JULY 2022

Annotated California Bar Questions

Study edition | Original question pages with added highlights and reading pointers.

Practice first: attempt the clean question, then use the numbered notes and online sample responses to compare your reasoning. The full source packet is preserved, including its instructions and library.

Original, ungraded instructional commentary. Not official selected answers, scored student work, or a claim of attorney review.

Source: State Bar of California | 27 original pages, all retained.

Bar Exam Doctor | Published November 4, 2026

JULY 2022
ESSAY QUESTIONS 1, 2 AND 3

California Bar Examination

Answer all 3 questions; each question is designed to be answered in one (1) hour.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the situation turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them to the facts.

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the resolution of the issues raised by the call of the question.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

QUESTION 1

Bath Stuff (Bath), a retailer located in Betaville, sent Neat Scents (Scents), an importer located in Sunville, a signed offer to purchase 1,000 individually wrapped candles at a price of $10,000, free on board ("FOB") Betaville. Scents promptly sent Bath a signed acknowledgment accepting the offer, which also included the following language: "Some shipping boxes have external water damage. Contents of shipping boxes guaranteed to have no damage." Bath did not respond to the acknowledgment. No other express warranties or disclaimers were stated in the offer or acknowledgment.

Scents timely shipped the order to Bath's warehouse using TruckCo, a third-party common carrier, at a freight cost of $400. One-quarter of the shipping boxes showed signs of water damage. Each shipping box contained candles that were individually wrapped for retail sale. All candles and individual wrapping were undamaged. When the shipment arrived, Bath's employees noticed the water damage on some shipping boxes. They immediately rejected the shipment without opening any boxes, promptly notified Scents of the rejection, and refused to pay any amount.

Scents paid TruckCo $500 to ship the candles back to Sunville and notified Bath that Scents intended to resell the candles. Scents promptly solicited bids from all of its customers and received the best offer, which it accepted, from Redemption Candles (Redemption) of $9,000, FOB Sunville.

Bath promptly entered into a valid written contract with Hot Candles (Hot), an importer in Hatville, to purchase 1,000 replacement candles for $12,000, FOB Hatville. TruckCo was engaged to transport the candles from Hatville to Betaville. In transit, TruckCo's truck was struck by lightning in a storm and all of the candles melted. TruckCo's shipping contract disavows liability from acts of God, including lightning. Bath refused to pay for the candles and Hot refused to send replacement candles.

Bath sued Scents for breach of contract and Scents countersued Bath. Bath sued Hot for breach of contract and Hot countersued Bath.

1. Did Bath and Scents have a binding contract and, if so, did either party breach the contract? If there was a breach of contract, what damages are likely to be recovered, if any? Discuss.

2. Has Bath or Hot breached their contract? If so, what damages are likely to be recovered, if any? Discuss.

READING POINTERS

1 Identify the promised goods

Damaged outer cartons are distinct from the undamaged candles and retail wrappers.

2 Count breach-related expenses

The return freight is incidental; the original outbound freight was a promised performance cost.

3 Locate the risk transfer

A seller-location FOB term ordinarily shifts transit risk upon proper delivery to the carrier.

QUESTION 2

Public School District (District) in State X is attempting to reduce gang violence in District's high schools. After consulting with local law enforcement, District has determined that most violence results from confrontations between two gangs, the Westsiders and the Eastsiders. As a result, District has adopted the following rule for all high school students: "No student shall wear any label, insignia, words, colors, signs or symbols that reflect gang-related activities. Students violating the policy will be immediately suspended or expelled from school."

1 For several years, Paloma, a high school senior, has had a small tattoo of a dove on one wrist, her "self-expression" as a peaceful person. Paloma has never been associated with any gang, including the Westsiders and Eastsiders. After learning of Paloma's tattoo, District officials described it to local law enforcement officials who said that it sounded like a Westsider gang symbol, which includes birds. Paloma was
2 suspended for the last ten days of school after she refused District's request that she either wear long sleeves to cover her tattoo or have it removed.

