

July 2025 Georgia Bar Examination Sample Answers

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Essay 1 — Sample Answer 1

(1) Victor and Cecilia have created a general partnership. The issue is what type of entity is formed when no filing is made and no magic word appears in the partnership name. A general partnership is the default form of partnership in Georgia, and it is defined as a business venture where two or more competent individuals carry on a business for profit. A general partnership can be created by the conduct of the parties and does not require any formal filing. This is in contrast to a limited partnership, limited liability company, corporation, or other entities in Georgia which all require filings to either the Secretary of State or the clerk of the superior court depending on the type of entity. Additionally, unlike other entities, a general partnership does not require a "magic word" in the partnership name. Absent an agreement to the contrary, a general partnership is managed jointly by the partners, who act as agents of the corporation. Partners contribute finances to the partnership through "capital contributions."

Here, Victor and Cecilia have created a general partnership. First, Victor and Cecilia never made **any** filings with the Secretary of State or any other governmental entity. This precludes every other entity, because a general partnership is the only entity that does not require filing an articles of incorporation or formation, certificates of limited liability, or any other document with the secretary or superior court clerk. On the other hand, it is consistent with a general partnership. While a filing may be made to conclusively establish the existence of a partnership, it is not necessary. While they have included "company" in their name A&V Book Company, this is not dispositive of creating any other type of business entity absent filings. Moreover, by failing to include "Limited" or similar terms, most other forms of entity are ruled out.

Moreover, Victor and Cecilia's management is consistent with a general partnership. A partner has the right to manage, but they need not execute it. Here, the facts suggest Victor and Cecilia both have the right to manage the partnership, although only Victor is actively using it. Finally, their contribution of capital contributions is consistent with a general partnership. There have been no issuances of shares or creation of bylaws, nor has there been designation of limited or general partners. Victor and Cecilia have a general partnership.

(2) Victor may unilaterally dissolve the partnership. The issue is how a general partnership may be dissolved. A general partnership may be dissolved by will of any of the partners, death,

completion of the partnership purpose if established, judicial intervention if the partnership becomes or pursues illegal purposes or fraud, or as provided in the partnership agreement if they have elected to make one. Unlike a limited partnership, which often has additional restrictions, or other entities which require formalities or handling shares or equity, there are no such formalities in a partnership. Because partners are agents of the partnership, they need to take steps to terminate their authority. Agents may act either through actual or apparent authority. Apparent authority is authority that third parties reasonably believe the partner has based on their representations to the third party. When dissolving a partnership, the agent must give actual notice to existing creditors and general notice to other creditors. When dissolving a partnership, the partners must make efforts to wind up their business. They may not enter into new contractual relationships for new business, but they do have necessary authority to cease the partnership's operations.

Victor likely has the right to dissolve the partnership. Victor could file a dissolution with the secretary of state, but this is unnecessary. Victor will need to take steps to wind up their business, including notifying creditors that the business is concluding so as to revoke apparent authority of both himself and Cecilia. Otherwise, as a general partner, Victor would be liable for the remaining obligations of the partnership as a result of contracts entered through apparent authority. Victor should tell Cecilia that he wishes to cease, and the partnership's assets should be distributed (see *infra*).

(3) Cecilia is entitled to a portion of the \$80,000 and books, but not the vinyl records or the building. On dissolution, partnership property first goes to pay back outside creditors. Then, it pays back any advances made by the partners to the partnership. Then, it pays back capital contributions. Finally, absent an agreement to the contrary, partners in a general partnership are entitled to an equal share of the remaining assets. This is distinct from other forms of limited liability entities where assets are distributed in proportion to capital contributions. Property purchased with partnership funds or titled to the partnership are presumed partnership property. Property purchased with individual funds, leased to the partnership, or titled in the name of an individual are presumed to be individual property. This presumption may be rebutted by evidence to the contrary. Real property will not be presumed to be partnership property at the expense of an innocent party. Partners are not entitled to reimbursement for services provided to the partnership except for services in furtherance of dissolution.

(a) \$80,000 Initial Bank Account

Here, the value in the bank account is proceeds from the sale of the partnership property. Partnerships are flow through entities, and their money is distributed to the partners. There are no outside creditors in these facts. Additionally, no facts suggest that either party made a capital advance to the partnership. Partners are not entitled to reimbursement for their services to the partnership in furtherance of the partnership. Hence, Victor is not entitled to any money as a result of his initial work without a salary. Because Cecilia contributed \$60,000 to the bookstore

as a capital contribution, she is entitled to get that paid back. The remaining \$20,000 will be distributed evenly between Victor and Cecilia since there is no agreement to the contrary.

(b) Books Inventory

Here, the books inventory is partnership property, so Cecilia is entitled to a 50% share of the book inventory. The facts do not provide where the book inventory came from, but considering that Victor is not contesting them, it is likely that the book inventory was obtained through the Cecilia's capital contribution of \$60,000 in cash to open the bookstore initially (as Victor never provided a cash contribution for the books to have been sourced elsewhere). Since the books were purchased with partnership money by the partnership, they are partnership property and will get equally distributed.

(c) Vinyl Records

The vinyl records are probably partnership property, though it is less clear. Victor seeded the money to purchase them himself, and he did not discuss it with Cecilia. This weighs in favor of finding them Victor's property. Although he sold them under a sign labeled Victor's Vinyl, he did so within the bookstore, benefitting from foot traffic into the bookstore. The facts do not expressly provide whether Victor purchased the records in the partnership name (albeit with his funds) or in his own name, but under these facts it seems likely that he purchased them in his name. Because property purchased with personal funds or not in the partnership name are presumed to be personal property, these records are likely personal property. Although he did sell them within the bookstore, it seems altogether disconnected to the purpose of the bookstore and otherwise unrelated to its operations. Moreover, he put the funds in a separate account rather than commingling. Furthermore Victor owned the bookstore property, and only leased it the partnership, although it paid utilities. These facts, taken together, weigh in favor of finding the records as Victor's property and thus Cecilia is not entitled to a share, although if she did, it would be 50%.

(d) Building

Cecilia is not entitled to a building. Here, Victor personally inherited the building. Victor never conveyed the building to the partnership. The partnership paid rent to use it, although \$100/mo is fairly cheap rent. It also paid the utilities, insurance, and taxes. This is a close call considering that paying taxes on the building in particular could suggest that the building is in the partnership's name. If that were the case, it would probably be deemed partnership property. However, real property will not be deemed partnership property at the expense of an innocent party, and here, it does not appear that Victor has done anything to suggest that the building is partnership property. Because Victor rented the building space to the partnership and owned title to the building, it seems likely that a court will find that Victor owned the building, although it is not a cut and dry case. Thus, Cecilia will not get a share, although if she did, it would be 50%.

Essay 1 — Sample Answer 2

1. The issue is what business entity has been created. Georgia law applies to the formation of all business entities in Georgia. Georgia business entities include partnerships, corporations, professional corporations, limited liability companies, and various other entities. A limited liability company is a business entity in which the members enjoy limited liability but has pass-through taxation, meaning the income of the members is only taxed once as income. A corporation is a business entity in which the members enjoy limited liability and the profits of the corporation are taxed twice, as both the income of the corporation and the income of the members. Both limited liability companies and corporations require filings with the Georgia Secretary of State because of their limited liability status. Here, Victor and Celia did not memorialize their agreement in writing, nor did they ever make a filing with the Georgia Secretary of State or any other governmental entity. Thus, they could not have formed an LLC or corporation.

Under Georgia law, a partnership is an agreement between two or more people to enter into a for-profit venture. The partners do not enjoy limited liability status and the income of the partnership is only taxed once. Parties need not expressly intend to create a partnership. Instead, courts look to the intent of the parties in determining whether a partnership was created. A general partnership is the default partnership where two or more partners who remain personally liable for the acts of the partnership. In a limited partnership, one partner is a limited partner who enjoys limited liability on the partnership while the other partner is a general partner. A party needs to expressly intend to enter a partnership as a limited partner due to the limited liability aspect of the agreement.

Here, Celia and Victor had the intent to enter into a for-profit venture, as evidenced by their decision to open a bookstore together in Savannah. Their intention to enter the venture together as partners is further mirrored in the name "C&V Book Company" being painted on the store and cash register receipts. Thus, Celia and Victor entered into a partnership. The conclusion is that type of partnership that they entered into was a general partnership because Celia did not expressly enter the partnership as a limited partner.

2. The issue is whether and how Victor can unilaterally dissolve the business entity. Under Georgia law, a partnership can either be for a specific term or indefinite. Here, Celia and Victor did not discuss how long they wanted to remain in business together, so the duration of their partnership was indefinite. A partnership for indefinite term can be ended by either partner. A partnership is dissolved when one of the partners decides to leave the partnership. Upon this decision, the partnership enters the phase of winding up, whereby all of the debts and assets of the partnership are settled. A partner must inform the other partner of the intent to dissolve. Here, Victor does have the right to unilaterally dissolve the partnership. Partners are not infinitely bound to the partnership. He must inform Celia and the partnership must begin winding up. The conclusion is that Victor can unilaterally dissolve the partnership.

3. The issue is how Celia's asset demands should be resolved. Under Georgia law, absent an agreement to the contrary, partners share equally in the profits and losses of the partnership. Upon the winding up of the business, the debts and assets of the partnership should be settled in an equal manner. Each partner has a right to an share of the assets of the partnership, and this share may be modified by each's contribution to the partnership. If Victor and Celia cannot wind up the partnership on their own, they will have to go to court and have the court judicially wind up their assets.

