California Bar Examination

Performance Test and Selected Answers

July 2022

The State Bar of California

OFFICE OF ADMISSIONS

PERFORMANCE TEST AND SELECTED ANSWERS

JULY 2022

CALIFORNIA BAR EXAMINATION

This publication contains the performance test from the July 2022 California Bar Examination and two selected answers.

The selected answers are not to be considered "model" or perfect answers. The answers were assigned high grades and were written by applicants who passed the examination after the First Read. They are reproduced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. These answers were written by actual applicants under time constraints without access to outside resources. As such, they do not always correctly identify or respond to all issues raised by the question, and they may contain some extraneous or incorrect information. The answers are published here with the consent of the authors.

CONTENTS

July 2022

California Bar Examination

Performance Test

INSTRUCTIONS AND FILE

NIESI v. GOSLING and HARDY

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.

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.

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.

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

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

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)

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.

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.

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

July 2022

California Bar Examination

Performance Test

LIBRARY

NIESI v. GOSLING and HARDY

LIBRARY

Anderson v. Walsh
Columbia Court of Appeal (2013) .....

Columbia Valley Fair Housing Council v. Roommate.com, LLC
Columbia Court of Appeal (2008) .....

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

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

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.

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

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.

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

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.

PT: SELECTED ANSWER 1

TO: Carmen Cardinal

FROM: Applicant

RE: Niesi v. Gosling and Hardy

Date: July 26, 2022

I. Introduction

You asked me to draft a memorandum analyzing: 1. whether Niesi will be able to prove that Hardy's statements, as quoted in the complaint, were defamatory if he were to prove the facts alleged, and 2. whether Gosling is immune from liability for Hardy's allegedly defamatory statements.

Niesi will likely be able to prove that some of Hardy's statements were defamatory, specifically that Niesi "is guilty of cable theft," and that Niesi "uses various unauthorized devices to get free phone, television and internet service to his condo." The remainder of the statements are unlikely to be categorized as defamatory, either because the statements are mere opinion or because the statements are true. Gosling will likely be able to establish, however, immunity from suit under Section 230 of the General Statutes of Columbia, as the defamatory statement arose out of Gosling's website's user interactive functions, rather than the website's information content provider functions.

II. Niesi Will Likely Be Able to Establish That Some of Hardy's Statements Were Defamatory

Niesi will likely be able to establish that Hardy's statement that "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" is defamatory.

The elements of defamation in Columbia are: 1. publication, 2. of a false statement, 3. to a third party, 4. which proximately results in an injury to another. *Anderson v. Walsh*, (Columbia Court of Appeal 2013). "To be false, a statement must be one of fact, and cannot be solely of opinion." *Id*.

In *Anderson*, the defendant posted to an online forum that the plaintiff had forged a check in her boyfriend's name and committed perjury in a prior breach of contract action between the defendant and the plaintiff. Essential to the court's analysis was whether the defendant's statements were reasonably susceptible to interpretation as fact or opinion. Where the determination is close, the proper inquiry is whether, under the totality of circumstances, a reasonable trier of fact would conclude that the statement conveys an actual fact rather than the publisher's opinion. The defendant's statements in *Anderson* were couched as facts that the plaintiff had committed several crimes. These sorts of allegations, the court held, were not reasonably susceptible to interpretation as mere opinion.

In online internet forums, general offensive and demeaning words are not sufficient to give rise to a defamation claim. *Insky v. Ilston* (Columbia Court of Appeal, 2011) In *Insky*, the defendant called the defendants "liars, losers, and crooks." The court found that the nature of the internet lends itself to "informal debate and criticism, leading many to substitute gossip for actual reporting and adopt a provocative tone." Whether an online post constitutes such nonactionable insults versus actionable libel centers on a question of whether the statement is "more emotional catharsis than *information*" (emphasis added).

a. Publication

Niesi will easily be able to establish that the statements in question were "published." In *Anderson*, the statements held to be defamatory were published in an online consumer blog, much like the blog in the instant case. Thus, Niesi will be able to show that the statements in question were published.