3 Paloma, now graduated, and attending the college of her choice, has brought a declaratory relief action challenging the validity of District's policy under the First and Fourteenth Amendments to the United States Constitution. District has moved to dismiss Paloma's lawsuit as moot on two grounds: (A) because she is no longer a high school student, and (B) District has now redefined "gang-related activities" in its rule in a manner consistent with State X's criminal code.

1. What arguments can Paloma make in support of her First and Fourteenth Amendment claims? Discuss.

2. Will either or both of District's arguments in support of its motion to dismiss Paloma's lawsuit be successful? Discuss.

5

READING POINTERS

1 Connect expression to actual risk

A broad association between birds and a gang is not itself a specific disruption forecast.

2 Identify the required process

Short suspensions ordinarily require notice and an opportunity to respond, not a full trial.

3 Test personal recurrence

A dispute recurring for future students is not necessarily recurring for this individual plaintiff.

QUESTION 3

Clint hired Linda, a lawyer, to represent him in a personal injury lawsuit against Dan, the driver of the car that collided with Clint's car, thereby causing him serious bodily injury. Clint could not afford to pay Linda, so Linda told Clint not to worry about paying anything until there is a recovery in the case. Linda told Clint that if a recovery is obtained, Linda would take 50% as her attorney fee and Clint will get the other half, less any costs Linda incurred. Clint orally agreed to this fee arrangement.

Dan's insurance company, Acme Insurance (Acme), emailed Linda before Linda completed any substantive work on the case, and offered to settle the matter for $100,000. Linda was thrilled and replied to the email that she accepted the settlement offer. Linda then told Clint about the settlement. Clint was relieved that the case settled so quickly.

Acme delivered a check for $100,000 payable to Linda, who deposited it into her law firm's business account. Linda then wrote a check from that account to Clint for $50,000, minus her costs, and mailed it to him. Upon receipt of the check, Clint complained about Linda's fee and threatened to sue Linda for malpractice and report her to the State Bar. Linda offered to return $10,000 of the fee in exchange for an agreement releasing Linda from all liability associated with the representation. Clint accepted and executed the release.

What ethical violations, if any, has Linda committed? Discuss.

Answer according to California and ABA authorities.

7

READING POINTERS

1 **Check the writing requirement**

Agreement about a percentage does not satisfy contingent-fee formalities.

2 **Identify the decision maker**

The client's later satisfaction does not establish prior settlement authority.

3 **Separate client funds**

Mixed settlement proceeds belong in trust until the lawyer and client portions are properly determined.

4 **Classify the release**

Settling threatened malpractice requires independent-counsel safeguards, even when accompanied by a fee refund.

JULY 2022
ESSAY QUESTIONS 4 AND 5

California Bar Examination

Answer both questions; each question is designed to be answered in one (1) hour. Also included in this session is a Performance Test question, comprised of two separate booklets, which is designed to be answered in 90 minutes.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the situation turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

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READING POINTERS

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QUESTION 4

The Articles of Incorporation for Corp Inc. (Corp) provide that it is a closely-held corporation formed for the purpose of manufacturing televisions. Corp has been highly profitable in this business for twenty years. The Articles also provide that, for the purpose of electing directors, each shareholder shall have one vote per share that they own multiplied by the number of open director positions, i.e., cumulative voting.

Aliyah and Bowen each owned sufficient shares to elect, through cumulative voting, one of the three directors of Corp. Aliyah and Bowen entered into a signed written agreement stating that they will vote to elect themselves to the board of Corp and agree on the election of any successor board members and, if they cannot agree on a particular successor, will abstain from voting in that election. They also agreed that, once they became directors, they would select Palmer as the new president of Corp. The agreement stipulated that it is binding on all subsequent owners of the shares. Aliyah and Bowen stamped "Subject to Agreement" on the backs of all of their share certificates.

Aliyah and Bowen were subsequently elected to Corp's board of directors, along with Chantal. At the next board meeting, Aliyah and Bowen voted to select Palmer as the new president of Corp, Chantal abstained, and Palmer was named as president.

Palmer immediately instituted several costly changes intended to shift Corp solely into the manufacturing of bicycles. Palmer reasoned that, by the time the directors heard anything about the changes, Corp would be so profitable that no one would complain.

Bowen discovered almost immediately what Palmer had done. Bowen then informed Daya of all of these facts, sold his shares to her, and resigned from the board.

