

## CO 7/2025 MPT 2 - Selected Answer #1

\*\*\*\*\* MPT 2 STARTS HERE \*\*\*\*\*

To: Anita Hernandez  
From:  
Date:  
Re: Gourmet Pro response to CPSC

### Legal Standard

The attorney-client privilege applies to communications between clients and attorneys where the purpose of the communication is to obtain legal advice. *Franklin Dept of Labor v. ValueMart* (2019). When a document contains both business and legal advice, attorney-client privilege will only apply to the whole document if "the predominant purpose" of the communication was legal advice. *Franklin Dept of Labor v. ValueMart*.

In order to determine the predominant purpose of a document, courts will use the "totality of circumstances" test set out in *In re Grand Jury* and adopted in both *Franklin Dept of Labor v. Value Mart* and *Infusion v. Spinex*. This test includes five relevant factors: the communication's 1) purpose, 2) content, 3) context, 4) recipients and 5) whether privileged matters can easily be removed. If the court determines that the primary purpose of the document is business advice, the court must then determine whether any paragraph or other portion of the document contains distinct legal advice that can be withheld. *Franklin Dept of Labor and Spinex*. In the case of emails, especially, that address many topics, "counsel should address each paragraph separately to determining if it is 'predominantly' legal or business." *Infusion v. Spinex*.

### Document One

Document One is an attorney-client communication whose predominant purpose was likely to obtain legal advice. While *Spinex* holds that each paragraph of an email must be examined to determine whether there are business or legal purposes, each of Document One's three body paragraphs contain explicitly legal advice. Document One is therefore likely entirely protected from discovery because of attorney-client privilege.

As *Franklin Department of Labor* holds, the attorney-client privilege will only apply to the whole document if its predominant purpose was to seek legal advice. We can determine what its predominant purpose was by looking at its 1) purpose, 2) content, 3) context, 4) recipients and 5) whether privileged matters can be removed.

Here, the purpose of the email was for the General Counsel of Gourmet Pro, Trisha Washington, to respond to CEO Maria Johnson's questions about litigation against their competitor. On its face, the email is about giving advice about litigation: its purpose is legal advice.

Its content also points to the entire document being legal advice protected by privilege. Each of the three paragraphs is explicitly about legal advice. The first paragraph describes and explains the implications and contours of the class-action lawsuit against Gourmet Pro's competitor. The second paragraph begins "legal considerations also suggest" followed by a series of legal recommendations. Finally, the last paragraph begins, "to help insulate us from legal liability," followed by more legal recommendations.

Document One's context and recipients also points towards its predominant purpose being legal advice. The CEO is worried about a litigious environment in their industry, and received an email from the general counsel with information about these worries. There are no unprivileged matters that could be removed, because the entire document is legal advice.

All five factors weigh in favor of Document One being legal advice under the *Franklin Department of Labor* (and *In re Grand Jury*) test.

Additionally, while *Spinex* holds that each paragraph of an email should be looked at separately

to determine the purpose of each paragraph, each paragraph in this email is primarily legal advice, as detailed above.

Document One is thus entirely legal advice, not subject to discovery because of the attorney client privilege.

## **Document Two**

Document Two likely has a predominant purpose of seeking business advice. As such, only some portions of it are protected from subpoena under attorney-client privilege.

We must apply the Franklin Department of Labor five-factor test to determine whether the primary purpose of Document Two is legal or business advice.

First, we must determine the purpose of the report. The report is titled "Embracing Safety as a Business Priority," which suggests that the recommendations are about business, not law. In the first paragraph, where the law firm details its purpose in creating the report, it writes that its main purpose is to help Gourmet Pro to "Maintain its reputation." This could either be business or legal: business because a good reputation helps money flow in, and legal because the business will only maintain a good reputation if there are not large class action lawsuits against it. But then, in paragraph two, the purpose is said explicitly: "Our main goal is to ... develop business recommendations [about] safety concerns." Given this last statement, combined with the title of the report, a court would likely find that this factor of the predominant purpose test weighs towards the report being business, not legal.

This conclusion comports with a similar finding by the court in *Franklin Department of Labor v. Valuemark*. The report at issue in that case, also written by lawyers, was similarly said to offer "business recommendations," and the court ultimately held that the report was predominantly business advice.