Here, Celia and Victor agreed that Victor's sweat equity during the first year would constitute his capital investment to the partnership. Thus, given Celia's \$60,000 cash contribution, they both initially contributed equally to the partnership. Celia lives in Seattle and has never been involved in running the business, while Victor does the day-to-day managing of the store. However, Victor receives a \$40,000/year salary for his work. No other disbursements have been made. Thus, Celia and Victor will likely split the assets of the partnership equally. There are no outstanding bills or liabilities of the partnership, so only asset division remains.

Here, the assets of the partnership that Celia claims a right to are: the book inventory, the vinyl inventory, the cash in both bank accounts, and the value of the building.

The bookstore inventory and bank account

The book inventory is plainly an asset of the partnership. The partnership's venture was a book store, so each of them has a right to a 50% share of the books. Additionally, each of them will be entitled to a 50% share of the cash remaining in the bookstore's bank account- \$40,000 each.

The vinyl inventory and bank account

Partners owe each other many duties, including the duties of loyalty and good faith. The duty of loyalty includes the duty not to compete with the partnership and the duty not to self-deal. Here, Victor breached the duty of loyalty by operating a vinyl records business out of the bookstore of the partnership without telling Celia. Using the business as a home for a competing business breached this duty. Thus, Victor will not be able to claim that the vinyl business was wholly distinct from the bookstore and Celia will be able to make a claim for half of the vinyl collection. Additionally, Celia will be entitled to the cash in the vinyl records bank account for the same reason, because a partner cannot siphon profits from the partnership by trying to start an alternate business that is housed within the partnership.

The vinyl store's bank account will be imputed to the partnership. Thus, Celia will be entitled to half of the vinyl collection and \$25,000 from the bank account.

The building

Lastly, Celia claims a right to the value of the building which houses the bookstore. Under Georgia law, a personal asset of a partner remains a personal asset, even when it is used by the

partnership. Here, Victor owned the building used for the bookstore separate from the partnership because he inherited it from his grandmother. Thus, Celia does not have a claim to the fair market value of the building. However, the utilities, taxes, and insurance on the building were paid by the partnership, so Celia may be able to get a credit for this. Conversely, the partnership paid only \$100 in rent while Victor estimates the fair market rent to be around \$200, so he would also have a claim to offset his takings.

Essay 1 — Sample Answer 3

1. The issue is what kind of business entity has been created by Celia and Victor.

A partnership is an agreement between two or more parties to carry on as co-owners of a for-profit business. The agreement to form a business need not be in writing and may be evidenced by the conduct of the parties involved. A general partnership does not require any special filings in Georgia, and two individuals agreeing and acting as co-owners of a for-profit business (i.e., a business for the purpose of generating profits) will be enough to effectuate the existence of a general partnership. Absent a written agreement outlining the terms of the general partnership, the default rules in Georgia will supply the rights and duties of the general partners. A limited partnership involves both at least one general partner and one limited liability partner and requires a written agreement delineating between the general partners' liabilities and identifying the partners who are limited partners. A limited liability company (LLC) is formed upon the filing of the articles of organization by the members of the LLC with the secretary of state. The articles of organization require certain inclusions: (1) the name of the LLC, including a mark/abbreviation denoting that the company is an LLC; (2) the number of authorized shares; (3) the name of the registered office and agent; (4) the purpose of the LLC; (5) any other rules that the members agree to; and (6) the mailing address of the LLC if it is different than the registered office and agent.

Here, Victor and Celia did not enter into a written agreement nor did they make any filings with the Georgia Secretary of State or any other governmental entity. Victor and Celia did not take any other action to formalize the arrangement between them. They did not formalize or outline either of their rights or duties, nor did they limited their liability among themselves or in writing. Thus, Victor and Celia did not form a limited partnership or an LLC. While Victor and Celia called their business a joint venture (i.e., carrying on as business partners for a specific purpose for a specific duration of time until the end of that purpose or duration), their conduct showed that they intended to carry on as co-owners of a business for profit. Their business was a bookstore, and they named their book store "C&V Book Company." The name has no abbreviations or marks denoting that it is a limited partnership or LLC. Thus, because a general partnership requires no special filings, and their conduct shows that they agreed to carry on as co-owners of a business for profit, Victor & Celia likely have a general partnership.

2. The issue is whether Victor has a right to unilaterally dissolve the business, and if so, what he must do to effectuate the dissolution.

A partner may unilaterally decide to end the partnership by expressing his desire to discontinue the business for profit. Once the partnership no longer has two people who agree to carry on as co-owners of a for-profit business, the partnership is considered to come to end. To effectuate a dissolution of the partnership, the partner must indicate his desire to end the partnership and must take steps to wind up the business by liquidating its assets, paying off creditors, and properly distributing the profits and losses among the general partners. A partner seeking to

dissolve the partnership may need to petition to the Court to effectuate dissolution if there is disagreement among the partners and the property distribution.

Here, Victor has a right to unilaterally dissolve the business because he is a general partner in a general partnership. To effectuate the dissolution, Victor must tell Celia that he no longer wishes to carry on as a co-owner of the C&V Book Company. Victor must wind up the Book Company by liquidating the assets of the Book Company and properly distributing the profits and losses among the general partners. Because there seems to be some disagreement between Celia and Victor as to the distribution of the property assets, Victor may need to petition the Court to effectuate the dissolution of the Book Company. Had Victor and Celia been members of an LLC, however, Victor would not have had a right to unilaterally dissolve or withdraw from the LLC. Members of an LLC may not withdraw unless it is agreed to in their articles of organization or if there is unanimous consent. But because this is a general partnership, Victor, as a general partner, may unilaterally dissolve the business.

3. The issue is how the assets of the business would be divided if the business relationship is dissolved.

As noted above, absent a partnership agreement controlling the rights of general partners, the default rules of the Uniform Partnership Act in Georgia will govern the rights of the general partners upon dissolution. In a general partnership, profits are shared evenly and losses follow the same rule. The fact that one partner provides more financial equity over (i.e., more cash) in starting the business does not mean that partner will receive more profits because of it. A partner providing sweat equity (i.e., labor) as initial investment is sufficient to entitle the partner to the default rule of equal profits and losses. However, this initial investment may have an effect on the distribution of property between the partners in the dissolution. Financial equity used to purchase certain partnership assets can entitle the purchaser of the assets to take the assets at the dissolution of the partnership. If the asset is traceable to the funds of one partner over the other, that partner will likely be entitled to that asset's value.

Here, Celia claims she is entitled to the inventory of both books and vinyl records, the total cash in both the Book Company's bank account and Vinyl Records bank account, and the value of the building. This is not fully correct. Starting with the profits from the inventory: the Book Company's bank account containing \$80,000 is a result of the business run by both Victor and Celia. Thus, Celia is entitled to 50% of the profits from the Book Company's business. The Vinyl Records bank account was opened separately by Victor and he called the bank account "Victor's Vinyl." However, he sold the vinyl records from within the Book Company, and records are typically found in book stores. Thus, it will likely be construed as profits of the business as a whole, and Celia will be entitled to 50% of \$50,000 in that bank account. Moving onto the inventory of books and vinyl: Celia contributed the \$60,000 in cash to open the bookstore. While it does not explicitly state in the fact pattern that the \$60,000 was used to purchase the inventory, it can be implied from the fact that she contributed money and he agreed "his sweat equity during [the first year] would constitute his capital investment." Thus, it is likely that the inventory was purchased by Celia's money. Thus, she would be entitled to the inventory of books. However, in his third year, Victor "used his personal funds as seed money to purchase the initial vinyl inventory." Thus, after

winding up the business, he would be be entitled to the inventory of vinyl he purchased using his own personal fund. Finally, the store is in a building owned only by Victor (through inheritance). The business venture paid all of the rent and utilities necessary for running the business. The fair market value of the building is \$200,000. Since the business profits helped paid for the building costs, it could be argued that Celia has a 50% interest in the \$200,000. However, because it was already owned by Victor before the business began, it is likely that Victor will take 100% of the building's fair market value.

Essay 2 — Sample Answer 1

Question One:

(a) I will file Perry's complaint in Fulton County, Georgia.

Subject matter jurisdiction. The first issue is whether this claim should be brought in federal or state court. This claim must be brought in a state court, because a federal court in Georgia would not have subject matter jurisdiction over this claim. For a federal court to exercise jurisdiction over a claim, the claim must either be a federal question (that is, arise under federal law) or satisfy diversity jurisdiction. For diversity jurisdiction to arise, there must be complete diversity in citizenship between the plaintiff and defendant (that is, they must be domiciled in different states), and the amount in controversy must be more than \$75,000. This medical malpractice claim is a state law claim that does not "arise under" federal law. Further, even though the amount in controversy is well over \$75,000 (at \$500,000), there is no citizenship diversity here. Perry and Dr. B are both citizens of Georgia. Therefore, the claim cannot be brought in federal court and must be brought in a state court of Georgia.

Additionally, this claim should be brought in superior court or state court. In Georgia, superior and state courts have concurrent subject matter jurisdiction over nearly all civil claims.

Venue. The claim should specifically be brought in Fulton County, where venue is proper. In Georgia, venue is first and foremost proper where the defendant resides, and Dr. B resides in Fulton County.

(b) The claim must be brought within the statute of limitations period. Medical malpractice claims have a two-year statute of limitations, which is measured from the accrual of the claim. The claim accrues when the injury is inflicted upon the plaintiff, or in other terms, when the plaintiff officially has a claim against the defendant. Here, the statute of limitations started to run on January 10, 2023 when Dr. B performed the emergency toe amputation on Perry. Therefore, Perry must bring the claim by January 11, 2025 (two years from the date of the injury not including the date of injury). Note that medical malpractice claims have a statute of repose of five years; however, it is not implicated here. Perry knew or should have known he was injured and that Dr. B was negligent at the time of the toe amputation. There is no reason why the statute of limitations would be tolled here.