b. By a Third Party

Niesi will also be able to establish that the statements in question were made by a third party. Each of the allegedly defamatory statements are signed at the end by Hank Hardy, thus establishing that the statements were made by a third party.

c. Damages

Niesi will likely be able to establish that Hardy's statements harmed his reputation. Hardy named Niesi by first and last name and identified Niesi's address. Hardy further alleged that Niesi is a criminal in an online blog. Hardy also alleged that Niesi is an adulterer. His statements were alleged to have been seen by Niesi's neighbors, business associates, and family, including his wife. Niesi properly pleads that as a proximate result of these statements, Niesi suffered injury to his reputation. This element will be subject to proof, but certainly Niesi has sufficiently pled this element of defamation.

d. False Statement

To meet this element, Nisei must prove that Hardy: 1. made a statement of fact, that 2. was false.

1. Statement of Fact

Niesi will likely be able to establish that Hardy's statement that "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," is a statement of fact. Turning once again to Anderson, this statement is similar to the defamatory "facts" published by the defendant. The defendant in *Anderson* posted online that the plaintiff "wrote an unauthorized check" and "brought to court a made-up document." The court points out that both of these statements constitute direct criminal allegations: first of fraud; second of perjury. Statements like these, directly asserting that someone has committed a crime are "not reasonably susceptible to an interpretation as mere opinion." Contrasting Hardy's statements of fact with the mere statements of offensive opinion by the *Insky* defendant (the plaintiffs are "liars, losers, and crooks"), it is clear that where an individual's statement goes beyond mere distasteful insults to assert knowledge of direct criminal misconduct, courts construe such statements as statements of fact. Here, the court is likely to read Hardy's statement as an assertion that Hardy knows that Niesi committed the crime of theft. Thus, the court will hold that this statement is a statement of fact.

Niesi will likely be able to establish that some of Hardy's statements in comment b are statements of fact. Specifically, Hardy's statement that "while his wife is at work, an attractive young woman is at their house most of the day." Niesi may also be able to establish that "[i]t looks as though they are watching TV on his stolen cable service" is also a statement of fact.

Hardy alleges that he has been watching Niesi and has observed an attractive young woman at his home. This clearly falls under the category as an assertion of fact - Hardy is not saying it is his *opinion* that an attractive woman is at the house, but that he has

actually seen an attractive young woman at the house. Further, for the reasons discussed above, Hardy's assertion that the two watch TV on his "stolen cable service" is likely another assertion of fact as Hardy alleges knowledge of Niesi's actual commission of a crime.

The remainder of the potentially defamatory statements are likely to be characterized as opinion and are thus not actionable. Hardy's statement that "I'll bet he isn't even a cable subscriber" is the type of allegation that is clearly by its own words mere speculation ("I'll bet") and even if it were a statement of fact, it is not one that would reasonably give rise to a defamation claim.

The statement "[h]e appears to be a cheating spouse!" is also unlikely to be construed as a factual statement. Though an accusation of adultery is certainly distasteful and offensive, here the accusation is couched as an opinion rather than a statement of fact. Hardy lays out the factual allegation, as discussed above, that an attractive young woman comes to Niesi's home while his wife is away. Hardy then provides his own analysis, that, to Hardy, Niesi appears to be unfaithful. Applying the test in *Anderson*, a reasonable trier of fact would conclude that the statement expressed a mere opinion given the totality of the circumstances, including the previous factual statement and the statement's appearance on the internet.

Thus, Niesi has two statements of fact, of which he will need to prove their falsity.

2. Falsity

In his complaint, Niesi alleges that the statement contained in comment a is false. He alleges that he has been a customer of Columbia Cable Company for 20 years and has paid for every type of cable service he has ever received. If these facts are proved as

alleged, Niesi will establish the falsity of the statement of fact in comment a.

Niesi will not be able to establish the falsity of the comment in paragraph b. Niesi admits as such in his complaint: Niesi "works with a technical assistant, Liana Mabry, from his home office." Hardy's statement of fact, that Niesi has a young woman over while his wife is away, is admitted as true. Thus, Niesi will not be able to prove the falsity of comment b. His defamation claim arising from comment b will likely fail.