Next, we look at the content of the report. The first 2 paragraphs set out the purpose of the report, the next paragraph offers a summary of Gourmet Pro's business, and the fourth paragraph discusses Gourmet Pro's past legal actions. Finally, the report ends with four paragraphs of "business recommendations," some of which include looking with more depth into legal exposure. This factor likely does not weigh in favor of either a legal or business predominant purpose. It is a mix between *Booker*, where the report in question was mostly a legal analysis of tax statutes (and the court found that the report was legal advice), and the *Middleton Report* in *Value Mart*, which was mostly factual information about the business (which the court found was business advice). In our case, Document Two seems to contain a mix of what the *Booker* and *Value Mart* reports did, so this factor likely does not weigh heavily either way.

Next, we look to the context of the report. The context of the report is that it was not prepared in connection with any pending litigation or government investigations. However, it seems to have been prepared with the whiff of litigation in the industry in the air--Gourmet Pro, after all, is suddenly concerned about "maintaining its reputation." However, the court in *Value Mart* found that this third factor weighed against finding the report as legal advice because the report was not prepared for any enforcement action. So, because the report in this case was not prepared for legal action, a court might find that it was not legal advice.

Next, we look at the recipients of the report. It was prepared for the management and board of Gourmet Pro, with a series of business recommendations that border on legal ones. This is similar to the report in *Value Mart*, where the court wrote, "the identity of the recipient does not determine the predominant purpose of the document." Therefore, this element likely does not weigh heavily one way or the other.

Finally, we look at whether some of the paragraphs can be excluded. In our report, they likely can be separated out by paragraph. As *ValueMart* states, if the legal paragraphs can be separated out, the court will weigh this factor in favor of finding a business purpose.

And, while the report in our case states that it is confidential and privileged, so too did the report in *Franklin Dept of Labor v. ValueMart*. In that case, the court held that the report was predominantly business advice, even despite that each page of the report read "privileged adn

confidential attorney-client communication." So, even though our report also stated that it was privileged, a court would likely look behind this declaration to the five factor test, just as it did in *Value Mart*.

Ultimately, a court would likely find that this document was predominately prepared for business purposes. Therefore, it would come in, and our client could only protect certain parts of it through attorney-client privilege.

Here, a court would likely find that paragraph four could be protected by attorney-client privilege. In paragraph four, the report discusses Gourmet Pro's legal exposure to lawsuits, and settlement numbers. This is explicitly a roundup of all of Gourmet Pro's legal exposure and so would likely be found to be predominately legal advice: it tells the company where it has stood historically with liability to tort suits.

Paragraph 1 of the Business Recommendations section also might be protected by attorney client privilege, because it could be seen to be legal advice. The report recommends that employees be required to report all violations of law, rules, regulations, or ethics, which could be construed to be legal advice, because it directs company employees to do something to better comport with the law. Our client should therefore move to protect this paragraph.

Paragraph 4 of the Business Recommendations section is also protected by attorney client privilege, because it is an explicit recommendation to do more legal research on legal exposure. Our client should move to have it protected from subpoena by attorney-client privilege.

### **Document Three**

Document Three is similarly only partially protected by attorney client privilege.

In order to determine the primary purpose of Document Three, we must look at the five factor test. First, the purpose of the email is not immediately clear. Mr. Alexander is asking about two different issues, one non-legal and one legal. He doesn't appear to privilege one over the other.

Next, the content and context are similarly split down the middle between business and legal because of the way he has structured the email, dividing it evenly between issues with no overarching discussion of the context. The recipient is the General Counsel, but as we know from *Franklin Department of Labor*, the recipient is not dispositive. Finally, we can break out pieces of the email into legal and non-legal advice, so that factor weighs in favor of finding this to be business advice that would come in, except for the paragraphs we can break out.

Because Document Three is an email that addresses a mix of topics, we know that we must address each paragraph separately to determine if it is "predominantly" legal or business. *Infusion v. Spinex*.

