

What Can a Faculty Member Say or Write?

REFERENCES: Whether it is a letter from a faculty member evaluating a student's work in class, an evaluation of a student teacher on a teaching assignment, or a report from an employer on a student's progress in his/her cooperative education assignment, what can the evaluator say or write? Reference writers want to know if they will get in trouble if they write that the person has a performance problem or needs to improve in certain areas.

The answers to these questions lie in another set of questions: To whom is this information to be given? Is that person entitled to the information? What is the purpose of the information? Is the information verified and accurate?

For example, a student has a cooperative education assignment in a publishing company. After the first three months, the student is evaluated and her supervisor 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 adviser. The adviser works with the student on some of her weak areas. Later, when asked 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 supervisor's performance evaluations. This letter becomes part of the student's credential file, which is communicated to other employers. After a year, the student remains unemployed.

Does this scenario sound familiar? How appropriate are the supervisor's and the adviser's actions? How would the law look at this scenario?

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 intra-company communications regarding an employee's fitness.

A statement loses its privileged character if the communicator is motivated by ill will, if there is excessive communication of the statement, or if it is made without grounds for believing it is 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 statements without believing them to be true or that he 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 qualified privilege applies: How does all of this 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 intra-company 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—that the supervisor had an ax to grind with the student—this communication is qualified. Had the supervisor sent these performance evaluations unsolicited to others in the company who did not request the information or had no reason to obtain the information, qualified privilege would be lost due to excessive publication. If the supervisor made inaccurate statements, and verification for accuracy was practical, then qualified privilege would also be lost.

The second communication, from the supervisor to the 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 agreement 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 in her weak areas. I suggest that the student be told this communication will occur and advised of its purpose.

The third communication is a reference letter from the adviser to other employers. Reference letters, like performance evaluations, 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. In any event, the reference letter is subject to the conditions of qualified privilege. Certainly, it was communicated to other individuals with a good-faith need to know. In fact, the student controlled who would receive it by placing it in her credential file. It would be different if the adviser were sending the letter to employers or providing employers with the information indiscriminately. The flaw 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. The result could be a loss of qualified privilege.

The current situation: Twenty-six states have passed reference immunity legislation, which essentially provides protection from civil lawsuits against employers who provide references on former employees. Individuals other than employers who provide references must rely on the common law defenses—truth or qualified privilege—against charges of defamation.

Evaluations of an individual's performance, whether at work or in the classroom, are an integral part of the world of work and education. Communication of this information is necessary and appropriate. There is nothing illegal about using this information and communicating it to individuals who need it to make employment decisions. **The only caveat is to make sure the information is correct and disclosed only to those individuals who need to know.**

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Tips for Providing References

Reference Providers (faculty, college administrative staff, and employers)

- Prior to providing a reference, obtain consent from the person about whom the reference will be given. If you are unaware that the job applicant has named you as a reference, ask the prospective employer for verification that the individual has given consent for the reference. Such verification could include a copy of the student's signed application listing you as a reference, your name listed as a reference on the student's resume, or verbal confirmation by the student to you.
- Discuss the type of reference that you will provide with the person who asks you to be a reference. If you cannot provide a good reference, be honest with the individual. Don't promise a "glowing reference" and then provide merely a "glimmer."
- 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 the reference. Direct the employer to the appropriate person in the organization.
- If "to whom it may concern" reference letters are requested, document that this is the type of reference requested and that the student or job applicant takes responsibility for disseminating the letters to the proper persons.
- **Respond to the specific inquiry about the student or job applicant. Direct the response to the particular person who requested the information.**
- Relate references to the specific position for which the person applied and to the work that the applicant will perform.
- Informal lunch discussions or "off the record" telephone conversations with prospective employers regarding a person's performance should be avoided. There is no such thing as "off the record."
- Information given should be factual, 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.
- Avoid giving personal opinions or feelings. 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 on which you base the opinion.
- 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.
- State in a reference letter, "This information is confidential, should be treated as such, and is provided at the request of (name of student or applicant), who has asked me to serve as a reference." **Statements such as these give justification for the communication and leave no doubt that the information was not given to hurt a person's reputation.**
- **Do not include information that might indicate an individual's race, color, religion, national origin, age, disability, citizenship status, sex (unless by the individual's name it is obvious), or marital status.** Do not base an opinion of performance on stereotypes about an individuals, for instance "for a woman, she excels in math."
- Document all information you release.

Sample Faculty Reference Letter

Name of Employer
Address
City, State, Zip

Date

Dear **[Name of Recruiter]**:

This reference letter is provided at the written request of **[name of student]**, who has asked me to serve as a reference on **[his/her]** behalf. It is my understanding that **[name of student]** is being considered by your organization for the position of **[job title]**. Please be advised that the information contained in this letter is confidential and should be treated as such. The information should not be disclosed to **[name of student, if student has waived access]** or anyone in your organization who would not be involved in the hiring decision regarding this individual. Additionally, the information should not be disclosed to anyone outside of your organization without the consent of the student.

I have known **[name of student]** for the past **[number of months, semesters, years]** as **[he/she]** has taken the following courses which I teach: **[list courses, give brief description of content of course]**. As **[his/her]** professor, I have had an opportunity to observe the student's participation and interaction in class and to evaluate the student's knowledge of the subject matter. I would rate the student's overall performance in these subjects as **average**.

[One or two specific examples of the student's performance may be appropriate.] As part of **[his/her]** grade in **[name of course]**, the student was required to prepare a paper. The paper was designed to measure the student's ability to research, to analyze the results of the research, and to write. **[Discuss how the paper submitted by the student indicated to you the student's skills in these areas.]** Based upon this, I rate the student's skills competent but not excelling.

The one area in which the student performed above average was in oral communications. **[Give specific example to support this.]**

Based upon the student's academic performance and my understanding of the position for which the student is applying, I believe the student would perform **(place overall evaluation here)**.

If you would like to discuss this further, please feel free to contact me.

Sincerely,

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