(c) In Georgia, a plaintiff must file an expert affidavit along with a claim of professional malpractice.

(i) A plaintiff who files a medical malpractice claim must allege in their complaint that the elements of the claim are met. In other words, the plaintiff must allege that the defendant owed the plaintiff a duty to act in conformity with the relevant standard of care, the defendant breached that duty by falling below the standard of care, the defendant's breach caused the plaintiff's injury, and the plaintiff suffered damages as a result. The standard of care in a medical

malpractice case is based on a national standard of care. Note that the pleading standard in Georgia is a notice standard. The plaintiff must provide enough in the complaint to provide the defendant notice of the claim being brought against him.

(ii) A medical malpractice claim does not typically require an affidavit from counsel. However, there is a limited circumstance in which such an affidavit will be required. If the plaintiff's medical malpractice claim fails to include the affidavit of a qualified expert witness, and that failure was because the attorney could not procure one because of the threat of the statute of limitations running on the claim, there does need to be an affidavit from the attorney explaining that circumstance and ensuring that an expert affidavit is forthcoming. Note that this will not apply when the attorney is at fault for failing to bring the claim in time. That could potentially be the case here. Perry came to my office with only a month remaining of the statute of limitations on his claim. If I am unable in good faith to retain an expert in time to file an expert affidavit, then I would be required to file an affidavit explaining that.

(iii) On the other hand, a plaintiff is required to file an expert affidavit along with his complaint for medical malpractice. This affidavit is due at the time of filing the complaint. If the circumstances above apply, and I am unable to retain an expert before the statute of limitations run, then I would have to file the expert affidavit within a reasonable time.

(iv) The expert affidavit must include the name and address of the expert witness that the plaintiff is using. Additionally, the complaint must include the facts that support the expert's qualifications (discussed in subsection (v)). The affidavit must also describe the basis of the expert's opinion and how that demonstrates that the defendant fell below the standard of care.

(v) Georgia generally follows the Daubert rule for experts. In order for an expert to be qualified, the expert must have scientific, technical, and educational training to enable him to demonstrate the standard of care, the expert's opinion must be based on reliable scientific methods, and his opinion must reflect an application of those reliable methods to the facts of the case. Additionally, in Georgia, an expert for a medical malpractice case must be licensed to practice medicine in Georgia, and the expert must have actively practiced or taught for three of the last five consecutive years. Even if Dr. Wonder is qualified (as a world-class board-certified podiatrist trained at Harvard), he does not meet those additional elements. It is unclear if Dr. Wonder is licensed to practice medicine in Georgia. While he seems to live in the English countryside, he also taught at a Georgia medical school. Regardless, Dr. Wonder has not actively practiced or taught medicine for three of the last five years. He teaches for only two years at a time for every five years, and he has spent the last three years performing in England. Therefore, Dr. Wonder cannot be a qualified expert in this case.

Question 2:

I will argue that Dr. B's claim is defeated because he failed to bring a compulsory counterclaim. Related, claim preclusion applies and precludes Dr. B from bringing this claim.

Compulsory counterclaim. A counterclaim is compulsory when it arises from the same transaction or occurrence as the claim originally filed. A counterclaim must be brought or is considered waived. Here, the basis of Perry's claim arose from Dr. B's emergency amputation on January 10, 2023. The basis of Perry's medical services claim is based on the same exact transaction. Dr. B billed the \$5,000 at issue for the surgery that gave rise to Perry's claim.

Claim preclusion. For that reason, Dr. B is precluded from bringing the claim. Claim preclusion applies when a prior case between the same parties for the same claim already occurred. Further, all the claims that a party could have brought "merge" into the "same claim" element. Because Dr. B's medical bill claim could have been brought in the first case, it merged and can no longer be brought.

Essay 2 — Sample Answer 2

1(a) The issue is where will Plaintiff file the Complaint, and whether federal court is an option.

Subject matter jurisdiction is the power of a court to be able to hear a specific case. In Georgia, there are several courts: magistrate court, superior courts, probate courts, Georgia Court of Appeals, and Supreme Court of Georgia. The superior courts are located in each county in Georgia, and they have the jurisdiction to hear civil cases where the amount exceeds \$500. Additionally, there are two federal courts in Georgia: the Northern District of Georgia and the Southern District of Georgia. In order for either Federal Court to hear the case, the case must either involve a federal question or the case must satisfy diversity jurisdiction. Federal question means that the case arises under federal law, and it is strictly construed to mean that the claims the Plaintiff brings against the Defendant must arise under federal (affirmative defenses do not satisfy such requirement). In order to satisfy diversity jurisdiction, two criteria must be satisfied: there must be complete diversity and the amount in controversy must exceed \$75,000. Complete diversity means that every Plaintiff is diverse from every Defendant. In other words, the Plaintiff and the Defendant must be citizens of different states. Citizenship is defined as where the individual is domiciled. A person is domiciled in a state where, at the time the complaint was filed, the individual physically lived there and had the intention to indefinitely live there. To meet the amount in controversy requirement, the Plaintiff must claim more than \$75,000 in damages.

In this case, the federal court is not an option. First, this lawsuit likely does not arise under federal law. Perry wants to bring a professional malpractice claim against Dr. B, which means that this would likely be a negligence claim under state law. Although Perry is asking for \$500,000, which clearly exceeds the amount in controversy, diversity jurisdiction is not met. Both Perry and Dr. B are citizens of Georgia, which means they are both domiciled in Georgia. Since they are both citizens of the same state, diversity jurisdiction is not met, and a federal court cannot hear this case.

Next, venue means which county in the state can hear a case. The rule of venue limits which counties can hear each specific case. In Georgia, venue can be proper in several ways: where the injury occurred or if all Defendants are Georgia residents, then where any Defendant lives. The Plaintiff's county residence generally does not play a part in deciding where venue is proper.

In this case, Dr. B is a resident of Fulton County, Georgia. Additionally, the medical services at issue occurred in Fulton County. This means that there is only one option where venue is proper, and that is Fulton County, Georgia. Therefore, the complaint will likely be filed in the superior court of Fulton County, Georgia.

1(b) The issue is by what date must the Complaint be filed.

Each case contains a statute of limitations. A statute of limitations is the time a Plaintiff has to file a lawsuit against a Defendant for the Plaintiff's injuries. In Georgia, the statute of limitations for a professional malpractice claim is two years from the date of injury.

In this case, the injury occurred on January 10, 2023, when Dr. B performed an awry procedure, then amputated Perry's baby toe. Therefore, the date of injury was January 10, 2023. The statute of limitations to bring a lawsuit according to these facts expires on January 10, 2025. Therefore, the complaint must be filed no later than January 9, 2025.

1(c) The issue is what is required when filing a professional malpractice Complaint and a supporting expert affidavit.

When filing a professional malpractice claim, the Plaintiff must include, with the complaint, a supporting expert affidavit that demonstrates how the Defendant breached its professional duty. If the Plaintiff does not file the expert affidavit, then the Defendant can file a Rule 12(b) motion to dismiss for failing to include such expert affidavit. However, if the Plaintiff's attorney can show that the Plaintiff retained the attorney within 90 days of the statute of limitations, then the Plaintiff is allowed to file a complaint without the supporting expert affidavit in order to avoid missing the statute of limitations deadline. If this is the case, the Plaintiff must supplement such expert affidavit within 30 days of the file of the complaint. The expert affidavit must contain the expert's experience, knowledge, and skill, what it based its findings on, and its findings and opinion on the case in hand, meaning that the expert must show how the Defendant breached its professional duty.

Additionally, the Complaint must include a short and plain statement of why the court has subject matter jurisdiction, a short and plain statement of the Plaintiff's claims which must satisfy the plausibility standard. Such statement does not have to be specific, but it cannot be conclusory. The complaint must include a short and plain statement that the Plaintiff's claims are plausible. Lastly, the complaint must contain a statement as to the prayer for relief, which means the damages the Plaintiff seeks in the case. In order for an expert to meet the qualifications required under the Georgia law, the expert must either be a practicing professional with enough skill and knowledge to be an expert, or the expert must be a teacher in the specific area for at least the last five years.

In this case, Perry approached me on December 20, 2024, about 30 days before the statute of limitations in his case against Dr. B expired. Therefore, I am not required to file a supporting expert affidavit along with the Complaint as long as I show that Perry approached me within 90 days of the expiration of the statute of limitations, which he did. Next, the complaint must allege a short and plain statement that shows why the superior court of Fulton County has jurisdiction over this case, a short and plain statement as to how Dr. B breached his professional duty to Perry (since it's a negligence claim, I must include a short and plain statement that is plausible to show

that Dr. B had a duty to Perry, Dr. B breached his professional duty, Dr. B caused Perry's injuries, and Perry suffered injuries), and a prayer for relief.

Since the expert affidavit is not required to be filed along with the complaint, I must file the expert affidavit within 30 days of filing the complaint to the court. As mentioned above, the expert affidavit must contain the expert's experience, knowledge, and skill, what it based its findings on, and its findings and opinion on the case in hand, meaning that the expert must show how the Defendant breached its professional duty.

Lastly, Dr. Wonder likely does not meet the qualifications required under Georgia law in order to submit an expert affidavit. Dr. Wonder, although a world-class board-certified podiatrist trained at Harvard, Dr. Wonder has not treated any patients within the last 10 years. Dr. Wonder does teach at Emory Medical School; however, Dr. Wonder teaching experience is a two year stint, once every five years. Meaning that he has not taught for five years continuously, as required by Georgia law. Therefore, it is likely that Dr. Wonder likely does not meet the qualifications required under Georgia law for him to submit a medical malpractice affidavit.

2. The issue is what procedural arguments can I make to defeat Mr. B's subsequent lawsuit that was filed to recover the money owed on the medical bill after the Court entered judgment in favor of Perry.