Issue One (paragraph one) is likely business advice and does not come in. Mr. Alexander is asking for advice about how to present a five year summary on the annual report, published on their website. He's asking for her stylistic take, not her legal take. This is classic business advice, and would likely come in as evidence. It is similar to the *Middleton Report* in *Value Mart*, where the report was offering business advice, covering nitty gritty details of running a business (ingress and egress to company stores), just like Issue One is covering nitty-gritty details of running a business (how to present our five year summary).

Issue Two (paragraph two), on the other hand, is likely requesting legal advice. Mr. Alexander wants to know about "potential exposure"--likely legal exposure--because of an uptick in consumer complaints. He seems to be suggesting that there may be some kind of products liability problem. He then asks for advice about sitting down with employees to talk to them about this legal problem. This is all classic legal advice, and so this paragraph could be excluded under the attorney-client privilege. This legal advice is more like the *Booker* report's offering of legal advice about complying with tax law.

Ultimately, Document Three likely has a predominant purpose of business advice, so it is only partially protected by attorney-client privilege. Only paragraph one can come in, because paragraph two requests legal advice from Gourmet Pro's legal counsel.

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## CO 7/2025 MPT-2 - Selected Answer #2

\*\*\*\*\* MPT 2 STARTS HERE \*\*\*\*\*

Robinson Hernandez LLP  
Attorneys at Law  
30 South Point Plaza  
Milton, Franklin 33705

### MEMORANDUM

To: Anita Hernandez, partner  
From: Examinee  
Date: July 29, 2025  
Re: Gourmet Pro response to CPSC

### Introduction

In Franklin, the attorney-client privilege applies to "communications made between a client and their professional legal adviser, in confidence, for the purposes of seeking, obtaining, or providing legal assistance to the client." ValueMart citing Franklin Mut. Ins. The purpose of the attorney-client privilege is to "promote open and honest discussion between clients and their attorneys. ValueMart citing Moore. The threshold inquiry of analysis is determining whether the contested document embodies a communication in which legal advice is sought or rendered. ValueMart. The privilege is strictly construed. Id. Non legal work such as advice on matters of public relations, accounting, employee relations, and business policy but not seeking legal advice is not considered privileged merely because the communication is with a lawyer. Id.

Advice given by corporate counsel often serves both a legal purpose and a business purpose. Id. When a document contains both business and legal advice, the attorney-client privilege protection will apply to the entire document if the predominant purpose of the attorney-client communication is to seek legal advice or assistance. ValueMart citing Federal Ry; see also Spinex. However, if the predominant purpose is business advice, then it is necessary to examine the document to determine if any portion of the document is legal advice. ValueMart; see also Spinex. If portions of the document are legal advice, then only those portions are protected by attorney-client privilege. ValueMart citing Franklin Machine Co. Determining the predominant purpose of a document is a highly fact specific inquiry and requires courts to consider the totality of the circumstances surrounding the document. ValueMart. Courts often consider five relevant factors: (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 any disclosure. ValueMart citing In Re Grand Jury.

### **I. Document One: Email from general counsel to CEO of Gourmet Pro is predominantly for legal advice and the full document should be protected.**

Considering the five factors to determine the predominant purpose of of a document from corporate counsel, Document One's predominant purpose is to seek legal advice or assistance, and the full document should be protected by the attorney-client privilege.

First, the third sentence of the document states that the purpose of the email is to communicate the implications for Gourmet Pro of the high-profile litigation against Main Street. In contrast to the document in ValueMart where the stated purpose was to gather information and offer business recommendations, the purpose of this document is much more clearly about legal advice, given that it centers around implications of litigation.

Second, the content of the communication is largely an analysis of litigation risk and legal liability for Gourmet Pro. Though the document contains a couple of sentences recommending meeting with other departments or asking other departments to take on certain tasks, these recommended meetings and tasks are related to the legal risk to Gourmet Pro and are not aimed at providing business advice.

Third, with regard to the context of the report, the class action against Main Street is already

underway, unlike in ValueMart where the litigation was not yet pending when the report was written. The document here was written in the context of ongoing litigation in the industry.

Fourth, the only recipient of the communication is the CEO of the company. While the identity of the recipient does not determine the predominant purpose of the document (ValueMart), it helps to contextualize the communication further. The fact that this was an email to only the CEO provides support for the notion that the entire document was for legal advice because it was not provided to a large group of individuals at the company.

