

Maryland State Board of Law Examiners
JULY 2025 UNIFORM BAR EXAMINATION (UBE) IN MARYLAND –
REPRESENTATIVE GOOD ANSWERS

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MPT 1

Representative Good Answer No. 1

I. The Court should qualify Dr. Shulman as an expert and admit her opinion testimony.

a. For the Court to qualify Dr. Shulman as an expert and admit her opinion testimony, she must meet the qualifications as an expert under Rule 702, adopted by Franklin Civil Code 233, consistent with the Supreme Court's decision in Daubert.

The criteria for an expert under this standard is whether an expert's "reasoning or methodology properly can be applied to the facts at issue." This includes two distinct prongs of the Daubert inquiry: qualifications and reliability. Rule 702 tells us that a qualified expert who has knowledge, skill, experience, training or education may provide their opinion testimony. Further, the testimony must be based on sufficient facts or data, the product of reliable principles and methods, and those facts and data must have been reliably applied to the principles and methods used. Dr. Ariel Shulman meets both prongs of Daubert as both a qualified and a reliable expert, and therefore should be admitted under this Court's standards.

b. Dr. Ariel Shulman meets the proper standards to be qualified as an expert in orthopedics for the purposes of this trial.

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. To be qualified as an expert the witness must possess scientific, technical, or specialized knowledge on all topics that form the basis of the witness's testimony. In this case, Dr. Shulman meets the criteria expressed in *Smith v. McGann* to be qualified as an expert in orthopedics. Dr. Shulman completed a residence in orthopedic surgery, she is board-certified in orthopedics, and is currently a professor of orthopedics at a Medical School. She has done hundreds of knee and hip replacement surgeries, and attends conferences and writes about how to properly perform these exact procedures. Although the plaintiff may argue that Dr. Shulman has not performed on hip replacement on a living patient since 2019, Dr. Shulman still possesses the knowledge and skills to testify regarding the proper standard of care for orthopedists and whether or not an orthopedist has breached their duty of care. Courts will also examine, as stated in *Smith*, whether the witness can demonstrate familiarity with the standard of care where the injury occurred. In *Smith*, the court mentions that Dr. Adams, the expert, testified that he had studied the demographics of the two locales where the case took place and where he practiced, and that the standard of care were virtually the same. Plaintiff may try to argue that the difference in locale between Olympia and Franklin disqualifies Dr. Shulman as an expert, however this is misstating the analysis in *Smith*. *Smith* did not require that an expert be intimately familiar with the two regions, and did not require that the expert have done a population and availability of medical care analysis. Rather, the court focused on those factors in addition to the fact that the testifying expert in *Smith* was aware that the standard of care between North Brunswick and Franklin was virtually the same. Dr. Shulman made a similar determination in her testimony to this court, when she stated that the "practice of orthopedics is pretty much the same in both states (Olympia and Franklin)." Additionally, she stated that she completed her residency in orthopedic surgery at Franklin Medical Center, so she is aware of the standard of care in orthopedics as Franklin is where she has completed most of her surgeries. Therefore, Dr. Shulman meets the standard to be qualified as an expert in orthopedics.

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c. Dr. Ariel Shulman meets the proper standards to provide a reliable expert opinion.

An expert opinion is reliable if the opinion is based on a scientifically valid methodology. The trial courts are instructed to use the factors included in the statute, such as sufficient facts or data, reliable principles and methods, and a reliable application of those methods to the facts.

Additionally, courts can "utilize any other factors" they deem appropriate. Dr. Shulman testified that the fracture and dislocation that the plaintiff suffered did not occur during or immediately after the surgery but occurred two weeks later, and that at no time did Dr. Jost's treatment depart from the good and accepted standards in the community. This opinion was based on reviewing all the surgical and medical records, the complaint and answer, and performing a personal physical examination of the plaintiff herself. Those demonstrate reliable facts and data from which Dr. Shulman based her opinion. Further, Dr. Shulman used reliable principles and methods in forming these opinions because she based them on her long experience performing hip replacements, medical literature on this area, information she learned from attending conferences on joint replacements, and following relevant up-to-date articles. This demonstrates that Dr. Shulman used reliable principles and methods, and when she applied those to the reliable facts and data, she came to a reliable expert opinion.

d. Therefore, Dr. Shulman meets the two distinct prongs to be certified as an expert in orthopedics: She is qualified as an expert, and her opinion is reliable. For these reasons, Dr. Shulman should be admitted as an expert in orthopedics.

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

a. The Court should not find Dr. Ajax to be a qualified expert.

Dr. Ajax is not qualified as an expert because he does not possess the skills, and knowledge on all topics that form the basis of his testimony. Although he currently practices in Franklin as an orthopedist, is familiar with the standard of care, and does all types of hip replacements, he did not testify to any other specialized skills or knowledge from which he could base his opinion.

Although he has done 50 hip replacements in private practice and did around 100 during residency, only 20 of those were done by himself. He completed his residency in orthopedics in 2007, which means that over the span of the last 18 years he has only done around 3-4 orthopedic surgeries. As this is the only basis for his qualifications, he does not have enough of the specialized skills and knowledge to testify.

b. Even if Dr. Ajax is qualified as an expert, the Court should exclude all of his proffered opinion testimony as it is not reliable.

