and extending would dislocate Plaintiff's hip. Just as Dr. Brown's testimony in McGann was insufficient because it was both speculative and without a reliable basis, the court should find that Dr. Ajax's testimony is neither based in fact nor based on reliably applied analysis to the relevant facts at hand. Because his testimony relies on insufficient facts and does not address other possibilities of Plaintiff's injury, Dr. Ajax's testimony will be confusing, not helpful to the jury.

**Therefore, the Court should not find Dr. Ajax to be a qualified expert, but even if he is qualified, the Court should exclude all of his proffered opinion testimony.**

**3. Even if the Court qualifies Dr. Ajax as an expert, the Court should grant the Motion for Summary Judgment because the plaintiff has failed to offer any admissible evidence on her malpractice claim.**

Franklin Rules of Civil Procedure Rule 56 provides that a motion for partial or full summary judgment should be granted where there is no genuine dispute as to any material fact such that the movant is entitled to a judgment as a matter of law. Rule 56 provides that, in the court's opinion, it should state on the record the reasons for granting or denying the motion. In *Jacobs v. Becker*, the Franklin Court of Appeal stated that the court must view the evidence in the light most favorable to the nonmoving party. The Franklin Supreme Court in *Alexander v. ChemCho Limited* defined a fact as material where it is essential to the establishment of an element of the case and determinative of the outcome. In *Jacobs v. Becker*, the Franklin Court of Appeal made clear that to prevail on a negligence claim, the plaintiff must prove three elements: (1) that a duty existed requiring the defendant to conform to a specific standard of care for the protection of others against harm; (2) that the defendant failed to conform to that specific standard of care;

and (3) that the breach of the standard of care caused the plaintiff's harm. The standard of care for physicians is to act with that degree of care, knowledge, and skill ordinarily possessed and exercised in similar situations by the average member of the profession practicing in the field. Jacobs. To succeed on a motion for summary judgment, the defendant must show that the plaintiff has failed to establish a factual basis on any of the foregoing elements. The Jacobs court further stated that a party's failure to provide any expert testimony on causation or the standard of care justifies granting a motion for summary judgment. To that end, the Franklin Supreme Court in *Alexander v. ChemCho Limited* made clear that a Rule 56 motion for summary judgment should be granted against any party who fails to make a showing sufficient to establish the existence of an essential element that it bears the burden of proof for. In turn, the moving party is entitled to a judgment as a matter of law because the nonmoving party has failed to make a showing of sufficient proof.

Here, Plaintiff has failed to offer any admissible evidence on her malpractice claim because Plaintiff has not alleged a factual basis for Dr. Ajax's testimony on causation or the standard of care required for her hip replacement. Dr. Ajax's testimony is clear that all Dr. Ajax reviewed was the x-ray from Dr. Jost's procedure. Dr. Ajax's testimony relies on no facts other than the x-ray and contends that an additional x-ray--might--have shown that the prosthesis was out of place or that there was a broken bone. Just as Dr. Brown's testimony in *McGann* was insufficient because it was both speculative and without a reliable basis, the court should find that Dr. Ajax's testimony is neither based in fact nor based on reliably applied analysis to the relevant facts at hand. Here, Dr. Ajax's testimony is "so fundamentally unsupported" because it did not consider the relevant facts at hand beyond a single x-ray that did not show a fracture, and thus cannot be helpful to the jury and therefore should be excluded. Just as in *Jacobs v. Becker* where the plaintiff failed to present expert testimony so the trial court properly granted the defendant's motion for summary judgment, here too, Plaintiff has failed to survive summary judgment. In sum, Plaintiff has failed to provide any expert testimony on causation or the standard of care required by Dr. Jost and summary judgment should be granted as Plaintiff has failed to provide a factual basis for which the court can rely on.

**Therefore, because the evidence should be viewed in the light most favorable to Dr. Jost, the court should grant summary judgment.**

**MPT-1 — Sample Answer 3**

**LOPEZ & NICHOLS LLP**

**Attorneys at Law**

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Centralia, Franklin 33705

TO: Sydney Nichols  
FROM: Examinee  
Date: July 29, 2025  
RE: Lowe V. Jost

Good Morning Attorney Nichols. Below I have drafted our brief arguing that the Court should, (1) qualify Dr. Shulman as an expert, (2) should not qualify Dr. Ajex as an expert, and (3) grant our motion for summary judgment. Thank you.

1. The Court should qualify Dr. Shulman as an expert and admit her opinion testimony because she contains specialized knowledge of hip replacement surgery, has performed well over 100 hip replacement surgeries, used reliable methods and principles and her opinion mirrors the methods and principles she has outlined.

Under rule 702 a witness a witness is qualified as an expert witness when through expert knowledge, skill, experience, training or education demonstrates to the court that it is more likely than not that: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

At issue here is whether Dr. Shulman, a 2004 graduate of Franklin Medical Center who performed an average of 100 knee and hip replacements per year during a 10 year stretch from 2009 to 2019 should be qualified as an expert under the Supreme Court's Daubert standard and the subsequent Franklin Civil Code § 233. Under Daubert as reiterated in Smith v. McGann the essential question is whether the experts "testimony was reliable". Dr. Shulman's testimony is reliable because it is specialized and technical with particularity to the matter at hand. Dr. Shulman has performed approximately 900 hip replacement surgeries and is now a professor of medicine. Dr. Shulman has based her testimony on sufficient facts in her continued experience teaching hip replacements at Olympia University Medical School for orthopedics through continued study. Dr. Shulman also continues to review relevant reliable sources such as the

Journal of the American Medical Association and The New England Journal of Medicine, which she has testified are the most up-to-date and reliable sources of information in medicine. Therefore her methods and principles are not just reliable, they are the standard in the community.

