BAR EXAM DOCTOR / STUDY EDITION

July 2026 California Bar Exam Annotated Questions

The actual essay questions and performance-test packet, with added highlights and numbered study pointers.

Start with a clean attempt. The markup is intended for review after you have tried your own issue outline. It is not an official issue list or scoring rubric.

Read alongside the sample responses. Five essay responses and a PT client letter are available in the online July 2026 study series. The responses and commentary are ungraded instructional examples.

- Gold: task, audience, and governing-law instructions
- Teal: facts to connect to rules and arguments
- Burgundy: distinctions, assumptions, and common pitfalls

Source: State Bar of California, July 2026 Examination Questions (23 original pages).

Original source pages are preserved. Highlights, margin notes, and this cover are additions.

Prepared November 4, 2026 | Original instructional commentary; not official selected answers.

JULY 2026
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.

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

READING POINTERS

1 Which law applies?

Use the question-specific instruction. Essays 1, 2, and 5 expressly call for particular authorities; do not assume all five use California law.

QUESTION 1

1 Arthur, an attorney licensed to practice in California, works as in-house counsel for Northwest Fidelity Fund (Northwest), a securities firm. Cooper is a lower-level securities analyst for Northwest and frequently confers with in-house counsel, including Arthur, for legal advice.

2 While attending a business-related conference for Northwest, Arthur and Cooper engaged in consensual sexual relations for the first time. The following night, on their way back to the hotel from a social function hosted by Northwest, Arthur, who was driving, got into an accident, and Cooper suffered a minor injury. Arthur was arrested for driving under

3 the influence of alcohol and subsequently pled guilty to the misdemeanor charge. Arthur did not notify anyone of his conviction.

Arthur is authorized to take on outside work, and decided to do so in order to pay the fines related to his criminal conviction. Greta, the president of Greencare, a local volunteer organization, asked Arthur to create a nonprofit corporation for Greencare. Arthur told Greta that he could easily handle these matters for Greencare. However, Arthur had never done this type of work before. Arthur used a free, open artificial intelligence tool to

4 fill out the application for nonprofit status and did not verify the information. Ultimately, the Internal Revenue Service rejected Greencare's application for nonprofit status because the forms had not been properly prepared.

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

5 Answer according to California and ABA authorities.

READING POINTERS

1 Who is the client?

Northwest is the organizational client. Then apply the special sexual-relationship rule for constituents who regularly consult the lawyer; rank alone is not decisive.

2 Timing matters

Compare the start of the professional and sexual relationships. Consent to the relationship does not itself waive the rule.

3 Separate the questions

Analyze criminal discipline and California self-reporting separately. Identify a reporting trigger and the 30-day period; do not treat every misdemeanor as reportable.

4 Competence is the focus

Unfamiliar work plus unverified output supports the competence analysis. AI use alone is not prohibited. Distinguish proven facts from possible confidentiality or communication issues.

5 Compare both systems

State California and ABA rules separately where they differ, including California competence culpability and its statutory self-reporting duty.

QUESTION 2

In 2016, Harry and Wilma were married in State X, a noncommunity property state. Harry and Wilma used their combined earnings to purchase a small farm and a house in State X. The house was held in Wilma's name alone. The farm was held in Harry's name alone.

1 Two years before his marriage to Wilma, while Harry was domiciled in State X, Harry had executed a will which was valid in State X. The will left everything to Harry's sister, Sis. Harry did not execute any subsequent testamentary instrument.

In 2021 Harry and Wilma moved to California. Harry and Wilma sold the house in State
3 X but kept the farm. All the proceeds from the sale of the State X house were used to purchase a house in California, which was titled in Harry and Wilma's names. That same
4 year, Harry inherited $10,000 from his aunt that he deposited into a savings account in his own name.

In 2025, Harry unexpectedly died in an accident in California. Harry's assets consisted of his ownership rights in the house in California, valued at $600,000; the farm in State X, valued at $400,000; and the $10,000 in his savings account. The California probate court
5 has jurisdiction over all of Harry's assets.

Neither Harry nor Wilma had any children. Both Wilma and Sis survived Harry.

What rights, if any, do Wilma and Sis have in the:

a. California house?

b. State X farm?

c. $10,000 savings account?

Discuss according to California law.