Esgar, a shareholder of Corp since its inception, wishes to seek legal relief regarding Palmer's actions and Corp's change to solely manufacturing bicycles.

1. Is the agreement between Aliyah and Bowen valid? Discuss.

2. Is Daya bound by Aliyah and Bowen's voting agreement with respect to the election of successor directors? Discuss.

QUESTION CONTINUES ON THE NEXT PAGE

READING POINTERS

1 Separate two voting capacities

A valid agreement to vote shares does not automatically validate a promise restricting director judgment.

2 Use actual notice

Daya learned the terms before purchase, independently of the short certificate legend.

3 Analyze deliberate bypass

Expected later profits do not supply present authority for the officer's change.

3. On what theory or theories, if any, might Esgar bring an action to enjoin Corp from moving solely into manufacturing bicycles, and what is the likely outcome? Discuss.

1 4. On what theory or theories, if any, might Esgar bring an action for damages against Palmer related to Corp moving solely into manufacturing bicycles, and what is the likely outcome? Discuss.

3

READING POINTERS

1 **Identify the injured claimant**

Corporate loss ordinarily supports a derivative recovery for the corporation.

QUESTION 5

Hari and Wanda were married to each other for 20 years, being domiciled in State X (a non-community property state) for the first 15 years, and thereafter, until Hari's death, being domiciled in California for 5 years.

At Hari's death in 2020, two documents were submitted for probate:

1. A formal will signed by Hari and Witness One on June 1, 2018 and signed by Witness Two on June 3, 2018. Both witnesses were disinterested. This document left all of Hari's community property to Wanda, but did not mention any separate or quasi-community property.

2. An undated pre-printed will form that had printing at the top, declaring that it was intended to be a will. On the form Hari had written, in his own handwriting, "All of my separate property and 25% of my community property goes to my son, Samir." Hari signed the will form, but no witnesses signed it, and there was no date on the form.

Hari had full mental capacity throughout his life.

At his death, Hari's property consisted of:

A. Separate property worth $100,000;

B. Community property – Hari's half being worth $50,000;

C. California land worth $100,000, which Hari had bought with his earnings while he and Wanda were still living in State X. In 2017, without Wanda's written consent, Hari gave this land to himself and his daughter, Deepa, as joint tenants on her birthday.

What rights, if any, do Wanda, Samir and Deepa have in Hari's estate? Discuss.

Answer according to California law.

READING POINTERS

1 Distinguish observation from signature

Witnesses must jointly observe a qualifying act but need not sign on the same day.

2 Preserve consistent provisions

The date problem can defeat an inconsistent gift without invalidating the separate-property disposition.

3 Use the survivor-recovery statute

A gratuitous retained-survivorship transfer of quasi-community property can trigger Probate Code section 102.

July 2022

California Bar Examination

Performance Test

INSTRUCTIONS AND FILE

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

NIESI v. GOSLING and HARDY

Instructions 2

FILE

Memorandum to Applicant from Carmen Cardinal 5

Excerpts from www.CravenCableConsumersUnited.com Blog 6

Complaint 9

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

PERFORMANCE TEST INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem.

2. The problem is set in the fictional State of Columbia, one of the United States. In Columbia, the intermediate appellate court is the Court of Appeal and the highest court is the Supreme Court.

3. You will have two sets of materials with which to work: a File and a Library.

4. The File consists of source documents containing all the facts of the case. The first document in the File is a memorandum containing the directions for the task you are to complete. The other documents in the File contain information about your case and may include some facts that are not relevant. Facts are sometimes ambiguous, incomplete, or even conflicting. As in practice, a client's or supervising attorney's version of events may be incomplete or unreliable. Applicants are expected to recognize when facts are inconsistent or missing and are expected to identify sources of additional facts.

5. The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant to the assigned lawyering task. The cases, statutes, regulations, or rules may be real, modified, or written solely for the purpose of this performance test. If any of them appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references. Applicants are expected to extract from the Library the legal principles necessary to analyze the problem and perform the task.

6. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

7. This performance test is designed to be completed in 90 minutes. Although there are no restrictions or parameters on how you apportion that 90 minutes, you should allow yourself sufficient time to thoroughly review the materials and organize your planned response before you begin writing it. Since the time allotted for this session of the examination includes two (2) essay questions in addition to this performance test, time management is essential.

8. Do not include your actual name or any other identifying information anywhere in the work product required by the task memorandum.

9. Your performance test answer will be graded on its responsiveness to and compliance with directions regarding the task you are to complete, as well as on its content, thoroughness, and organization.

3

READING POINTERS

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LAW OFFICES OF CARDINAL AND DEETZ
45 Bennington Circle
Craven, Columbia

TO: **Applicant**
FROM: **Carmen Cardinal**
RE: **Niesi v. Gosling and Hardy**
DATE: **July 26, 2022**

Grace Gosling is the web host of www.CravenCableConsumersUnited.com, a consumer website that contains a blog established to provide a platform for dissatisfied cable customers in Craven, Columbia. Gosling has retained our firm for advice concerning a complaint for defamation filed against her and Hank Hardy, a subscriber and poster to her blog, by Jack Niesi. Niesi claims that both Gosling and Hardy are liable as a result of statements Hardy posted about him to Gosling's blog.

I am preparing to meet with Gosling about Niesi's complaint. To help me prepare for the meeting, please draft an objective memorandum that discusses:

1. Whether Niesi would prove that Hardy's statements, as quoted in the complaint, were defamatory if he were to prove the facts alleged.

2. Whether Gosling is immune from liability for Hardy's allegedly defamatory statements.

Do not draft a separate statement of facts, but use the facts in your discussion.

READING POINTERS

1 Follow the assignment

Address both the statements and the host's immunity without a separate factual narrative.

EXCERPTS

www.*CravenCableConsumersUnited.com Blog*

Welcome to the voice of cable ratepayers in the City of Craven! I inaugurated this blog to highlight the incompetent and overpriced cable "disservice" and mistreatment we consumers receive as a result of the mismanagement and greed of the tone-deaf colossus, Columbia Cable Company. Despite some government regulation, the lack of competition has nevertheless resulted in poor and costly cable service. It is time to educate ourselves about cable services, our rights as consumers, and ways to contain the cost of cable service. I will be posting information on these topics and invite you to participate by posting anything you think will contribute to these goals. My hope is that members of the community will subscribe to this blog and participate constructively in ongoing discussion and action.

Note: To comment, you must be a subscriber. To subscribe, simply log on and, using the pre-populated pull-down menu, insert your first and last names, full physical address and email address, gender, age, and whether you are a Columbia Cable Company customer. There is also a blank box at the end where you can provide any additional information or comments. Each subscriber will have a profile containing all of this information that is accessible to other subscribers. The profiles will allow you to choose which other subscribers to communicate with outside this blog, including to develop ideas and actions against Columbia Cable Company, organize carpools to and from events, and the like.

In Solidarity, Grace Gosling

Oppose Rate Increase!

On June 27, 2022 at 6:00 p.m., the Craven City Council will hear a request from Columbia Cable Company for a 10% increase in cable rates to subsidize its planned re-cabling and the construction of a new store at the Stratford mall! This comes at a time

READING POINTERS

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when we are experiencing further deterioration in customer service with even longer waits on the phone and at the stores to talk to a customer service representative, and bait and switch sales tactics! Be sure to show up all together at the meeting in the Council chambers at Craven City Hall to express your opposition to the rate increase request and to demand better service and ethical sales practices. And if you have any other ideas about how to keep cable costs down, please post them below.

In Solidarity, Grace Gosling

Comments:

Grace: Thanks for starting this very necessary dialogue. I'll tell you a big way to keep down cable rates – report cable theft! I live in the Green Hills condominium complex at 451 Green Hills Drive in Craven. Like most of us, I pay a lot for full cable service while one of my neighbors, Jack Niesi, is guilty of cable theft: He uses various unauthorized devices to get free phone, television and internet service to his condo. I'll bet he isn't even a cable subscriber. It's crooks like Jack Niesi who cause cable costs to go up for the rest of us!