It does not matter that Dr. Shulman has not practiced orthopedics in Franklin since 2009 and practiced in Olympia exclusively from 2009 to 2019. In *Smith v. McGann* the Franklin Court of Appeal's noted that "it is not necessary for the expert witness testifying to the standard of care to have practiced in the same community as the defendant, the witness must demonstrate familiarity with the standard of care where the injury occurred." (*Smith v. McGann*, 2004). Dr. Shulman continues to review medical journals of medicine as mentioned above which demonstrate the standard of care required in the Franklin community. Additionally, as a professor who continues to do simulated knee replacement procedures with students, she is well qualified on the latest techniques, and procedures required within the orthopedic medical community. Dr. Shulman has testified that across two states, including Franklin, that the standard of care for hip replacement surgery is largely the same, demonstrating just like in *Smith*, that the population and availability of medical care in both venues were quite similar. (*Smith*) Finally, Dr. Shulman has written three articles on the proper procedures for knee replacement surgeries, demonstrating that she not only is familiar with the standard of care but is part of the standard of care's continued advancement.

2. The Court should not qualify Dr. Ajax as an expert and even if he is qualified his proffered opinion testimony is improper because it is not specialized and even if the Court in its discretion admits Dr. Ajax's as an expert witness, it should exclude all of his proffered opinion testimony.

Under *Daubert* the trial court is the "gatekeeper" to determine whether expert testimony is admissible. As discussed above "the physician must demonstrate that she is 'sufficiently familiar with the standards' in that area by her 'knowledge, skill, experience, training or education' to satisfy Rule 702." (*Smith*) Here, Dr. Ajax practices orthopedics and treats fractures, knee replacements and hip replacements. Dr. Ajax has only performed by his guess on the stand of approximately 50 hip replacements since he completed his residency and only completing 20 during residency by himself. While it's true the trial court has discretion to allow expert witnesses to testify, the standard is not so flexible that it allows experts who are unqualified as experts in orthopedics to be allowed to testify. Similar to *Smith*, where an expert did not testify about the standard of care for an obstetrician and was excluded from qualifying as an expert, here, Dr. Ajax only generally testified to his knowledge and admitted his limited knowledge on the topic of hip replacements and should not be qualified as an expert.

If Dr. Ajax is admitted as an expert witness in this case, his prior testimony testifying that a second x-ray was commonplace in Franklin should be excluded. In *Smith*, the court noted that "even when an expert is qualified and the expert's testimony is based on reliable methods, the trier of fact must still- as with any other witness - determine whether the witness is credible." (*Smith*) The court determined that the expert in that case that the orthopedic orthopedist testimony that

an x-ray was read incorrectly was "both speculative and without reliable basis." (Id.) Here, in Dr. Ajax brief testimony on direct, claims that a second x-ray should have been ordered by the defendant. Dr. Ajax failed to provide any reliable basis for his speculative opinion and simply claimed that "that practice did not comport with the standard of care in Franklin." This testimony is speculative and has no basis in fact, study or reliability and must be excluded.

3. The Court should grant defendant's motion for summary judgment because there is no genuine issue of dispute and the plaintiff failed to make a showing in support of her claim.

Rule 56 says in part that "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The central issue here is whether the defendant Dr. Jost was negligent in performing a hip replacement surgery. The burden rests with the defendant, as it is our motion, to prove that there is no material issue of fact. There is none. On March 1, 2022 Dr. Jost (Defendant) performed a hip replacement on Ms. Lowe's left hip in Centralia, Franklin. The plaintiff claims that Ms. Lowe followed all post-operative requirements set by Dr. Jost, and that she "felt a sharp pain" then dropped her purse, and fell to the ground two weeks after her initial surgery on March 16, 2022. However, a signed witness affidavit provided by the defendant shows that a neighbor of Defendant "Karen Baines" witnessed the moment that Ms. Lowe fell on March 16, 2022, and that she dropped her purse on her own and through her own refusal to accept help from Karen Baines bent forward at the waist and touched the ground with her hands. This witness testimony alone is enough to provide a grant of summary judgment, as it shows through direct eyewitness testimony that Plaintiff did not in fact follow all prescribed limitations of twisting and bending prescribed by Defendant. Defendant testified that for six weeks plaintiff should not bend more than 90 degrees at the waste and should not twist at the hip, and the plaintiff injured herself exactly contrary to those instructions only two weeks after he surgery.

Additionally as noted in *Jacobs v. Becker*, "because only expert testimony can demonstrate how the required standard of care was breached... a party's failure to provide any expert testimony on causation or the standard of care justifies an adverse ruling on summary judgment. As noted above in section two, Plaintiff's expert witness should not be allowed as an expert witness and even if allowed the testimony provided by that expert should be excluded. If the court here finds that the testimony should be excluded, that alone would provide grounds for an adverse ruling against plaintiff regardless of the defense witness to the incident in question.