There are many factors with which courts can assess the reliability of expert testimony. One of these factors is the degree to which the expert's opinion and its basis are generally accepted within the relevant community, whether experts in the field would rely on the same kinds of evidence to reach their opinions. The court in Smith tells us that speculation about what might have occurred had the facts been different can never provide a sufficiently reliable basis for an expert opinion. In this case, Dr. Ajax could only provide speculation about what might have occurred had the facts been different. The facts of Smith regarding this factor exactly mirror the facts regarding Dr. Ajax's testimony. Dr. Ajax in his testimony, states that Dr. Jost departed from good and accepted medical practice because he failed to order another X-ray from a different position; this is the same argument that Dr. Brown made in Smith. The Smith court, as a result, excluded the testimony of Dr. Brown because she did not demonstrate that her methods were reliable because she based it on the "possibility" of a fracture. This type of speculation is the same as Dr. Ajax's, when he says a second X-ray "might have shown" a fracture. Because of this speculation, Dr. Ajax's testimony as to causation is speculative and without reliable basis and therefore should be excluded.

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III. 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 elements of her malpractice claim.

The plaintiff failed to offer any admissible evidence to show that Dr. Jost's supposed breach was the cause of the injuries that plaintiff suffered.

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. In this case, the plaintiff failed to prove that even if Dr. Emil Jost breached his duty of care, that the breach of the standard of care caused harm to the plaintiff.

According to the Franklin Appeals Court in *Jacobs v. Becker*, 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, (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 harm to the plaintiff. According to *Jacobs*, in a medical malpractice case expert testimony is required for the plaintiff to meet their burden of proof for these elements. Only expert testimony in a medical malpractice case can demonstrate how the required standard of care was breached and how the breach caused the injury to the plaintiff. In this case, because the plaintiff failed to provide any expert testimony that sufficiently establishes the causation element of the prima facie negligence case, this justifies an adverse ruling on summary judgment against the plaintiff and in favor of Dr. Jost.

It is clear that the elements of causation is not met to survive a motion for summary judgment, because nowhere in the plaintiff's expert's (Dr. Robert Ajax's) testimony does Dr. Ajax make a clear statement establishing how Dr. Jost's breach caused the plaintiff's injury. To establish the breach of care, Dr. Ajax testifies that Dr. Jost "departed from a good and accepted medical practice in failing to order another X-ray from a different position." Dr. Ajax justifies this inaction as a breach because, "A second X-ray, from a different angle, might have shown that the prosthesis was out of place or that there was a broken bone." Dr. Ajax contends that the breach of the proper standard of care was the failure to do an additional X-ray, stating that the one front-to-back X-ray did not comport with the standard of care in Franklin. However, upon establishing this breach of the standard of care, Dr. Ajax does not allege facts sufficient to find that the failure to get a second X-ray caused the plaintiff's injury. Even viewing the evidence in the light most favorable to the nonmoving party (the plaintiff), the essential element of causation is missing from the plaintiff's prima facie case.

In *Smith v. McGann*, the court tells us that "speculation about what might have occurred had the facts been different can never provide a sufficiently reliable basis for an expert opinion." This means that the reliability of Dr. Ajax's conclusion regarding causation, that the failure to do an additional X-ray "might have shown" additional information, is not a sufficient basis to overcome the motion for summary judgment. Further, the court in *Jacobs* tells us that when there is a complete failure of proof concerning an essential element of the nonmoving party's case, that there is "no genuine issue as to any material fact" and the motion must be granted. In this case, Dr. Ajax's testimony suggests that there was a breach, but does not establish that but for the breach that the plaintiff's harm would have occurred. Instead, he offers speculation, which can never provide a reliable basis for an expert opinion. Dr. Ajax's testimony ignores key facts, such as the fact that the X-ray that was done showed no signs of fracture or damage, and that the plaintiff ignored the directions from Dr. Jost to not bend at a 90 degree angle for six weeks, and did so after two weeks. Therefore, the elements of the prima facie case for negligence did not establish a factual basis for these elements, even when viewing the evidence in the light most favorable to the nonmoving party. Therefore, our motion for summary judgment should be granted.

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Representative Good Answer No. 2

TO: Sydney Nichols
From: Examinee Date: July 29, 2025
RE: Lowe v. Jost Medical Malpractice Expert and Summary Judgment Brief

Hi Sydney,

You have asked me to draft a section of our brief that outlines to the Court why 1) our expert, Dr. Ariel Shulman, and his testimony, should be admitted, 2) the plaintiff's expert, Dr. Robert Ajax, is not qualified as an expert, and even if he is his testimony should be excluded, and 3) even if Dr. Ajax is qualified as an expert, there is no genuine dispute of material fact so our motion for summary judgment should be granted.

Please find below that brief. Please let me know if you have any questions related to it.

Ms. Lowe has sued Dr. Jost for malpractice, alleging that Dr. Jost was negligent in performing a hip replacement which subsequently caused her injuries. In support of her allegations, Ms. Lowe seeks to admit testimony from Dr. Robert Ajax. As will be shown, Ms. Lowe has failed to offer any admissible evidence on the prima facie elements necessary for her malpractice claim.

Furthermore. Ms. Lowe's expert witness, Dr. Ajax, is unqualified to be an expert and nor his opinion testimony is not reliable. For these reasons, the Court should grant summary judgment in favor of Dr. Jost.