READING POINTERS

1 Omitted spouse

A valid premarital will is not simply revoked by marriage. Apply omitted-spouse protection and its exceptions before distributing to the named beneficiary.

2 Trace the house

Follow the source of the acquisition funds. Separate the original title, quasi-community classification at death, and any actual survivorship language in the new deed.

3 Do not combine the real estate

The retained farm is outside California. Check Probate Code section 66 rather than importing the broader family-law definition used at divorce.

4 Separate-property share

Inheritance is not marital earnings. Apply the omitted-spouse share to the separate account after classification.

5 Jurisdiction is not classification

Read this together with the instruction to use California law. Do not treat jurisdiction alone as converting foreign real property into California quasi-community property.

QUESTION 3

In July 2024, Mary knowingly misrepresented to Wanda that Wanda's deceased husband was the father of Mary's 12-year-old child, Sam. Mary asked Wanda for $200,000 to ensure Sam would have a good home and education. In reasonable reliance on Mary's statement, Wanda wrote Mary a check for $150,000 and gave Mary 1,000 shares of stock, then selling at $50 per share.

1 Mary deposited the check into her only bank account, which had a balance of $500. Mary had no other assets. The next day, Mary wrote a check for $1,000 to buy a baseball
2 autographed by legendary player Hank Aaron. Mary gave the baseball to Sam.

3 In August 2024, Mary bought a condominium for $400,000, with a $100,000 down payment and a $300,000 loan from Bank, secured by a mortgage on the condominium. Mary made the down payment by check.

4 In December 2024, Wanda learned that Mary had lied and that her deceased husband was not Sam's father. Wanda took no action at the time, since the holiday season was a week away.

5 In February 2025, Mary sold the stock at $100 per share and used the $100,000 proceeds to pay four years of tuition for Sam at a private high school.

In June 2025, Wanda hired a lawyer to file a complaint seeking to rescind the transfers of the money and the stock, naming Mary and Sam as defendants. Because Mary only had $35,000 in her bank account, the complaint requested a constructive trust on the autographed baseball that Mary had given to Sam and on the condominium, now valued at $450,000.

Mary filed a motion to dismiss the claim for constructive trusts.

QUESTION CONTINUES ON THE NEXT PAGE

READING POINTERS

1 Mixed funds

Account for Mary's original money. Explain the tracing presumption used for the first withdrawal rather than treating every dollar as Wanda's automatically.

2 Donee versus purchaser

A gift recipient has not paid value. Innocence alone does not establish bona fide purchaser protection. Trace the interest transferred.

3 Financing and priority

The down payment, current value, loan balance, and equity are different figures. Analyze the traced contribution and Bank's security before choosing a trust or lien.

4 Delay needs application

Connect knowledge of fraud and delay with later asset disposition and any claimed prejudice. Consider rescission and equitable defenses separately.

5 Follow the substitute

Shares became proceeds, then tuition. Identify any surviving refundable right or benefit; a constructive trust needs property, not merely a loss.

1 What claims does Wanda have, what defenses (if any) can Mary raise, and who is likely to prevail regarding:

2 1. the autographed baseball? Discuss.

2. the condominium? Discuss.

3. the stock? Discuss.

3 4. the $35,000 in Mary's bank account? Discuss.

READING POINTERS

1 Pleading versus proof

The prior page identifies a motion to dismiss. Discuss whether the allegations identify property and grounds for restitution; distinguish this from ultimate proof.

2 Organize by asset

Use four numbered headings matching the call. Address the remedy, tracing, defenses, and likely outcome for each.

3 Remaining balance

Check the account history and lowest intermediate balance. Avoid counting the same money twice across the bank, baseball, and condominium.

JULY 2026
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

Original section divider or contents page. Continue to the next source page for highlighted passages and study notes.

QUESTION 4

4 1 Anne and Beth decided to start a new business called Toy Shop with $1,000 of initial capital. Wanting to incorporate, Anne mailed the completed articles of incorporation for "Toy Shop Co." to the Secretary of State. The articles provided that Anne and Beth would be equal owners of the business and that Anne was its president and Beth was its secretary and treasurer.