## MPT-2 — Sample Answer 1

### Memorandum

**To: Anita Hernandez**

**From: Examinee**

**Date: July 29, 2025**

**Re: Gourmet Pro Response to CPSC**

Our client, Gourmet Professional Grilling Co. (Gourmet Pro) was recently served with a subpoena from the Consumer Product Safety Commission (CPSC). The CPSC seeks Gourmet Pro's business records related to the design, manufacture, and safety of some of its products. This memorandum will discuss how the attorney-client privilege applies to all three documents, as they involve communications between company employees and counsel.

#### **I. Legal Standard**

Under Franklin law, the attorney-client privilege applies to "communications made between a client and their professional legal adviser, in confidence, for the purpose of seeking, obtaining, or providing legal assistance to the client." (*Franklin Dep't of Labor v. ValueMart*, Franklin Supreme Court (2019) (citing *Franklin Mutual Insurance Co. v. DJS, Inc.*, Franklin Supreme Court (1982))). In a corporate context, this privilege generally extends to communications between the company's lawyers and its directors, executives, and managerial employees who seek legal advice on the company's behalf. (Id.) The privilege is strictly construed. (Id.)

The primary inquiry in a privilege analysis is determining whether the contested document contains a communication in which legal advice is sought. (Id.) Advice regarding nonlegal work, such as public relations, accounting, and business policy, does not become "cloaked" with the attorney-client privilege just because the communication is with a licensed attorney. (Id.) Additionally, advice from corporate counsel may serve a dual purpose of providing legal advice and providing business information. (Id.) In such cases, the attorney-client privilege will apply to the entire document only if the predominant purpose of the communication is to seek legal advice or assistance. (Id. (citing *Federal Ry. v. Rotini*, Franklin Supreme Court 1998)). If the predominant purpose is business advice, the attorney-client privilege will not protect the whole document, just the sections containing legal advice. (Id.) If those portions containing legal advice are easily severable, they should be withheld from disclosure to protect the privilege. (Id.)

Determining the predominant purpose of a document is a fact-specific inquiry, done on a case by case basis and based on the totality of the circumstances. (Id. (citing *In re Grand Jury*, 1116 F.3d

56 (D. Franklin 2016))). Relevant factors in this inquiry include (1) the purpose of the communication, (2) the content of the communication, (3) the context of the communication, (4) the recipients of the communication, and (5) whether legal advice permeates the document or whether any privileged matters can be easily separated and removed from disclosure. (Id.)

The Powell County District Court recently reiterated the importance of this five factor analysis in an order addressing a motion in *Infusion Technologies, Inc. v. Spinex Therapies LLC*. (*Infusion Technologies Inc., v. Spinex Therapies LLC*, Powell County District Court (2021)). It reiterated that legal advice within documents with a "predominately business" purpose is still entitled to protection, but only those distinct sections. (Id.) Only documents with a predominately legal purpose may be withheld in their entirety. (Id.)

With these guidelines established, the remainder of this memorandum will apply Franklin law to the three documents at issue with the CPSC subpoena.

**II. Document One, the email from general counsel to CEO of Gourmet Pro, should be withheld in its entirety because it serves a predominately legal purpose and is therefore subject to the attorney client privilege.**

Document One appears to be protected entirely by the attorney client privilege, as it does not serve a dual purpose of providing business advice and legal advice. Instead, based on analysis of the email using the *ValueMart* factors, it serves a single purpose of providing legal advice based on developments in the industry.

First, the purpose of the email from general counsel to the CEO was to update the CEO on general counsel's thoughts on the litigation against Gourmet Pro's competitor, Main Street. The CPSC presumably is seeking Gourmet Pro's business records to inquire into the propane grill industry and its safety practices. (File Memorandum) It will possibly compare and contrast the design of Gourmet Pro's products with Main Street's (Id.) Therefore, while we don't have the full context of the email contained in Document One, it is likely that the CEO was asking general counsel's opinion on whether the related litigation and CPSC investigation will subject Gourmet Pro to any liability. So, *ValueMart* factors one and three (the purpose of the email and the context in which it was sent), lean towards this communication being categorized as one for legal advice.

Next, the goal of the email was to provide that legal advice. (*Franklin Dept. of Labor v. ValueMart*). General counsel describes the type of litigation at issue and the possible effects of that litigation in the first paragraph. (Document One) The second and third paragraphs discuss legal considerations and strategies to insulate the company from legal and regulatory liability. (Id.) Thus, *ValueMart* factor two (the content of the communication) again leans in favor of this communication being considered one solely for legal advice.

Further, the recipient of the communication was the CEO of the company - it was sent directly to her by Gourmet Pro's general counsel. (Document One) The CEO is in charge of the company and insulating it from legal liability based on the advice of counsel. Additionally, nobody else was

copied on the email - it was solely between the CEO and general counsel. (Document One) Thus, *ValueMart* factor four (the recipients of the communication), again weighs in favor of these document being classified solely for legal purposes. Finally, legal advice permeates the document in its entirety (*ValueMart* factor five). The email does reference non-legal purposes, such as asking the marketing department to track down media reports, advertising quality and navigating regulatory standards on quality. (Document One) However, these non-legal purposes are referenced in the context of legal advice and counsel - general counsel seeks to bring in those purposes to achieve the goal of protecting the company from liability. Counsel was not performing those non-legal acts and discussing them for a non-legal purpose. Instead, she sought to reference those purposes in order to protect the company from future lawsuits.

Because each of the five *ValueMart* factors weighs in favor of finding that this document has a predominately legal purpose, Document One is likely subject to the attorney-client privilege in its entirety. I recommend that it be withheld in its entirety due to that purpose.

