

## Legal Implications of Letters of Recommendation

### **I. Background.**

Letters of recommendation are frequently sought from the University's faculty and staff members. Those requesting recommendations may be current or former students as well as current or former employees. Recommendations play an important role in decisions regarding whether applicants gain admission to graduate and professional education programs and in decisions regarding who is hired.

To some degree, those providing recommendations are placed in a dilemma. If recommendations are to serve their proper function, they must be honest, accurate, and complete. At the same time, in today's litigation-prone environment, any unfavorable comments or reservations in a recommendation may well result in a law suit. Some private businesses have attempted to minimize their exposure to liability from litigation arising out of letters of recommendation by limiting such "recommendations" to providing dates of employment, a salary history, and a copy of relevant job descriptions. Even that limited information is provided only upon the written request of the individual and only if the individual executes a release of any right to sue the business. As will be discussed below, policies limiting the content of letters of recommendation in this fashion will not eliminate exposure to liability in all cases.

### **II. General Concerns.**

Litigation in this area is not limited to cases involving disappointed applicants, on whose behalf a recommendation was provided, suing the provider of the letter of recommendation. In an employment situation, the new employer to whom the recommendation was provided may bring suit. In some cases, even third parties may sue based upon matters contained in or omitted from letters of recommendation provided to the new employer.

The most common basis for suit by disappointed applicants is defamation. Defamation includes both oral (slander) and written (libel) unprivileged false statements of fact about an individual that are published (communicated) to a third party resulting in harm to the reputation of the individual who is the subject of the statements. Since defamation includes oral statements, providing recommendations orally rather than in the form of letters of recommendation will not eliminate exposure to suit based upon defamation. Similarly, qualifying unfavorable statements with phrases such as "in my opinion" does not necessarily eliminate such exposure. While statements of opinion will not, in most circumstances, support a suit for defamation, the distinction between statements of fact and those of opinion may not always be easily drawn.

Defenses to defamation include the truth of the statement, consent to its publication, lack of publication, and the fact that the statement was protected by a qualified privilege. Accordingly, care should be taken to ensure that letters of recommendation are factually accurate. Requiring a written request (which is kept on file) from the party seeking a letter of recommendation provides evidence of consent to publication. However, even with such a

request, letters of recommendation must be treated as confidential during the process of their preparation and dispatch. This should avoid their being improperly “published” to a third party, such as a passer-by who reads a letter lying on a desk top. The writer of a letter of recommendation can also provide the letter to the subject and have the subject dispatch it to the recipient as a way to avoid involvement in the “publication” of the statements in the letter.

Qualified privilege protects the writer of a letter of recommendation as long as there is no “actual malice” on the part of the writer. The circumstances under which this privilege exists have been described as follows:

“Where a party makes a communication, and such communication is prompted by duty owed either to the public or to a third party, or the communication is one in which the party has an interest, and it is made to another having a corresponding interest, the communication is privileged, if made in good faith and without actual malice.... The duty under which the party is privileged to make the communication need not be one having the force of legal obligation, but it is sufficient if it is social or moral in its nature. . . .”

*Berry v. City of New York Ins. Co.*, 98 So. 290, 292 (Ala. 1923). Actual malice would be shown by “evidence of previous ill will, hostility, threats, rivalry, other actions, former libels and slanders, and the like emanating from the defendant, or by the violence of the defendant’s language, the mode and extent of publication, and the like.” *Kennedy v. Gurley*, 95 So. 34, 37 (Ala. 1923). Thus, intemperate language or inappropriate distribution of the letter of recommendation could result in loss of the qualified privilege.

Where letters of recommendation are written incident to an employment application, there is the possibility of suit by the new employer or by third parties. This has occurred in at least two cases. In a California case, *Randi W. v. Muroc Joint Unified School District*, 60 Cal. Rptr. 2d 263 (1977), the writers of the letters of recommendation knew that the former employee, Gadams, had been accused of making sexual advances toward students. Despite this knowledge, they recommended him for any position, without reservation. Gadams subsequently was hired and sexually molested a female student. The student sued the former employer. The California Supreme Court held that “the writer of a letter of recommendation owes a duty to prospective employers and third persons not to misrepresent the facts in describing the qualifications and character of a former employee, if making those representations would present a substantial, foreseeable risk of physical injury to the prospective employer or third persons.”