A counterclaim is when a Defendant files its own legal claim against the Plaintiff. There are two types of counterclaims: compulsory and permissive counterclaims. A permissive counterclaim is a claim by the Defendant against the Plaintiff that did not arise from the transaction or occurrence that is the subject of the Plaintiff's complaint against the Defendant. Such counterclaims are permissive, meaning that a Defendant is not required to bring the counterclaim in the same lawsuit that was brought by the Plaintiff. To the contrary, a compulsory counterclaim is a counterclaim by the Defendant against the Plaintiff that arose from the same transaction or occurrence that is the subject of the Plaintiff's complaint against the Defendant. Such counterclaims are compulsory, meaning that if the counterclaim arises from the same transaction or occurrence, then the Defendant must bring the counterclaim within the same lawsuit. If the Defendant fails to bring this compulsory counterclaim, then the Defendant cannot bring the compulsory claim in a later and separate lawsuit, which means the Defendant has lost the chance to its claim. Claim preclusion means that the parties have already litigated this claim. Claim preclusion precludes the same parties from litigating the same claim over and over again. Therefore, in order to satisfy preclusion, the party must show that the second litigation has the same parties, the claim that is being litigated in the second claim arose from the transaction or occurrence as the first claim, and there was a final judgment on the merits by the court in the first case.

In this case, Perry filed a complaint against Dr. B for a professional malpractice claim. The claim arose from a procedure that went awry, which led to Dr. B amputating Perry's baby toe. Dr. B then sent Perry a bill for \$5,000 to charge him for the medical services he provided: the awry procedure and the amputation of Perry's baby toe. After filing the complaint, Dr. B filed a motion

to dismiss with no other responsive pleadings. Then, the case proceeded to trial where the jury awarded Perry \$500,000 for his injuries, and the Court entered judgment, meaning that there was a final judgment on the merits about the professional malpractice claim. Several months later, Dr. B filed a lawsuit against Perry, making a claim on the bill for medical services for \$5,000 that Perry owed Dr. B. This claim arises from the same transaction and occurrence that led to the filing of the initial complaint by Perry against Dr. B. Since the medical services that Dr. B is now requesting money for arose from the procedure that went awry and the amputation of Perry's baby toe, then that means that Dr. B's claim on his bill for medical services arose from the same transaction and occurrence that Perry previously sued Dr. B for. Therefore, Dr. B was supposed to bring the claim on his bill as a compulsory counterclaim. Since Dr. B failed to bring the compulsory counterclaim, Dr. B lost his chance and cannot bring the claim against Perry. Therefore, I will file a motion to dismiss based on claim preclusion, as Perry and Dr. B were involved in the first case, the second claim arose from the transaction and occurrence as the first case, and there was a final judgment on the merits since the court in the first case entered the jury's judgment. Therefore, Dr. B's second claim will likely be barred by claim preclusion.

Essay 2 — Sample Answer 3

Question 1

a) At issue is where the complaint should be filed and whether federal court is an option.

Under Georgia law, venue rules govern where a case should be filed. Under Georgia law, venue is appropriate in the county where any defendant resides, provided all defendants are residents of Georgia or where a substantial part of the events giving rise to the claim occurred. If neither of the foregoing options are available, venue is appropriate where a court would have personal jurisdiction over the defendant. A case can be removed to federal court if a federal court would have subject matter jurisdiction over the claim. To have subject matter jurisdiction there must be (a) diversity of citizenship, meaning that no plaintiff is from the same state as any defendant and the claim must exceed \$75,000 or (b) federal question jurisdiction where the claim arises under a federal law, treaty or constitution.

Here, the complaint should be filed in Fulton County as that is where Dr. B resides. Fulton County is Perry's only option as to venue because even if Perry wanted to assert venue based on a substantial part of the events, those too, occurred in Fulton County as that is where the emergency amputation occurred.

This case is not removable to federal court because there is no diversity of citizenship between the parties. Here, Perry is a citizen of Dekalb County, Georgia and Dr. B is a citizen of Fulton County, Georgia. Therefore there is no complete diversity of citizenship and the case cannot be removed although Perry has made a good-faith claim of \$500,000 in damages. There are no facts giving rise to federal question jurisdiction either.

Therefore, the complaint should be filed in Fulton County and federal court is not an option.

b) At issue is by what date the complaint should be filed.

Under Georgia law, a complaint must be filed before the statute of limitations expires on a claim. For medical malpractice suits, the claim must be brought within two years of the cause of action accruing. While there are some exceptions to the statute of limitations normally being two years for medical malpractice claims, they are not at issue here. If they were, the statute of repose would require that the claim be brought within five years of it arising.

Here, Perry got treatment from Dr. B on January 10, 2023. On January 10, Dr. B performed the emergency amputation of Perry's baby toe so the injury and claim was readily apparent to Perry on that date. Because the statute of limitations is two years for medical malpractice actions, Perry would need to file his claim by January 10, 2025. The facts allege that Perry came to my office on December 20, 2024, so I will need to work fast to get an expert affidavit to assert the standard of care Dr. B breached by performing the amputation.

Therefore, the complaint should be filed by January 10, 2025.

c) At issue is what the Georgia Rules of Civil Procedure require for filing a professional malpractice complaint and support affidavit.

i. what the complaint must allege

Under Georgia law, a complaint must give notice to the defendant of what it is being sued for. Georgia is a notice pleading state which means that extreme detail is not required. A plaintiff needs to give the defendant notice of essentially the who, what, when, and where, and state a claim for relief. Importantly, Georgia complaints must provide a factual basis for alleging venue. Specific damages, i.e. monetary claims, must be specifically plead in the complaint.

Here, the complaint must allege an action for medical malpractice against Dr. B. Essentially, the claim must set out basic facts as to (1) duty; (2) breach; (3) causation; and (4) damages. The complaint should give Dr. B notice that on January 10, 2023, Dr. B committed medical malpractice by severing Perry's toe and giving him Tylenol. The complaint must also specifically plead special damages, namely that Perry wants \$500,000 for pain and suffering. Moreover, the complaint must allege specific facts giving rise to venue in Fulton County which were previously discussed in part (a). Lastly, the complaint needs to be supported by an expert witness that will testify as to the standard of care Dr. B should have used on January 10 and how his conduct fell below that standard.

Therefore, the complaint must allege facts giving notice to Dr. B of the claim against him, specifically plead damages, and venue.

ii. whether an affidavit from counsel is required

Under Georgia law, an affidavit from counsel is required attesting that it could not get an expert affidavit in time to comport with the statute of limitations. The affidavit from counsel must allege that counsel made a good faith attempt to get an expert's opinion in time but could not do so before the statute of limitations expired. If provided, the affidavit generally states that such expert affidavit will be procured in reasonable time and that counsel will amend the pleadings as soon as the expert has been found and given their affidavit.

Here, counsel will not be able to procure an expert affidavit from Dr. Wonder until January 25, 2025 which is past the statute of limitations for Perry's claim. As such, counsel will need to provide an affidavit showing that he has made a good-faith attempt at trying to procure an expert and that it could not be done in the limited window between Perry coming to his office on December 20, 2024 and the statute of limitations expiring on January 10, 2025. Once counsel obtains an expert's affidavit, he should amend his pleadings such that the complaint is updated to reflect the new expert's affidavit and remove his own affidavit stating why he was unable to comply with the Georgia Civil Practice Act's requirements on this issue.

Therefore, at this time an affidavit is required because counsel will not be able to get an expert affidavit by the time the statute of limitations runs.

iii. when an expert affidavit is due

Under Georgia law, generally an expert affidavit is due at the time of the complaint. As previously mentioned, if counsel cannot get the expert to attest to the standard of care in time, and counsel made a good faith attempt to get an expert's opinion in time but could not do so before the statute of limitations expired, the court will give counsel extra time to comply with this requirement.

Here, counsel will not be able to get Dr. Wonder's expert affidavit until Perry's claim passes the statute of limitations. He should submit a counsel affidavit in the meantime and obtain an expert's affidavit as soon as possible. A Georgia court generally will give between 30 and 60 days to get the expert affidavit.

Therefore, an expert affidavit will be due within 30-60 days of the original filing.

iv. what the expert affidavit must contain

Under Georgia law, in cases alleging professional malpractice, a complaint must be supported an expert affidavit providing the standard of care that the allegedly negligent professional should have exercised in the case at hand. It must also allege facts showing that the expert is qualified to give the opinion, that is, that the professional was in active practice or teaching professionally for the last three out of five years in the relevant area of practice.

Here, the expert affidavit must contain an expert's opinion, likely a podiatrist, as to what the standard of care would be for treating a painful ingrown baby toenail and what pain medicine should have been administered. The affidavit must allege facts about why the professional's treatment fell below the standard of care. Lastly, the expert affidavit must contain the expert's qualifications to give the opinion, namely their area of expertise, if they are practicing or teaching currently, and that they were teaching or practicing for three out of five of the preceding years in their relevant jurisdiction.

Therefore, the podiatrist's affidavit must contain an opinion as to what the standard of care was, how the professional breached that standard, and the basis for their qualifications as an expert.

v. whether Dr. Wonder meets the qualifications required under Georgia law for him to submit a medical malpractice affidavit

Under Georgia law, a professional is qualified to submit an expert affidavit if he is from the same profession as the negligent professional and has been in active practice or teaching professionally for the last three out of five years in the relevant area of practice. As to the same profession prong, to provide an example, a medical doctor could testify as to the standard of care required

by a doctor of osteopathy but a nurse practitioner could not testify to the standard of care required by a medical doctor.

