

July 2025
MPT 1
Representative Passing Answer

1)

I. Dr. Shulman should be qualified as an expert witness and the Court should admit her testimony because it is sufficient and reliable.

a. Dr. Shulman is a qualified expert.

Under Franklin Rule of Evidence 702, an expert witness should be qualified if they possess requisite "scientific, technical, or specialized knowledge" on all topics that form the basis of the witness's opinion testimony." *Smith v. McGann*, Fr. Ct. App. 2004 ("*McGann*"). The proponent must demonstrate that this evidence is "more likely than not" helpful for the trier of fact "to understand the evidence or to determine a fact in issue." Fr. R. Evid. 702. This inquiry gets to whether the expert witness is the "type of person who should be testifying on the matter at hand." *McGann*. Specifically, expert witnesses should specialize in the same or a similar specialty that includes the "performance of the procedure at issue." *McGann*. Another requirement for an expert witness is that they are familiar with the standard of care in the area the incident occurred. But this does not mean that the expert practices there, just that they are able to testify to the population and availability of medical care. It is helpful if the expert witness has experience in a similar locality.

Here, Dr. Shulman possesses scientific, technical, or specialized knowledge relevant to the hip surgery and the standard of care. Dr. Shulman attended Franklin Medical School and completed a residency in Franklin from 2004 to 2009. That opportunity to be around Franklin demonstrates that Dr. Shulman has experience with the population and availability of medical care in Franklin. The plaintiff will argue, as was elicited in the cross-examination of Dr. Shulman, that because Dr. Shulman has not made a thorough comparison of the population and availability of medical care in Olympia and Franklin, she is not qualified to testify about the standard of care. But thorough examinations are not required, as long as the expert witness is aware of the comparative populations and availabilities of medical care.

While in residency in Franklin, and while in practice in Olympia, Dr. Shulman completed numerous hip surgeries. She is board-certified in Orthopedics. She also completed numerous knee surgeries, which is an adjacent specialty that may qualify her alone. But she does not only have the knee surgery expertise. Dr. Shulman also teaches hip and knee replacements, so although she is not currently performing the procedure at issue, she is teaching it, which should qualify her as to the standard of care relevant to the procedure. Dr. Shulman also reads the literature in *JAMA* and the *New England Journal of Medicine*, the most up-to-date and reliable sources of information. Dr. Shulman also presents lectures on joint replacements at conferences.

But a successful qualification alone does not mean the expert's opinion should be admitted. Their testimony must also hold up to scrutiny of reliability under *Daubert*.

b. Dr. Shulman's methodology is sufficient and reliable.

To be reliable, an expert witness's testimony must be based on sufficient facts or data, it must be the product of "reliable principles and methods," and the opinion must reflect "a reliable application of the principles and methods to the facts of the case." Fr. R. Evid.

702. The judge must determine whether each expert's methodology fits these requirements. In *McGann*, the Franklin Court of Appeal reversed the trial court's exclusion of an expert who had based his opinion on many years in orthopedics, the articles he had read and conferences he had attended, and the fact that other physicians relied on his diagnoses of fractured bones. Here, too, Dr. Shulman's qualifications do not fit "neatly" into the statute, but the statute simply provides examples and courts are instructed to "utilize any other factors' we deem appropriate." *McGann*. The Franklin Court of Appeal has held that basing an expert opinion on medical records, CT scans, medical notes, and deposition testimony, that is sufficient. *Ridley v. St. Mark's Hospital* 2002.

Here, Dr. Shulman has done more. She reviewed the notes, she described the procedure in the deposition, she reviewed the X-ray. She also reviewed all of Ms. Lowe's surgical and medical records, and also performed a physical examination of Ms. Lowe. This enabled her to opine on the cause of the injury. And it also allowed the judge to review her testimony, methodology, and records she based her opinion on.

For these reasons, Defendant requests that the Court qualify Dr. Shulman as an expert witness and admit her expert opinion.

II. Dr. Ajax's testimony is not sufficiently reliable to be admitted.

Although Dr. Ajax will be qualified as an expert witness, his testimony is not sufficiently reliable or thorough to be of any help to the jury, and should be excluded.

