



by Rochelle Kaplan, Esquire

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*This newsletter addresses legal issues related to providing references for students and referring students for jobs.*

## References

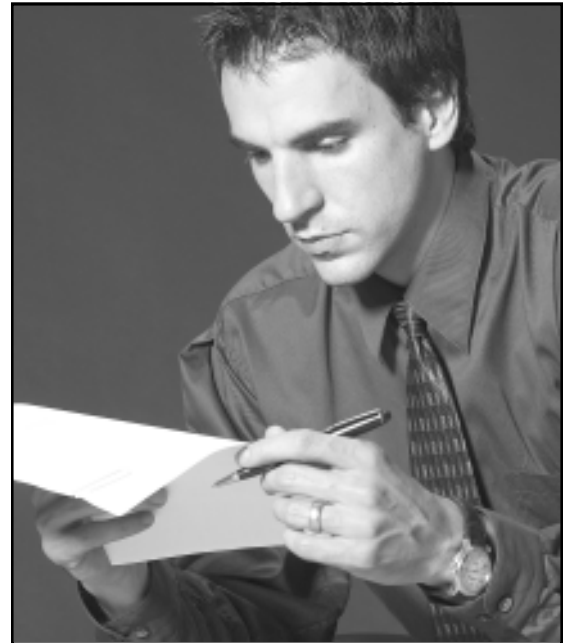
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Whether it is a letter from a faculty member evaluating a student's work in class for full-time employment prospects, an evaluation of a student teacher on a teaching assignment, or a report from an employer on a student's progress in a cooperative education assignment, what can the reference provider say or write?

Many who have been called upon to provide references want to know if they will "get into trouble" if their reference indicates that the person in question has a performance problem or needs to improve in certain areas. They want to know *what* they can say in a letter of reference.

### **Case Study: The Co-op Student**

A student has a cooperative education assignment with a publishing company. After the first three months, the student's supervisor evaluates her and identifies certain areas for improvement, discusses the evaluation with her, and places it in her personnel file at the company. Over the course of the assignment, which spans several semesters, three more evaluations occur and are placed in the student's file. Her performance is uneven, and each of the evaluations indicates her weak areas. At the end of the assignment, the vice president of the company has to determine if the student will be offered a full-time position after graduation. To make this determination, he asks the supervisor to share with him the student's written performance evaluations. Based on the evaluations, the student is not hired for a full-time position.



The supervisor shares these evaluations with the school's cooperative education coordinator and the student's faculty adviser. The adviser works with the student on some of her weak areas. Later, when asked by the student to give a reference, the adviser prepares the reference outlining the student's strengths and weaknesses based on the adviser's own observations and on information contained in the co-op supervisor's performance evaluations. At the student's request, this letter becomes part of the student's credential file, and the student specifies that she grants access to the file to any employer to which she applies. After a year, the student remains unemployed.

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In this scenario, defamation and qualified privilege are the key issues involved.

**Defamation:** To be defamatory, a statement must be false and must harm the person’s reputation and lower him or her in the esteem of the community. “Harm to one’s reputation” must result in some tangible harm to the person, e.g. loss of money, business, or employment. A substantially true statement may be defamatory if it is incomplete and misleading. Statements of pure opinion are defamatory if they are based on unsubstantiated facts.



The general rule is that no defamation is committed unless the statement is written or spoken to someone other than the person about whom the statement is made. This can be a communication within a company or institution, or a communication outside of an organization. Some courts have held that if the communication is among managerial personnel of the same organization and concerns business issues such as performance problems of employees, it is not a publication to a third person.

**Qualified privilege:** Additionally, in the employment context, the law provides a “qualified privilege” for making defamatory remarks. That is, while the remarks may still be untrue, if the conditions of the

privilege are met, the communicator has a complete defense against the defamation claim. A qualified privilege to the communication exists as long as the speaker makes the communication in good faith and has a public or private duty, or legal, moral, or social obligation to do so, and as long as the person receiving the information has a corresponding duty or interest in the communication. Some courts have held that qualified privilege applies to personnel evaluation information or intracompany communications regarding an employee’s fitness.

A statement loses its privileged character if the communicator is motivated by ill-will, demonstrates excessive communication of the statement, or makes it without grounds for believing it to be true. The issue is not only the factual accuracy of the statement; an employee must also show that substantial evidence exists that the supervisor made his or her statements without believing them to be true or lacked grounds for belief in the truth of the statements. Reckless disregard for the truth includes a failure to verify in circumstances where verification is practical.

An employer may be protected by a qualified privilege concerning an employee when disclosing information is necessary to serve the employer’s legitimate interest in an employee’s fitness to perform. For example, qualified privilege applies when a current employer discloses the reason for an employee’s discharge to a prospective employer, and when a supervisor is informed of his/her employee’s improper conduct. The privilege may be lost if the defamatory communication reaches people who do not have a legitimate interest in the subject.