Hank Hardy (June 11, 2022)

Hank: That sounds awful! Can you tell us more?? Have you considered reporting Niesi's theft to the Columbia Cable Company's cable theft hotline?!

In Solidarity, Grace Gosling (June 16, 2022)

Grace: This is further to my June 11, 2022 post about Jack Niesi. Since then, I've been watching him closely. And – get this – while his wife is at work, an attractive young woman is at their house most of the day. It looks as though they are watching TV on his

READING POINTERS

1 **Identify verifiable content**

A specific accusation of how theft occurred is different from a loose insult.

1 stolen cable service. He appears to be a cheating spouse! I put a note on his wife's car windshield telling that nice woman about her husband's infidelity while she is hard at work. What a loser and low life he is!

Hank Hardy (July 1, 2022)

8

READING POINTERS

1 **Read qualifications in context**

Appears or looks does not automatically turn a factual implication into protected opinion.

SUPERIOR COURT OF THE STATE OF COLUMBIA
COUNTY OF MOREHEAD

JACK NIESI, Plaintiff, v. GRACE GOSLING and HANK HARDY, Defendants.	CASE NO: 2022 – 7459 COMPLAINT

1. Plaintiff Jack Niesi is a private individual who at all times mentioned in this complaint was a resident of Morehead County, Columbia.

2. Niesi has worked as an independent television producer for over 20 years and has resided at 451 Green Hills Drive in Craven, Columbia for about 5 years. Niesi has during all this time been faithfully married to his wife, Jill Niesi, and has enjoyed a good reputation, both generally and in his occupation.

3. Defendant Grace Gosling is an individual and is now, and at all times mentioned in this complaint has been, a resident of Morehead County, Columbia. She is the web host of www.CravenCableConsumersUnited.com (3CU.com), which contains a blog. As such, she has unlawfully caused, and is legally responsible for, the injury to Niesi as alleged in this complaint.

4. Defendant Hank Hardy is an individual and is now, and at all times mentioned in this complaint has been, a resident of Morehead County, Columbia. Hardy unlawfully caused, and is legally responsible for, the injury to Niesi as alleged in this complaint.

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

5. On or about June 11, 2022 and on or about July 1, 2022, Gosling published statements by Hardy on the 3CU.com blog in which Hardy stated:

   a. “I'll tell you a big way to keep down cable rates – report cable theft! I live in the Green Hills condominium complex at 451 Green Hills Drive in Craven. Like most of us, I pay a lot for full cable service while one of my neighbors, Jack Niesi, is guilty of cable theft: He uses various unauthorized devices to get free phone, television and internet service to his condo. I'll bet he isn't even a cable subscriber. It's crooks like Jack Niesi who cause cable costs to go up for the rest of us!”

   b. “Since then [i.e., the date of the statement quoted in Paragraph 5.a.], I've been watching him [i.e., Niesi] closely. And – get this – while his wife is at work, an attractive young woman is at their house most of the day. It looks as though they are watching TV on his stolen cable service. He appears to be a cheating spouse! I put a note on his wife's car windshield telling that nice woman about her husband's infidelity while she is hard at work. What a loser and low life he is!”

6. The statements quoted in Paragraph 5 referred to Niesi by name and address and were so understood by those who read them.

7. The statements quoted in Paragraph 5 are false as they pertain to Niesi. Among other things, Niesi has been a Columbia Cable Company customer for over 20 years. In that entire time, he has paid for every type of cable service he has ever received. He works with his technical assistant, Liana Mabry, from his home office. His relationship with Mabry is, and always has been, purely professional.

8. The statements quoted in Paragraph 5 were seen and read by Niesi’s neighbors, business associates, and family, including his wife.

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

9. As a proximate result of the publication of the statements quoted in Paragraph 5, Niesi has suffered injury in the form of loss of his personal and professional reputation and business, shame, and mortification, all to his damage in a total amount to be established by proof at trial.

WHEREFORE, Niesi demands judgment against Gosling and Hardy, and each of them, as follows:

1. For compensatory damages according to proof;
2. For punitive damages;
3. For interest as allowed by law;
4. For costs of suit; and
5. For such other and further relief as this court may deem just and proper.