Here, Dr. Wonder does not meet the qualifications required under Georgia law for him to submit a medical malpractice affidavit because although he is a world-class board certified podiatrist that was trained at Harvard, Dr. Wonder has not treated patients in the last ten years (must less than the 3/5 requirement) and neither has he taught at Emory Medical School for three out of five of the last years. Because he has not been in active practice as a podiatrist or teaching at Emory for 3 of the last 5 years, Dr. Wonder is not qualified to submit a medical malpractice affidavit.

Therefore, Dr. Wonder does not meet the qualifications as required under the Georgia Civil Practice Act.

Question 2: At issue is what procedural arguments can be made to defeat Dr. B's claim.

Under Georgia law, a compulsory counterclaim is one that must be plead in response to a plaintiff's complaint. A compulsory counterclaim is one that arises out of the same transaction or occurrence as the plaintiff's claim. A compulsory counterclaim is a "use it or lose it" claim, meaning that if the defendant does not bring the claim in the original proceeding, he loses the claim.

Here, Dr. B filed a motion to dismiss within 30 days and no other responsive proceedings. The jury awarded Perry \$500,000 which signaled the end of the case. At no time did Dr. B try to amend his answer to add the compulsory counterclaim. The counterclaim is compulsory because it arose from the same exact transaction as Perry's original claim against Dr. B, as it is the medical bill that Dr. B charged Perry with after negligently amputating his baby toenail.

Claim preclusion is not at issue here because the parties are not in the same configuration with Perry v. Dr. B, (here, Dr. B v. Perry) despite there being two separate claims: one for property (the unpaid bill) and one for personal injuries by Perry.

Therefore, Dr. B's claim can be defeated by arguing that the claim was compulsory and was therefore lost when it was not plead in his answer to Perry's complaint.

Essay 3 — Sample Answer 1

(1) Common Law Marriage

A Georgia court will likely recognize the common law marriage of Alice and Bob. Under Georgia law, common law marriages are not recognized. However, there are two exceptions. The first is when the common law marriage was entered into before 1997. The second is when the parties entered into a common law marriage in a state that does recognize common law marriage. Georgia will give recognition this.

Here, Alice and Bob meet the legal standard for common law marriage in Alabama. Thus, a Georgia court will likely recognize the common law marriage of Alice and Bob even though common law marriages in Georgia are not recognized. Bob will be able to file for divorce from Alice in the State of Georgia and avail himself of the rules associated with division of assets (unless there is potential out of state property, spousal support, and child support. A Georgia court has jurisdiction over a divorce matter if either party has resided in Georgia for the past six months. A Georgia court has jurisdiction over a custody matter if the children have resided with Georgia for the past six months or if they have moved, if they have not resided somewhere else for six months.

(2) Division of Property- Equitable Division

Georgia uses an equitable division of marital property to decide the division of property. Equitable division does not mean equal division and the court will look at several factors. There are two kinds of property for division of property. The first is separate property, which is property that is inherited or is often acquired before the marriage. The second is marital property. This is property that is acquired during the marriage or grows during the marriage because of the efforts of the spouses. In Georgia, the parties will keep their separate property and the marital property will be divided equitably.

There are several factors to decide equitable division of property. The first is length of the marriage. The second is the other assets the parties have. The third is the ability the parties have to support themselves with their individual property and assets. The fourth is the contributions each spouse has made to the properties. The fifth is the contributions the spouses have made the marriage, as this includes income and jobs in the home. The sixth is the standard of living during the marriage. The court will look at these factors to decide how the property should be divided. The parties have been together for over 20 years and this shows that the property should be divided more equally instead of a shorter marriage where the parties may not have relied as much on the resources of the other party. The parties have also likely become accustomed to this life style and the asset they gave. Each spouse has made contributions to the marriage, as Bob used to work but is now a homemaker and takes care of the children, and Alice the breadwinner of the family. The court has a wide discretion and title is not decisive of who the marital property belongs to.

Another factor that can be considered is martial fault, such as adultery. This will not bar equitable division, like with alimony in a fault divorce if this was the reason for the divorce. Instead, it will be another factor the judge to consider when dividing the property. Alice will still be able to get property, but it could be more limited with this fact.

(3) Specific Property

a. Lake House

The lake house is Alice's separate property that Alice inherited from her grandmother in 1997. Alice and Bob did not meet until 2000. Thus, this is Alice's separate property. A potential wrinkle is this if the property's valued has been increased by Alice's improvement or if Alice paid off a mortgage during the marriage. Then, the property would become mixed property and the increase in value from Alice's improvement or mortgage during the marriage would become marital property. If the property only increases because of market forces, then this increase will not be marital property. Bob is likely not have a claim unless more evidence show an improvement or payments to the house during marriage.

b. 401(k)

This 401(k) will be classified as marital property to the extend that Alice contributed to it during the marriage. Alice was in graduated school when she first met Bob, and likely all or most of this will be martial property. Bob is likely to have a strong claim for this property as it is marital property.

c. Alice's mother's will

Assets that are gained from a will, even during a marriage, are separate property. Bob likely does not have a claim for this money. Bob could try to argue restitution damages for taking care of Alice's mother without payment. However, family members often take care of other family members without payment. Bob could try to get some payment for services rendered, but would likely not have a strong claim to this money.

d. Personal Injury

A tort settlement is typically viewed as a individual property unless there is some kind of loss of consortium damages to the spouse. Here, there is no evidence of that and Bob got money for reimbursement of medical expenses and pain and suffering, which is personal to him. Bob has a strong claim over this property unless there is evidence that Alice has previously paid for the medical expenses. The fact that it is in a separate account is not dispositive.

e. Baseball Cards

This is likely marital property and both Alice and Bob have a claim. The items were sold during the marriage and was placed in a joint checking account where there was commingling of the funds.

(4) Child Support

Georgia uses the income shares model to decide child support payments. The court will use a chart and will look at the income of both parties and the number of children to calculate the amount owed monthly. Significant expenses and insurance can be analyzed to increase or decrease amount owed. Since Alice is the primary breadwinner and Bob is a homemaker, he will likely be awarded child support to take care of Cindy and David.

The purpose of child support is the best interest of the child and to make each home as equally as possible. Courts do not want one home to vastly differ from the other.

(5) Permanent Alimony

Periodic permanent alimony can be granted to a party looking at several factors. This is a type of alimony where the paying party will make payments indefinitely. However, this type of payment is not binding and can be amended due to change in circumstances of if the non paying party gets remarried or cohabits or either party dies. Again, the court has wide discretion to decide the amount of alimony or if alimony should be used.

The first factor is the length of the marriage. Alice and Bob have been together for over 20 years. A shorter marriage can cut in favor of granting of alimony because the parties have not grown accustom to relying on the other party. The next is the standard of living. Courts will often try to keep the same standard of living for the parties. Here, Bob has grown accustom to being the homemaker and Alice being the primary breadwinner. This also cuts in favor of granting alimony. The next factor is other assets the parties have access to through their separate property or the property that was divided during the equitable division. Bob has a decent claim for several of the valuable assets.

The next factor is the education of the parties and the ability to support oneself after the divorce. Court also look at the time it will take parties to become educated and/or to re-enter the workforce. Bob was a community college professor until he retired in 2011 to care for the children. It would likely take some time for Bob to re-enter the workforce.

The next factor is the contributions to the marriage. Bob worked for 11 years in the marriage and cared for the children and home for the rest of them. Bob also supported Alice as she got her education. Alice contributions to the marriage by working, as she is VP at a major company and earns a substantial income. Bob has used his time and resources to care for the children.

Martial fault, if it is in the reason for divorce, can also bar or decrease alimony. However, Alice is the party at fault here. She could not claim alimony if there was a fault divorce and adultery was the reason for the divorce.

Bob likely has a good claim for permanent alimony on these factors. Bob used to support Alice, now Alice has paying job, and Bob has cared for the children.

Essay 3 — Sample Answer 2

1. Georgia will recognize the common law marriage of Alice and Bob so long as they met the requirements for same in Alabama when they moved to Georgia. Under the full faith and credit clause of the constitution, Georgia is bound to recognize legally sufficient marriages of other states', regardless of the fact that Georgia abolished common law marriage for its citizens on January 1, 1997. Here, it is assumed that Alice and Bob met Alabama's requirements and thus Georgia must recognize their marriage as legally sufficient per the full faith and credit clause. Thus, their marriage would be recognized.

2. In a divorce, Georgia courts divide marital property based on equitable division. The issue is how property is divided in a Georgia divorce and how same is affected by evidence of Alice's affair. In Georgia, an affair that causes a divorce operates as a bar to alimony for the offending spouse. Further, because the party is at fault for the divorce when they engage in an extramarital affair, the court has discretion to increase the equitable distribution of the property for the "innocent" spouse. Here, Alice engaged in an affair during the marriage which is the cause for the separation. Therefore, Alice is barred from claiming alimony from Bob, and Bob is likely going to get a larger share of the marital estate in equitable division because he was the innocent spouse.

3. The issue is whether the property is marital and subject to equitable division or is the separate property of one spouse not subject to equitable division.

Lake House: The lake house is Alice's separate property. When a party inherits or is gifted property, that property is considered separate property and not marital. Further, when a party obtains title to property prior to the date of marriage, that property is separate property and remains so throughout the marriage. Unless the property is later converted to or comingled with marital property, the property remains separate.

Additionally, any increase in value to the property that is the result of market forces and not the effort of the parties is separate property. Here, Alice inherited the lake house in 1997, three years before her common law marriage to Bob. There is no evidence to suggest the parties put effort into increasing the home's value beyond routine maintenance. Therefore, the lake house is Alice's separate property and not part of the marital estate.