### **III. Document Two, the executive summary of the report from outside counsel, serves a dual business and legal purpose, and thus cannot be withheld in its entirety.**

An analysis of Document Two using the five *ValueMart* factors indicates that it serves a dual purpose of providing both business and legal advice to Gourmet Pro. Therefore, it cannot be withheld from the subpoena entirely, but the portions containing legal advice are easily severable and thus can be redacted before production.

First, as stated at the beginning of the document, the purpose of the executive summary was to provide business recommendations to make the company "even better" when it comes to safety concerns. Next, the content of the document was an analysis of Gourmet Pro's business practices and legal liability. It discussed Gourmet Pro's industry footprint, but also discussed its liability to individual consumer lawsuits. Third, the context of the document shows that the report was prepared not in response to any active litigation, but was instead prepared to insulate the company and protect it from the "looming threat" of liability. Fourth, the recipients of the document were the managers and board of directors of GourmetPro. Even though these individuals are typically within the scope of attorney-client privilege, the focus of this report was not seeking legal advice on a specific issue, but rather, an objective analysis of GourmetPro's business activities. Finally, the document is not permeated by legal advice. While the document does contain two paragraphs discussing the company's liability with regard to individual consumer lawsuits, the bulk of the document contains recommended business practices, such as corporate training and maintaining a hotline for anonymous complaints. Thus, the *ValueMart* factors here suggest a dual business/legal purpose.

Additionally, this document can be compared to the document that was actually at issue in the *ValueMart* case. There, defendant *ValueMart* retained a law firm to conduct a compliance audit and make recommendations as to company safety regulations. (*Franklin Dept. of Labor v. ValueMart*). Portions of the report discussed applicable state regulatory requirements, and each page of the report was marked "confidential." (Id.) The Franklin Department of Labor sought to

compel *ValueMart* to produce the report, but ValueMart opposed the motion, citing the attorney-client privilege. (Id.) The court applied the five analysis factors and found that the report served a predominately business purpose, but also contained legal advice. (Id.) Thus, it needed to be produced, with those sections containing legal advice being withheld. (Id.)

Document Two is very similar to the *ValueMart* document. Much like the document at issue there, this report was obtained with the goal of providing business recommendations and analyzing the company's safety practices. Next, much like the ValueMart report analyzed each of its facilities, Document Two contains an analysis of GourmetPro's manufacturing processes and safety measures. Third, no lawsuit was pending against Main Street when this report was created (much like the *ValueMart* document), and outside counsel therefore did not represent GourmetPro in any litigation. The recipients of the communication here were the board of directors and managerial staff, similar to the *ValueMart* report, but this factor alone is not dispositive, even though those recipients are the primary holders of the attorney-client privilege. Finally, legal portions of the report at issue here are not difficult to distinguish from the nonlegal portions, just like they weren't in *ValueMart*. The legal advice is in discrete paragraphs in the document, and therefore can be redacted. Thus, the report at issue will likely be deemed to be predominately for a business purpose.

Additionally, the fact that outside counsel marked Document Two as "privileged and confidential" is not dispositive. The ValueMart court specifically stated that "a document is not cloaked with privilege merely because it bears the label 'privileged' or 'confidential.'" (Id.) So, because the factors above demonstrate that the report is one for business purposes, and the fact that it was marked "confidential" is not dispositive, this report will likely need to be produced. However, I recommend that we redact Paragraph 4 in the report discussing GourmetPro's liability to individual consumer lawsuits, as this is sensitive client information and is subject to the confidentiality of the attorney-client privilege. The remainder of the report should be produced according to the subpoena.

#### **IV. Document Three, the email from Gourmet Pro's chief auditor to general counsel, serves a dual business and legal purpose, and thus cannot be withheld in its entirety.**

An analysis of Document Three using the five *ValueMart* factors indicates that it serves a dual purpose of providing both business and legal advice to Gourmet Pro. Therefore, it cannot be withheld from the subpoena entirely.

Here, the purpose of Document Three was to get general counsel's advice on two matters related to the audit department. It contained questions regarding how to present the five-year summary of safety audit results on the company website, as well as potential legal exposure due to an increase in consumer complaints about products manufactured in Olympia. The communication was sent by GourmetPro's chief auditor to general counsel in the context of obtaining counsel's advice on a several questions, and general counsel was the only recipient of the email. Finally, the communication itself was not cloaked in legal advice. However, it did discuss information involving the company's potential legal liability to consumer lawsuits, which is related to general

counsel's goal of protecting the company and giving it legal advice on sensitive matter. Thus, the questions regarding the audit report are a predominately business purpose, while the questions regarding the consumer complaints are within the realm of legal advice, especially because they involve the best methods of interviewing witnesses to potential GourmetPro wrongdoing.

Because the email cannot be said to have a predominately legal purpose based on the application of the *ValueMart* factors, it cannot be withheld in its entirety. Thus, the attorney-client protection will only apply to the portions of the document involving legal matters. Therefore, I recommend that the portions of the complaint relating to consumer complaints about products manufactured in Olympia be redacted. Specifically, I recommend that sentences one through three in the second paragraph of the document labeled "Issue Two" be redacted, because they contain sensitive legal information. The rest of that paragraph should be produced along with the remainder of the document. Doing so will further our goal of protecting as many documents as possible from disclosure while also fulfilling our duties of candor to the court.

