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Providing References for Schools or Jobs

This teshuvah was approved on April 30, 2014 by a vote of eighteen in favor, one against, and two abstaining (18 - 1 - 1). Voting in favor: Rabbis Kassel Abelson, Aaron Alexander, Pamela Barmash, David Booth, Elliot Dorff, Baruch Frydman-Kohl, Susan Grossman, Reuven Hammer, Joshua Heller, David Hoffman, Jeremy Kalmanofsky, Jane Kanarek, Adam Kligfeld, Gail Labovitz, Amy Levin, Daniel Nevins, Elie Spitz, and Loel Weiss. Voting against: Rabbi Paul Plotkin. Abstaining: Rabbis Avram Reisner and Jay Stein.

Question: What norms govern giving oral or written references for schools or jobs?¹

Answer:

At first blush, the answer to this question seems obvious: just tell the truth. After all, the Torah itself demands that we *מִדְּבַר־שָׁקֶר תִּרְחֶק*, “Keep far from falsehood.”² The prophet Zechariah urges, *דַּבְּרוּ אֱמֶת אִישׁ אֶת־רֵעֵהוּ*, “Speak truth to one another,” and *וְהֶאֱמַת וְהִשְׁלֹם אֶהְבֹּו*, “Love truth and peace.”³ In the Talmud, Rabbi Hanina declares, *אמר רבי חנינא: חותמו של הקדוש*, “The seal of the Holy Blessed One is truth”⁴-- and we, after all, are supposed to emulate God. So why is there any question here?

The Committee on Jewish Law and Standards of the Rabbinical Assembly provides guidance in matters of halakhah for the Conservative movement. The individual rabbi, however, is the authority for the interpretation and application of all matters of halakhah.

¹ This responsum addresses an issue that has some parallels with the responsum on whistleblowing by Rabbi Barry Leff, to which readers are referred: “Whistleblowing: The Requirement to Report Employer Wrongdoing,” http://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/20052010/leff_wistleblowing.pdf

² Exodus 23:7.

³ Zechariah 8:16, 19.

⁴ B. *Shabbat* 55a; B. *Yoma* 69b; B. *Sanhedrin* 64a.

There are two reasons why this is a question worth considering. First, although the Jewish tradition does indeed value truth greatly, it also bids us respect the honor of all God's creatures (*kevod ha-briyyot*),⁵ and an important way in which it instructs us to do that is through how we talk to and about other human beings. In other words, in this area of life, as in most others, it recognizes that truth is not an absolute value but rather one that must be balanced with another value, in this case that of *kevod ha-briyyot*. Exactly how to do that is the topic of this responsum.

Second, Jews are also governed by the laws of the nations in which they live, and so this is a topic where they must consider not only what their religious tradition tells them to do, but also the civil laws and moral norms that govern this area of life. They must then integrate the instructions they receive from both legal and moral systems. This responsum will use American law as its example of civil law because the question arose in that context. Jews living in Israel and other countries can and should adopt what is said here about American law to the laws of the nation in which they live and make the changes necessary to our conclusions, but the principles of Jewish law delineated in this responsum apply to Jews worldwide.

Finally, this responsum, as a responsum in Jewish law, applies directly to Jewish employees and owners of a company and the employees, administration, and lay leaders of Jewish nonprofit organizations. Jews, however, function in a largely non-Jewish world, and so it will also address the question of Jews working for a non-Jewish company or agency.⁶ In both

⁵ B. *Berakhot* 19b; B. *Shabbat* 81b, 94b, B. *Eruvin* 41b; B. *Megillah* 3b; B. *Menahot* 37b.

⁶ Traditional Jewish law distinguishes in a number of areas of the law, especially commercial law, between what Jews owe other Jews in contrast to what Jews owe non-Jews. Sometimes this distinction was simply a manifestation of what it means to be part of the community, with its incumbent duties as well as rights, as against being outside the community, very much like the distinction between citizens and aliens in duties and rights within many modern nations. So, for example, even though the Rabbis declared (T. *Gittin* 3:18; B. *Gittin* 61a) that Jews must care for the poor (and the sick and mourners) of other nations "for the sake of peace," and that obligations for the sake of peace have Penateuchal authority (B. *Gittin* 59b), they also declared that a Jew's duty are to follow the form of concentric circles, with caring for oneself first, then one's family, then one's local community, then the larger Jewish community, and only then the non-Jewish poor (*Mikhilta* "Mishpatim" 19 on Exodus 22:24; *Sifrei* "Re'eh" on Deuteronomy

contexts this responsum addresses when Jews must live up to the standard of Jewish law on this issue, even at the cost of their jobs or of losing in the competitive race of business, and when not.