For the sake of thoroughness, if the court does find that Hardy's accusation of infidelity is factual, then Niesi likely adequately pleads that statement's falsity. Niesi alleges that his relationship with Mabry has always been professional. If proven at trial, such a statement is likely to prove the falsity of the infidelity allegations.

III. Gosling's Immunity Under Section 230

Gosling will likely be able to claim immunity from suit under Section 230 of the General Statutes of Columbia. Under Section 230, "interactive computer service providers" are immune from liability arising from content created by third parties on their websites. "Information content providers" are not immune from liability. An "interactive computer service provider" is a person or entity that "enables computer access by multiple users to a computer server," while an "information content provider" is a person or entity responsible, in whole or in part, for the development of content. In other words, "an 'interactive computer service provider' passively displays content that may be actively created or developed by an ‘information content provider.’" *Columbia Valley Fair Housing Counsel v. Roommate.com* (Columbia Court of Appeal, 2008)

As an initial matter, Hardy's statements would be considered statements by a third party under Section 230, as Gosling is the purveyor of the website and Hardy is an

unrelated party. Thus, if the comments arise under the site's "interactive computer service provider" functions, Gosling will be entitled to immunity.

In *Columbia*, the defendant website had several functions where the website and its owner solicited information from users, and then *itself* made choices as to what other users would see on the website. The court goes feature-by-feature to determine which features provide the defendant immunity from suit, and which do not. The defendant would collect information from subscribers and then choose which other subscribers that information was conveyed to. Because the defendant took an active role in deciding which information users would see, the court held that, for these functions, the defendant's service was that of an "information content provider," and thus the defendant was not entitled to immunity *on those particular services*.

The court also found that where the defendant gave users a blank text box and published whatever the users typed into it "without revision," it was "not responsible, in whole or in part, for the development of this content." Thus, where an internet service merely displays text entered by a third party without revision as to what people see or who sees it, the service is an "interactive computer services provider" for the purposes of that feature.

Gosling's immunity turns on whether the comments feature to the blog is categorized as an "information content provider" or an "interactive computer service provider." A court would likely find that the comment feature is more like the latter, and thus Gosling is entitled to immunity.

Gosling's website invites users to "participate by posting anything [the user thinks] will contribute" to Gosling's goals in running the website. She does this in the hope "that

members of the community will subscribe to the blog and *participate constructively* in ongoing discussion and action." Gosling does not revise comments that are posted on the website, nor does she limit who is permitted to make comments. Though commenters must subscribe to Gosling's website, this does not preclude her immunity. In *Fair Housing Counsel*, the court held that the subscription feature did not give rise to immunity, but that the ability of those subscribers to freely comment without censorship did. It is likely here that the court will find that Gosling's comment section is more like the open comments feature in *Fair Housing Counsel* since Gosling does not edit what her subscribers say in the comments and the comments are entirely provided by third parties.

One area where Gosling may have issue is where she solicits further information from Hardy. In *Fair Housing Counsel*, the court noted that the defendant was "not responsible, in whole or in part, for the development of the content" where it found immunity. In Gosling's comment, she says: "Can you tell us more?? Have you considered reporting Niesi's theft to the Columbia Cable Company's cable theft hotline?!" In commenting as such, the court may find that Gosling did, in fact, solicit the second comment from Hardy, thus weakening her argument for immunity. Further, Hardy addresses his second comment, comment b, to Gosling. Since, as discussed above, Niesi has a weaker argument for defamation in the second comment, it may be that this is not a problem.

It is important to note that the court in *Fair Housing Counsel* urged that "close cases must be resolved in favor of immunity lest websites be forced to face death by a thousand cuts... such an interpretation is consistent with the intent of the legislature to

preserve the free-flowing nature of internet speech and commerce..." To the extent that this is a "close case," it will be important to note that the court found it was the intent of the legislature to err in favor of immunity and to preserve the open forum nature of the internet.