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 failed to conform to that specific standard of care, and 3) that the breach of the standard of care caused the harm o the plaintiff." *Jacobs v. Becker* (Fr. Ct. App. 2020) "Expert testimony is required in medical malpractice cases because only expert testimony can demonstrate how the required standard of care was breached and how the breach caused the injury to the plaintiff." *Id.*

1) Dr. Schulman is qualified to be an expert and the court should admit her opinion testimony under FRE 702.

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*. Under the Franklin Rules of Evidence 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 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." "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."

FRE 702 was amended by Franklin Civil Code §233 following the Franklin Supreme Court's "determination that Franklin would adopt the United States Supreme Court's approach in *Daubert*" in *Park v. Green* (Fr. Sup. Ct. 1999). In *Daubert*, the Supreme Court "clarified that 'general acceptance' was no longer the standard for determining the reliability of expert testimony. Instead, the trial court had broader latitude to determine whether an expert's 'reasoning or methodology properly can be applied to the facts at issue.'" *Smith v. McGann* (Fr. Ap. Ct. 2004). This standard makes the trial court the "gatekeeper" in determining whether expert testimony is admissible.

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In following Daubert, the trial court must determine whether each party's experts are sufficiently qualified to testimony. Smith. The court must look to the qualifications and reliability of the witness. A witness is qualified as an expert if he is the type of person who should be testifying on the matter at hand. Id. An expert opinion is reliable if the opinion is based on a scientifically valid methodology. Id. The two inquiries are not to be conflated; to do so is legal error. Id.

In Smith v. McGann, the Franklin court faced a medical malpractice case where there was an issue of admitting expert testimony. In Smith, the plaintiff alleged a failure to diagnose a fracture of their tibia by the doctor which allegedly caused them pain. There, the court held that an expert witness must "demonstrate familiarity with the standard of care where the injury occurred" but 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 court went on to admit the expert testimony of Dr. Adams, who was an orthopedist in New Brunswick, a state 800 miles from Franklin. In admitting Dr. Adams as a qualified expert, the Franklin court found it important that Dr. Adams based his opinion on "his many years of experience in orthopedics, the many articles he had read and conferences he had attended, and the fact that other physicians relied on his diagnosis of fractured bones."

Under FRE 702, experts are qualified based on their knowledge, skill, experience, training, or education. Dr. Shulman is qualified to be an expert based on all of these criteria. Dr. Schulman, like Dr. Adams in Smith, has many years of experience in orthopedics as a practitioner and professor, the medical literature on joint replacements that he keeps up with from the Journal of The American Medical Association and the New England Journal of Medicine, and attends and lectures at conferences on joint replacement. Dr. Shulman has vast experience in the area of hip replacements, the subject area of this dispute, and he is a well-respected figure who is relied upon by many in the area as evidenced by his presenting lectures on the appropriate procedures for joint replacements at annual conferences and his teaching of students how to do knee and hip replacements at Olympia University of Medical School. Dr. Shulman is also board certified in orthopedics, which "means that [he has] finished [his] residency in orthopedics and that [he has] passed the board certification exam."

The plaintiff attacks Dr. Shulman's qualifications by arguing that he no longer practices in Franklin and so he is not familiar with the standard of care necessary for the state. This is a baseless argument. As the Franklin Court noted in Smith, an expert witness need not specifically practice in the same community as the defendant. But more importantly, while Dr. Shulman currently teaches orthopedics in Olympia, he was educated and practiced orthopedics for many years in Franklin. His personal experience in Franklin is numerous. According to his affidavit, Dr. Shulman graduated from the University of Franklin Medical School and completed his residency in orthopedic surgery at Franklin Medical Center, During his time in private practice, which occurred in Olympia, he completed on average, 100 knee and hip replacements per YEAR. Dr. Shulman has also written three articles on the proper procedures for knee replacement. And as Dr. Shulman has testified, he determined the standard of care in Olympia by his personal experience having operated in Olympia and Franklin. The plaintiff's find probative Dr. Shulman's admission that Olympia has a much smaller medical community than Franklin but this is immaterial. As the Franklin Court noted in Smith, Dr. Adams testified from his studying of Franklin and North Brunswick that the standard of care in orthopedics was virtually the same in Franklin and in North Brunswick. The court then noted that "he was properly qualified as an expert in orthopedics." So too here. It is evidence that Dr. Shulman is preeminently qualified to be an expert on the standard of care of orthopedics in Franklin based on his vast experience, training, and knowledge.

Furthermore, Dr. Shulman's testimony is reliable and should be admitted. Dr. Shulman conducted a thorough examination of all the surgical and medical records and performed a physical examination of Ms. Lowe, as noted in his affidavit. Dr. Shulman's testimony that Dr. Jost met the standard of care in the community is based on medical literature and his experience, and his reviewing of the notes of the surgery. In Smith, the court noted that reliability of an expert depends on whether or not it is based on speculation of what might have occurred. It is evidence that Dr. Shulman's testimony is not based on speculation but on the facts of the case. In Ridley v. St. Mark's hospital, the court noted that "expert opinions were based on sufficiently reliable methodology when based on medical records, Ct scans, medical notes, and deposition testimony." Dr. Shulman noted that Dr. Jost performed the adequate range-of-motion testing during surgery before closing the incision and he reviewed the post-operative X-ray that Dr. Jost ordered and reviewed. Dr. Shulman evaluated the x-ray and determined that Dr. Jost's medical assessment was at all times appropriate and fully comported with the standard of

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care and that as a result “no act or omission attributable to Dr. Jost proximately caused any of the injuries.” It is clear that Dr. Shulman’s testimony is reliable because it is not speculative but determined on the basis of what proper care for his replacement looks like and a comparison of Dr. Shulman’s care to those standard. Dr. Shulman is credible based on the extent of his qualifications and his testimony should be admitted by the court under the standards set forth by FRE 702.