DATED: July 22, 2022 _____*Ella Wang*_____

Ella Wang
Attorney for Jack Niesi

READING POINTERS

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July 2022

California Bar Examination

Performance Test

LIBRARY

READING POINTERS

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NIESI v. GOSLING and HARDY

LIBRARY

Anderson v. Walsh
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READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

Anderson v. Walsh

Columbia Court of Appeal (2013)

This case arises from an aborted sale of a wig by Wilma Walsh to Ann Anderson. According to Anderson, Walsh represented that the wig was custom made. Anderson, who works for the City of Astoria Building Department, tendered a check from All Coast Building Contractors, a corporation she and her husband own. After realizing the wig was not custom made, Anderson tried to return the wig via FedEx, but Walsh refused the delivery. Anderson stopped payment on the check. Walsh sued Anderson for breach of contract in small claims court. At trial, Anderson introduced a FedEx document confirming that the package containing the wig had been refused by Walsh. Anderson prevailed in the small claims action.

Thereafter, Walsh authored a lengthy statement about the sale on an online consumer blog on RipOffReport.com. Prefaced by the word "Facts" were two allegedly defamatory statements: (1) "Ann Anderson, who works for the Astoria Building Department, wrote an unauthorized check for a wig from her boyfriend's account and at the bottom wrote that it was for a ‘prosthetic donation.’" (2) "Ann Anderson brought to court a made-up document from FedEx stating that Walsh had opened the package, saw what was in it, and gave it back to FedEx." Thereafter, an anonymous author posted the following to the consumer website Yelp.com: "Thank you Ann Anderson of the Astoria Building Department for hurting the community by giving all the construction business in Astoria to family and friends in exchange for bribes. I hope that an investigation takes place soon and that you end up in prison." Though Walsh denied responsibility for the Yelp.com posting, expert testimony tied the email address used in that posting to her.

Upon reading these statements, Anderson was devastated. She felt compelled to report them to her employer and was thereby humiliated and concerned about

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

losing her job. Shortly thereafter, she sued Walsh for defamation based on false statements imputing dishonesty, fraud, and criminal activity. Walsh asserted the affirmative defense of truth. At trial, Anderson proved that the statements were false and the court entered judgment in her favor. On appeal, Walsh asserts that the statements were opinion rather than fact.

In Columbia, defamation consists of the publication of a false statement to a third party, which proximately results in injury to another. To be false, a statement must be one of fact, and cannot be one solely of opinion. If a statement is reasonably susceptible to an interpretation as either fact or opinion, its proper characterization is determined by asking whether, under the totality of the circumstances, a reasonable trier of fact would conclude that the statement communicates actual fact rather than expresses mere opinion.

Walsh claims that her statements concerning Anderson were not defamatory because they were not factual. Relying on our recent decision in *Insky v. Ilston* (Columbia Court of Appeal, 2011), she argues that, even if they were reasonably susceptible to an interpretation as either fact or opinion, a reasonable trier of fact would conclude that they expressed a mere opinion rather than communicated an actual fact under the totality of the circumstances, including that they appeared on consumer websites, where most readers expect to see opinions rather than facts.

In *Insky*, we stated: "Internet forums promote a looser communication style and an outlet for the user to criticize others. Users are able to engage freely in informal debate and criticism, leading many to substitute gossip for accurate reporting and adopt a provocative tone." There, we held that, under the totality of the circumstances, a reasonable trier of fact would conclude that a statement posted online calling company executives "liars, losers, and crooks" expressed mere opinion rather than communicated actual fact. We explained that, "while

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

unquestionably offensive and demeaning" to the executives, the statement was more emotional catharsis than information.

Here, however, things are different. Walsh's statements on RipOffReport.com, which were labeled "facts," recited alleged facts detailing perjury and fraud by Anderson. Walsh's statement on Yelp.com similarly recited alleged facts detailing Anderson's awarding of city contracts to friends and family in exchange for bribes. We do not believe that these statements were reasonably susceptible to an interpretation as mere opinion. But even if they were, we conclude that, under the totality of the circumstances, a reasonable trier of fact would conclude that they communicated actual fact.

AFFIRMED.