IV. Conclusion

Niesi will likely be able to meet his burden to show that portions of Hardy's statements were defamatory, specifically that Niesi "is guilty of cable theft" and that Niesi "uses various unauthorized devices to get free phone, television and internet service to his condo." The remainder of the statements are unlikely to be categorized as defamatory, either as opinions or statements of fact. Gosling will likely be able to establish immunity arising under Section 230 of the General Statutes of Columbia, as the defamatory statement arose out of Gosling's website's user interactive functions, rather than the website's information content provider functions.

PT: SELECTED ANSWER 2

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

TO: Carmen Cardinal

FROM: Applicant

RE: Niesi v. Gosling and Hardy

DATE: July 26, 2022

The following memorandum responds to your memorandum asking whether Jack Niesi's allegations from his complaint, if true, would constitute a claim of defamation against Hank Hardy and whether Grace Gosling would be entitled to immunity from liability for Hardy's allegedly defamatory statements in any event. I first address whether Hardy's statements, as alleged, could be considered defamatory. I then turn to whether Gosling would be entitled to immunity in any event.

For the reasons that follow, I tentatively conclude that Hardy's statements are likely to be considered defamatory under Columbia law because, viewed under the totality of the circumstances, they are statements of fact, not mere opinion. *Anderson v. Walsh* (Colum. Ct. App. 2013). Second, under Columbia General Statutes Section 230, Gosling is likely entitled to at least partial immunity with respect to Hardy's first comments. *See Columbia Valley Fair Housing Council v. Roommate.com LLC (Columbia Ct. App. 2008).* But because Gosling actively sought out further comments from Hardy about Niesi's alleged wrongdoing, her immunity may be limited to Hardy's

original comment and not his subsequent comments.

1. Were Hardy's statements defamatory as alleged by Niesi?

Probably yes. Hardy's comments were likely defamatory assertions of fact rather than mere opinion under Columbia law.

The Columbia Court of Appeal in *Anderson v. Walsh* (Colum. Ct. App. 2013) has set forth the applicable standards for determining what statements constitute defamation in the state of Columbia. In Columbia, "defamation consists of the publication of a false statement to a third party, which proximately caused injury to another." *Anderson*. Not all false statements, however, can be considered defamation. Rather, to be a false statement, "a statement must be one of fact and cannot be one solely of opinion." *Anderson.* To determine whether a statement is a statement of fact--which might constitute defamation--or instead a statement of opinion, the courts consider whether a statement "is reasonably susceptible to an interpretation as either fact or opinion" by asking whether "under the totality of the circumstances, a reasonable trier of fact would conclude that the statement communicates an actual fact rather than expresses mere opinion." *Anderson*.

In *Insky v. Ilston* (Colum. Ct. App. 2011), the court of appeals set forth some special considerations that apply to defamation cases involving internet forums. Specifically, *Insky* emphasized that "Internet forums promote a looser communication style and an outlet for the user to criticize others." *Insky*. Because the internet enables users to engage in free informal debate and criticism "leading many to substitute gossip for accurate reporting and adopt a provocative tone," a reasonable trier of fact may be

more likely to conclude in cases involving internet defamation that the statements are "mere opinion rather than" assertions of actual fact. *Insky*.

Insky considered posts on an internet forum in which the defendant had called a group of company executives "liars, losers, and crooks." *Insky.* The court in *Insky* held that that kind of language, although "unquestionably offensive and demeaning," was best interpreted as "more emotional catharsis than information," particularly in light of the characteristics of the internet forum on which the comments were made. *Insky.*

Anderson, however, declined to extend the rationale of *Insky* to create a strong presumption that internet defamation is mere opinion as opposed to factual information. There, the court considered a defamation claim brought by a consumer after the proprietor of a store that had attempted to do business with the consumer posted defamatory statements on an online consumer blog about the consumer. *Anderson*. Specifically, the defendant there posted, under the preface word "FACTS," that the consumer had written an "unauthorized check" and had committed fraudulent acts in the course of their contractual relationship. *Anderson*. The retailer also separately commented on a consumer comment website that the buyer was engaging in bribery and hurting the community.