2) The court should not find Dr. Ajax as qualified to be an expert nor should it admit his testimony under FRE 702.

The same rules in evaluating Dr. Shulman’s qualifications and reliability apply to evaluating Dr. Ajax. However, it is clear that Dr. Ajax is not qualified nor reliable and any proffered testimony should be excluded by the court.

Dr. Ajax is unqualified to as an expert in orthopedics given his limited experience in the area. As Dr. Ajax admitted in his testimony, he has performed 50 hip replacements since he finished his residency in 2007. Further, during his residency he “probably did about 20 [himself.] Dr. Ajax’s first-hand experience with conducting his replacements is not sufficient to warrant him to be qualified as an expert in the area. While Dr. Ajax has done, at most, 70 hip replacements in his entire career, Dr. Shulman has done on average 50 a year even if one concludes he only did half hip replacements during that time). The multitude of replacements done by Dr. Shulman far outweighs those done by Dr. Ajax. As such, in comparing Dr. Ajax to Dr. Shulman, it is clear that Dr. Shulman’s experience and knowledge of the standard of care in hip replacements in Franklin far outweighs that of Dr. Ajax. Furthermore, Dr. Ajax has not provided any proof that he keeps up with the medical literature in the area, attends conferences, or is knowledgeable about the practices of other doctors in Franklin. Dr. Ajax seeks to testify solely from his own personal adoption of standard of care in Franklin. This is insufficient basis to form an opinion that is admissible.

Additionally, even if the court finds that Dr. Ajax is qualified to be an expert, the court should not admit his testimony because it is unreliable and uncredible. Dr. Ajax’s testimony is based on pure speculation and makes no reference to the proper standard of care adhered to in Franklin.

Dr. Ajax’s testimony makes no mention of his evaluating the medical record, the surgery notes, or any of the complaints and allegations in the case, in contrast to Dr. Shulman who evaluated all of the aforementioned items before forming his opinion. As the Ridley court noted, evaluation of these records is important for an expert to form a reliable opinion and that “speculation about what might have occurred had the facts been difference. can never provide a sufficiently reliable basis for expert opinion.” Dr. Ajax simply states that Dr. Jost departed from “good and accepted medical practice in failing to order another x-ray from a different position” because “a second x- ray, from a different angle, might have shown that the prosthesis was out of place or that there was a broken bone.” Dr. Ajax’s testimony is clearly speculative. The use of “might” and potential language to indicate that there was a possibility that further examinations could have yielded knowledge of any errors in the surgery is insufficient. This testimony proves no that the standard of care in Franklin was to order more than one x-ray and nor does it show that proximate causation that the lack of the second x-ray is what caused the injury to Ms. Lowe. Dr. Ajax claims that the front-to-back x-ray “did not comport with the standard of care in Franklin” but he provides no evidence of why this is the case. Dr. Ajax has no evidence nor anecdotal testimony that it is common practice for surgeons in Franklin to order more than one post- operative surgery when the first x-ray yields no evidence of issues or concerns.

Nor does Dr. Ajax also makes no mention of the standard of care in the actual surgery room to evaluate whether the hip prosthetic has been properly place. Contrastingly, Dr. Shulman’s testimony clearly makes reference to the proper standard of care exercised when the patient is under anesthesia and the post-operative care and instructions to be made. Additionally, Dr. Ajax mentions nothing about what kind of post-operation instructions are to be proffered to the patient. Rather, the testimony that Dr. Ajax offers is merely based on a claim that more additional inquiry by Dr. Jost could have yielded evidence of incorrect placement. As noted in Park v. Green, “an expert opinion is fundamentally unsupported when it fails to consider the relevant facts of the case.” Dr. Ajax has done precisely this. Dr. Ajax did not consider what instructions Dr. Jost provided Ms. Lowe for her post-operative care. Dr. Ajax did not evaluate the method of insertion and the surgical room evaluation of the prosthetic placement. Nor did Dr. Ajax consider whether the first x-ray offered provided any evidence of issues with the hip placement such that a second x-ray would have been warranted. Rather, Dr. Ajax simply

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conjectures that a second x-ray could have helped discover an issue “from a different angle” and so there was deviation from the necessary standard of care. This is unreliable and incredible testimony. When an expert’s opinion “is so fundamentally unsupported that it can offer no assistance to the jury, it must be excluded.” Dr. Ajax’s testimony because it is fundamentally unsupported and so cannot offer any assistance to the jury. As such, even if the court finds that Dr. Ajax is qualified to be an expert, his testimony should be excluded.

“A party’s failure to provide any expert testimony on causation or the standard of care justifies an adverse ruling on summary judgment.” Jacobs If the court finds that Dr. Ajax should be excluded as an expert, summary judgment must be granted in favor of Dr. Jost.

3) The court should grant summary judgment for Dr. Jost because Plaintiff has failed to offer any admissible evidence to plead a prima facie claim of malpractice.