As outlined above, an expert witness's testimony must pass two bars: the qualification bar and the reliability bar. The qualification bar requires an expert witness to be the type of person who should testify on the issue at hand. Here, Dr. Ajax works in Franklin, which shows a general knowledge of the standard of care in Franklin. And Dr. Ajax is board-certified in orthopedics, and has done around fifty hip replacements since residency. This qualifies Dr. Ajax as the type of person who should testify.

However, to conflate reliability and qualification is legal error. *McGann*. Dr. Ajax's testimony consists of conclusory statements regarding what Dr. Jost should have done and what could have happened if Dr. Jost did what Dr. Ajax suggests. Namely, take another X-ray from a different position. Dr. Ajax's testimony asserts that a "second X-ray might have shown that the prosthesis was out of place or that there was a broken bone." This conclusion is not helpful to the fact finder, and when an opinion is so fundamentally unsupported, it should be excluded. *McGann* (quoting *Park v. Green*). Fundamental unsupport is considered when the opinion fails to consider the relevant facts of the case, which is true here because Dr. Ajax does not speak about the standard of care. Dr. Ajax may know the standard of care, but does not testify to it. Similar to *McGann*, Dr. Ajax's opinion as to causation is speculative and without reliable basis.

Further, Dr. Ajax's opinion, because of its curt and speculative nature, cannot be properly examined by the Court. An expert opinion must be of sufficiently reliable principles and methods, and the opinion must reflect a reliable application of those principles and methods. Here, Dr. Ajax's opinion is based on speculation about what an additional x-ray could show, not a medical principle that should be applied consistently.

For the above reasons, Defendant requests that the Court exclude Dr. Ajax's opinion.

III. The Court should grant our summary judgment motion because Plaintiff has failed to offer any admissible evidence on the standard of care.

For a negligence claim, the plaintiff must prove that a duty existed for the defendant to conform to a specific standard of care for the protection of others against harm, that the defendant breached that standard of care, and that the breach of the standard of care caused the harm to the plaintiff. *Jacobs v. Becker*. Physicians are required to act with the "degree of care, knowledge and skill ordinarily possessed and exercised in similar situations by the average member of the profession practicing in the field." *Id.* When a defendant shows that the plaintiff has failed to establish a factual basis for any of these elements, the Court should grant the summary judgment motion, even considering the evidence in the light most favorable to the nonmoving party. *Id.*

If the party that will have that burden has failed to prove an element essential to their case, the court should grant a summary judgment motion. *Id.* (quoting *Alexander v. ChemCo Ltd.* Specific to negligence in medical malpractice cases, failing to produce "any evidence to prove an element of the case on which that plaintiff bears the burden of proof" justifies an adverse ruling. When there are no genuine issues as to any material fact, and the movant is entitled to judgment as a matter of law, the court should grant the motion. If the nonmovant has failed on any of the elements, then the facts relevant to other elements are nonmaterial.

Here, there is an issue of fact. Contrasting Plaintiff's testimony in the complaint with Karen Baines's affidavit shows that there is a dispute as to whether Ms. Lowe dropped her purse first, or if the pain in her leg started randomly without her turning. If she pivoting first, then she will lose because that is breaching the agreement with Dr. Jost to not bend past 90 degrees. However, this fact is immaterial. It is not relevant to whether Dr. Jost breached the standard of care.

It is especially not relevant as to whether Dr. Jost breached the standard of care because Plaintiff has not produced any expert testimony establishing a standard of care or a breach of that standard of care. Dr. Ajax's testimony, which is open to credibility determinations by the fact finder, which is the Court at summary judgment, conclusorily stated that Dr. Jost's front-to-back X-ray did not comport with the standard of care in Franklin. But the Plaintiff cannot simply assert that a standard of care exists. The correct standard of care is that a physician is required to use the degree of care, knowledge, and skill possessed and exercised in similar situations by the average member of the profession practicing in the field. Dr. Ajax's testimony suggests that he believes the standard of care is "good and accepted medical practice," which is not the standard. *Daubert*. When a party fails to provide expert witness testimony on an essential element that they would have the burden of proof to prove at trial, summary judgment is proper to the other party.

For these reasons, Defendant respectfully requests that the Court grant our summary judgment motion.

END OF EXAM

July 2025
MPT 2
Representative Passing Answer (1)

2)

From: Examinee

To: Anita Hernandez

Re: Gourmet Pro Response to CPSC

Issue: Whether Document One, Two, or Three are protected by the attorney-client privilege.