How does qualified privilege apply to the co-op student’s situation? The first communication is made in the performance evaluations, which are sent from the supervisor to the vice president of the division so he can make a hiring decision. This is an intracompany communication given to an individual in the company who has a legitimate interest in the information. Unless the student can show that there was ill-will underlying the evaluations—for instance, that the supervisor had an axe to grind with the student—this communication is qualified. Had the supervisor sent these performance evaluations to others in the company who did not request the information or who had no reason to obtain the information, qualified privilege would be lost due to excessive publication. If the supervisor made inaccurate state-

ments, and verification for accuracy was practical, then qualified privilege would also be lost.

The second communication, from the supervisor to the faculty adviser, was made outside of the company and outside of the employment context. Did the adviser have a good-faith reason to know this information? If the cooperative education arrangement between the school and the employer specifically states that reports will be made to the school regarding the student's progress, then the adviser has a contractual right to this information. It is not clear under the law whether the adviser should be receiving these reports if there is no agreement for him to do so. One could argue that there is an educational need to know; that is, the adviser needs to have this information to work with the student on her weak areas. It is also wise to advise the student prior to the commencement of the employment experience that such a communication between the supervisor and the faculty adviser will occur.

The third communication is the reference letter from the adviser to other employers. Like performance evaluations, reference letters are used as part of the selection process for hiring decisions. It is not clear whether an adviser's reference to a prospective employer would be given the same qualified privilege as a prior employer's communication to a prospective employer.<sup>1</sup> However, an argument could be made that the adviser is merely providing relevant job-related information to an employer as part of the hiring process, and thus, the reference should be viewed under the qualified privilege test.

Regardless of whether the reference meets the tests used to assess the legality of a reference (standard defamation or qualified privilege), what matters in this case is that the reference was communicated to other individuals who had a good-faith need to know—in this case, prospective employers. In fact, the student controlled who would receive the letter by placing it in her credential file and specifying who could obtain the contents of the file: She could designate that access was to be given to specific employers or give blanket consent and open the file to any employers interested in her. It would be different if the adviser sent the letter to any employer or sent the information indiscriminately to anyone who requested it. The flaw in the reference, however, is the use of the supervisor's performance evaluations as part of the letter. The adviser did not collect this information, nor did he make an attempt to verify its accuracy. Once again, it is not at all clear

whether this alone would result in the adviser being held liable for defamation since we don't know what was said in the letter and whether the student's failure to gain employment can be directly related to the contents of the reference letter. Certainly, if reference letters are based upon another individual's observations,



the reference writer should have documentation of these observations and accurately describe them in the reference.

### Reference Immunity Laws

Thirty-nine states and jurisdictions have passed reference immunity legislation, which essentially provides protection from civil lawsuits against *employers* who provide references for former *employees*.<sup>2</sup> Individuals other than employers who provide references are *not* protected under these laws and must rely on the common law defenses—truth or qualified privilege—against charges of defamation. This means that faculty members, student advisers, or other school personnel who provide students with references would not be protected by the law, unless the student was an employee of the school. In the above scenario, the supervisor would have protection under the immunity laws, but the faculty adviser would not.

To be sure, evaluations of an individual's performance, whether at work or in the classroom, are an integral part of the world of work and education. Information contained in the letter must be based upon facts that can be documented in the person's employment or student records. Besides this simple rule of thumb, those providing references should be aware

of certain limitations on what should be communicated in a reference letter (i.e., limitations arising out of discrimination law, FERPA, and case law on intentional misrepresentation liability), even if the information is truthful.

### **Intentional Misrepresentation Liability**

Reference writers sometimes overcompensate and provide a glowing reference, when in fact the student may have done something wrong or been a problem performer. In most cases, when a reference “accentuates the positive and eliminates the negative,” there is no liability. However, a small number of courts have held that if a former employer misrepresents a person’s performance in a reference and the person causes physical harm to another, the former employer may be liable for the injury when there is a foreseeable risk of physical injury by the prospective employee.

For example, in one case<sup>3</sup>, an employer provided a reference for a former employee—a detention sergeant—describing him as a “pleasure to work with” and an “excellent” employee even though the employer had been planning to place the employee on an unpaid disciplinary suspension as a result of an investigation into allegations of inappropriate sexual behavior with female inmates. The detention sergeant was subsequently hired by a psychiatric facility where he was accused of sexually and physically assaulting a patient over a period of two weeks. Because the former employer supplied misinformation about the detention sergeant, the patient successfully sued the former employer for negligent misrepresentation.



The court found that a reference should give the complete picture, especially if there is good reason to believe that the prospective employee will cause physical harm to others. The alternative, the court said, is to refuse to provide a reference.