Analyzing these facts in light of *Insky*, the *Anderson* court nevertheless held that, although posted on the internet, the statements were properly considered factual assertions rather than mere opinions. In particular, *Anderson* stressed that the defendant's statements on the consumer website were labeled as "facts," recited alleged facts detailing perjury and fraud by the plaintiff, and therefore were not reasonably susceptible to an interpretation as mere opinion.

Applying both *Insky* and *Anderson* to Hardy's comments, assuming that the allegations in Niesi's complaint are true, a court is likely to conclude that Niesi has stated a valid claim of defamation against Hardy.

To start, Niesi has alleged that he suffered injury to his professional and personal reputation, shame, and mortification. Complaint. He has therefore satisfied the requirement that he show the allegedly defamatory statement proximately result in injury. *Anderson*.

Turning to the substance of the comments, Hardy's comments about Niesi are more similar to the assertions determined to be factual in *Anderson* than the mere opinion considered in *Insky*. Niesi identifies two sets of Hardy's comments as defamatory: First, Niesi points to Hardy's comment from June 11 on Gosling's website accusing Niesi of cable theft. Although, unlike in *Anderson*, Hardy did not expressly characterize these statements as "facts," he used similar language that tends to suggest Hardy intended the statements to be taken as fact, not opinion. For instance, Hardy stated factual information about where he lives in Craven and then asserted, as a definite, actual fact, that his neighbor "Jack Niesi, is guilty of cable theft." Complaint Paragraph 5a. Hardy then went on to assert that Niesi "uses various unauthorized devices to get free phone, television and internet service to his condo." Complaint Paragraph 5a. These sorts of assertions do not present themselves as mere conclusory opinions. Rather, like the statements in *Anderson* that recited alleged fats detailing bribery, perjury, and fraud committed by the plaintiff there, Hardy's statements recite alleged facts detailing specific instances of alleged misconduct by Niesi.

To be sure, as in *Insky*, Hardy's comments also use the kind of "emotional catharsis"

language that might be expected on Internet forums, where there is a "looser communication style" and users "substitute gossip for accurate reporting and adopt a provocative tone." *Insky*. For instance, Hardy concludes his first comment by asserting that Jack Niesi is a "crook." Complaint Paragraph 5a. But that statement alone, when viewed in the totality of the circumstances, is not likely to change the conclusion that the other statements were clear assertions of fact and not mere bluster.

Hardy's July 1 comment is likely to be treated the same as his June 11 comment. Again, as with the earlier comment, the overwhelming majority of Hardy's statements appear to make assertions of fact, not just opinion. Again, unlike in *Anderson*, Hardy's comments do not expressly identify themselves as "facts," but the implication of his statements is that he is reciting known facts based on his own investigation, not merely opinions or conjecture. Specifically, Hardy stated that he has been "watching" Niesi "closely," and accused him of engaging in an affair with an "attractive young woman" at his house most of the day while his wife is at work. Complaint Paragraph 5b. Although Hardy stated only that Niesi "appears to be cheating" on his wife, that statement is based on Hardy's first-person reporting of observations of fact, not merely his opinion or conjecture. Complaint Paragraph 5b. Once again, as with the earlier comment, Hardy completed the comment with something more akin to the opinion from *Insky*, stating that Niesi was "a loser and a low life." Complaint Paragraph 5b. But the context of that statement is a paragraph of factual assertions and investigation by Hardy. Again, as in *Anderson*, Hardy's comment detailed specific acts of purported wrongdoing and presented them to the world as fact.

I therefore conclude that a court would likely treat Hardy's comments as defamatory

statements of fact, not mere opinion. A reasonable trier of fact, considering the totality of the circumstances, would conclude that the statements are not reasonably susceptible to an interpretation of mere opinion but rather communicated actual fact.

2. Is Gosling immune from liability for Hardy's allegedly defamatory statements under Columbia General Statutes Section 230?