401(k): Alice's 401(k) is marital property subject to equitable division. Any income earned during the marriage by either party is marital property, including retirement accounts. Here, Bob supported Alice through school, so we can assume she did not start working until after the date of marriage. Therefore, any income in her 401(k) must have come after the date of marriage. Because it was all earned during the marriage, the 401(k) is subject to equitable division.

Alice's Mother's Net Worth: Neither Alice nor Bob have any property interest in Alice's mother's net worth. In Georgia, there is no expectancy interest that potential heirs have in a living parent's net worth, regardless of the existence of a will because the will can be revoked and/or changed

up until the testator's death. Here, Alice's mother is still alive, albeit 92 years old. Because Alice's mother is still alive, she can change her will at any time and therefore Alice does not have any interest in her mother's net worth and will not do so until her mother's passing provided that she is still named in the will. Thus, the property is neither separate nor marital, it is the property of Alice's mother and not subject to equitable division in the divorce of Alice and Bob, regardless of Bob's efforts to care for Alice's mother.

Personal Injury Settlement: The personal injury settlement is part Bob's separate property and part marital property subject to equitable division. In Georgia, personal injury settlements for the reimbursement of medical expenses are considered marital property subject to equitable division. However, personal injury settlements for pain and suffering are separate property. Here, \$50,000 of the settlement was provided for the reimbursement of medical expenses and \$150,000 was awarded to Bob for pain and suffering. Thus, \$50,000 is marital property subject to equitable division but the remaining \$150,000 is Bob's separate property.

Proceeds from Sale of Baseball Cards: The proceeds from the sale of Bob's childhood baseball cards is marital property subject to equitable division. In Georgia, personal property acquired prior to the date of marriage is separate property unless and until it is converted or commingled with marital property. Here, Bob acquired the baseball cards as a child, well before the date of marriage. However, when he sold the cards which were his separate property, he deposited the proceeds into a joint checking account out of which Alice and Bob both spent money in the normal course of their lives. When Bob did this, he converted his separate property into marital property and commingled the money. Thus, the proceeds from the sale of Bob's baseball cards are marital property subject to equitable division.

4. It is likely that a Georgia court will order Alice to pay Bob child support in the event they agree to joint custody. In Georgia, child support is statutorily calculated and mandatory, it cannot be waived because it is in the best interests' of the children and is meant to provide for their lives. When parties have vastly unequal incomes, it is especially likely that support will be awarded in accordance with the statutory guidelines so that the children can enjoy relatively the same economic condition in both parents' homes. Starting next year, there is a parenting time deviation that Courts have begun presumptively enforcing which would lower the amount due to Bob if the parties agree to true joint physical custody on a 50/50 basis. Here, Alice is a Senior Vice President of a publicly traded company and has been the primary breadwinner since Bob retired to stay home and care for the children in 2011. Thus, Alice will likely owe Bob the statutory amount of child support, subject to the court's discretion of whether to presumptively apply the parenting time deviation.

5. It is likely that Bob would be awarded permanent alimony from Alice, in light of her wrongdoing via the affair. In Georgia, spousal support is intended to provide for a spouse who has limited income and means of gaining employment and is only barred for an adulterous spouse. Further, the length of the marriage plays a pivotal role in determining the duration of support, the longer the marriage the longer the support will last. Here, Alice was the adulterous spouse, not Bob, and the parties have been married for 25 years. Further, Bob retired in 2011 and has not worked in

almost 15 years, caring for the children. Alice has a high-status and presumably high paying career as an SVP. Thus, Alice will likely have to pay Bob permanent alimony to support him because they were married for 25 years and he is likely unemployable at this point with very few marketable skills.

Essay 3 — Sample Answer 3

Question 1:

The issue is whether a Georgia court will recognize common law marriage status for Alice and Bob so that Bob can formally file for divorce from Alice in the State of Georgia.

Georgia abolished common law marriage in 1997. As a result, no common law marriage can be formed in Georgia following that abolition of the doctrine. However, Georgia recognizes common law marriages that were validly entered into in another state.

Here, Bob and Alice met the legal standard for common law marriage before moving to Georgia in 2020. Because Alabama will recognize them as married under the doctrine of common law marriage, Georgia courts will acknowledge that and allow Bob to avail himself of the rules associated with division of assets, spousal support and child support.

Georgia will recognize Bob and Alice's Alabama common law marriage.

Question 2:

The issue is how will the Georgia court divide property in the context of a divorce and how will said division be affected by Alice's affair.

Here, Bob can move for a fault divorce because of Alice's adultery and courts will consider the adultery when dividing up the property. Further, Alice is the breadwinner of the family so is almost certainly not eligible for alimony, but if she was, the court will completely block alimony payments to a spouse that commits adultery. This policy reflects the overall attitude of Georgia courts on the affect of adultery. Nevertheless, the marital assets will be divided into either separate property, or marital property. Separate property constitutes property owned entirely by one party prior to the entry into a marriage. This constitutes items owned by a spouse prior to marriage, as well as gifts or inheritance that have been acquired subsequent to the marriage. Outside of separate property, the court will establish marital property. This constitutes things obtained by the couple throughout their marriage and includes the marital estate, any income earned by the couple (even if entirely by one spouse), as well as any interest or appreciation of marital assets.

Following a divorce, each member is entitled to retain their separate property and the court will divide up the marital property in an equitable manner. Equitable manner does not equate to an even 50/50 split of the assets. The court retains discretion to deviate and will assess a number of factors including length of marriage, contribution of each party, education of each party, future earnings potential of each member, and also any fault attributable to either party (in this case, adultery).

Question 3:

The issue is how will a Georgia court categorize the following assets and how likely is Bob to have a claim to those assets.

Lake House: Alice obtained this lake house in 1997. This is three years prior to her meeting Bob. The facts indicate that this property was inherited, which likely means that it was completely paid off when Alice received it. This is important because Alice owned it outright and the couple never paid into it together. This will be deemed separate property owned by Alice and will not be apart of the marital assets.

Alice's 401(k): Alice's 401(k) was paid into throughout her time working. The facts indicate that Alice was still in school when she met Bob so therefore the entire retirement account balance was accumulated while the couple was married. The fact that the income paid into was done entirely by Alice does not matter and Bob is still entitled to a share in the account. The 401(k) will be deemed marital property and Bob will have a claim on the account.

Alice's Mother's Estate: It is unlikely Bob has a claim in Alice's mother's estate. Alice's mother is testate, meaning she has prepared a will. In the will, she specifically devises the assets to Alice and her heirs. A divorce action will effectively sever Bob's claim. Further, Alice's mother has not died, so any rights in the distribution of property has not yet vested, and it is not an asset ripe for distribution among the estate.

Paul's Personal Injury Settlement: Paul will be able to keep the entire settlement. As mentioned, assets in the event of divorce are either marital property or separate property. Among property included in the separate assets category include pain and suffering damages awarded following a personal injury claim. Bob was the one injured here and the accounts have been kept completely separate (important to avoid commingling). However, Alice may have a claim for the \$50,000 awarded as a reimbursement of medical expenses. Any medical expense was likely paid from the couple's assets and Alice will be entitled to receive her portion of the reimbursement. Therefore, Bob will keep the entire \$150,000 for pain and suffering but will likely be entitled to split the \$50,000 paid for medical reimbursement.

Bob's Baseball Cards: The baseball cards were owned by Bob and completely separate prior to the inception of the marriage. However, Bob sold the cards and deposited the money into a joint account used to fund the couple's lives. Therefore, the proceeds from the sale of the cards became commingled with other assets and are no longer Bob's separate property. Accordingly, Bob will have to share the proceeds with Alice as marital property.

Question (4):

The issue is whether Bob will be awarded child support for Cindy and David if the couple agrees to joint custody, and what means of enforcement will be used to calculate the child support payment.

Bob will be entitled to child support payments if the couple agrees to joint custody. In Georgia, child support payments are paid according to a statutory scheme. The incomes of both parties are added together to form a total, and from that total it will be determined how much total money per month the couple brings in. The court will then look at the monthly total and divide up child support payments based on the percentage of time a parent has custody of the kids. Based on the amount of time a parent has custody of the children as well as the amount of money contributed from each side, the court will award child support to one parent or another.

Because Bob is contributing no income, and because the parties have agreed to joint custody, Alice will be entitled to pay to him child support going forward and the amount will be calculated pursuant to statutory scheme.

Question (5):

The issue is whether a court is likely to award Bob spousal support (permanent alimony) from Alice.

A court has discretion to award alimony to the economically dependent spouse in the event of divorce. When assessing this, courts look to a number of factors such as the length of the marriage, the earnings potential of either party, and contribution to the earning potential of one spouse from another, as well as the fault of the divorce.

Here, Bob and Alice were together for 20 years. Bob worked to support Alice while she was obtaining her graduate degree and increase her earnings potential. Bob contributed to the family in terms of watching the kids while Alice worked. The couple has two kids together, and the marriage was ended due to an affair by Alice. A court will likely award Bob spousal support. Permanent alimony is usually in the form of periodic payments from one spouse to another throughout the duration of one's life. Bob will be entitled to these payments as long as he lives, assuming he does not remarry or cohabit with another partner.

Bob will likely be awarded permanent alimony.

Essay 4 — Sample Answer 1

To: District Attorney

From: Examinee

Re: Memorandum Regarding AFU

1a. The first issue involves whether Evelyn may be properly charged with any crimes, which crimes, which facts would support a conviction, and whether she has any valid defenses available.

Party to A Crime

To be properly charged with any crime, someone must be a party to the crime. In Georgia, anyone who intentionally offers support, encouragement, or aid may be considered a party to a crime. A party may be held liable to the same extent as the actor engaging in the illegal conduct. Passive approval is not sufficient to constitute participation. In Georgia, someone is presumed to be acting of sound mind and to intend the natural and probable result of their actions. For crimes like first degree murder, inchoate crimes (solicitation, attempt, or conspiracy) and theft, someone must have specific intent to commit the crime. Specific intent may be negated by an honest but unreasonable belief.