## **MPT-2 — Sample Answer 2**

TO: Anita Hernandez

FROM: Examinee

Date: July 29, 2025

RE: Application of the Attorney-Client Privilege to Gourmet Pro Documents

### **MEMORANDUM**

You have asked me to analyze application of the attorney-client privilege to three Gourmet Professional Grilling company documents potentially subject to production by the Consumer Product Safety Commission ("CPSC"). One of Gourmet Pro's competitors, Main Street Cookers, is being investigated by the CPSC over injuries caused by gas leaks from its grills. See Hernandez LLP Memo. In connection, Gourmet Pro has been served with a subpoena from CPSC seeking all of its documents related to the design, manufacture, and safety of its propane tank hoses for informational purposes. *Id.* CPSC has indicated that Gourmet Pro has not a target of the investigation, but any access to company documents may be used adversely by Main Street. *Id.* While Gourmet Pro's lawyer offers legal advice, she also serves on the executive team and often renders business advice as well. *Id.* As a result, Gourmet Pro has a few goals it prioritizes in seeking our help: (1) to cooperate in good faith with the investigation and (2) to protect as many documents as possible from disclosure. *Id.*

Specifically, you have asked me to analyze whether the attorney-client privilege will protect in whole or in part three documents at issue, and if there are any close calls, which legal outcome is the most likely and why. Below is the relevant law and my analysis as requested.

#### **I. Franklin Law on Attorney Client Privilege**

In Franklin, the attorney-client privilege applies to communications made between a client and their professional legal adviser, in confidence for the purpose of seeking, obtaining, or providing legal assistance to the client. See *Franklin Dep't of Labor v. ValueMart*; see also *Franklin Mut Ins v. DJS*. In the corporate context, the privilege typically extends to such communications between the company's lawyers and its board of directors, executives, and managerial employees who seek legal advice on behalf of the company. *Id.* The purpose behind this privilege is to promote open and honest discussion between clients and their attorneys. *Id.*; see also *Moore v. Central Holdings*. The threshold inquiry in a privilege analysis is determining whether the contested document embodies a communication in which legal advice is sought or rendered. *Id.* A document is not cloaked with privilege merely because it bears the label "privileged" or confidential. Because the privilege is a barrier to disclosure and suppresses relevant facts, courts

construe this privilege strictly. *Id.* The key inquiry behind an attorney-client privilege analysis is the predominant purpose of the communication, as communication can often serve dual purposes of providing both legal and business information. See *ValueMart*. To make this inquiry, courts use the predominant purpose test. If a report contains both business and legal advice, the protection of the privilege applies to the entire document only if the predominant purpose of the consultation is to seek legal advice or assistance. See *Federal Ry v. Rotini*. If the predominant purpose is business advice, a more tailored assessment is required, and the privilege will still protect any portions of the document that contain legal advice. See *Franklin Machine Co v. Innovative Textiles*. Therefore, when assessing a document where the predominant purpose is business, courts must take care to identify any distinct portions that are protected by the privilege and are easily severable. *Id.* See *ValueMart*. Those portions should accordingly be withheld from disclosure. *Id.* This predominant purpose test is highly fact intensive and requires a totality of the circumstances approach. See *In re Grand Jury*. Accordingly, courts look to factors like: purpose of the communication, content, context, recipients of the communication, and whether legal advice permeates the document or whether any privileged matters can be easily separated and removed from any disclosure. See *Proskuer*. Courts are clear that this standard is not an "all or nothing approach;" instead, documents should be examined closely to determine if protected portions can and should be severed. See *Infusion v. Spinex*. In deciding how and whether to sever certain portions, the legal portions cannot be "intimately intertwined" with or "difficult to distinguish" from the nonlegal portions. *Id.* If the legal advice is in discrete sections or separate paragraphs of a lawyer-client communication that also covers non-legal topics, courts will order disclosure of the nonlegal portions and protect the legal portions from disclosure by allowing them to be redacted. *Id.*

## **II. Document One: Email Regarding Main Street Litigation**

Document One is an email to the CEO of Gourmet Pro from Trisha Washington, the counsel for Gourmet Pro, regarding liability implications for the Main Street litigation. Its main purpose subject line pertains to the current pending class action against Main Street, and the document's contents seem focused around "insulating" Gourmet Pro from legal liability. In looking at the predominant purpose factors, it appears as if the purpose of this email is to discuss the highly publicized litigation and any relevant legal considerations. The content and context both surround liability stemming from the pending investigation from Main Street and namely how Gourmet Pro can avoid any legal involvement. The recipient of the communication is Gourmet Pro's CEO, and legal advice permeates the entire email. In fact, Ms. Washington provides several points of legal advice to help "insulate" the company from liability: advertising commitment to quality, informing the public about quality assurances, navigating regulatory standards by the FTC. All of these suggestions are given within the context of legal considerations in the face of numerous sources of liability. Unlike document 77 in *Spinex*, where the predominant purpose was business with only an incidental piece of legal advice, this entire email wholly centers around rendering legal advice in order to avoid legal liability from the investigation. Just like the case in *Franklin Dep't of Revenue v. Hewitt*, where the court held that the privilege extends to assessing legal liabilities arising from the results of an audit, this document addresses the legal liabilities arising out of a pending federal investigation. As a result, because the predominant purpose of

this email is to render legal advice to avoid and assess legal liabilities, its predominant purpose is legal and the entire document is privilege. Therefore, because the document's main purpose is giving out legal advice, the entire document is privileged and therefore withheld from production.