### **Discrimination Laws**

A reference should not disclose information regarding an individual’s race, color, religion, national origin, age, disability, or gender—which also is referred to as “protected class status.” (One caveat: In the case of gender, although using the person’s first name or a title such as “Mr.” or “Ms.” in the reference is indicative of gender, this is not illegal.) References should not disclose any information that would be considered personal such as economic status, parental/marital status, or any type of information which, if disclosed, would be considered an invasion of the person’s privacy.

Prospective employers requesting information from a reference should not ask for information that they could not request from the job applicant. The prospective employer may ask questions regarding dependability, absentee record, and use of drugs/alcohol on the job. In addition, if the position involves the safety and security of others, questions pertaining to violent behaviors can be asked. The answers should be based upon documented incidents or behaviors. The reference provider should not speculate.

Providing references for only certain individuals based upon race, age, sex, national origin, disability, or religion will expose the reference provider to potential liability. Individuals who provide references that seem to be generally positive for members of certain groups and generally negative for members of other groups on a consistent basis could be liable for discrimination.

### **FERPA**

Faculty or other school personnel who are asked to give references have an additional duty under the Family Education Rights and Privacy Act (FERPA). They must obtain the signed, written consent of the student to disclose information from a student’s education record. Thus, if the reference wants to disclose the student’s GPA or grades, the student must provide a signed, written consent prior to the disclosure.

## Referrals

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Typically, employers contact faculty or other school personnel to request the names of students who would be good candidates for job opportunities. At first glance, it seems harmless to provide the names of the “best” students. However, there are some potential legal pitfalls. The equal employment opportunity laws prohibit employment agencies from referring or refusing to refer individuals for employment based upon the individual’s protected class status. By identifying individuals for employment on a “regular” basis, faculty or school personnel may be considered an “employment agency” for purposes of compliance with equal employment opportunity laws. For example, if it appears that only male students or only minority students are being referred for employment opportunity, the staff member, as well as the school, may be open to charges of discrimination.

Many employers have diversity objectives in their college relations programs. Accordingly, they will make a special effort to identify and attract minority candidates. School personnel will probably be asked for help in accomplishing this task. While it is lawful and ethical to assist employers in reaching out to minority groups, it is inappropriate to identify only minority individuals who might fit the needs of an organization. Referrers have an obligation to provide a “fair” system, i.e., one where all students have access to information about career opportunities.

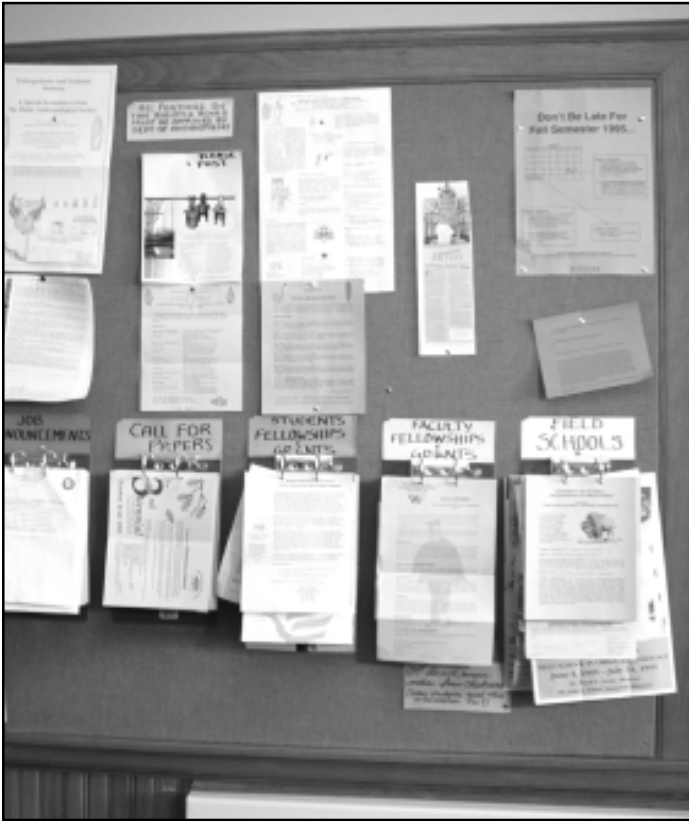
In many cases, an employer will ask a faculty member to refer students who have a specific GPA and/or are “the best and the brightest in class.” These are con-

sidered neutral criteria because, on their face, they do not ask for referrals based upon race, ethnicity, or gender criteria and apply to all candidates. However, applying the criteria to screen out students may result in the screening out of more minority students than nonminority students. While the employer may have a business- or job-related reason for requiring a certain GPA, the referrer may not be aware of the basis for this requirement. Moreover, assessing whether someone is “the best and the brightest” involves a subjective evaluation that, unless founded in some objective measure, could result in unintentional discrimination. In these situations, it is far better to refer all interested candidates. Faculty, administrators, and career services should avoid screening resumes/students for employers. That is solely the employer’s responsibility since the employer knows the job and the skills required.