Even if the court admits Dr. Ajax as an expert, and his testimony, the court should grant summary judgment in favor of Dr. Jost because there is no material dispute of genuine fact. As previously noted, the plaintiff must prove three elements to establish a prima facie case of negligence - 1) duty, 2) breach, 3) causation. Jacobs. It is undisputed that Dr. Jost owed Ms. Lowe a duty of care as her physician. If Dr. Shulman’s expert testimony is admitted, as it should be, it is clear that Dr. Jost did not breach any duty owed to Ms. Lowe because he at all times abided by the specific standard of care necessary in Franklin for orthopedic surgeries. But even if the court believes that Dr. Jost breached the standard of care owed, the court must grant summary judgment because, viewed in the light most favorable to the nonmoving party (Ms.

Lowe), there is no genuine dispute of material fact that Dr. Jost caused the injury to Ms. Lowe. A material fact is a fact that is essential to the establishment of an element of the case and determinative of the outcome. Jacobs.

Ms. Lowe alleges in her complaint that she “felt a sharp and excruciating pain that caused her to drop her purse” and fall to the ground in pain on March 16, 2022. Ms. Lowe has not disputed Dr. Jost’s testimony that he instructed Ms. Lowe that she should not bend more than 90 degrees at the waist and should not twist at the hip for 6 weeks following her surgery. Dr. Jost gave her those instructions the day after surgery, on March 2. Furthermore, Dr. Jost testifies that the physical therapist reminded Ms. Lower of those precautions at their first meeting as well. And, Ms. Lowe was again instructed on these precautions when she began using a cane instead of a walker two weeks after surgery. This is undisputed in the record.

In Jacobs v. Becker, Ms. Jacobs “failed to use” the antibiotics prescribed by Dr. Jacobs. The court held that this failure to do so was the cause of her injuries rather than any malpractice on the part of Dr. Becker.

The injury to Ms. Lowe that occurred on March 16, and the subsequent hip reversion, was the result of Ms. Lowe’s own negligent acts and cannot be traced back to Dr. Jost. As the affidavit of Karen Baines shows, Ms. Lowe did not abide by the instructions against bending and twisting for 6 weeks following surgery. Rather, 15 days after her surgery, and mere days after she was again reminded of the precautions against doing so when she received her cane in exchange for the walker, Ms. Lowe “bent over to pick up her purse” that she had dropped in the Cloverdale Condominiums. See affidavit of Karen Baines. Ms. Baine has testified, under oath and on the record, that she saw Ms. Lowe drop her purse and that she offered to pick it up for her. Rather than take Ms. Baines up on that offer, “she said that she didn’t need my help and then she bent over to pick up her purse. To pick up the purse, she bent forward at the waist and touched the ground with her hands.” Ms. Lowe did precisely that which she was warned against doing - she bent forward 2 weeks post-operation. The causation of her injury that occurred “immediately after picking up the purse and standing back up” was not the result of a defective hip surgery but rather from Ms. Lowe’s personal negligence. Ms. Lowe was aware she was not to bend down and yet she did it anyway. She immediately “cried out in pain” and fell to the pavement, not because the hip was negligently inserted, but because Ms. Lowe acted negligently in failing to adhere to the instructions set forth by Dr. Jost and that which she was subsequently reminded of on numerous occasions in the two weeks following surgery.

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The summary judgment motion must be viewed in the light most favorable to Ms. Lowe. On doing so, it is clear that the record is undisputed with regards to Ms. Baine’s testimony of Ms. Lowe’s actions on March 16. Ms. Lowe has provided no evidence to dispute this testimony or offer any evidence that she felt the pain prior to her dropping the purse. As such, there is no genuine dispute of material fact that Ms. Lowe bent down to pick up her purse which caused her injury. “The moving party is entitled to a judgment as a matter of law [when] the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. Alexander. Ms. Lowe has the burden of showing a prima facie case of negligence. Ms. Lowe has failed to meet her burden, and so summary judgment is warranted in favor of Dr. Jost.

As explained, this court should admit the expert testimony of Dr. Shulman, reject Dr. Ajax as a qualified expert, and exclude any proffered testimony by him. Furthermore, this court should grant summary judgment in favor of Dr. Jost because Ms. Lowe has failed to make a sufficient showing on essential elements of her claim. Because there is no genuine dispute of material fact on causation, summary judgment in favor of Dr. Jost should be granted.

MPT 2

Representative Good Answer No. 1

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

The legal standard is found in *Franklin Dep’t of Labor v ValueMart* (Franklin Supreme Court, 2019) and in *Infusion Technologies Inc. v Spinex Therapies LLC* (Powell County District Court, 2021). 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. (citing *Franklin Mut. Ins. Co. v DJS Inc* (Franklin Supreme Court 1982)). The privilege 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. The purpose of the privilege is to promote open and honest discussions between clients and their attorneys. (citing *Moore v Central Holdings, Inc.* (Franklin Court of Appeal 2009)). A document is not cloaked with privilege merely because it bears the label “privileged” or “confidential.” *Id.* The privilege does not extend to accounting work performed by a lawyer or to occasions when a lawyer performs a financial audit or is advised of its results. *Id.* (citing *Franklin Dep’t of Revenue v Hewitt & Ross LLP* (Franklin Court of Appeal 2017)). When a document contains both business and legal advice, the protection of the attorney-client privilege applies to the entire document only if the predominant purpose of the consultation 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 privilege will still protect any portions of the document that contain legal advice. *Id.* (citing *Franklin Machine Co. v Innovative Textiles LLC* (Franklin Supreme Court 2003)). When assessing a document where the predominant purpose is business, care must be taken to identify any distinct portions that are protected by privilege because they contain legal advice or information. *Id.* If such portions are easily severable, they should be withheld from disclosure to preserve the privilege.