In a Florida case, *Jener v. Allstate Insurance Co.*, No. 93-09472 (Fla. Cir. Ct., Aug. 10, 1995), Allstate fired a worker, Calden, because he had brought a gun to work. In a letter of recommendation, Allstate stated that his departure from the company was not related to job performance. Calden was hired by the new employer and later brought a gun to work, shooting several people in the office cafeteria. The victims of the shooting were allowed to sue Allstate based on the claim that the letter of recommendation was not truthful and forthcoming.

It has been suggested that, under the rationale of *Randi* and *Allstate*, even a refusal to give

a recommendation could lead to liability in a situation where there the employer knows of facts that present a substantial, foreseeable risk of physical harm to either the prospective employer or third persons. It would appear that the principles announced in *Randi* and *Allstate* would apply to letters of recommendation given to students seeking employment.

Within the University setting, writers of letters of recommendation must also be concerned with the implications of the various federal statutes prohibiting discrimination. References to race, national origin, religion, gender, physical disability, marital status, or age in letters of recommendation could raise employment discrimination claims. Such references should be avoided, aside from use of the appropriate gender pronoun. References to a protected status are considered discriminatory irrespective of the spirit with which they are made. For example, it would be inappropriate and ill-advised to state in a letter of recommendation that, “For a 55 year old non-traditional student, she has a remarkable record, particularly in view of her inner city background.”

### **III. Special Student Concerns.**

A special concern in a university setting when writing letters of recommendation for students is the Family Educational Rights and Privacy Act (FERPA). Under FERPA, the federal government may deny federal funding to a university if the latter discloses personally identifiable education records of a student or former student to third parties without the prior written consent of the student, subject to exceptions not relevant to the provision of letters of recommendation. 20 U.S.C. § 1232g(b). A letter of recommendation will be considered an education record if a faculty member writes that letter, in his/her role as a faculty member, about the student’s tenure at the University. The faculty member must, therefore, obtain the advance written approval of the student to furnish such a letter to a third party. This requirement would also apply to providing a telephonic or other oral recommendation. That authorization should be retained by the faculty member for at three years.

In addition to FERPA’s requiring that the student give prior written permission for the faculty member to provide a letter of recommendation, FERPA also requires that the letter of recommendation be provided on the condition that the recipient not permit any other party to have access to it without the written consent of the student. 20 U.S.C. § 1232g(b)(4)(B). This limitation should be explicitly stated in the letter of recommendation itself.

FERPA further requires a university to grant students access to their own education records. A student may waive in writing this right of access to confidential letters of recommendation that have been provided with respect to admission to an educational agency or institution, an application for employment, and/or the receipt of an honor or honorary recognition. Without such a written waiver, the student will have access to such letters of recommendation, despite any oral representations made by the student or recipient that the letter of recommendation will be kept confidential. The fact that the student has made such a written waiver should be explicitly stated in the letter of recommendation, and the waiver itself should be kept on file. Even in the case of such waivers, the student, upon request, must be informed of the names of all persons making confidential recommendations. 20 U.S.C. § 1232g(a)(1)(C)(iii) and

20 U.S.C. § 1232g(a)(1)(D).

#### **IV. Conclusion.**

While there is no University policy concerning letters of recommendation, certain general guidelines are suggested by legal concerns and policies at other educational institutions. All letters of recommendation should be written on the assumption that the subject will read the letter. Factual accuracy is essential. Opinion should be labeled as such and facts should be provided to support that opinion. Letters of recommendation should be dated and addressed specifically to the party concerned; avoid using the “To Whom It May Concern” address. They should also indicate the purpose for which they were written, *e.g.*, “This letter of recommendation is provided for your consideration in determining if Mr. James J. Jones should be accepted into your master’s degree program in English for academic year 2002-2003.” Faculty members should understand that they are not legally obligated to provide letters of recommendation for students. When such letters are written, faculty must strictly comply with FERPA requirements. The sanction for failing to comply with that law is, potentially, the University’s loss of federal funding.