As we will develop below, the question at hand is both what *duty* does an evaluator have to tell the truth – and to whom and how much – and, conversely, what *permission* does an evaluator have to tell the truth – and to whom and how much – despite the real danger of slandering the candidate for the school or job? Further, what are the *grounds* for establishing that duty and that permission? That is, what laws and values in the Jewish tradition require us to tell the truth – and to what extent – and what laws and values in the Jewish tradition permit us to do so despite the fact that because nobody is perfect, evaluations will inevitably involve saying negative things about the person being evaluated?⁷

15:7; B. *Bava Metzia* 71a; B. *Nedarim* 80b; M.T. *Laws of Gifts to the Poor* 7:13; S.A. *Yoreh De'ah* 251:3). Sometimes, though, this distinction was a response to the persecution and legal discrimination that Jews faced. At the same time, the Torah demands that with respect to aliens living among Israelites, תורה אחת ומשפט אחד יהיה לכם ולגר הגר אִתְּכֶם, “The same ritual and the same rule shall apply to you and to the stranger who resides among you” (Numbers 15:16), on the basis of which the Rabbis maintained that בא הכתוב והשוה הגר לאזרח בכל מצות שבתורה “the Torah equated the Israelite and the stranger with regard to all the commandments of the Torah” (*Sifrei*, “Shlah” 3). This, of course, was with regard to the resident alien and not to other non-Jews. In our day, however, when the vast majority of the world’s Jews live either in Israel side by side with non-Jewish citizens, or in Western liberal democracies outside of Israel, where Jews and non-Jews are equal citizens, this thrust in the Torah and Rabbinic literature toward equal treatment should clearly apply.

In this responsum, therefore, the distinction between Jews working for other Jews as against Jews working for non-Jewish companies is not based on Rabbinic or medieval responses to prejudice, for in modern Western countries Jews are thankfully treated in the law as equals with all other citizens. The distinction is rather due to the fact that Jews working for non-Jewish companies are bound by the policies of those companies, and, with a few exceptions noted later in this responsum, must and may abide by those policies in order to keep their jobs. In contrast, Jews working for Jewish companies or nonprofit agencies have an additional Jewish duty to abide by Jewish law, and this responsum spells out what that requires for both employers and employees in the matter of providing references. (We would like to thank Mr. Jerry Abeles for raising the issue of Jews working for non-Jews in responding to an earlier draft of this responsum, and Rabbi David Booth for alerting us to the misconception that readers may have in our making any distinction between the norms that affect Jews in working for Jews in contrast to non-Jews.)

⁷ We would like to thank Rabbi Elie Spitz for suggesting that we alert readers to these two elements of our question early on in our responsum.

The Power of Words

On Yom Kippur (the Day of Atonement), the holiest day of the Jewish year, at each of the five services of the day, Jews recite a long litany of sins for which we ask God's forgiveness. A large proportion of that list involves sins we commit through speaking. Clearly, then, the Jewish tradition takes the ethics of speaking very seriously. In fact, the Rabbis of the Talmud note that if one embarrasses someone else in public, the victim's face often turns white, and they compare that to the pale face of the dead so as to say that embarrassing a person is akin to killing him or her:

תני תנא קמיה דרב נחמן בר יצחק : כל המלבין פני חבריו ברבים כאילו שופך דמים. - אמר ליה : שפיר קא אמרת, דחזינא ליה דאזיל סומקא ואתי חוורא.

Someone taught before Rabbi Nahman bar Isaac: If a man put his neighbor to shame, it is as if he shed blood. Rabbi Nahman said to him: Well have you spoken, for we see how the red disappears [in the victim's face] and the pallor comes.⁸

In fact, they go further: such a remark, also “kills” both the speaker and the listener. The Rabbis therefore call slander “the third tongue” (*lishan telitae*) because “it slays three people: the speaker, the listener, and one spoken about.” לשון תליתאי קטיל תליתאי, הורג למספרו ולמקבלו.⁹ Not only do speech violations cause death; they also deprive a person of a place in the World to Come:

ר' מנא שמע כולהון מן הדין קריא כי לא דבר רק הוא מכם זה תלמוד תורה כי הוא חיים זה כיבוד אב ואם ובדבר הזה תאריכו ימים זו גמילת חסדים על האדמה זה הבאת שלום בין אדם לחבירו וכנגדן ארבעה דברים שהן נפרעין מן האדם בעולם הזה והקרן קיימת לו לעולם הבא ואלו הן ע"ז גילוי עריות ש"ד ולשון הרע כנגד כולן

⁸ B. *Bava Metzia* 58b.

⁹ B. *Arakhin* 15b.