### **III. Document Two: Executive Summary Report**

Here, document two is an executive summary report titled "Embracing Safety as a Business Priority." Looking to the predominant purpose factors, it appears as if the main purpose of this document is to render business advice about how to prioritize and emphasize safety. The title labels safety as "business priority" and the content seems to focus on "learning the company's processes and practices to develop business recommendations..." Given that the Main Street investigation likely wasn't pending on June 30, 2024, it does not appear that this document was written or made in anticipation or consideration of the investigation. This is a persuasive factor, as noted in ValueMart, that can help identify the main purpose of the communication. Although each page is labeled privileged and confidential, Franklin courts are clear that such a label is not and cannot be a "cloak" for the information in the communication. See ValueMart. Looking to the context and content of the executive report, although there are brief mentions of "risk of liability," the report is focused on "business recommendations" to Gourmet Pro, as evidenced by the entire section labeled as such. The recipient of the report is Gourmet Pro's board, but it does not appear that legal advice "permeates" the document. Just like the Middleton Report in ValueMart, where the main purpose was to gather information about facilities and offer "business recommendations to upper management," the same purpose is present in this document. Therefore, the predominant purpose of the document is business advice, and a second phase of analysis is required to see whether any portions of the communication are protected by the privilege. It seems as if paragraphs four of the Overview section and paragraph four of the Business Recommendations section are the only two that even remotely implicate legal advice. Both paragraphs speak heavily about Gourmet Pro's consumer claim liability, but the paragraph in the recommendations section gives out affirmative legal advice. While the information in the overview section of paragraph 4 pertains to the number of claims against Gourmet Pro, nothing in the paragraph constitutes "legal advice" for purposes of the privilege. Because of that, although potentially a close call, it is unlikely that that paragraph can be severed. However, paragraph four in the business recommendations sections affirmatively recommends conducting a survey of the safety laws and regulations of foreign countries to avoid risks and liabilities stemming from consumer safety laws. This appears like traditional "legal advice," and this paragraph is not "intimately intertwined" with the nonlegal portions. In other words, this legal advice, if considered to be as such, is contained in a completely separate paragraph at the end of the document. The court in Spinex noted that authors usually divide an email into separate paragraphs for a reason, and each paragraph should be addressed to determine if it is protected or not. As such, only paragraph 4 at the end of this document resembles the type of legal advice that would be privileged. As a result, severance of that portion is possible and likely.

Therefore, because the document's predominant purpose is business advice with some legal advice rendered in paragraph four, the Court will likely sever the protected portion and allow the rest of the document to be produced.

#### **IV. Document Three: Email Regarding Audit Results**

Here, the email from Gourmet Pro's chief auditor to Trisha Washington asks some questions regarding Gourmet Pro employees in Olympia. Most of the questions pertain to the safety audit results. Looking to the predominant purpose factors, it appears as if the main purpose of this document is more for business advice and questions rather than legal advice. The title says "Audit results" and the subject of the communication is to ask questions about employees in another state. Because the Main Street investigation likely had not started in January 15, 2024 when this email was written, it does not seem as if this email contemplated litigation or sought legal advice. Similarly, the court in ValueMart noted that the privilege usually does not extend to occasions when a lawyer performs a financial audit or is advised of the result. See *Peterson v. Xtech*. This email seems in-line with a communication advising a lawyer of audit results, specifically non-legal audit results. In fact, this communication is even further away from privileged because, rather than being advised of results, a chief auditor is just asking a series of questions regarding how to best present the audit results on the website. The context and content of the email do not indicate that the main goal is to ask for legal advice, and legal advice certainly does not permeate the content of the email. The questions asked do not seem to inquire into liability concerns or desires to abide by legal standards for audit reports. Instead, the questions appear to be based on aesthetic concerns, namely how best to public the report, whether to use graphics, and so on. As a result, the predominant purpose of this email is likely business advice. Therefore, we must engage in the second step of the process to see whether any portions of the email are protected and therefore severable. It does not appear that anything said in the email constitutes "legal advice" or any protected information. While Ms. Washington mentions an "uptick in consumer complaints" and expresses concerns over "potential exposure" from faulty products, it is a close call as to whether or not that is a strong enough invocation of a legal concern to make clear that what is sought is legal advice. Given that the privilege is construed strictly, it seems unlikely that a court would read into those questions an implicit request for legal advice. Unlike the documents in *Spinex*, where a handful of paragraphs indeed did render legal advice, no such situation appears here. There are only two paragraphs in this email, and both consist of non-legal questions strung together without any clear request for legal advice that a court could deem protected.

Therefore, because the document's predominant purpose is business advice with no legal advice included, the entire document can be produced.

#### **V. Conclusion**

For the aforementioned reasons, my conclusions are as follows: (1) document one is likely protected in its entirety, (2) document two can be produced but with certain paragraphs being severed, (3) document three is likely not protected at all.

Please let me know if you have any questions about the analysis I have provided. I am happy to clarify any points you may need!