Standard:

"[T]he 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. . . . 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.'" *ValueMart*. The purpose of the privilege is to " 'promote open and honest discussion between clients and their attorneys.'" *ValueMart*. "A document is not cloaked with privilege merely because it bears the label 'privileged' or 'confidential.'" *ValueMart*. Due to the fact the privilege is used as an impediment to disclose relevant facts the privilege is strictly construed. *ValueMart*. A key inquiry into the analysis is whether legal advice is being sought. *ValueMart*. "Nonlegal work does not become cloaked with the attorney-client privilege merely because the communication is with a licensed lawyer." *ValueMart*.

When a report contains both business and legal advice, the problem 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. *ValueMart* (emphasis added). "If the predominant purpose is business advice, however, a more tailored assessment is required. In such cases, the attorney-client privilege will still protect any portions of the document that contain legal advice." *ValueMart*. If such portions of legal advice are easily severable, they should be withheld from disclosure to preserve the protection of the attorney-client privilege. *ValueMart*.

When determining the predominant purpose of a document courts consider the 'totality of the circumstances' with a 'highly fact-specific inquiry.' *ValueMart*. "Relevant factors 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. *ValueMart*. "The identity of the recipient does not determine the predominant purpose of the document" alone. *ValueMart*. Additionally, [i]n cases of pedestrian emails, . . . counsel should address each paragraph separately to determine if

it is 'predominantly' legal or business." *Infusion*.

Document 1:

Document 1's purpose was to communicate legal advice from Trisha Washington (Washington), as general counsel, to Maria Johnson (Johnson), as CEO. This document concerned litigation involving Gourmet's main competitor Main Street. Johnson was seeking advice on the legal implications that litigation would have on Gourmet. The content of the communication included legal considerations for ensuring a similar action is not filed against Gourmet and ways to help insulate Gourmet from legal liability. However, under the *Infusion* Order, an email should be broken down separately into individual paragraphs to assess if they are predominantly legal. The opening paragraph to this email is certainly not legal advice as it is merely a greeting and reflects what the rest of the document concerns without giving any legal advice. Additionally, the second paragraph does not contain any legal advice. It merely reflects the facts on what is happening in the Main Street litigation and that Gourmet's marketing department should follow it. Therefore, under the *Infusion* Order, paragraph one and two of the e-mail likely will be subject to disclosure. Paragraphs three and four, on the other hand, addressing legal implications and ways to insulate legal liability do concern legal advice and should be protected by the privilege. Counsel should redact paragraph three and four, but disclose paragraphs one and two to comply with the relevant law regarding attorney-client privilege.

Document 2:

Document 2 is an executive summary regarding Gourmet's Safety from an outside law firm. The purpose of this document was to learn the company's processes and practices and develop business recommendations to make the company even better when it comes to dealing with safety concerns. The content of the communication largely includes facts regarding Gourmet's business and procedures. There is one paragraph that addresses complaints and legal disputes of Gourmet along with another paragraph stating risks and liabilities the company faces. These two paragraphs are not a substantial part of the document, however. This document was not prepared in connection with pending or anticipated litigation. It was done instead as an audit to ensure best practices were being followed. The recipients of the communication were the board of directors and management of Gourmet. Lastly, legal advice does not permeate the entire document, but instead it may be easily separated and removed from disclosure. Under this analysis, factors 1, 2, 3, and 5 suggest the predominant purpose of this communication was business advice. As stated factor four alone, recipient of the communication, is not enough to make something predominantly legal. Additionally, as stated in *ValueMart*, "[a] different result might be compelled if the enforcement action were pending when counsel was retained to produce the report and if counsel represented the client in the pending enforcement litigation." Here, however, no pending litigation was present. Therefore, this communication is predominantly for business advice.

The inquiry does not stop there, however. Since the predominant purpose of this communication is business advice, it must be addressed whether there is legal advice that must be protected and removed from disclosure. As set forth in the case law, the privilege does still protect any portions of the document that contain legal advice. The two paragraphs that contain legal advice are paragraph four of the Overview and paragraph four of the Business

Recommendations. Both of these paragraphs address the legal liability of Gourmet.