5

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

Columbia Valley Fair Housing Council v. Roommate.com, LLC

Columbia Court of Appeal (2008)

Defendant Roommate.com, LLC (Roommate) operates a website designed to match people renting spare rooms with people looking for a place to live. It features approximately 150,000 active listings and receives a million page views a day. To post or search listings on Roommate's website, Roommate requires subscribers to create profiles. Roommate also requires subscribers to disclose their gender, sexual orientation, presence of children, and to state their roommate preferences under the same three criteria. Lastly, Roommate encourages subscribers to provide "Additional Comments" about themselves and their desired roommate.

The Columbia Valley Fair Housing Council (Council) sued Roommate for violating housing discrimination laws. The trial court held that Roommate is immune from liability under Section 230 of the General Statutes of Columbia and dismissed the claim. The Council appeals.

The Legislature enacted Section 230 to protect websites from liability for including or failing to remove actionable content in order to preserve the free-flowing nature of internet speech and commerce without unduly prejudicing the enforcement of other important laws. To that end, Section 230 immunizes “interactive computer service providers” from liability arising from content created by third parties. But it does not immunize “information content providers” from liability. Nor does it immunize “interactive computer services providers” from liability to the extent that they act as “information content providers.” An “interactive computer service provider” is a person or entity that “enables computer access by multiple users to a computer server.” An “information content provider” is a person or entity that “is responsible, in whole or in part, for the creation or development of content.” Thus, an “interactive computer service provider” *passively* displays content that may be *actively* created or developed by

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

an “information content provider,” whereas an “information content provider” *actively* creates or develops content that may be *passively* displayed by an “interactive computer service provider.”

Against this background, we examine whether Roommate is entitled to immunity under Section 230 for the three specific functions the Council alleges violate housing discrimination law.

1. **Roommate's questions to prospective subscribers during the registration process, requiring them to disclose and therefore be subject to discrimination for their gender, family status and sexual orientation**

Because Roommate designed its website registration process around the questionnaire and choice of answers containing discriminatory categories, Roommate is undoubtedly the "information content provider" of the questions and can claim no immunity. Section 230 does not grant immunity for inducing third parties to express illegal preferences.

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2. **Roommate's development and display of subscribers' discriminatory preferences**

If an individual queries for a roommate of a particular gender using a search engine that does not contribute to, but provides only neutral tools to carry out, what may be unlawful searches, the search engine has not engaged in "development" for purposes of Section 230. But by requiring subscribers to provide their preferences using a limited set of pre-populated answers *as a condition of accessing its service*, Roommate is more than a passive displayer of information created by others; it becomes, at least in part, a developer of that information. “Discriminatory” questions solicit, and thereby develop, “discriminatory” answers. Here, Roommate designed its search to limit the listing

READING POINTERS

1 **Link the mechanism to the wrong**

Structured questions matter when they contribute to the allegedly unlawful content.

available to subscribers based on gender, sexual orientation, and presence of children. Roommate both elicits the allegedly illegal content and makes use of it in conducting its business. Roommate's work in developing the discriminatory questions, answers, and search mechanism, and in enforcing a system that subjects subscribers to allegedly discriminatory housing practices, renders it an information content provider and, as such, not eligible for immunity under Section 230.

3. Roommate's display of discriminatory statements in the "Additional Comments" section of subscriber profile pages

Roommate encourages subscribers to personalize their profiles by writing additional comments about themselves and their desired roommate in a blank text box at the end of the registration process, and publishes these comments without revision. It is not responsible, in whole or in part, for the development of this content. This is precisely the kind of situation for which Section 230 was designed to provide immunity.

One final note: We must keep in mind that the Legislature enacted Section 230 to protect websites from liability for including or failing to remove actionable content. Close cases must be resolved in favor of immunity lest websites be forced to face death by ten thousand cuts, fighting off a barrage of claims that they created or developed actionable content. Such an interpretation is consistent with the intent of the Legislature to preserve the free-flowing nature of internet speech and commerce without unduly prejudicing the enforcement of other important laws.

REVERSED in part, AFFIRMED in part, and REMANDED.

READING POINTERS

1 **Apply the library's direction**

The supplied precedent favors immunity at the boundary without protecting a host's own created content.