Best,

Examinee

## **MPT-2 — Sample Answer 3**

To: Anita Hernandez, partner

From: Examinee

Date: July 29, 2025

Re: Gourmet Pro response to CPSC

### **MEMORANDUM**

#### **Applicable legal standard governing the law of privilege in Franklin.**

In Franklin, the attorney-client privilege applies to "communications made between a client and their professional legal adviser, in confidence, for the purpose of seeking, obtaining, or providing legal assistance to the client. *Franklin Mut. Ins. Co. v. DJS Inc.* (1982). The purpose behind the privilege is to "promote open and honest discussion between clients and their attorneys." *Moore v. Central Holdings, Inc.* (2009). For corporations, the privilege usually extends to communications between the company's lawyers and its board of directors, executives, and managerial employees that are seeking legal advice on behalf of the company. *Franklin Dep't of Labor v. ValueMart* (2019). The privilege is strictly construed because it is a barrier to disclosure that results in the suppression of relevant facts.

The threshold question in determining whether the documents at issue falls within the privilege is whether or not the document embodies a communication in which legal advice is sought or rendered. *Franklin Dep't of Labor*. A document may not fall within the privilege merely because it is labeled as being "privileged" or "confidential". *Moore*.

A common question arises as to whether legal advice is being sought. Company executives commonly seek advice from counsel regarding public relations, accounting, employee relations, and business policy. However, nonlegal work does not become cloaked under the privilege merely because the communication is with a licensed attorney. *Franklin Dep't of Labor*. For example, the privilege does not extend to accounting work, such as preparing tax returns and financial statements and calculating accounts, or when a lawyer performs a financial audit or is advised of its results, just because it is performed by a lawyer. *Peterson v. Xtech, Inc.* (2007). However, the privilege will extend to a lawyer's advice interpreting tax regulations or assessing legal liability that may arise from the results of a tax audit. *Franklin Dep't of Revenue v. Hewitt & Ross LLP* (2017). However, in certain cases the advice given by corporate counsel can serve dual purposes of providing both legal advice and business advice and information. When a report contain both business information and legal information, the court will apply a predominant purpose test to determine if the privilege applies. *Federal Ry v. Rotini* (1998). The entire document will be cloaked in the attorney-client privilege if the predominant purpose is to seek

legal advice or assistance. *Id.* If the predominant purpose is for business, the court will take a narrow approach and protect any portions of the document that contain legal advice. *Franklin Machine Co. v. Innovative Textiles LLC* (2003). For example, legal advice on tax implications were protected from disclosure in a nonprivileged document on business strategy. *Id.* If legal portions of an otherwise nonprivileged document are easily severable, they should be withheld from disclosure to preserve the privilege. *Id.*

In making a predominant purpose determination, the court will apply a five factor test in looking at the totality of the circumstances. *In re Grand Jury* (2016). Relevant factors include: (1) purpose of the communication, (2) content of the communication, (3) context of the communication, (4) recipients of the communication, and (5) whether legal advice permeates the document or whether privileged matters may be easily separated from the disclosure. If the court finds that the predominant purpose is to provide business advice, a second step must be taken to examine each paragraph or distinct portion of the document to determine if it is legal advice. If so, that distinct portion of the document may nevertheless be withheld, but the rest of the document will be discoverable. *Infusion Technologies Inc. v. Spinex Therapies LLC* (2021).

## **I. Document I**

Document 1 is an email re "Main Street class-action litigation" from Trisha Washington, General Counsel, to Maria Johnson, CEO of GourmetPro (GP). The court will apply the *In re Grand Jury* five factor test in determining the predominant purpose of the document to determine whether it falls within the attorney client privilege.

The purpose of the communication is to discuss Washington's thoughts on the implications the Main Street litigation will have on GP, particularly concerning its high-profile publicity. The content of the communication is largely filled with legal considerations, a brief background on the legal situation that Main Street is in, and advice regarding the WatsonSmith safety audit and how best to insulate the company from legal liability. The communication was made in the context of prior discussions between Johnson and Washington, as evidenced by the statement that Washington had "given some thought" about the implications of the high-profile litigation against the consumer, and the spotlight now on Main Street and the grill industry. While not dispositive, the communication between the CEO and general counsel is at the core of those who would typically be covered by the attorney-client privilege in corporate scenarios. Due to the content of the document, the email is arguably permeated with legal advice that would not be easily separated. The first paragraph after the introduction provides the CEO with a background on the legal scenario Main Street is in. Washington states that the Main Street suit will be a class-action lawsuit based on the issues with propane tank hoses cracking prematurely and what to expect on the media. The sentence "we should ask our marketing department to track those media reports" is arguably legal advice given to the CEO in how to stay informed of the progression of the case of a competitor selling the same products. The paragraph that begins with "legal considerations" is arguably filled with legal advice. The statements that GP "redouble our efforts to ensure safety" and that the "WatsonSmith safety audit identifies several concerns that, if made available in litigation, would create sources of liability" are meant to serve as legal

advice to the CEO of the corporation. Washington's further recommendations to adhere to the safety audit and meet with department heads supports that. The final paragraph on legal liability is likely legal advice given for the purpose of outlining next steps for the company to take. Specifically, Washington mentions that the steps may help "navigate the regulatory standards on quality set by the Federal Trade Commission." This Document is arguably closer to the Booker report in *Booker v. Chemco* (2002) than the Middleton Report in *ValueMart*. This email was written by Washington, general counsel, in an intent to help the company comply with regulations and take steps in protecting the company from potential future litigation that relates to the suit against Main Street.

Therefore, Document One likely will be cloaked within the attorney-client privilege because the predominant purpose of the email is to seek legal advice, particularly in light of the CPSC investigation on Main Street and the ramifications it could impose on GP if the information is made available to Main Street.