Determination of the predominant purpose is fact specific based on the totality of the circumstances. *Id.* (citing *In re Grand Jury* (District of Franklin 2016)). The relevant factors to determine the predominant purpose are: 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. *Id.* (citing *J. Proskauer, Privilege Law Applied to Factual Investigations*, 78 *Univ. of Franklin L. Rev.* 16 (Spring 2018)). If a document is found to have a business advice predominant purpose, only the legal advice portions of the document may be excluded, not the entire document. *Infusion Technologies Inc. v Spinex Therapies LLC* (Powell County District Court, 2021). This is also found in Rule 2.1 of the Franklin Rules of Professional

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Conduct, which states that, “In rendering advice, a lawyer may refer... to other considerations such as moral, economic, social, and political factors, that may be relevant to the client’s situation.” In that case, the court should take care to protect the intertwined content from disclosure. ValueMart.

1. The attorney-client privilege attaches to all of Document One under the predominant purpose test and should be shielded in its entirety.

The purpose of Document One is found in the email subject line, which is “Main Street class- action litigation.” This could lead to the finding that Document One is a legal advice document. The content of Document One revolves exclusively around the Main Street lawsuit, while giving relevant advice on how the class-action suit works, as well as how to prevent similar suits being directed towards Gourmet Pro. The context of Document One is that there is pending litigation against Main Street, Gourmet Pro’s competitor. While no litigation has begun against Gourmet Pro, this document was prepared to combat any potential litigation. As opposed to ValueMart, Ms. Washington is hired as General Counsel, so she is entitled to represent Gourmet Pro in any subsequent litigation. While there is no pending litigation, this leans heavily in favor of a legal advice document, as the context is between the lawyer and client regarding potential litigation. The fourth factor is the recipient of the document, in this case the CEO of Gourmet Pro. Under ValueMart, the documents were created as an analysis of the facilities, not any legal implications thereof. In this case, the document was created with specific legal advice of the company’s actions and any legal implications relating thereto. Similarly, the document was to the CEO, a management position in the company who can enforce this advice. The final factor is whether legal advice permeates the document. Here, the advice is intertwined with every paragraph except paragraph one. The second paragraph explains the lawsuit, the third explains potential liability for any actions taken by Gourmet Pro, and the final paragraph discusses shielding the company from any liability. For these reasons, it is likely to be found that the document is legal advice. If the document is found to be business advice with relevant legal advice therein, then paragraphs two and four should be excluded on the basis of pure legal advice, per the standard stated in Infusion Technologies.

2. The attorney-client privilege only applies to “Business Recommendations” paragraphs one and four of Document Two, as the rest of the document is pure business advice.

The purpose of Document Two is an audit and recommendation for safety protocols prepared by an outside firm. The content of Document Two is a safety audit of defects within Gourmet Pro’s line of grills. There seem to be no legal implications or advice that is not pertinent to the business advice purpose of the document. While there is information regarding legal issues, those are past issues that are stated to show an adherence to good safety standards and no deviation on the part of Gourmet Pro that would lead to liability. Paragraphs one and four of “Business Recommendations” are likely legal advice, as they are giving advice on how to protect from liability in a business setting. The context of the document is a prepared audit and safety evaluation conducted by a non-retained outside firm in preparation of litigation that is not imminent or current. This is consistent with ValueMart, as this document is very similar to the Middleton Report that is the basis of that case. The recipients of this communication are the management positions and the board of directors for Gourmet Pro. This is similar to the ValueMart report, as it was prepared for the management staff but mostly discusses the business implications of the company, not any legal implications of the company’s actions. The document is not permeated with legal advice, and instead the advice is contained to paragraphs one and four of the “Business Recommendations” section. This leads to the conclusion that this a business advice document, which should be produced with the relevant legal advice sections removed.

The relevant sections containing legal advice are, as stated, paragraphs one and four of the “Business Recommendations” section. These two paragraphs give legal advice on how to best prevent against any potential lawsuits and how to use the outside firm’s services to further protect Gourmet Pro. Under the ValueMart and Infusion Technologies holdings, Gourmet Pro should remove those relevant portions from Document Two and produce the rest of the document.

3. The attorney-client privilege applies only to Issue Two of Document Three, as it is legal advice while Issue One is purely business advice.

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The purpose of Document Three is twofold. The purpose of Issue One is pure business advice for the manner in which the annual report should be presented. The purpose of Issue Two is legal advice on how to advance safety while discussing the issue with managers in another facility.

The content of Issue One is pure business presentation strategy, while the content of Issue Two is advice on how to handle a legal issue to prevent liability and further complaints from another facility. The context of Issue One is an annual report and website design, and the context of Issue Two is liability and protection from such liability. The recipient of Document Three is Ms.

Washington in first her management position, then in her general counsel position in issues One and Two, respectively. The document is not permeated by legal advice, and instead has two distinct sections that can be separated to protect from legal advice being disclosed. Therefore, the document is likely to be found with a predominant of business advice, with some legal advice that can be removed.

Under the ValueMart and Infusion Technologies holdings, Issue Two can safely be shielded from production under the attorney-client privilege. The rest of the document, however is not able to be protected from production, as it is solely business advice on an annual report and website design.