Rabbi Manah derived them all from reasoning about a verse [Deuteronomy 32:47]: “For this is not a trifling thing for you,” this is study of the Torah; “it is your very life,” this is honoring one’s father and mother; “through it you shall long endure,” this refers to acts of loving kindness; “on the land,” this is bringing peace between one person and another. In contrast to these virtues, there are four great sins for which a person is punished in this world, and their capital, or stock, remains in the form of punishment dealt out to him or her in the world to come. These four are idolatry, incest, murder, and slander, the last of which is as bad as all the other three put together.¹⁰

As the Book of Proverbs succinctly put it, מָוֶת וְחַיִּים בְּיַד לָשׁוֹן, “Death and life are in the hands of the tongue.”¹¹

Words obviously are not altogether a bad thing; like all our other faculties, the moral quality of our speech depends on how we use it. The following rabbinic story makes this point eloquently:

ארשב"ג לטבי עבדיה פוק זבין לי צדו טבא מן שוקא נפק זבן ליה לישן אי"ל פוק זבין לי צדו בישא מן שוקא נפק זבן ליה לישן אי"ל מהו דין דכד אנא אמר לך צדו טבא את זבן לי לישן וכד אנא אמר לך צדו בישא את זבן לי לישן אי"ל מינה טבתא ומינה בישתא כד הוה טב לית טבה מיניה וכד ביש לית ביש מיניה

Rabbi Shimon ben Gamliel said to his servant Tabbai: “Go to the market and buy me good food.” He went out and brought back a tongue. He told him, “Go out and bring me bad food from the market.” He went out and brought him a tongue. He then asked him: “Why is it that when I said ‘good food’ you brought me a tongue, and when I said ‘bad food’ you also brought me a tongue?” He replied: “It is the source of good and evil. When it is good, it cannot be surpassed; when it is evil, then there is nothing worse.”¹²

The Misuse of Words

We human beings have been quite creative in developing ways to misuse words, and, as the Yom Kippur liturgy reminds us, we therefore have to be especially careful in how we speak about and to others. Moreover, as people created in the image of God, we must have respect for ourselves as well; when we abuse our power to speak, we besmirch ourselves as well as the

¹⁰ J. *Pe'ah* 1:1 [15d in the one-volume edition; 3a in the Judaic Classics online version].

¹¹ Prov. 18:21.

¹² *Leviticus Rabbah* 33:1.

people to or about whom we are speaking.

In the context of creating references for schools or jobs, the Rabbis' norms banning the following forms of speech are relevant.

Lies (sheker)

Telling lies – that is, knowingly and intentionally telling someone something that you know to be false – undermines people's trust in one another. Indeed, at the extreme – that is, if everyone lied so often that one could never assume that the next person was telling the truth – social cooperation, commerce, friendships, and family relations would become impossible. We would all be living in a terrifying world. It is not surprising, then, that the Torah specifically prohibits lying: *לא תשא שמוע שוא* “You must not carry false rumors (literally, “worthless words to be heard”) ... *מִדְּבַר־שֶׁקֶר תִּרְחַק* “Keep far from falsehood (*sheker*),”¹³ and *לֹא תִגְנְבוּ וְלֹא תִכְחָשׁוּ* *וְלֹא תִשָּׁקְרוּ אִישׁ בְּעַמִּיתוֹ*

“You shall not steal; you shall not deal deceitfully nor lie to one another.”¹⁴

The Rabbis understood the social consequences of lying:

כך עונשו של בדאי, שאפילו אמר אמת - אין שומעין לו

“This is the penalty for the liar: even when he tells the truth, no one believes him.”¹⁵ They also condemned it as a form of theft, indeed the worst form of theft: *שבעה גנבין הן הראשון שבכולן גונב*: “There are seven types of thieves. The person who steals a person's thought [i.e., deception] is the worst of them.”¹⁶

Why did the Rabbis think of lying as the worst form of theft? Why is it worse than stealing money or property from a person? One answer is that even though people who have been robbed often feel personally violated, in the end it is one's property that the thief has

¹³ Ex. 23:1, 7.

¹⁴ Lev. 19:11.

¹⁵ B. *Sanhedrin* 89b.

¹⁶ T. *Bava Kamma* 7:3.

encroached upon, not one's person. Often the thief does not even know the person from whom he or she has stolen. Deception, though, is immediately and directly personal: the liar knows you and did not think enough of you to tell you the truth, and so you rightly feel dishonored and molested. We will see below how the Rabbis make the same kind of distinction between property and person with regard to slander.