## **II. Document 2**

Document 2 is an executive summary prepared by the outside firm, WatsonSmith. The document is titled "Embracing Safety as a Business Priority" Executive Summary to a Privileged and Confidential Report Prepared by the Law Firm of WatsonSmith for the Management and Board of Directors of Gourmet Pro. The title of the document in quotations lends itself to a business advice purpose, rather than a legal purpose. However, taking into consideration the subheading, which suggests that the report is confidential and privileged. The title and labeling of this document is similar to the title of the Middleton Report in *Franklin Dep't of Labor*, which was found to be prepared primarily for business advice. However, precedent cases make clear that merely labeling something as being privileged or confidential will not necessarily ensure it falls within the attorney-client privilege. The document was seemingly prepared for the management and board of directors of GP, whom fall within the typical core privilege group. However, the identity of the recipient does not determine the predominate purpose of the document. *Franklin Dep't of Labor v. ValueMart*.

Paragraph one of the overview notes that the firm has not been hired in connection with any pending litigation, which was a factor that weighed against a finding of legal purpose in *ValueMart*. The court noted that if an action was pending when the report was written and the counsel represented the client in pending litigation, that may have led to a different result in *ValueMart*. Paragraph two sets out the purpose of the summary, which is stated as being to learn the processes of the company when dealing with safety concerns. This is likely not for a legal purpose and would not fall within the privilege. Paragraph three of the overview details a background on GP and is likely for a business purpose, not for any legal advice. This would not likely fall within the privilege. Paragraph four could arguably be for legal advice. This paragraph is easily severable from the document and details the 52 reports by customers found in the audit and the 7 lawsuits GP was previously subject to. Unlike *ValueMart*, the focus was not the facilities or products themselves, but was the subject of the prior claims, the disposition of the suits, and

any subsequent settlement. This paragraph will likely be severed and withheld under the privilege.

The first paragraph of the business recommendations portion is advice to develop and promote a culture of ethics and compliance to adopt good business practices and require employees report any violations of law. This could likely go either way, depending on whether this is part of assessing legal liability of GP if they were to not adopt a code of business conduct and ethics. Paragraphs two and three suggest similar recommendations targeted to training and maintaining a hotline to field complaints and questions about safety practices. These could also go either way. Paragraph four concerns the risks and liabilities from consumer safety laws in the US and a legal recommendation that GP conduct a survey of the laws and regulations of those. This is arguably legal advice that should be excluded as advice regarding potential risk of legal liability or the necessity to further investigate interpretations of regulations applicable to GP.

Document 2 is likely a dual purpose document, containing both business advice and legal advice. The legal advice detailed above should be stricken or removed from the document (easily severable because of the numeration) while the rest of the document should be produced.

### **III. Document 3**

Document 3 is an email re "Audit results, etc." from Lionel Alexander, the chief auditor in Gourmet Pro's (GP) auditing department, to Trisha Washington, general counsel for GP. The court will apply the predominant purpose test here and analyze the five factors.

The purpose of the communication here is split into two issues: questions on how to present the five year summary of the safety audit results in the company's annual report and questions in how to approach discussions with managers in response to consumer complaints about faulty product manufacturing. The content of the communication is primarily interrogative and seeking advice on how to format the results of the audit and asking for personnel advice on how to approach a sensitive topic. Trisha Washington, general counsel and member of the executive team, is the recipient of the communication. However, just because the communication is with an attorney, does not mean it falls within the privilege. Finally, the court will look at whether legal advice permeates the email or whether the issues are easily separable.

Here, the document does not appear to serve a primarily legal purpose, so the entire document will not likely fall within the privilege. Because this email is arguably for a predominant business purpose, the court must look at each issue separately to determine if it falls within the privilege. Issue One essentially asks for how best to stylistically present a summary of the results of the audit. Alexander is likely asking Washington this because of her position as an executive member. Alexander says that he is "new to my GourmetPro position" and wanted her take on how best to present the summary of the audit. While he refers to Trisha in her capacity as general counsel, he makes it clear that he is asking for advice on the annual report that will be published on the company's public website. The information he is referring to is not likely not privileged because it will be available for public view within the next year. The purpose of the communication was

to get input from Washington on how to best design his report (e.g. input graphs, breakdown by product or production unit, charts, narrative). Thus, the purpose of Issue One relates to business advice, not legal advice, and does not fall under the attorney client privilege.

Here, Issue Two could arguably be a closer call. Issue Two relates to consumer complaints about faulty product manufacturing in Olympic City. Alexander's comment that they have "been tracking them for a while now because of potential exposure resulting from faulty products being shipped from that facility" could suggest that he is seeking legal advice. If he is expressing concerns about exposure to legal counsel, it is arguably for the purpose of bringing it to Washington's attention and to get legal advice on how to proceed. Further, if Alexander is the Chief Auditor, he is the type of manager that would typically fall within the core privilege group in corporate cases. However, the tone of the Issue Two seems to be more similar to the advice sought in Issue One. Alexander asks for Washington's advice in how best to sit down and approach an uncomfortable conversation with employees at the facility because she knows the managers there. It could be argued that he is seeking her advice on how to approach uncomfortable conversations regarding potential liability in her role as general counsel. Because Issue Two is easily separable from Issue One and it would be easy to sever (at least) the sentence regarding "potential exposure" from discovery, I would separate that portion of Issue Two to be withheld.

The remainder of Document 3 will likely be discoverable because the predominant purpose of the email is business advice, as opposed to legal advice.