In the Overview paragraph, the communication discloses complaints and legal action taken against Gourmet. These complaints and legal action subject Gourmet to legal liability and are therefore in connection to legal advice. In the Business Recommendations paragraph, the communication address legal liability that is still looming due to consumer safety laws. These two paragraphs, having such legal legal implications and advice, should be protected by the attorney-client privilege and redacted from the document before disclosing the rest of the document.

The rest of the paragraphs in the document do not contain any legal implications or advice. Paragraph 1 and 2 give a summary of the document, which has already been stated as being predominantly for business advice. Paragraph 3 gives facts regarding the size and scope of the business. It, however, was not produced for legal advice and is, therefore, not subject to protection. Additionally, the first three paragraphs of the Business Recommendations are not in connection with any legal advice. Instead, they contain business advice to ensure safety and compliance. Therefore, these paragraphs are not protected by the attorney-client privilege either. Only paragraphs four of each section have a valid basis to be protected by attorney client privilege.

Document 3:

Document three is also an email and is therefore subject to the breakdown of individual paragraphs as set forth in the *Infusion* Order. Paragraph one, the introductory paragraph will be subject to disclosure because it does not provide any legal advice and the document is more likely seeking business advice.

The second paragraph marked as "Issue One" will not be protected by the attorney client privilege and will be subject to disclosure. This paragraph is seeking business advice on how to present a summary of safety audits. Further, it asks whether a narrative summary or mix of charts would be better. This is not seeking legal advice, but instead business advice. Washington is not being asked to interpret law or assess and legal liabilities stemming from the publication of the audits. Therefore, the main purpose of this paragraph is to seek business advice and is subject to disclosure.

The third paragraph marked as "Issue Two" is a closer call. This paragraph addresses complaints made about products. These complaints could lead to legal liability and therefore, could be asking for legal advice on how to best curb that liability. However, it does not appear that this is Lionel Alexander's main concern. Rather he is concerned about how to best question managers without placing undue pressure on them. This, on the other hand, is business advice on how to deal with management. Therefore, this document is a close call. As stated in *ValueMart*, the privilege is strictly construed to prevent the nondisclosure of relevant facts. With this in mind, it may be argued that the first two sentences of this paragraph should be protected by the attorney client privilege as they address complaints and legal liability. The following sentences, however, will likely need to be disclosed as they are not seeking legal advice, but rather, business advice. Overall, Document 3 will be subject to disclosure, but Gourmet may have a valid argument to exclude the first two sentences of the third paragraph in the email.

END OF EXAM

2)

MEMORANDUM

From: Applicant

To: Anita Hernandez

Date: July 29, 2025

Re: Gourmet Pro Response to CPSC

Issue

Which documents, if any, and which portions of documents, if any, are protected by the attorney-client privilege, and which documents and/or portions of documents are not protected by the attorney-client privilege.

Rule

"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.'" ValueMart quoting Franklin Mutual Insurance. "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." ValueMart.

"The purpose behind the attorney-client privilege is to 'promote open and honest discussion between clients and their attorneys.'" ValueMart quoting Moore. "The threshold inquiry in a privilege analysis is determining whether the contested document embodies a communication in which legal advice is sought or rendered." ValueMart. "A document is not cloaked with privilege merely because it bears the label 'privileged' or 'confidential.'" Moore

Nonlegal work such as seeking "the advice of their counsel on matters of public relations, accounting, employee relations, and business policy. . . does not become cloaked with the attorney client privilege just because the communication is with a licensed lawyer." Advice given by a lawyer can serve two purposes, providing legal advice and providing business information and advice. If a report contains both purposes, "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.'" ValueMart quoting Federal Ry. If a document has a predominantly legal purpose, then the entire document can be withheld; If the predominant purpose is business, then one "should take the second step of examining each paragraph or other distinct portion of the document to determine if a distinct section is legal advice and thus can be withheld." Spinex. "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 concern legal advice or information." Franklin Machine Co. "If such portions of legal advice are easily severable, they should be withheld from disclosure to preserve the protection of the attorney-client privilege." ValueMart. "In cases of pedestrian emails, unlike the formal report. . .counsel should address each paragraph separately to determine if it is 'predominantly' legal or business." Spinex.

The predominant purpose test is "a highly fact-specific inquiry, which requires courts to consider the 'totality of the circumstances' surrounding each document." ValueMart quoting In re Grand Jury. "Relevant factors 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. ValueMart citing Proskauer.