Of course, sometimes one tells a falsehood without knowing that one is doing so and without intending to do so. In such cases, the level of moral culpability is much less; one has simply made a mistake. Nevertheless, the Rabbis warn us against our very human desire to be seen as someone who knows everything, for that may lead us to give people false information: “Mar said: Teach your tongue to say ‘I do not know,’ lest you invent something and be trapped”¹⁷ Similarly, the Jerusalem Talmud reports a letter of recommendation that praises someone specifically for admitting when he did not know something:

דרבי חייה בר אבא אתא לגבי ר' לעזר אמר ליה פייס לרבי יודן נשייא דיכתוב לי חדא איגרא דאיקר דאיפוק לפרנסתי לארעא ברייתא ופייסיה וכתב ליה הרי ששלחנו לכם אדם גדול שלוחינו וכיוצא בנו עד שיגיע אצלינו. רבי חזקיה רבי דוסתי רבי אבא בר זמינא ומטו בה בשם רבי דוסתי סבא אכן כתב ליה הרי שלחנו לכם אדם גדול שאינו בוש לומר לא שמעתיו

R. Hiyya bar Abba came to R. Eleazar. He said to him, “Win the favor of R. Yudan, the patriarch, so that he will write on my behalf a letter of recommendation, because I am going abroad to make a living.” He won his approval, and he wrote him as follows: “Lo, we send you a great man as our messenger. He is our agent and is in our status until he

comes back to us.” R. Hezekiah, R. Dosetai, R. Abbai bar Zamina, and some present tell the tale in the name of R. Dosetai the Elder: Thus did he write for him, “Lo, we send you a great man, who is not ashamed to say, ‘I have not heard the answer to your question.’”¹⁸

“I do not know” is a really important sentence to make part of one’s common speech patterns, for then the hearer knows that the provider of the reference is being careful in asserting only what s/he really knows. “I do not know, but I suspect something negative,” though, is a flat violation of the prohibition against slurs (*leshon ha-ra*). On the other hand, “I do not know, but I suspect something positive” indicates exactly how much you yourself trust what you say if you then venture a guess and then explain the basis for your assertion. Under those circumstances nobody is deceived. The hearer may just accept the guess or suggest one of his or her own if the matter does not mean very much to either person. On the other hand, if the hearer or the recipient of a letter of evaluation really needs to know the answer for some practical or personal purpose, the speaker has put him or her on notice that even though the speaker or writer *thinks* that the answer is X, the hearer or recipient will have to go elsewhere to find out conclusively. That is, by saying “I do not know,” the speaker or writer has transferred responsibility for discovering the answer back to the hearer or recipient of a reference letter.

Does such an admission, though, undermine our own self-respect and the honor that others will give us? Not really, for in our heart of hearts we realize that none of us is all-knowing, as the Jewish tradition believes God to be. Therefore, one should not be embarrassed to admit not knowing something. Even if the question is in the hearer’s or recipient’s area of expertise, that person will appreciate an honest admission of a lack of knowledge – especially if the one asked then goes to the trouble to find the answer if one is known. Honesty about what one knows and does not know about relevant, work-related factors that affect the person’s

¹⁷ B. *Berakhot* 4a.

¹⁸ J. *Nedarim* 10:11 (35b); see also J. *Hagigah* 1:8 (7a). We would like to thank Rabbi Daniel Nevins for pointing out this source to us.

candidacy is always the best policy so that one can avoid telling even unintended falsehoods and thus be trusted.

Slurs (lashon ha'ra) and Slander (motzi shem ra)

While saying false, negative things about a person (slander, *motzi shem ra*) is obviously problematic as a form of lies intended to defame and hurt the person being described, in most situations Jewish law also prohibits negative comments that are true (slurs, *lashon ha'ra*). It even prohibits comments that are not themselves defamatory but imply negative things about someone (*avak lashon ha-ra*, “the dust of saying bad things” or “the dust of slurs”). Maimonides defines these prohibitions this way:

ב יש עון גדול מזה עד מאד והוא בכלל לאו זה והוא לשון הרע, והוא המספר בגנות חבירו אע"פ שאומר אמת, אבל האומר שקר נקרא מוציא שם רע על חבירו, אבל בעל לשון הרע זה שיושב ואומר כך וכך עשה פלוני וכך וכך היו אבותיו וכך וכך שמעתי עליו ואמר דברים של גנאי, על זה אמר הכתוב יכרת ה' כל שפתי חלקות לשון מדברת גדולות. ג אמרו חכמים שלש עבירות נפרעין מן האדם בעולם הזה ואין לו חלק לעולם הבא, עבודת כוכבים וגילוי עריות ושפיכות דמים ולשון הרע כנגד כולם, ועוד אמרו חכמים כל המספר בלשון הרע כאילו כופר בעיקר, שנאמר אשר אמרו ללשונו נגביר שפתינו אתנו מי אדון לנו, ועוד אמרו חכמים שלשה לשון הרע הורגת: האומר, והמקבלו, וזה שאומר עליו, והמקבלו יותר מן האומר. ד ויש דברים שהן אבק לשון הרע, כיצד מי יאמר לפלוני שיהיה כמות שהוא עתה, או שיאמר שתקו מפלוני איני רוצה להודיע מה אירע ומה היה וכיוצא בדברים האלו, וכל המספר בטובת חבירו בפני שונאיו הרי זה אבק לשון הרע שזה גורם להם שיספרו בגנותו, ועל זה הענין אמר שלמה מברך רעהו בקול גדול בבקר השכם קללה תחשב לו, שמתוך טובתו בא לידי רעתו, וכן המספר בלשון הרע דרך שחוק ודרך קלות ראש כלומר שאינו מדבר בשנאה, הוא ששלמה אמר בחכמתו כמתלהלה היורה זקים חצים ומות ואמר הלא משחק אני, וכן המספר לשון הרע דרך רמאות והוא שיספר לתומו כאילו אינו יודע שדבר זה שדבר לשון הרע הוא אלא כשממחין בו אומר איני יודע שדבר זה לשון הרע או שאלו מעשיו של פלוני. ו כל אלו הם בעלי לשון הרע שאסור לדור בשכונתם וכל שכן לישב עמהם ולשמוע דבריהם, ולא נחתם גזר דין על אבותינו במדבר אלא על לשון הרע לבד.

