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Legal Concerns in Writing Job Recommendations

Lori K. Miller, Brenda G. Pitts, Lawrence W. Fielding

Prospective employers of students routinely ask educators for references. As noted by Wonder and Keleman, educators are rated as a preferred source of reference information. Letters of recommendation serve three significant purposes (Paetzold and Willburn, 1992; Von der Embse and Wyse, 1985; Webster, 1992). One, references verify application information provided by the prospective candidate. The solicited reference ensures that the itemized degree(s), certifications, and experiences are accurate. Two, the pre-employment reference can reduce worker and third-party accidents. For example, it is influential for a school district to know if a candidate has a history of assaulting co-workers or children. A school district that fails to check references may be hiring a child abuser. The thoroughness of the employer's investigative procedures is a determinant of liability (Carrel, Kuzmits, Elbert, 1992, p. 212). Three, thorough employment procedures facilitate the hiring of competent, qualified individuals. Proper hiring reduces business expenses associated with employee turnover, absenteeism, recruiting and training.

Literature cautions individuals about giving references (Daniloff, 1989). The pervasive fear in providing a reference letter hinges on defamation liability (Paetzold and Willburn, 1992). However, research indicates there are currently few legal cases in which a student has sued an educator alleging defamation via a reference. The identified cases are from the early twentieth century. Three reasons account for the dearth of cases. One, students are not aware of their legal rights. Students unfamiliar with the law may not know when individual rights have been violated. Two, students often times are not in a financial position to pay the legal expenses associated with a tort claim. Three, as noted by the U.S. Supreme Court, courts enter the educational domain with extreme reluctance (*Cannon v. University of Chicago,* 1978). The lack of judicial precedent is one indication of cases which have proceeded beyond the district court level. Cases not published in state and federal reporters are not readily available for analysis.

The tort of defamation requires the plaintiff to prove three primary criteria: 1) the communicated statement must be *false,* 2) the statement must be *communicated* to a third party, and 3) the plaintiff must show that the defendant's communication brought *disrepute.* Each criteria is examined separately.

Falsity of the Statement

One criteria of a defamation action is that the communicated statement be false. Truth is an absolute defense. The defendant has the burden of proving that the statement is true (McGuire, 1989, p. 230).

Defendants do have access to a "qualified privilege" defense. This "protects speech in areas in which uncensored expression is an important public policy" (Daniloff, 1989). The qualified privilege allows an educator to make comments which may positively or negatively influence the prospective employer's hiring decision. The free flow of information enhances efficient operations in a variety of ways. For example, prudent hiring reduces costs associated with employee turnover (e.g., hiring, screening, training). Society benefits since these costs are

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not passed to the consumer. However, the qualified privilege is not absolute. Courts recognize it only when educators make statements in "good faith" and for a legitimate purpose. Recommendations made maliciously and with a disregard for the facts are subject to liability (Daniloff, 1989; Fischer, Schimmel, and Kelly, 1987, p. 82). For example, in *Lattimore v. Tyler Commercial College* (1930), a prospective employer requested a reference letter about a former Tyler College student. The student alleged that the provider of the reference supplied a defamatory reference letter. The letter stated that the student:

> did not complete any of his work in our school and his record was very bad, indeed, while with us. In fact, to be plain with you, he was arrested and put in jail for stealing a typewriter. He was one of the most unsatisfactory students we ever had and we feel that you will be very much disappointed should you give him a place in your organization. p. 362

The Texas court stated that the provider of the reference was not granted a qualified privilege. In fact, the evidence indicated that the plaintiff had never taken a typewriter, was never arrested, and had never been put in jail. The failure of the defendant to investigate the accuracy of his comments constituted malicious behavior. Judgment of the Court of Civil Appeals was reversed in favor of the plaintiff.

In a 1986 case (*True v. Ladner*), the Supreme Court of Maine found the reference provider had abused the qualified privilege. The plaintiff in this case applied for a position as a high school mathematics teacher. The search committee selected True as the top candidate. The Superintendent later denied True employment after receiving a phone reference. The Superintendent stated:

> 1) True was a good mathematician, but not a good mathematics teacher; 2) True was "more concerned with living up to the terms of his contract rather than going the extra mile"; and 3) Ladner (the superintendent) did not feel True turned the students on. p. 260

The court held that the superintendent's comments were neither privileged nor discretionary. Furthermore, the court noted "there was ample evidence to support a finding of the falsity of the statement in question and Ladner's reckless disregard of its falsity."

Communication to a Third Party

Communicating information about a student to a prospective employer fulfills the second defamatory criteria. A prospective employer may request information either orally or in a written format. The educator who responds to the request is transmitting information about the student to a third party, the prospective employer.

Closed conversations between only the educator and student do not theoretically constitute "communication to a third party" since information is transferred only between two independent parties. Consequently, an educator may feel at liberty to verbally assault a student when no one else is around. However, courts are repeatedly recognizing the concept of defamation by self-publication (Prentice & Winslett, 1987) which introduces liability when comments are communicated to a student in a private setting. The key issue is foreseeability. An educator could be liable for defamation if it is foreseeable that a student may have reason to repeat the information at a later time. Communication to a third party occurs when the student repeats an educator's comments to a prospective employer. Consider the following situation.