Document 1 -- Email from General Counsel to CEO

Document 1 is a pedestrian email, meaning each paragraph will be separately analyzed to determine if it is predominantly legal or business. Paragraph 1 is likely legal as it introduces the purpose of the email is to discuss implications of litigation for the competitor. But, because the paragraph does not concern actual legal implications, it might be non-legal work and not protected.

Paragraph 2 is likely legal advice because it discusses the Main Street lawsuit, the mechanics of the lawsuit, and how class actions work. Part of the paragraph ("you can expect that the media in Franklin and elsewhere will be reporting on the dangers of the Main Street defects and interviewing concerned customers. We should ask our marketing department to track those media reports") does discuss non-legal work like marketing, but it seems that the majority of the paragraph is discussing the Main Street lawsuit, thus predominantly legal advice.

Paragraph 3 is legal advice. Here, the general counsel is discussing areas of liability, interpreting audit results and its implications for liability, and meeting with department heads to ensure the safety recommendations are being adhered to so that the company does not open itself up to liability.

Paragraph 4 is a close call. A large part of the paragraph discusses marketing and public relations, which is not considered legal advice and protected by the attorney client privilege even though the advice was given by a licensed lawyer. ValueMart and Franklin Department of Revenue. But, we may be able to argue this advice is meant to insulate from liabilities/lawsuits and is thus legal advice and protected by the attorney-client privilege, but that argument does not seem successful.

Paragraphs 1-3 are likely legal advice and protected by the attorney client privilege, and paragraph 4 is likely business advice and not protected by the attorney-client privilege, although there are arguments both ways on each paragraph.

Document 2 -- Executive Summary of Report from Outside Law Firm

Document 2 is a report, so it goes through a more thorough analysis pursuant to the factors. The purpose of the document is more like the purpose in Booker than in ValueMart in that it is a review of the safety record and related policies to ensure the grills and accessories are safe

and high-quality. Thus, these issues are more legal issues than just merely studying the facilities themselves. This study goes through policies and safety records, leaning the report towards legal advice.

The report is an analysis of the track record of the company, and does not contain legal analysis of statutes and regulations. Thus, according to Booker, this factor leans towards business advice.

The third factor is somewhat unclear, as the report was made in June 2024, but we are not told when the action was pending. But, there is no action pending with Gourmet Pro, so this leans toward business advice since the CPSC has no pending action with Gourmet Pro.

The fourth factor initially leans toward legal advice because it is given to the types of people that legal advice is given, management and board, but there is an argument that the report does not focus on legal implications. Merely it is just a review of past safety, and all recommendations are labeled as business recommendations and do not contain legal implications. Thus, this factor leans towards business advice.

The fifth factor is if nonlegal portions are intertwined with legal portions. Because the paragraphs are numbered, it is easier to untangle any possible entwinement between legal and business advice.

Thus, this report is predominantly business advice. Pursuant to Franklin, "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 concern legal advice or information." Here, overview 4 is legal because it discusses claims and defects, and recommendations 1 and 2 are maybe legal because they describe policies and procedures to insulate against liability. Recommendation 3 is not legal because it is more so an employee relations issue, and the report from recommendation 4 would be legal advice. The rest of the overview sections are not legal and are thus not protected. Even though overview 2 states the report is protected, that does not matter.

Document 3 -- Email from Chief Auditor to General Counsel

Document 3 is a pedestrian email, meaning each paragraph will be separately analyzed to determine if it is predominantly legal or business. Paragraph 1 is business advice because it contains no legal analysis and is only briefly introducing an employee issue. But, perhaps because employee issues can lead to legal advice, this would be protected under the attorney-client privilege.

Paragraph 2 is business advice because the auditor is asking the general counsel advice on how to present auditing figures, not a legal analysis of state or federal tax statutes and regulations like in Booker, nor advice interpreting the tax regulations or legal liabilities from the audit's results like in Franklin Department of Revenue. So, this advice would be accounting advice, which is not protected. ValueMart

Paragraph 3 is also business advice because it is seeking the general counsel's advice on how

to approach/sit down with the managers, because she used to work with some of the managers. So, according to ValueMart, this advice is employee relations advice and is not protected. If the auditor had asked legal implications from disciplining, firing, etc. workers, then this paragraph may have been legal advice and have been protected.

Each paragraph is business advice and is not protected by the attorney-client privilege.

conclusion:

END OF EXAM