There is a sin much greater than this [that is, greater than telling tales about someone else], and it is included in this negative prohibition, namely, slurs (literally, “talk about the bad,” *lashon ha-ra*). That is someone who talks negatively about someone else, even if he speaks the truth. But one who [additionally] tells lies is called “one who spreads a bad name” (*motzi shem ra*) about someone else. One who engages in such slander sits and says: “So-and-so did this,” “So-and-so were his ancestors,” “So-and-so I heard about him,” all of which are [false and] defamatory. For such a person Scripture says, “May the Lord cut off all flattering lips, every tongue that speaks arrogance” (Ps. 12:4).

The Sages said: “For three sins, a person is punished in this world, and he has no place in the World to Come: idolatry, incest/adultery, and murder – and slander is like all of them combined.”¹⁹ ...

There are also words that are “the dust of slurs” (*avak lashon ha-ra*). How so? If A says to B, “Who would have ever thought that C would be as he is now?” Or A says, “Don’t ask about C; I don’t want to tell you what happened,” and similar talk. Also, anyone who compliments a person in front of his enemies speaks the dust of slander, for that [positive talk] will cause his enemies to speak negatively of him. About such speech Solomon said: “He who greets his fellow loudly early in the morning shall have it reckoned to him as a curse,”²⁰ for from his compliment comes defamation. Similarly, one who slurs another through a joke or frivolity, that is to say, he does not speak in hatred [but nevertheless insults a person engages in the dust of slander]. This is what Solomon in his wisdom said: “Like a madman scattering deadly firebrands, arrows, is one who cheats his fellow and says, ‘I was only joking.’”²¹ Similarly, someone who slurs someone through deceit, as, for example, he speaks innocently as if he did not know that what he was saying was a slur, and when people protest, he says, “I did not know that this is a slur or that So-and-So did that” [when he in fact does know the defamatory character of what he was saying is a person who engages in the dust of slurs.]...

All these are people who slur others. It is forbidden to live in their neighborhood, and even more to sit with them and listen to them.²²

Spreading false, negative comments about people – that is, slandering them -- clearly attacks their integrity and reputation, and that is, as Maimonides says, akin to murder. But even slurs – that is, true but negative comments about someone (*lashon ha-ra*) – can be nothing less than lethal. Oliver Sipple is a woeful case of this. Sipple, an ex-Marine who saved the life of

¹⁹ J. *Pe’ah* 1:1 (5a).

²⁰ Prov. 27:14.

²¹ Prov. 26:18-19.

²² M.T. Laws of Ethics (*De’ot*) 7:2, 3, 4, 6.

President Gerald Ford by deflecting the gun directed at him by Sara Jane Moore, became an instant national hero. Despite his request to reporters, “Don’t publish anything about me,” many noted in their articles that Sipple was active in the gay community. This led to rejection by his parents, who had not known about that aspect of his life – even to the point of his father telling him that he was not welcome at the funeral of his mother – which, in turn, led Sipple to drink heavily and to die alone at age 47. The reporter who first publicized Sipple’s homosexuality made this postmortem comment: “If I had to do it over again, I wouldn’t.”²³

Note that this case illustrates that what constitutes negative information depends largely on how the hearers will respond to it. After all, being gay is not in and of itself a bad thing; for many young people now, it is simply a fact of life, like the fact that some people have blue eyes and some have brown eyes. At the time, though, Sipple knew that his parents would think ill of him if they knew that he was gay, and that was all that mattered.

The prohibition of uttering negative speech applies all the more if everyone knows that what the person is saying is negative, for then there is a clear intention to defame a person. *We may not defame a person, for we are required to respect each and every person as being created in the image of God:*

בן עזאי אומר זה ספר תולדות אדם זה כלל גדול בתורה, ר"ע אומר ויקרא יט) ואהבת לרעך כמוך, זה כלל גדול בתורה, שלא תאמר הואיל ונתבזיתי יתבזה חבירי עמי הואיל ונתקללתי יתקלל חבירי עמי, א"ר תנחומא אם עשית כן דע למי אתה מבזה, בדמות אלהים עשה אותו.