2 One week later, Beth purchased $50,000 worth of initial toy inventory from Supplier, payable in 12 monthly installments. Beth signed the contract "Beth, Secretary/Treasurer of Toy Shop Co." Once the toys were delivered, Toy Shop opened its doors for business. Two weeks later, the previously mailed articles of incorporation came back to Anne, marked "Return to Sender" because Anne had not mailed them to the correct address. Anne promptly corrected the address and resubmitted the articles, which were 3 successfully filed and processed.

After being in business for five months, Beth purchased $30,000 of additional toys from Supplier, payable in 12 monthly installments. She again signed the contract "Beth, Secretary/Treasurer of Toy Shop Co."

5 Due to competition from online sellers and higher-than-expected operating expenses, Toy Shop was unable to meet its financial obligations. Because Anne and Beth were spending such long hours working to make the business profitable, they did not tend to the formalities of running the corporation and failed to hold any shareholder, board, or incorporator meetings or an organizational meeting. Six months after opening, Toy Shop went out of business with no cash, valuable assets, or inventory remaining and notified Supplier that it could make no more payments. Supplier, who was still owed $25,000 on the initial toy purchase and $30,000 on the second toy purchase, brought suit against Anne, Beth, and Toy Shop Co.

1. What viable claim(s) can Supplier assert regarding the $25,000 and $30,000 debts? Discuss.

2. What viable defenses can Anne, Beth, and Toy Shop Co. assert? Discuss.

3. What is the likely outcome of Supplier's claim(s)? Discuss.

READING POINTERS

1 Find the formation date

Mailing is not necessarily effective filing. Put both contracts on a timeline before analyzing liability.

2 Before incorporation

Consider promoter liability, any preincorporation partnership, adoption, and the available de facto/estoppel defenses. Do not assume an officer title eliminates personal liability.

3 After incorporation

The second purchase occurred after formation. Begin with corporate contract liability and agency; examine owner liability on a separate basis.

4 Capitalization is a factor

Compare capitalization with expected obligations, but do not equate a failed business with automatic veil piercing. Look for abuse and inequitable consequences.

5 Formalities and defenses

Discuss this evidence together with control, separation of finances, and the ordinary-business-loss explanation. No commingling or diversion is expressly stated.

QUESTION 5

Dan was charged with second-degree murder. According to the prosecution's theory of the case, Dan shot Vick around 11:00 p.m. on Super Bowl Sunday in Moe's Bar (Bar). Before trial, the parties stipulated that Vick died from his injuries while on the way to the hospital.

At trial, the prosecutor called Officer Olivia, who arrived at Bar after the shooting. On direct examination, Officer Olivia was asked and answered the following questions:

Q: What did you observe once you arrived at Bar?

A: I saw Vick lying on the ground, bleeding from at least one bullet wound.

Q: Did you speak with Vick?

1 [1] A: Yes, I did. I asked him, "Who shot you?"

[2] Q: What did Vick say to you in response?

2 A: Vick said, "Dan shot me about 5 minutes ago – he's inside Bar."

At trial, the prosecutor also called Greta, who dated Dan before Vick's death. On direct examination, Greta was asked and answered the following questions:

Q: About three weeks before Super Bowl Sunday, did you and Dan have a conversation?

A: Yes.

[3] Q: During that conversation, what did Dan tell you?

3 A: Dan told me that Vick cheated him, and that he's going to get even with Vick.

4 In presenting his defense, Dan claimed he shot Vick in self-defense. As a character witness, Dan called Cate, who testified that Dan has a reputation in the community for being peaceful. On cross-examination, Cate was asked and answered the following question:

5 [4] Q: Have you heard Dan was arrested for assault with intent to kill in 1997?

[5] A: No, I had not heard that, but that would not change my opinion of Dan's peaceful nature.

QUESTION CONTINUES ON THE NEXT PAGE

READING POINTERS

1 Point 1: a question

Distinguish an interrogative offered as context from an assertion offered for its truth. Miranda is not triggered merely because an officer questions the victim.

2 Point 2: two screens

First analyze hearsay exceptions and foundation. Then separately apply the confrontation primary-purpose test, including the possible ongoing emergency.

3 Point 3: purpose and exception

Consider Dan's own statement offered against him, motive/intent, and self-defense. Do not substitute a general bad-character argument.

4 The defense opens a door

California permits pertinent reputation or opinion evidence. Keep the permissible character testimony distinct from cross-examination testing its basis.