Partially, yes. Gosling is likely entitled to immunity under Section 230 for at least some of Hardy's comments, which he delivered unprompted in response to her open invitation for posts from the community. But insofar as Gosling specifically prompted Hardy to provide further defamatory information, she is likely not entitled to immunity under Section 230.

Applicable Law: Section 230 and *Columbia Valley*.

Whether Gosling is entitled to immunity depends on whether, by running her blog, she was acting as an "interactive computer service provider," or rather as an "information content provider" under Columbia General Statutes Section 230.

In order "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," the state of Columbia enacted Section 230. *Columbia Valley Fair Housing Council v. Roommate.com LLC* (Columbia Ct. App. 2008) (Columbia Valley). Section 230, accordingly, provides immunity for "interactive computer service providers," defined as a person or entity that "enables computer access by multiple users to a computer server." *Columbia Valley* (quoting Section 230). But Section 230 does not immunize an

"information content provider" from liability, defined as a person who "is responsible, in whole or in part, for the creation or development of content." *Columbia Valley*. Nor does Section 230 immunize interactive computer service providers from liability to the extent that they act as a content provider. *Columbia Valley*. Accordingly, determining whether Gosling may be immune from liability for Hardy's allegedly defamatory statements depends on whether she was acting as an interactive computer service provider or instead as an information content provider.

The Columbia Court of Appeal in *Columbia Valley* provided a shorthand for determining in what capacity an internet website manager is acting. As a shorthand, Section 230 immunizes conduct if the conduct is limited to *"passively"* displaying content that "may be *actively* created or developed by" a content provider. *Columbia Valley*. In contrast, when a website or entity "*actively* creates or develops content," it is more likely acting as an information content provider and therefore would not be entitled to Section 230 immunity.

Columbia Valley applied these principles in the context of a fair housing lawsuit against a website that matched people renting spare rooms with potential roommates. *Columbia Valley*. Specifically, the court broke down the analysis in three ways. First, to the extent that the website had actually "designed its website registration process around" a questionnaire and choice of answers "containing discriminatory categories," it had acted as an "information content provider" and could not claim immunity. *Columbia Valley*.

Second, the court explained that the website had acted as an information content provider (and was therefore not immune) when it designed its search functions to limit

listings available based on gender, sexual orientation, and other prohibited characteristics. *Columbia Valley*. Although merely creating a search engine on its own with "neutral tools" would not be content creation, requiring prohibited pre-populated answers and "developing the discriminatory questions, answers, and search mechanism" was sufficient to go beyond mere hosting of a website and constitute content creation. *Columbia Valley*.

With respect to a third category, the court found the website was entitled to immunity. Specifically, the website also encouraged subscribers to personalize their profiles by writing comments about themselves and then "publish[ed] these comments without revision." *Columbia Valley*. Because the website was "not responsible, in whole or in part, for the development of this content," but merely republished comment after an open-ended prompt to users, it was acting only as an "interactive computer service provider" and therefore was entitled to immunity. *Columbia Valley*.

Gosling's Posts and Hardy's First Comment

Turning to Gosling's blog, it is necessary to compare the characteristics of her blog to the characteristics of the website in *Columbia Valley*. The question is whether Gosling was merely passively hosting Hardy's comments and posting them "without revision" or instead had prompted his creation of the comments by developing questions that were designed to create Hardy's content. *Columbia Valley*.

As a general matter, Gosling identified her blog as being a place where she would "invite" the public "to participate by posting anything you think will contribute" to the goals of improving cable service in the area. Excerpts. Gosling hoped to create "ongoing discussion," but did not claim to have the power to moderate the content of

those discussions or pre-approve any particular content. Although Gosling did post to account holders that if they "have any other ideas about how to keep cable costs down, please post them below," that kind of broad, open-ended prompt resembles the kind of open-ended prompt discussed in the third section of *Columbia Valley*. It appears to be the case that Hardy's first defamatory comment was made in response to this open-ended prompt. But because Gosling did not in any way limit Hardy's response to providing only a defamatory answer, her conduct with respect to Hardy's first comment is likely more the passive variety that resembles an interactive computer services provider, not a content creator. She "publish[ed] these comments without revision" and "is not responsible, in whole or in part, for the development" of Hardy's initial comment. *Columbia Valley.*