Ben Azai said, “This is the record of Adam’s line. [When God created man, He made him in the likeness of God; male and female He created them]” (Gen. 5:1-2). This is a great principle in the Torah. Rabbi Akiba said: “Love your neighbor as yourself” (Lev. 19:18). This is a great principle of the Torah, for one should not say that since I have been shamed, let my fellow person be shamed with me, since I have been disgraced, let my fellow person be disgraced with me. Rabbi Tanhuma said: If you did so, know whom you are shaming, for “God made him [the human being] in the likeness of God” (Genesis

²³ Stephen Bates, *If No News, Send Rumors: Anecdotes of American Journalism* (New York: Henry Holt, 1989), pp. 142-143.

5:1).²⁴

רבי אליעזר אומר יהי כבוד חברך חביב עליך כשלך.

Rabbi Eliezer said: Cherish your fellow human's honor as your own.²⁵

תא שמע: גדול כבוד הבריות שדוחה [את] לא תעשה שבתורה.

So great is human dignity that it supersedes a negative commandment of the Torah.²⁶

The respect demanded by the Jewish tradition for each and every human being does *not* mean that we must accept everything that anyone does. After all, the Torah is filled with laws that categorize certain forms of human behavior as prohibited and others as required, and if Jews fail to abide by those laws, the Torah demands this:

לֹא־תִשְׂנֵא אֶת־אָחִיךָ בְּלִבְבְּךָ הוֹכַח תּוֹכִיחַ אֶת־עַמִּיתְךָ וְלֹא־תִשָּׂא עָלָיו חָטָא :
Do not hate your brother in your heart. Reprove your kinsman,
and bear no guilt because of him.²⁷

But that reproof must be given in private so as not to disgrace the person in public and must be done constructively and with respect for the ultimate human dignity inherent in each of us. The Torah applies this even to someone who is to be flogged for violating a negative commandment:

אַרְבָּעִים יִכּוּ לֹא יִסֹּף פְּרִי־סִיף לְהַכְתּוֹ עַל־אָלֶּה מִכָּה רַבָּה וְנִקְלָה אָחִיךָ לְעִינֶיךָ :

He may be given forty lashes, but not more, lest being flogged further, to excess, your brother is degraded before your eyes.²⁸

Certainly, then, in everyday speech we must respect the dignity of each person by avoiding defamatory speech, even if the negative information is true and all the more if it is false.

This has several important implications for writing letters of reference. First, one should decline to write a letter of reference when the job description or school program for which the

²⁴ *Genesis Rabbah* 24:7.

²⁵ M. *Avot* 2:15 (2:10 in some editions).

²⁶ B. *Berakhot* 19b.

²⁷ Lev. 19:17.

²⁸ Deut. 25:3.

person is applying is not clear, for then one will likely be saying things about the candidate that are irrelevant (and thus forbidden *rekhlut*, gossip) and possibly negative (*lashon ha-ra*), even when not intending to do so. An exception to this rule occurs in those circumstances when the applicant is applying for a variety of different university programs or jobs and requests a general letter attesting to the applicant's academic or professional qualifications.²⁹

Second, as we shall develop more fully below, even negative comments about a person must not be general slurs against the person, such as "He is lazy," or "She is irresponsible." Instead, negative evaluations of the person must be justified by reference to specific, relevant things the person did or failed to do that demonstrate the negative evaluation.

When, though, *may* one say something negative about someone else? Indeed, when *should* one do so?

One may share negative information with someone else – and one *should* do so – when ignorance of this information is likely to harm the recipient of the reference. This is in contrast to the many circumstances in which negative speech about a person serves no practical purpose for the listener but is just intended to diminish that person's honor. These are the kinds of lies, slurs, and slander that the Torah and later Jewish legal literature have prohibited, as discussed above. Although the rules about speech begin in the Torah and are developed further in the Talmud and by medieval authorities, Maimonides in particular, Rabbi Israel Meir Ha-kohen Kagan (Poland, 1838-1933) arguably wrote the most extensive halakhic treatment of the Jewish laws of speech in the book by which he is often known, "*Hafetz Hayyim*," the title of which is based on Psalm 34:12-15. Therein he defines when *lashon ha'ra* is permissible and even mandatory:

6:2. There is of course a distinction between hearing and accepting, because in the case of listening there is no prohibition unless the information has no future relevance to the listener. If, however, the information - should it be true - does have relevance to the listener, for example if the listener realizes at the outset that the speaker wants to show

²⁹ We would like to thank Rabbi Amy Levin for calling our attention to this aspect of providing recommendations.

through his story that the subject is untrustworthy or some other such trait and the listener is considering a business dealing or partnership with the subject, or arranging a marriage for him or any similar involvement, it is permissible to listen in order to explore the information and protect himself. The listener's desire to hear the information must not be to listen to the disparagement of his friend, but rather to protect himself so that he will not sustain damage or end up in a dispute, or any other sort of misfortune.