Conspiracy (to commit any other below crime)

In Georgia, a conspiracy occurs when two or more people have the specific intent to commit an illegal act and then take a overt act in furtherance. Here, Evelyn may argue that Drake alone was responsible for creating the account and that the two never shared or agreement an intent to take client profits, so thwas responsible for the there was probably not a conspiracy.

Larceny

Larceny is the taking of another person's property with the intent to deprive them of it. Someone does not commit larceny if the person intends to return the property; however, if at any time that the person retains the property and then decides to convert it to be their own, a person has then committed larceny. Evelyn may argue that her lack of knowledge of the operation means that she did not know and lacked the requisite mens rea to commit the specific intent crime of larceny; however, this may be rebutted by her retention of benefits despite knowing, per her statement to Martie, that the funds were stolen.

Embezzlement

Embezzlement is when someone lawfully obtains funds that belong to someone else, and then converts the funds to their own use. Here, AFU was an official corporation that brokered investments for high-wealth individuals. The company was successful by pooling investments and putting money into a private equity fund that invested in AI. Here, investors willingly gave their money to the company and its officers with the belief that the money would be invested and managed fairly. Instead, a portion of each client account was diverted to a secret account that only Drake could access. Because Evelyn participated in depositing portions of client funds into the secret account without explicit or implicit lawful authority from any client, she is likely a party to embezzlement.

False Pretenses vs. Larceny by Trick

Larceny by trick only requires that someone obtain property as a result of a misrepresentation. False pretenses applies when someone obtains property and title through a misrepresentation. A misrepresentation concerns a false statement about a present fact or past circumstance. Here, it is arguable that Evelyn was a party to committing false pretenses, because she obtained people's money and the right to spend it through allowing the company to pretend that it was investing.

Defense Through Specific Intent

Here, Evelyn will argue that she was not a party to any crime of theft because she lacked the specific intent. Specifically, Evelyn may argue that she did not know that Drake was asking her to participate in any crime, because she was told the account was a "reserve for liabilities" and the raise was deserved for her "hard work and discretion." It is arguable that the term "discretion" as well as the unusual amount of the raise should have clued Evelyn in to the nature of the activity, but, even if Evelyn's original excuse is true and she was simply "surprised", she later had reason to be suspicious. Specifically, Evelyn saw Drake's Maserati. Evelyn may argue that she then reported Drake and continued depositing these funds only because the Board unanimously voted to do nothing, which indicated that nothing was amiss. Therefore, she had an honest (but unreasonable) belief, which is enough to negate specific intent.

However, Evelyn's argument is undermined by her statement to Martie. Evelyn told Martie, "I was waiting for the day someone figured out Drake has been stealing client money for his lavish lifestyle and the AFU Board is just letting it go." Therefore, it is likely that Evelyn did not honestly hold the belief that Drake was not doing anything wrong. Rather, she was benefitting and saw no reason to go forward with any additional steps. Under Rule 801, an out-of-court statement that is offered for the truth of the matter is hearsay. However, because the District Attorney would be bringing suit against Evelyn, this statement would be a nonhearsay statement because it would have been made by a party opponent.

Therefore, Evelyn may likely be held responsible for any crime that Drake could be held responsible for committing, because of her participation.

1b. The second issue involves whether AFU may be properly charged with any crimes, which crimes, which facts support a conviction, and whether AFU has any valid defenses available.

Under Georgia law, a company is usually prosecuted only if there is statutory intent showing that the legislation would want the company to be held responsible. Alternatively, a company may be prosecuted if a manager or Board of Directors knew, ratified, ordered, or recklessly tolerated behavior by an employee which would constitute an element of a crime.

Here, both Drake, as a Chief Operating Officer, and Evelyn, as his assistant, may have their actions imputed to the company; additionally the Board had their own responsibilities. The Board may try to argue that the actions of Drake and Evelyn cannot be imputed to the company because these actions were selfish and served only the individuals, but, because the Board knew about Evelyn's suspicion and Drake's potential involvement, this argument will likely fail. In fact, Evelyn reported her suspicions to the Board. Instead of investigating, the Board decided to ignore her because of the good that Drake has done for the company. More likely, because of the Director fee increase.

Therefore, the Board may be held liable for Drake and Evelyn's actions.

Other Relevant Evidence/Contemplation of Civil Claims:

As evidence of wrongdoing, we can point to the Board's fiduciary duties to shareholders, which include the duty of care, meaning acting as a reasonable person would under the circumstances, and the duty of loyalty, which means putting the corporation's interest above your own. By prioritizing their own money-making endeavors, the Board violated their duty of loyalty to shareholders. Civily, this may mean that shareholders who have been directly affected will be direct suits or that someone may bring a derivative suit on behalf of harm to the corporation, although neither is within the District Attorney's purview. In Georgia, fraud includes intentional, constructive (innocent), and concealment. In Georgia, the corporate form may be pierced by shareholders if there is malice, which means more than mere negligence. Piercing can be shown through evidence of commingling, undercapitalization, self-dealing, siphoning, control and dominion, and misleading of corporate creditors. Here, Drake's acts likely also give rise to piercing the corporate veil. In considering actions against the company, we should also consider how shareholders may self-serve and bring their own claims.

2. The second issue is whether Martie's audio recording or video recording are admissible, and whether the outcome is affected by Martie's status as a police officer.

Under Georgia law, only one party needs to know of and consent to an audio recording. However, all parties must agree to a video recording. There are a few exceptions to the consent required for a video recording, like if a homeowner is recording her private property, inmates are being

recorded in prison, or police officers who are acting within the scope of their duties and recording using, for example, bodycam.

The Fourth Amendment applies to unlawful searches and seizures. In Georgia, seizures are determined by a higher standard than the usual standard of a reasonable person. Rather, there must be a significant restraint on someone's freedom of movement. A search occurs when a government actor enters an area where someone has a reasonable right to privacy without consent or a warrant. A warrant may be granted by a neutral magistrate when the particular fruits are addressed with particularity.

Here, Martie's audio recording of his phone call with Evelyn is likely admissible (especially assuming that Evelyn is also in Georgia). Because Martie was apart of the conversation, rather than an errant eavesdropper, his consent is sufficient to allow the audio recording to be admissible. However, Martie then decided to video tape Drake's office. Here, Martie was not recording a public place or even in a common area of the building. Rather, Martie was recording in "Drake's private office, out of public view." Drake was in his office when Martie walked in. Drake did not impliedly consent to the video, which was likely easy to spot since Martie was recording with his phone; in fact, Drake directly objected and said that he did not consent. Therefore, the video is likely not admissible.

Because Martie was not acting in the scope of his duties as a police officer, his video cannot come in under this exception. On the flip side, because Martie was acting as in an individual capacity rather than as a police officer, his decisions cannot be considered as within the realm of government conduct. In particular, his conduct should not qualify as a violation of Drake's Fourth Amendment rights. Therefore, although Martie cannot show the video in court, he may, as a lay witness, be able to testify under 701 to what he saw and heard while in Drake's office.

Essay 4 — Sample Answer 2

1(a). At issue is whether Evelyn Flowers can be charged with theft by embezzlement. Under Georgia law, the actus reus of theft by embezzlement occurs when an individual converts property obtained legally to deprive the owner of it permanently. Further, in Georgia, theft crimes are specific intent crimes, meaning the defendant must have the means of intending to deprive an individual of their property permanently. Here, while Evelyn did make the deposits into Drake's account and thus convert legally obtained property to permanently deprive the owners of it, she likely did not have the requisite mens rea. Evelyn did not know what the account was, and when she reported Drake's unusual behavior to the board and they did nothing, she assumed nothing was amiss. Despite her admission to Martie that she was waiting for someone to find out, this likely does not rise to the level necessary to establish a specific intent mens rea as she was not purposely acting with the intent to deprive Marite of his property permanently. Because of this it is likely that if charged, Evelyn could establish a defense of mistake of fact surrounding the deposits that would be sufficient to dismiss the charge.

At issue is whether Evelyn Flowers can be charged with conspiracy to commit theft by embezzlement. Under Georgia law, conspiracy requires an agreement between two or more parties to engage in a criminal enterprise and an overt act in furtherance of the criminal enterprise. Here, this likely cannot be established because Evelyn did not agree to steal client funds and knowledge of criminal behavior is necessary to establish a conspiracy charge. Because Drake told Evelyn the account was a reserve for liabilities, it likely cannot be established that she agreed to enter a conspiracy with Drake.

At issue is whether Evelyn Flowers can be charged as an accomplice to theft by embezzlement. Under Georgia law, an accomplice is an individual who aids or helps further an underlying crime. The underlying crime in this case would be theft by embezzlement. The mens rea requirement for an accomplice is to knowingly aid someone in the commission of a crime. A mens rea of knowing requires that a defendant knew or should have known that their actions would cause a natural outcome. Here, Evelyn was on notice that Drake's request was dubious as she reported the conduct to the board.

Further, when questioned by Martie, she admitted that she was waiting for someone to figure out Drake was stealing client money. While she may argue she did not know Drake was stealing because the board took no action, it is likely that her admission to Martie shows that she at least should have known that she was aiding Drake steal client funds. Therefore it is likely that a charge can be brought against Evelyn as an accomplice to Drake's crime. Further, Drake need not be prosecuted for a successful charge to be brought against Evelyn.

1(b). At issue is whether AFU can be charged with crimes for Drake or the Board's conduct. First, with respect to Drake's conduct, a corporation can be charged with crimes committed by its officers, directors, and executives when taken on behalf of the company. Here, Drake did not

steal client funds on behalf of the company, and therefore AFU cannot be charged for theft by embezzlement resulting from Drake's conduct.