Niesi might argue that, like the website in *Columbia Valley*, Gosling "elicits the allegedly illegal content" and exercises some control over it by requiring commenters to subscribe. *Columbia Valley*. Niesi would contend that, like the website in *Columbia Valley,* Gosling uses the commenters to conduct her business by requiring them to subscribe and provide information to her about themselves. Although this is a superficial similarity, it is not likely to convert all of Gosling's website into an information content provider. To be sure, Gosling requires commenters to subscribe, but, unlike in *Columbia Valley,* the requirement that commenters subscribe here has nothing to do with Hardy's allegedly defamatory statements. Moreover, unlike in *Columbia Valley* where the website required users to create profiles using certain discriminatory prompts and thereby creating discriminatory answers, Gosling did not restrict users to creating only defamatory speech on their profiles. Rather, she explained that the profiles will allow

users to choose how to communicate outside of the blog and develop their own ideas. For this reason, a comparison of Gosling's website to the Roommate.com website in *Columbia Valley* is likely inapposite, at least with respect to Hardy's initial comments.

Gosling's Immunity Regarding Hardy's Second Comment

Niesi may have a stronger argument, however, that Gosling is not entitled to immunity with respect to Hardy's second comment. After Hardy's first comment, Gosling wrote back and asked Hardy if he could "tell us more." Excerpts. Specifically, she further prompted Hardy to provide additional information about Niesi by asking if he had considered reporting Niesi's theft to the cable company. Excerpts. In making this statement, Gosling did not merely permit Hardy to produce content on her hosted site but rather joined in his comment creation by ratifying his characterization of Niesi as a thief. As such, she had essentially engaged in the kind of "development" and active creation of content that is not protected by Section 230.

Furthermore, by prompting Hardy to post additional information--asking if he can "tell us more???"--Gosling again likely acted as an information content provider or at least as a service provider behaving in the capacity of a content provider. In particular, Gosling's conduct in this respect resembles the website in *Columbia Valley* prompting its users to provide discriminatory preferences with a set of pre-populated answers. *Columbia Valley.* To be sure, unlike in *Columbia Valley*, Gosling did not require Hardy to provide more information "as a condition of accessing" her service. *Columbia Valley*. But at the same time, by asking Hardy for more information and implicitly blessing that additional statement Gosling was "more than a passive displayer of information created by others" but rather was "at least in part, a developer

of that information." *Columbia Valley*.

Gosling's best chance at avoiding liability with respect to Hardy's later comments is the admonition from *Columbia Valley* to tread lightly when interpreting the scope of Section 230. Specifically, the court emphasized that the legislature enacted Section 230 to protect websites from liability "for including or failing to remove actionable content." *Columbia Valley*. "Close cases," the court held, "must be resolved in favor of immunity lest websites be forced to face death by ten thousand cuts" and to protect the "free-flowing nature of internet speech and commerce." *Columbia Valley*.

Even in light of this language in *Columbia Valley*, however, a court is more likely to find that Gosling's comments prompting Hardy's second post goes beyond the scope of Section 230's immunity provision. Gosling, by prompting Hardy specifically to provide more specific information about Niesi, did more than merely "including or failing to remove actionable content;" she quite clearly assisted in its creation by soliciting it. *Columbia Valley*. Accordingly, notwithstanding *Columbia Valley*'s admonition that Section 230 be interpreted in favor of immunity in close cases, Gosling will likely be unable to seek immunity for this aspect of her conduct.

Conclusion

Because Hardy's comments, although they occasionally contained language similar to that found in *Insky,* were primarily presented as assertions of fact based on his own investigations, Hardy's comments are likely to be considered defamatory under Columbia law, assuming the complaint to be true. And, although Columbia Section 230 provides immunity to at least some of Gosling's conduct insofar as she merely passively

hosted Hardy's comments, Gosling may have lost that immunity when she prompted Hardy to provide more specific details about Niesi's conduct.