It is also a principle that if the listener will not benefit by hearing the information, but through his listening good can come to others, it is permissible. For example, if he listens to the information so that he can later verify it and then rebuke the individual in question such that perhaps through [his involvement] the sinner will repent, or he will return stolen goods to their owner or he will appease the person he incensed, or similar rectifications, his listening would be permissible, as explained above....

6:3. Let this not be a surprise to the reader that he should say: "How can we possibly satisfy the expectations of Heaven, for you have defined [the parameters of the law such that] even listening to the disparagement of one's fellow is forbidden, yet what if the information is relevant to me, with regard to my business or for other reasons?"

The answer is: one who wants to satisfy his obligations with regard to listening [to Lashon Hara] should conduct himself as follows: if someone were to approach him and should want to talk about another, and he understands that the speaker wants to speak negatively about the other person, he should ask the speaker, "Will the information that you want to tell me have future relevance to me, or will I thereby be able to rectify a situation by rebuking the offending individual, or some other positive outcome (as discussed above in paragraph 2)?" If the speaker replies that it does have future relevance or that he could correct a situation as discussed above, it is permissible to listen to the information.³⁰

In two other places, Rabbi Kagan creates a list of the conditions under which one has a duty to give negative information about a person to another potential mate, business partner, or employee (and presumably the same would apply to a potential student). Although the lists are somewhat different, they both include the following conditions for revealing such information: (1) only if the problem is serious; (2) only if person providing the reference does not exaggerate the nature or extent of the problem; (3) only if the sole motivation for revealing the information is to prevent harm to the person to whom it is supplied and not from animosity for the person named and discussed; (4) only if there is no way to protect the potential victim without engaging

³⁰ Hafetz Hayyim, *Laws of Slurs (Lashon Ha-ra)* 6:2-3, available at

in a slur or gossip; and (5) only if there are reasonable grounds to presume that the information divulged will be a determining factor in making the decision.³¹

Although Rabbi Kagan's book is often cited in articulating Jewish laws about speech, one can plausibly interpret it as a book of moral education, *musar*, rather than one aiming to specify the law. In that case, one might understand these norms as moral ones but not legal ones.³² The Torah and Talmud, however, include several legal bases for overriding the Torah's bans on slurs and gossip, and it is more likely that Rabbi Kagan intended to lay down legal norms as well as moral ones. Whether he did or not, it is appropriate for us to interpret these norms as demanded by Jewish law as well as Jewish moral concerns. Specifically, these three legal sources are relevant to what he says: Leviticus 19:14, וְלִפְנֵי עֵינָי לֹא תִתֵּן מְכֻשָׁל, "Before a blind person do not put an obstacle," which the Rabbis apply not only to a physically blind person, but also to one who lacks important information that could likely harm him or her³³; Leviticus 19:16, לֹא תֵעָמֵד עַל־דַּם רֵעֶךָ "Do not stand idly by the blood of your brother," which the Talmud interprets to require that we seek to rescue people who are in harm's way,³⁴ and which the Rabbis in the *Sifre*, Maimonides, Rashbam, Tosafot, and *Sefer Ha-Hinukh* apply to monetary harm as well as

<http://torah.org/learning/halashon/chapter6.html> (accessed 9/3/12).

³¹ Hafetz Hayyim, *Laws of Slurs (Lashon Ha-ra)* 10; *Laws of Gossip (Rekhilut)* 9. Both are available at <http://torah.org/learning/halashon/rchapter9.html> (accessed 9/3/12).

³² We would like to thank Rabbi Elie Spitz for pointing this possibility out to us. Of course, if one sees moral norms as integrally related with Jewish law, then even if Rabbi Kagan had originally intended to articulate only moral norms, it would nevertheless be appropriate for later writers to use his analysis in their legal rulings, as indeed happened, as explained below. For a discussion of the relationship between Jewish law and morals, see Elliot N. Dorff, *For the Love of God and People: A Philosophy of Jewish Law* (Philadelphia: Jewish Publication Society, 2007), ch.6.

³³ *Sifra*, Kedoshim, on Leviticus 19:14; B. *Nedarim* 62b. They also apply this verse to prohibit tempting those who are morally blind – that is, prone to violate a moral norm or a commandment: B. *Mo'ed Katan* 17a; B. *Bava Metzia* 75b; B. *Avodah Zarah* 6b.