At issue is if AFU can be charged as an accomplice after the fact for failing to remedy Drake's behavior. Under Georgia law, an individual, or in this case a company, can be liable as an accessory after the fact when they aid someone in concealing criminal conduct. This kind of claim often arises in a situation in which an individual obstructs law enforcement or hides a fugitive, also known as misprison. This crime requires that the defendant knew or should have known that they were aiding the concealment of a crime. Here, AFU knew that Drake had stolen client funds and appropriated them to his own personal use. When presented with this information the board voted to do nothing because they did not want to create a ruckus over what an assistant said. While AFU may argue they did not have the requisite mens rea because they did not necessarily believe Ms. Flowers, they still should have known what Drake was doing and how failing to act would allow him to go undetected for his crimes. Therefore a charge of accessory after the fact can likely be brought against AFU.

At issue is if AFU can be charged as an accomplice to theft by embezzlement for stealing Martie's funds. Under Georgia law, an accomplice is an individual who aids or helps further an underlying crime. The underlying crime in this case would be theft by embezzlement. The mens rea requirement for an accomplice is to knowingly aid someone in the commission of a crime. A mens rea of knowing requires that a defendant knew or should have known that their actions would cause a natural outcome. Here, the Board when confronted with evidence of Drake's theft voted to do nothing and thus aided the continuation of his crime. As discussed above, they had the requisite mens rea because they at least should have known that the theft of more client funds was the likely outcome of their inaction. Therefore it is likely that AFU can be charged as an accomplice to theft committed by Drake after being put on notice by Ms. Flowers.

2. At issue is whether Martie's audio recording can be used as evidence. Under Georgia rules of criminal procedure, Georgia is a one-party state for audio recordings. This means that both parties do not have to consent to have private conversations audio recorded. Here, Martie secretly recorded a conversation between himself and Ms. Flowers. Because Georgia is a one-party state for audio recordings, this can likely be used as evidence. Further this likely does not run afoul of evidentiary hearsay rules because this recording would be party opponent statement.

At issue is whether Martie's position as a police officer affect the audio recordings admissibility. Under Georgia criminal procedure laws, there is an exception for video recordings taken by police officers on duty. As this was taken by Martie in his personal capacity and is an audio recording, it does not affect the analysis. Further, as Martie was acting in his personal capacity and not as an agent of the government, his behavior also does not trigger any of Evelyn's constitutional rights such that the recording would be excluded because only government conduct triggers protections under the constitutional criminal procedure amendments: 4th, 5th, and 6th.

At issue is whether the video recording Martie took of Drake would be admissible. Under Georgia law, video recordings taken in private spaces must have the consent of both parties. Here, Martie took a video recording of Drake in his office. Because Drake clearly expressed that he did not consent to the recording, this video is likely not admissible. Further, as mentioned above, under Georgia law there is an exception for video recordings taken by police officers on duty. However, Martie was not acting as a police officer on duty while video recording Drake and therefore his employment as a police officer does not affect the analysis in this instance either. Further this likely does not run afoul of evidentiary hearsay rules because this recording would be party opponent statement.

Essay 4 — Sample Answer 3

To: District Attorney

From: Assistant District Attorney

Re: AFU Investigation

Good afternoon sir, please see the below regarding your two inquiries:

1.

We could charge Evelyn with embezzlement or conspiracy to commit embezzlement but it is unlikely the charges will stick.

In Georgia, embezzlement is the crime of converting property which is legally entrusted to you. Like most crimes, there is a mens rea component and actus reus which must be proven. The mens rea can be satisfied either intentionally, knowingly, or with reckless indifference to the facts. Meanwhile, actus reus is satisfied by actually doing the converting. Evelyn could be charged as a principle to the embezzlement or an accomplice. The principle is the primary criminal agent, while the accomplice supports the principle. The punishment for the accomplice is the same as the principle. Meanwhile, conspiracy in Georgia is when two or more people work together in a criminal enterprise and take a significant step towards the completion of that criminal enterprise. In Georgia and unlike most jurisdictions, conspiracy merges with the completed crime.

On one hand, certain facts support these charges against Evelyn. She was told by Drake that she was to put the money into a certain account and is the one that actually put the money into the account. Nor can she claim that she had clean hands: she accepted a 20% raise for her "hard work and discretion," which is a substantial amount. She even suspected that something was wrong twice: once when she noticed the Maserati and reported Drake to the AFU Board and then again when Officer Conway called her. These facts demonstrate that Evelyn was aware that something was afoot and was not a mere innocent agent, even if she was not privy to all the details. While Evelyn was the one that deposited the money, she was not the principle: instead, she'd have to be charged as an accomplice as she was acting as an agent for Drake.

Moreover, while conspiracy and the completed crimes merge, this appears to have been an ongoing effort to embezzle money. Therefore, Evelyn could be charged for the completed crime with regards to Office Conway and those Drake has already embezzled, and conspiracy to continue doing it with future client deposits.

In response, Evelyn would likely defend herself by arguing that she had no knowledge of the embezzlement and therefore she lacked the requisite mens rea. In the alternative, she could argue that she tried to withdraw from the criminal enterprise. The former defense might fly, but

the latter would not. There is no evidence that Evelyn was directly aware of the embezzlement. While she did receive a raise for her "discretion," she was not aware that the reserve account was a slush fund and she only ever suspected but never knew about Drake's activities. This mistake of fact might be sufficient to avoid both charges. Likewise, she could argue that even if she knew, she attempted to withdraw and report the criminal activity by telling the Board. But here, she received her raise and embezzled the money before telling the board, thus completing the crime. Likewise, she never actually withdrew and continued supporting the embezzlement the whole time.

We could charge AFU as an organization with embezzlement and criminal fraud.

See above for the description of embezzlement. Additionally, AFU could be charged with criminal fraud on the basis that it was intentionally, materially misreporting facts to those that it owed a fiduciary duty and those people relied on AFU's reporting. Under Georgia law, a corporation can be criminally charged like a natural person. But unlike a natural person, to find a corporation criminally liable, it must be proven that the corporation itself ratified the illegal conduct and it was not just the activities of a rogue officer acting *ultra vires*.

Like Evelyn, there is no evidence that AFU formally knew about Drake's activities. But it created the cracks for Drake to commit his embezzlement, allowed Drake to use its corporate resources, and when said activity was brought to its attention, it willfully and unanimously buried its head in the sand. Thus because AFU effectively ratified Drake's conduct and did no investigation of its own, AFU is criminally liable for Drake's acts.

AFU would likely respond that it was unaware of Drake's acts. But as an investment brokerage, AFU has a fiduciary duty to those that entrust their money with it. This includes a duty of reasonable care when a plausible report of wrong doing was reported to the Board. Yet, the evidence suggests the reason for the Board dismissing the claim had nothing to do with its merits, but because it did not want to disrupt what Drake was doing for its bottom line. Thus this is also the basis for criminal fraud: AFU was aware, or should have been aware, of Drake's wrongdoings but continued to represent itself as being a dutiful steward of clients' money.

Finally, AFU could defend itself by arguing that Drake was acting beyond the scope of his employment in embezzling the money. But one Board member even said "Drake has done so much good for this company and for us." If Drake were acting beyond the scope of his employment, then a member of the Board would not have made such statements before unanimously voting to do nothing. Ultimately, AFU had a duty to reasonably investigate the activities of its employees if wrongdoing was suspected and it violated that duty by failing to investigate Drake when a reasonable concern was voiced.

2. Both the audio recording is usable and admissible, but likely not the video tape, and Martie's employment does not impact this analysis.

The audio recording was permitted and certain parts are admissible.

Georgia is a one-party consent state for recordings. This means that only one party need to consent to an audio recording for it to be lawful. Here, Martie turned on the microphone and operated it. Therefore, while Evelyn did not consent to the audio recording, Martie did. It doesn't matter if Martie told Evelyn the conversation was private or was not being recorded, as long as he consented to it. The recording itself was lawful and can be used in discovery.

Additionally, parts of the audio recording would be admissible at trial. A hearsay statement is any out of court assertion used for the truth of the matter. Both of Evelyn's and Martie's statements would be hearsay if used for their truth. But there is an exclusion for party opponents. The party opponent exclusion would apply either directly in a trial against Evelyn, or through her status as AFU and Drake's agent, as the exclusion also applies to agents of the opposing party. Martie's statements would likely be inadmissible for their truth, but could be used for a non-hearsay purpose such as notice.

The video recording is likely impermissible but might be admissible.

Under Georgia law, video recordings can be made in any public place. Here, Drake's office was not public as Martie had to go through a front desk to reach his office and then go to an out-of-view office. Unlike audio recordings, video captures substantially more information and takes data that cannot be consented to, as video takes a scene as it is while any words spoken are volunteered by the speaker. As Drake's office was private and out of view, behind a security checkpoint, Drake likely could not legally record the office without his permission.

But it still might be admissible as it is relevant by making a fact at issue more or less likely and would be the statements of a party opponent by Drake.

Martie's employment as a police officer does not impact this analysis because he was not acting under color of state law at the time.

Under the 4th Amendment, a police officer must have a warrant before searching a place where someone has a reasonable expectation of privacy. But the 4th Amendment only applies to state actors through the 14th Amendment when they're acting on behalf of the state. Here, Martie was not in uniform, did not use his dash cam, and even stated to the deskman that he was a client, not an officer. Moreover, he came on a personal mission to get his money back, not at the behest of a superior officer. Thus, he was not acting as a police officer but as a private citizen and the 4th Amendment did not apply to him.

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 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 the 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 prosthesis 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.

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

12 Main Street

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. Ajax 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 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.