A female student applies for a job at a public elementary school. In an interview, the principal requests that the student provide a written reference from her primary academic advisor. The student is fully aware that her relationship with her academic advisor is adversarial. In fact, the student vividly remembers her advisor belittling her beliefs and morals. Consequently, the student tells the principal that a favorable recommendation from the advisor may not be received. The prospective employer may refuse to

hire the applicant based on the derogatory reference. The student has an action for defamation if she can prove that the advisor's reference was a significant factor regarding her failure to secure employment.

Communication about a student among other faculty members and administrators has been subject to judicial scrutiny. Conversation among those "who have a reason to know" is typically regarded as privileged communication since the perceived benefit of this communication outweighs resultant individual harm (Duffy, 1983/1984). For example, it is appropriate for an educator to communicate the facts to campus police upon witnessing one student assault another. However, gossiping among faculty colleagues about the perceived psychotic propensities of the student falls outside the realm of a qualified privilege.

Individual Disrepute

The third criteria of a defamation claim deals with individual disrepute. The law of defamation strives to protect an individual's reputation (Daniloff, 1989). Any false statement communicated to a third party "that tends to hold the plaintiff up to hatred, contempt, or ridicule, or tends to injure the reputation of the plaintiff" is defamatory (McGuire, 1989, p. 230). For example, consider the following statement, "she is a good person, but not emotionally strong enough to withstand the rigors involved in being an athletic director." This statement has many inferences. One, the recipient of the information could conclude that the candidate is an emotional disaster. Two, the recipient could infer that the candidate lacks the confidence and assertiveness necessary to function successfully as an athletic director. Regardless, the initial statement reflects an opinion which may, or may not, be true.

Implications of the Family Educational Rights and Privacy Act (FERPA)

The 1974 FERPA (a.k.a. Buckley Amendment) improved parent and student access to school records (Belo, Castagnera, & Young, 1984; Creim, 1979). FERPA gives all students and parents access to letters of recommendation placed in student files since January 1, 1975. The students are the prime beneficiary, allowing them to identify and modify inaccuracies or misleading statements within their records.

Educators frequently write letters of recommendation for students transferring or enrolling in other educational institutions. Students indicate whether or not they want to waive access to review the reference. The students will not be able to read the educator's comments if they have waived this right to access. However, students who do not waive the right to access can review their references. Contested references can result in liability.

Summary

Educators pride themselves on being a part of the student's educational development and career placement. Educators may choose to adopt a no-comment policy to avoid costly legal expenses, physical and mental aguish, and professional scrutinization. However, this policy fails to benefit deserving students and society at large. It is a professional responsibility to assist graduates in obtaining employment. To provide oneself with a legally defensible reference, the following guidelines are suggested:

1. Provide only written references. A written reference allows an educator time to thoroughly investigate facts and figures. Phone references are often problematic. Clouded memories and hasty comments can invite litigation.

2. Retain a copy of the provided reference. This copy is influential in defending defamatory allegations. Again, phone conversations can leave the educator with no defensible document.

3. Obtain written consent from the person seeking a recommendation. The student's written request helps an educator prove that the student was indeed cognizant of the letter and its anticipated contents. Furthermore, this practice confirms that the date of the requested reference and the letter supplied are in tandem. A reference provided in 1982 holds little credence in a 1992 defamation claim.

4. Use qualifying statements when providing a letter of reference. For example, consider using a phrase such as "in response to your request." This statement infers that the reference letter is not provided maliciously or with ill intent.

5. Seal and address the letter of reference to a particular person. A "To whom it may concern" salutation opens the reference up to individuals who may, or may not, have reason to access the letter.

6. Do not share letters of recommendation with other colleagues, students, or practitioners. This communication could invite the legal problems addressed above.

7. Remain objective and provide only that information that is factual and documented. The social utility of letters of recommendation encourages the sharing of both negative and positive information. However, documented facts are essential when preparing a legal defense.

8. Avoid comments that the recipient may interpret as *either* positive or negative. For example, "It is definitely a man's job, but if any female could handle it, it would be her."

9. Provide only that information specifically requested. Costly ramifications result when additional information is volunteered on an ad hoc basis.

10. Stay away from "trap" questions. For example, prospective employers often ask a reference supplier the question, "Would you hire this person?" This innocuous question is in fact dangerous. There may be several reasons why an employer may, or may not, hire a particular individual. Reasons could range from objective (lacking credentials) to subjective (is married). "Yes, I would hire" or "No, I would not hire" responses fail to convey objective information.

Writing letters of recommendation is an important professional responsibility. The careless provision of recommendations can pose legal problems. The above suggestions can assist the educator in his or her effort to provide a valuable, yet legally defensible letter of recommendation.

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