Of course, the reality is that faculty and staff members *do* refer some students and not others. If school personnel wish to do this, they should consult legal counsel to ensure that the referral practice can be



justified. Referral practices should be regularly reviewed to assess whether there is disparate impact. If such a review reveals that nonminorities are being referred substantially more often than minority students, then the practices should be examined to determine why this is the case. School personnel would then want to determine if there is another way to measure the person’s ability to do the job and discuss the disparate impact with the employer so that



the employer can change the criteria to diversify the candidate pool. Ultimately, it should be the employer who performs the selection since the employer is better placed to defend its hiring practices.

Upon receiving a request to refer students, school personnel should notify individual students who have declared an interest in such positions and encourage them to apply. The position should also be posted in the department, announced in classes, and listed on the career center's campus-wide posting system. If the employer indicates that it is working to diversify its candidate pool, the career center can assist the employer by notifying minority student organizations and refer the employer to the college's minority student advisory office, if one exists. That office may be authorized to provide a full list of the members of a requested population. (Note: As a practical matter, it is often the better choice for the employer to start with the career center and ask for assistance in reaching out to other offices, campus organizations, and departments; sometimes unproductive misunderstandings occur when an employer's efforts on campus aren't coordinated.)



**Rochelle Kaplan, Esquire**, specializes in labor arbitration, employment law, and related issues. She provides legal guidance to NACE members through regular columns in the NACE Journal, and through web seminars.

Legal information is provided as a resource and should not be construed as legal advice for any particular situation. NACE is not able to give advice about specific legal issues regarding situations particular to your institution, nor answer questions from students or alumni. For specific legal advice, please contact your institution's legal counsel.

### Footnotes

<sup>1</sup> There are no reported reference cases involving a reference from a student adviser to prospective employer.

<sup>2</sup> As of this writing, states that do not have such laws are Alabama, Connecticut, District of Columbia, Massachusetts, Mississippi, Nebraska, New Hampshire, New Jersey, New York, Puerto Rico, Vermont, Washington, West Virginia.

<sup>3</sup> *Davis v. The Board of County Commissioners of Dona Ana County*

## Tips for Providing References and Referrals

<i>If you are providing a reference...</i>	<i>If you are referring students...</i>
<ul style="list-style-type: none"> <li>• Prior to providing a reference, obtain consent from the person about whom the reference will be given. Written consent is better, but verbal consent will suffice.</li> <li>• Candidly discuss the type of reference that you will provide.</li> <li>• Follow your organization's policy regarding providing a reference. If references are handled in a centralized fashion, advise the prospective employer that even though you may be named as a reference, your organization's policy prohibits you from providing one.</li> <li>• Avoid lunch discussions or "off the record" telephone conversations with prospective employers regarding a person's performance. There is no such thing as "off the record."</li> <li>• If you are unaware that the job applicant has named you as a reference, ask the prospective employer for verification that the person has given consent for the reference.</li> <li>• Provide factual information, based upon personal knowledge/ observation of the person through direct contact with the person or obtained from the person's personnel record or student record.</li> <li>• Respond to direct and specific inquiries about the job applicant. Direct the response to the particular person who requested the information.</li> <li>• Relate the reference to the specific position for which the person applied and the work that the applicant will perform.</li> <li>• If you make subjective statements or give opinions because they are requested, clearly identify them as opinions and not as fact. If you give an opinion, explain the incident or circumstances upon which you base the opinion.</li> <li>• Don't guess or speculate. If someone asks you questions regarding personal characteristics about which you have no knowledge, state that you have no knowledge.</li> <li>• Do not disclose protected class information in a reference. Do not include information that might indicate the individual's race, color, age, religion, national origin, disability, gender (unless the individual's name makes gender obvious), or marital/parental status.</li> </ul>	<ul style="list-style-type: none"> <li>• The referral process must be the same for everyone. You can't have a different process or standard for candidates based upon the candidates' protected class status.</li> <li>• Direct students to opportunities without bias. While instincts and intuition can be valuable aids in personnel selection, providing unguided "gut feelings" about a candidate's fit for an opportunity is dangerous from a legal perspective. Subjective evaluations allow stereotypes and biases to enter the process, which could lead to negative perception and result in the employer's refusal to interview candidates who are qualified.</li> <li>• Refer/screen resumes without regard to race, color, national origin, or any other characteristic that is covered by a protected class.</li> <li>• Refer/screen resumes based upon job-related criteria. "Job-related criteria" means that the prospective candidate's skills match up to the skills necessary to perform the job duties.</li> </ul>

Legal Resources on NACEWeb  
[www.naceweb.org/info\\_public/legal.htm](http://www.naceweb.org/info_public/legal.htm)



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