Fifth, legal advice permeates the document and is intertwined with any potential business advice also included in the document. As mentioned previously, the document contains some recommendations regarding meetings and tasks for other departments, but the suggested meetings and tasks are not related to business advice but are rather related to the company's litigation risk.

Document one is likely fully protected under attorney-client privilege because the predominant purpose of the document is to seek legal advice.

## **II. Document Two: Executive summary of report from outside law firm is predominantly for a business purpose, but paragraph 4 should be protected as legal advice.**

The five considerations from ValueMart to be used in determining whether a document is predominantly for a business purpose or for legal advice point toward document two's predominant purpose being business advice.

First, the purpose of the communication is for the outside law firm to learn the company's processes and practices and develop business recommendations to make the company better when it comes to dealing with safety concerns. This is very similar to the purpose of the document in ValueMart which was to gather information about ValueMart's facilities and offer business recommendations. The purpose of both documents is stated to be providing business recommendations.

Second, the content of the communication is largely business recommendations and an analysis of factual information, just as in ValueMart.

Third, the context of the communication provides support for the notion that the document is primarily for a business purpose. The document, like the document in ValueMart, was not created in connection with any pending litigation but rather to review Gourmet Pro's policies and processes.

Fourth, the recipients of the report are the management and board of directors of Gourmet Pro. While these are typically the core privilege group for legal advice, this is not determinative of the predominant purpose of the document.

Fifth, legal advice does not permeate the document. Rather, it can be easily separated. The document contains separate paragraphs and a separate section titled "business recommendations," so legal advice can be separated from the rest of the document.

Having determined that the predominant purpose of the document is for business advice, it is necessary to determine if any portion of the document is legal advice. In Document Two, paragraph 4 is legal advice and should be protected by attorney-client privilege. The paragraph talks about the potential for Gourmet Pro's liability and discusses previous reports of product defects. This sensitive information is closely related to any potential litigation and does not provide any separate business advice. Paragraph 4 in Document Two should be protected.

## **III. Document Three: Email from Gourmet Pro's chief auditor to general counsel is partially seeking business advice and partially seeking legal advice.**

The first factor under the ValueMart five factor test is the purpose of the communication. The purpose of this communication is to seek the general counsel's advice regarding employees in the neighboring state of Olympia. The purpose of the communication in Document Three is not clearly for legal advice or business advice.

Second, the content of the document is about half business advice and half legal advice. The first question is about how to present the safety audit results. This is a purely business question

because it does not relate to interpreting rules or statutes and is not related to litigation. The second question, however, is about consumer complaints about products manufactured in Olympia and, although the question does not directly ask for legal advice, consumer complaints increase the risk of legal action, so the second question is mainly for legal advice.

Third, the context of the document does not indicate any ongoing litigation or express concerns about legal risk, nor does the context seem to involve interpreting federal regulations or statutes as did the document in Booker. The context points toward the document being primarily for business advice.

Fourth, the recipient of the communication is the general counsel, which indicates that the communication might be for legal advice. However, the general counsel at Gourmet Pro is also a trusted member of the executive team and is often involved in high level business discussions. Thus, the fourth factor is not determinative.

Fifth, any privileged matters can be easily removed from the document. Because the document contains two separate questions, the question relating to legal advice can be easily separated and removed from the document. Though the first question deals with audit, its purpose is not to assist the company in complying with regulations like in Booker. See also ValueMart citing Hewitt & Ross. Rather, the purpose is to get advice on how to represent the data, which is a business purpose. However, the second question presents issues of potential liability because it may lead to assessing legal liabilities or trying to prevent those legal liabilities. See ValueMart citing Hewitt & Ross.

Because it is necessary to address each paragraph separately and determine if it is predominantly for legal advice or business advice, the first paragraph of the email should be treated as seeking business advice and the second paragraph should be treated as seeking legal advice. Spinex.

### **Conclusion**

Using the five part test set out in *In Re Grand Jury* and expanded upon in ValueMart, the first document should be entirely protected because the primary purpose is for legal advice. The second document should be treated as primarily seeking business advice, but paragraph 4 should be protected under attorney-client privilege as seeking legal advice. Finally, the third document should be treated as partially seeking business advice and partially seeking legal advice.

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