5 Points 4 and 5

Assess good-faith foundation, remoteness, section 352, and limiting instructions. An arrest does not establish that the conduct occurred.

1 [6] The prosecutor next moved to introduce into evidence a certified copy of the 1997 arrest report.

2 At each of the six indicated points above, what appropriate objection(s), if any, and motion(s), if any, should have been made, and how should the court have ruled on each objection or motion? Discuss.

3 Answer according to the California Evidence Code and the United States Constitution.

READING POINTERS

1 Point 6: certification is not enough

Authentication does not automatically solve hearsay, extrinsic-character proof, section 352, or confrontation. Identify the proposed use.

2 Follow the numbering

For each point give the objection, any motion or response, and the ruling. Do not write a general evidence essay that omits a numbered item.

3 Jurisdiction-specific rules

Apply California evidence law and the federal Constitution. Do not accidentally replace California's character rules with different federal rules.

July 2026

California Bar Examination

Performance Test

INSTRUCTIONS AND FILE

READING POINTERS

Original section divider or contents page. Continue to the next source page for highlighted passages and study notes.

IN RE FREEMAN POTENTIAL LITIGATION

Instructions……

FILE

Memorandum to Applicant from Irma Moisa.....

Notice of Arbitration and Statement of Claim .....

READING POINTERS

Original section divider or contents page. Continue to the next source page for highlighted passages and study notes.

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.

1 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.

2 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.

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. 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.

READING POINTERS

1 Use the supplied jurisdiction

The PT library controls. Familiar-looking cases may be modified. Do not replace the packet with outside California defamation law.

2 Make a source map

Use the task memo for scope, the claim for alleged statements, and both cases for governing analysis.

1

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.

READING POINTERS

1 **Keep identities straight**

Follow the requested signature format. The fictional supervising lawyer in the sample response is not a real author or reviewer.

Moisa, Ormand & Romo LLP
350 Fairfax Avenue
Mayfair, Columbia

TO: Applicant
FROM: Irma Moisa
DATE: July 28, 2026
RE: In re Freeman Potential Litigation

We have been retained by Jane Freeman to evaluate the likelihood of success of an action for defamation that she is contemplating bringing in Columbia State Court against the Columbia Museum of Modern Art and Christine Hogan.

Freeman's defamation claim arose out of her employment with the Museum under the supervision of Hogan. She submitted the claim to arbitration; the Museum and Hogan denied the claim and she lost. Because the arbitration was nonbinding as to her, she is now free to bring a defamation action in court.

Please prepare a letter to Freeman for my signature. Assess whether each of the statements she alleged in the arbitration is indeed defamatory, assuming we are able to prove each is false, and give a reason for your conclusions.

READING POINTERS

1 Respect the premise

Do not spend the answer relitigating arbitration preclusion. The task tells you why a court action remains possible.

2 Deliver a client letter

Use a salutation, understandable legal explanations, six statement-specific applications, and the supervising lawyer's fictional signature block.

3 Assume falsity

The assigned question is whether each statement is defamatory. Do not spend the response proving the emails false or calculating damages.

Jane Freeman
875 Holly St.
Mayfair, Columbia

Pro Se

IN ARBITRATION BEFORE
THE COLUMBIA ARBITRATION ASSOCIATION

JANE FREEMAN, Claimant, v. COLUMBIA MUSEUM OF MODERN ART and CHRISTINE HOGAN, Respondents.	Case No. 254 NOTICE OF ARBITRATION AND STATEMENT OF CLAIM Robert Jaros, Arbitrator July 8, 2026, 9:30 a.m. Columbia Arbitration Association 1 Speer St., Mayfair, Columbia

1

NOTICE OF ARBITRATION. Pursuant to the Agreement of March 28, 2026, between Claimant, Jane Freeman, and Respondents, the Columbia Museum of Modern Art (the Museum) and Christine Hogan, Ms. Freeman hereby gives Notice of Arbitration against the Museum and Ms. Hogan. The arbitration will be conducted before Mr. Robert Jaros at 9:30 a.m. on July 8, 2026, at the Columbia Arbitration Association, 1 Speer St., Mayfair, Columbia. Also pursuant to the Agreement of March 28, 2026, any award will be binding on the Museum and Ms. Hogan but nonbinding on Ms. Freeman.