To conclude, Document One should be protected in its entirety, and if not entirely, paragraphs two through four should be protected as inseparable legal advice. Document Two should be produced with paragraphs one and four of “Business Recommendations” being shielded under the privilege. Document Three should be produced and Issue Two should be protected under the privilege. While the client would prefer to protect as many documents as possible, the Powell County District Court has held that attorneys must review the documents thoroughly to prevent the courts from having to conduct in camera review of contested documents. As such, we must produce the documents while protecting the pertinent sections from production under the attorney-client privilege in order to maintain our professional responsibilities as attorneys and officers of the court.

Representative Good Answer No. 2

TO: Anita Hernandez, Partner
FROM: Examinee
DATE: July 29, 2025
RE: Gourmet Pro response to CPSC

Issue Presented: How does the attorney Client Privilege apply to three representative documents?

Brief Answer:

- Document One:
- Document Two:
- Document Three:

Analysis:

Under Franklin law, the attorney-client privilege applies to “communications made between a client and their professional legal advisor, in confidence, for the purpose of seeking, obtaining, or providing legal assistance to the client. Franklin Mut. Ins. Co. v. DJS Inc.; Franklin Dep’t of Labor v. ValueMart. This privilege also typically extends to communications between a corporate company’s lawyers with the board of directors, executives, and managerial employees who seek legal advice on behalf of the company. The attorney-client privilege is strictly construed, and the purpose of it is to foster open, honest communications between attorneys and clients. Id.; Moore v. Central Holdings, Inc. The court must determine whether the contested document “embodies a communication in which legal advice is sought or rendered.” Franklin Dept of Labor v. Value Mart. Further, just because a document says “privileged” does not mean it is automatically “privileged”. Id.

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Lawyers are often asked by clients for advice that goes beyond the technicalities of law. Rule 2.1 of the Franklin Rules of Professional Conduct. Advice from attorneys can serve purpose of providing legal advice or business-related advice. Often times, both might occur in one document or communication. When this happens, the “protection of the attorney-client privilege ‘applies to the entire document only if the predominant purpose of the attorney-client consultation is to seek legal advice or assistance.’” *Id.*; *Federal Ry. v. Rotini*. If the predominant purpose is business advice, the court must determine if any portions of the document contain legal advice, and if so, those portions will be protected by attorney-client privilege and must be excluded if they can be easily separated. *Franklin Dept of Labor v. Valuemart*; *Infusion Tech v. Spinex Therapies*.

Determining the predominant purpose of a document is highly fact specific and courts must look at the totality of the circumstances. In *re Grand Jury*. Courts should consider: 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 of whether any privileged matters can be easily separated and removed from any disclosure. See *Franklin Dept of Labor v. ValueMart*; *J. Prosjauer, Privilege Law Applied to Factual Investigations*.

I. Document One

Document One contains an email from Trisha Washington (General Counsel) to Maria Johnson (CEO) on March 25th, 2025, discussing the Main Street class action litigation as well as any potential implications for GourmetPro and steps she recommend Gourmet Pro take. To determine if this email is privileged, the Court will use the 5 factors from *Franklin Dept of Labor v. Valuemart* to determine what the predominant purpose of the document is.

1.) The Purpose of the Communication:

The Court will look at the purpose of the communication. Here, the email indicates that Trisha Washington, the General Counsel, was reaching out to the CEO to, as she states, “give some thought as to the implications for Gourmet Pro of the high-profile litigation against [their] competitor Main Street. This purpose suggests that this is legal as Ms. Washington is analyzing the class action against their competitor Main Street, analyzing the legal implications that this may have for Gourmet Pro (including a safety audit that could create sources of liability for Gourmet Pro), as well as steps that will be necessary to protect themselves against litigation. Thus, the purpose of the communication appears to be entirely legal advice as to what Ms. Washington believes will protect Gourmet Pro from liability and cuts in favor of it being privileged.

2.) The Content of the Communication:

The content of the email was a legal analysis of why Main Street is subject to liability and a class action and what steps Gourmet Pro must take to protect themselves against liability. This is similar to *Booker*, where the Court determined that the report was predominantly a legal analysis of state tax statutes and regulations, rather than *Valuemart*, where the court considered it to be more of a factual analysis. Thus, the content of the communication also is more legal advice and analysis and cuts in favor of it being privileged.

3.) The Context of the Communication:

The Court could go either way when analyzing the context of this communication. At the point that the email was written, there was no pending litigation against Gourmet Pro. Thus, the court could determine as it did in *Valuemart*, that it is not legal. However, the court will likely consider heavily the fact that GourmetPro and Main Street are competitors, and since Main Streets litigation was so highly publicized, that Gourmet Pro could also fear or be anticipation of litigation since they are the same type of company in the same community. Thus, the court will likely find the context of the communication to cut in favor of being privileged as well.

4.) The Recipients of the Communication:

The recipient of this email is the CEO of Gourmet Pro, Maria Johnson. It appears to be a private email, with no one else included. Legal advice from the general counsel to the CEO of the company via email is totally normal and reasonable. Thus, the court will likely find that the recipients of the communication also cuts in favor of privileged.