STATEMENT OF CLAIM.

Background. Ms. Freeman alleges as follows:

Ms. Freeman was employed by the Museum at its Film and Television Archive (Archive). Her direct supervisor was Ms. Hogan, who was the Archive's Assistant Director; Ms. Hogan's direct supervisor was Walter Quist, who was the Archive's Director. The Museum hired Ms. Freeman in 2006 and laid her off in 2024. At the time of her layoff, she was the head of Commercial Services for the Archive. Although she worked on multiple projects for the Archive, the main one involved the *Columbia Times* Newsreel Collection. Over a seven-year period, she worked with International Digital Corporation (IDC) to create a digital catalog and search engine for the Newsreel Collection. The project remained unfinished when she was laid off.

READING POINTERS

1 Separate allegations from findings

The file contains the client's allegations. Use them under the task's assumption without inventing supporting evidence.

In a series of defamatory statements, Ms. Hogan blamed Ms. Freeman for the unfinished status of the project. Although the Museum claimed it laid Ms. Freeman off as a result of restructuring, it actually did so because of Ms. Hogan's defamatory statements.

To prevent a claim of defamation against Ms. Hogan directly and against the Museum vicariously, Ms. Freeman demanded that the Museum and/or Ms. Hogan pay her the sum of $1 million, but the Museum and Ms. Hogan refused. Instead, the Museum and Ms. Hogan offered to arbitrate Ms. Freeman's defamation claim before the Columbia Arbitration Association, with any award binding on the Museum and Ms. Hogan, but nonbinding on Ms. Freeman. Ms. Freeman accepted the offer.

Claim. Ms. Freeman alleges as follows: Ms. Hogan made all of the statements quoted below, each of which was defamatory, being false and having a tendency to injure her in her occupation. Subsequently, each of these statements was broadly disseminated, both within the Museum and beyond it, by a person or persons unknown.

1. In an email dated January 15, 2024, and addressed to Ms. Freeman alone, Ms. Hogan stated: "I can't say you are incompetent. But I can say you have not been performing well on the Newsreel Collection, and do not seem up to the job."

2. In an email dated April 5, 2024, and addressed to Mr. Quist but not to Ms. Freeman, Ms. Hogan stated: "Ms. Freeman has from the start independently guided the Newsreel Collection project, with spotty oversight by previous management. She never completed documents formulating goals and deliverables over the life of the project and always refused my requests for the same."

3. In an email dated April 6, 2024, and addressed to Mr. Quist but not to Ms. Freeman, Ms. Hogan stated: "In my frustration with Ms. Freeman's lack of communication about the Newsreel Collection, I asked her in early February to start copying me on all important emails with IDC. She agreed and has since been copying me on highly technical emails concerning IT minutiae (which frankly I don't understand). Yesterday, I found out that she had taken a high-level meeting with Steve Canepa of IDC three weeks ago to discuss the Newsreel Collection project. I was not copied on any of the emails that must have been written to set up and discuss the meeting. I feel that Ms. Freeman may be actively undermining our efforts to communicate with IDC, because she believes she should be the only contact with them. Obviously, I can't prove any of this, but her apparent attempt to keep IDC for herself leads me to this suspicion."

4. In an email dated April 11, 2024, and addressed to Mr. Quist but not to Ms. Freeman, Ms. Hogan stated: "It is now my opinion that Ms. Freeman will never be a team player and that she may be actively working against our interests in her

READING POINTERS

1 Statement 1: context

Analyze the complete evaluation and the disclaimer of incompetence. Explain the competing interpretation rather than treating one word as dispositive.

2 Statement 2: conduct or rating?

The specific refusal allegation is verifiable. Then ask whether it crosses Jensen's threshold for serious accusations or remains protected performance evaluation.

3 Statement 3: disclosed suspicion

Identify the stated factual basis and qualified inference. Compare this with statement 4's claimed written evidence.

handling of the Newsreel Collection Project with IDC. I would therefore like to let her go, and I think we can restructure her department to eliminate the position. Proving malfeasance is difficult, despite much written evidence, so I think a separation through restructuring is the way to go. Your views?"

5. In an email dated April 13, 2024, and addressed to Ms. Freeman alone, Ms. Hogan stated: "I asked you to make every effort to come to my office at 1:00 p.m. You failed to show up until 1:15 p.m."

6. In an email dated April 17, 2024, addressed to senior managers at the Archive but not to Ms. Freeman, Ms. Hogan stated: "Today I laid off Ms. Freeman for reasons including various established financial improprieties."

Relief. Ms. Freeman alleges that she is entitled to damages for defamation in the amount of $1 million from the Museum and/or Ms. Hogan.

DATED: April 8, 2026.

/s/ Jane Freeman
Jane Freeman

READING POINTERS

1 Statement 4: implied support

An opinion label may imply supporting provable facts. Explain why asserted evidence of intentional wrongdoing matters under both cases.

2 Statement 5: minor criticism

Verifiability alone is not enough in this employment context. Apply Jensen's treatment of relatively minor performance concerns.

3 Statement 6: integrity

A claim of established financial wrongdoing directly implicates integrity and honesty. Explain its factual character and the relevant Jensen exception.

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California Bar Examination

Performance Test

LIBRARY

READING POINTERS

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IN RE FREEMAN POTENTIAL LITIGATON

LIBRARY

Slaughter v. Dental Administrators, Inc.
Columbia Court of Appeal (2012).....

Jensen v. OmniWare Co.
Columbia Court of Appeal (2013).....

READING POINTERS

Original section divider or contents page. Continue to the next source page for highlighted passages and study notes.

Slaughter v. Dental Administrators, Inc.

Columbia Court of Appeal (2012)

Terry Slaughter, DDS, an oral surgeon, brought a defamation action against Dental Administrators, Inc., an established dental insurance plan administrator. Dr. Slaughter had submitted claims to Dental Administrators for certain dental services that he had rendered to some of his patients. In denying each claim, Dental Administrators enclosed a letter to the patient explaining its reasons for the denial. In the letter, Dental Administrators stated that Dr. Slaughter's dental work was "unnecessary" and stated that he was "overcharging." Dr. Slaughter alleged that Dental Administrators' statements were defamatory. Dental Administrators moved to dismiss the action for failure to state a claim upon which relief could be granted—specifically, for failure to effectively allege that the statements were indeed defamatory. The trial court granted the motion and dismissed the action. On appeal, we now reverse.

Defamation includes libel. (Colum. Civ. Code, § 44.) Libel is a "false … publication by writing … which exposes any person to hatred, contempt, ridicule, or obloquy, or which … has a tendency to injure them in their occupation." (Colum. Civ. Code, § 45.)

To be defamatory, a statement must contain a provable falsehood. To contain a provable falsehood, the statement must relate a fact. To this end, courts distinguish between statements of fact and statements of opinion. A statement of fact generally says something about the world surrounding the speaker. For example, "John Jones was convicted of theft." In contrast, a statement of opinion generally says something about the speaker themself, such as their belief, feeling, conjecture, or speculation. For example, "I think" or "I sense" or "I guess" or "I have a hunch" that "John Jones is a thief." But some statements of opinion may imply a statement of fact. For example, if a speaker says, "In my opinion, based on the testimony given at trial, John Jones is a thief," the speaker implies the existence of facts, reflected in the testimony referred to, that support an inference that John Jones is a thief. The key to determining whether a statement is one of fact or opinion is whether a reasonable fact finder could conclude the statement declares or implies a fact. Whether such a fact finder could so conclude must be determined under the totality of the circumstances, including the words of the statement as a whole and the context in which the statement was made.

We believe that, under the totality of the circumstances, a reasonable fact finder could conclude that the statements in Dental Administrators' letters to Dr. Slaughter's patients, to the effect that his dental work was "unnecessary" and that he was "overcharging," declare or imply facts. Such a fact finder could understand the statements in question as

READING POINTERS

1 General contextual test

Extract a rule about what a reasonable reader would understand from the whole communication and its context. Avoid a fact/opinion word-matching test.

2 Opinion can imply facts

Use this for an assertion presented as opinion but backed by claimed evidence. Compare statements 3 and 4.

statements *of fact*, specifically, that Dr. Slaughter performed dental work that was unnecessary and charged fees that were excessive. Such statements of fact, if false, would be defamatory, tending, as they do, to injure Dr. Slaughter in his occupation.