5.) Whether Legal Advice Can Be Easily Separated:

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The majority of this document includes legal analysis and advice. There are some parts that could possibly be considered business advice, such as when Ms. Washington shares that she should ask the marketing department to track media reports and generally discussing their marketing tactics. However, these are merely a few sentences in a three-paragraph email that is mostly focused on legal advice/analysis. Thus, they likely cannot be easily separated as the entire document would be so heavily redacted that those sentences would be effectively meaningless. Therefore, in conclusion, under the totality of the circumstances the predominant purpose of Document One is legal analysis, and thus the Court will likely find that the entire document is protected by privilege.

II. Document Two

Document Two is an executive summary of a report from WatsonSmith (an outside law firm) titled “embracing safety as a business priority”. It was drafted on June 30, 2024.

A.) 5-Factor Analysis:

1.) The Purpose of the Communication:

The document states that it is made after it was “prompted by high-profile controversy over several accidents and related injuries associated with propane grills” manufactured by Gourmet Pro’s competitors. While the stated purpose appears to be legal, it actually more resembles the purpose in Valuemart which was actually deemed to be business. This report is a factual analysis of GourmetPro’s processes and practices and includes business recommendations to “make the company even better when dealing with safety concerns.” Thus, the court will likely find that the purpose is more business related.

2.) The Content of the Communication:

As was with the first factor, the content of this document also resembles the report at issue in ValueMart. It contains facts regarding Gourmet Pro’s sales and business model and a factual analysis with business recommendations of prior history of product defects and recommendations to protect safety in future. Thus, the contents are less of a legal analysis and more factual.

3.) The Context of the Communication:

The context of this document cuts to be more legal than business however as this document was prepared by an outside law firm because Gourmet Pro could likely reasonably anticipate litigation against them given the litigation against other similar manufacturers. The fact that it is outside and former counsel could cut against it, but the court will likely outweigh this with Gourmet Pro’s risk of litigation. Thus, the court will likely find the context to be legal.

4.) The Recipients of the Communication:

This report was prepared for the Management and Board of Directors. While that is typically a part of the core privilege group, the court found in Value mart that the focus was an analysis on the facility itself. Here, teh report is an analysis on the company itself, and not legal implications of the Gourmet Pro. Thus, the court will likely find that this does not make the predominant purpose legal.

5.) Whether Legal Advice can be Easily Separated:

Yes

B.) What is likely to be redacted/privileged?

The business recommendations are business purpose and admissible. Paragraphs 1-3 are also business related. The only paragraph that appears legal is paragraph 4, which can easily be redacted or separated. this discusses risks of claim and loss against Gourmet Pro. This will be redacted. The rest is business related.

III. Document Three

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This document is an email from Lionel Alexander, a Chief Auditor, to Trisha Washington, as General Counsel on January 15, 2024. Mr. Alexander sends an email asking for advice relating to two issues he is experiencing. The purpose of this document is not entirely clear, so the court will again look at the 5 factors to determine the predominant purpose.

A.) 5-Factor Analysis:

1.) The Purpose of the Communication:

Here, the email states that Mr. Alexander’s auditors are “running into some questions with regard to [] employees in our neighboring State of Olympia,” and that he is hoping Ms. Washington could help. He does not state any legal issues. Issue One deals with her advice on how to best deal with portraying graphics and data on the website, while Issue Two seeks her advice on how to best sit down with employees. She would likely not be providing legal advice for either of these issues, and it would be more general advice. Thus, the court will likely find that the purpose of this is not legal.

2.) The Content of the Communication:

The content of this email is largely an analysis of two issues that the auditor was having and seeking Ms. Washington’s advice. The Court has held that tax/accounting advice may not be a legal purpose, but an email that is primarily intended to assist the company with complying with tax regulations, would be legal content. *Booker v. Chemco*. Here, this is less of an email seeking her advice on complying with statutes and regulations and moreso a general factual and business- related advice. Thus, the court will likely find that the content is also not legal.

3.) The Context of the Communication:

This email does not surround any pending or active litigation, and there are no facts to suggest that it deals with any anticipatory litigation either. While this is likely how the court would rule, Gourmet Pro can attempt to argue that the email discussed product defect issues by Gourmet Pro and is thus legal. The court will not likely rule in favor however since it is still seeking business advice.

4.) The Recipients of the Communication:

Here, the email was sent to Ms. Washington, who is General Counsel for Gourmet Pro. Typically, this would cut in favor of it being a legal purpose, however, it is important to remember Ms. Washington’s dual-role as general counsel and as an executive. It appears that he is reaching out to her in context as her role as an executive, rather than as general counsel, as in Issue One he acknowledges taht she is general counsel and not an accountant, yet he seeks her help in how to display data on the website, something that appears to be separate from her legal role. Additionally, in Issue Two, he seeks her advice dealing with people that she used to work with. While it does not say whether this was in her role as general counsel, the court could imply it is unrelated as it is dealing with managers in general, which she is likely to have more experience dealing with in her role as an executive rather than as general counsel. Thus, the court will likely find that this factor cuts in favor of it being a business purpose and thus not privileged.

5.) Whether Legal Advice can be Easily Separated:

Any legal advice in this email could be easily redacted as the majority of this email seeks business advice.

B.) What is likely to be redacted/privileged?

The predominant purpose of this document is business related. Thus, it is not privileged. However, the court can redact any legal related issues. Thus, the court could determine that the discussions under Issue Two regarding potential products liability issues deal with legal issues and thus those can be separated. In that case, the court would redact the first two sentences of Issue Two.