Dental Administrators argues that, in stating that Dr. Slaughter's dental work was "unnecessary" and that he was "overcharging," their letters to his patients contain statements *of opinion*. In so arguing, they rely on the settled proposition that a statement that simply comments adversely on a person's attitude, efforts, or results is one of opinion. Although a reasonable fact finder might indeed understand such statements as Dental Administrators' as mere opinion *if made by some layperson*, such a fact finder could understand them as actual fact, *made as they were by an established dental insurance plan administrator*.

For these reasons, we conclude that the trial court erred when it granted Dental Administrators' motion and dismissed Dr. Slaughter's action for failure to state that the statements in their letters to his patients were defamatory.

REVERSED.

READING POINTERS

1 Why the speaker matters

Context includes the speaker's institutional position. Show why a reader might understand an accusation as an actual professional finding.

Jensen v. OmniWare Co.
Columbia Court of Appeal (2013)

In *Slaughter v. Dental Administrators, Inc.* (Colum. Ct. App., 2012), we recently addressed actions for defamation and defamatory statements. Today, we address such actions and statements again, but now in the particular area of employment.

Sean Jensen seeks reversal of a judgment of dismissal of his action for defamation against his employer, OmniWare Co. The trial court rendered the judgment after granting OmniWare's motion to dismiss the action on the ground that Jensen had failed to state a claim upon which relief could be granted because he had failed to effectively allege that the statements on which he based the action were defamatory.

1 In a nutshell, the underlying action for defamation arises out of statements evaluating an employee's performance. Hank Phelps, Jensen's supervisor at OmniWare, informed Jensen that he needed to improve his on-the-job performance in certain relatively minor respects. Jensen took offense at the statements, claimed they were false, and accused Phelps of trying to hide his own incompetence. Jensen demanded the statements be removed from his personnel file and challenged Phelps "to prove his various allegations to an impartial fact finder." OmniWare investigated the matter and sided with Phelps. Jensen brought the underlying action but continued working at OmniWare.

As a prelude to our holding, we express our strong judicial disfavor for defamation actions based on statements evaluating an employee's performance. In light of the multitude of laws designed to protect employees from oppressive employment practices, such statements serve the important business purpose of documenting the employer's hiring, promotion, discipline, and firing practices. Moreover, the laudable practice of evaluating employees is to be encouraged for other important reasons. The practice is a vehicle by which an employer or its designee informs an employee of what the employer expects, how the employee measures up, and what the employee needs to do to obtain wage increases, promotions, or other recognition. The employee is the recipient of statements evaluating their performance and is their beneficiary.

Clearly, there is a legitimate reason for evaluating an employee's performance, and the employer has an unquestioned obligation to keep records of statements doing so. We would therefore be loath to subject an employer to the threat of a defamation action in which a jury might decide, for instance, that the employee should have been given a rating of "average" rather than "needs improvement," or that the employee had an ability, unrecognized and unappreciated by a foolish supervisor, to get along with and lead

READING POINTERS

1 Employment-specific rule

Read this case with Slaughter. Do not assume that every provably false criticism of job performance is actionable.

others.

Yet that result is exactly what Jensen intended to accomplish with his defamation action against OmniWare—namely, to have an "impartial fact finder" judge whether Phelps was "right" or "wrong" in his statement evaluating Jensen's performance as an employee, which is to say whether Jensen was more valuable to OmniWare than Phelps was willing to acknowledge.

1 Based on the facts here, we hold: Unless a statement evaluating an employee's performance falsely accuses an employee of criminal conduct, lack of integrity, dishonesty, incompetence, or reprehensible personal characteristics or behavior, it should be deemed *not* a statement of fact and hence *not* defamatory.

In this case, Phelps's statements evaluating Jensen's performance as an employee do not accuse Jensen, falsely or otherwise, of criminal conduct, lack of integrity, dishonesty, incompetence, or reprehensible personal characteristics or behavior. All that they do is
2 inform him that he needs to improve his on-the-job performance in certain relatively minor respects.

Accordingly, the trial court was right to grant OmniWare's motion and dismiss the action. It would have been wrong to do otherwise.

AFFIRMED.

READING POINTERS

1 Extract the exceptions

Map the serious-accusation categories to each email. Explain why ordinary rating disagreements receive different treatment.

2 Use a comparison

The punctuality email is a useful analogy. The financial-misconduct email is a useful distinction.