³⁴ B. *Sanhedrin* 73a.

physical harm³⁵; and the Talmud's law of the pursuer (*rodef*), where a third party must intervene, even lethally, to protect an innocent third party.³⁶ Thus it is not surprising that in the twentieth century, Rabbis Eliezer Waldenberg, J. David Bleich, and Aaron Levine, among others, adopted Rabbi Kagan's line of reasoning in their own legal rulings and used these three sources of justification for determining when revealing negative information about a person is legally permissible and, further, when the extent of the potential danger to a third party makes disclosure of the negative information actually mandatory.³⁷

So, for example, if A has asked you to write a letter of recommendation for him or her to be sent to B, a potential employer, you have a duty to B to be honest about A's qualifications for the job as you see them. Presumably A would not ask you to write a letter of reference unless A thinks that you will be generally positive, but even if that is true, you should share with B whichever of A's weaknesses you anticipate will affect A's performance at that job. You should also be sure to indicate where you have no grounds for assessment about how A would function in specific aspects of the job so that B will not think that by omitting those areas you want to

³⁵ *Sifre*, "Kedoshim" 4:8 on Lev. 19:16; Maimonides, *Sefer Ha-Mitzvot* #297; Rashbam and Tosafot on B. *Bava Batra* 39b; *Sefer Ha-Hinukh* #237.

³⁶ *Ibid.*, 72b; see also *ibid.* 57a, where Rabbi Yohanan ben Sha'ul asserts that the least damage must be done to accomplish the rescue, and the rescuer is liable if s/he injures the pursuer more than necessary. The duty to rescue is much stronger and broader in Jewish law than in American law, where it exists only in ten states, and in them the failure to intervene is punished only under limited conditions and leniently. All the other states follow the common law, according to which anyone ignoring someone in distress is not liable for anything. For a summary of the states that have legislated a duty to rescue, and what that duty is, see

<http://www.volokh.com/2009/11/03/duty-to-rescuereport-statutes/> (accessed January 19, 2014).

³⁷ Eliezer Waldenberg, *Tzitz Eliezer* 13:81. J. David Bleich, *Contemporary Halakhic Problems*, Volume II (New York: Ktav and Yeshiva, 1983), pp. 74-80, esp. p. 76. Aaron Levine, *Case Studies in Jewish Business Ethics* (Hoboken, NJ: Ktav and New York: Yeshiva, 2000), pp. 280-320, where he discusses the legal and ethical issues in student evaluations and employment appraisal systems, which involve many of the same issues of slurs and gossip. We thank Professor Steven Resnicoff of DePaul University College of Law for suggesting these sources.

indicate that you evaluate A negatively in those respects. If you really do not think that A is qualified, it would be not only kind on your part to tell that to A candidly, but also a duty of yours to refuse to provide the reference because of the prohibition of uttering true but negative facts about a person (slurs, *lashon ha-ra*), and then A may reconsider applying for the job or ask someone else to write on his/her behalf. As discussed below, however, even in the absence of writing a letter for A, if the employer contacts you about A, you must answer the employer's questions about A's qualifications for the job truthfully, but, in accord with the prohibition on slurs, you should not volunteer negative information about an aspect of the person's candidacy that was not directly asked, except if the candidate poses significant danger to the school or job. The same would apply to letters of recommendation for schools.

Jewish law also places demands on the recipient of a reference. Normally potential employers and schools are wary of extreme praise of a candidate. Some recommendation forms for schools actually instruct writers to avoid general praise and to list specific weaknesses as well as strengths. That is not only a good practice, but one that invokes Jewish duties. As part of one's duty to protect oneself and the welfare of the institution considering the applicant, recipients of a positive but very general reference should seek further information from the recommender, including specific examples that support the positive recommendation and a list of any weaknesses relevant to the academic program or job.

Jewish law instructs recipients to be wary of negative information too. On one hand, the recipient of negative information may and indeed should take such information into account and not dismiss it out of hand as prohibited slurs (*lashon ha-ra*). This is justified by B. *Niddah* 61a, where the Talmud indicts Gedalyah ben Ahikam, governor of Israel after the destruction of the

First Temple, for not taking seriously the warnings of Yoḥanan ben Karaḥ that opposition leader Yishma'el ben Netanyah was planning to attack him. One has, in other words, a duty to protect both one's person and one's assets and thus should listen to plausible threats to either.

On the other hand, the laws that we have been discussing that prohibit uttering lies and even saying truthful but negative things about people require restraint on the part of the hearer in listening to such accusations and prohibit even more strongly encouraging such negative talk about the person with follow-up questions. This is especially important in our day, when the internet is filled with outright lies as well as truthful, but negative information about people.

Thus Rabbi Kagan says this:

[Although he is permitted to listen to it,] the listener should not believe the information when he hears it; rather, he should only suspect [its veracity] until he investigates the matter.

However, if the listener understands from the speaker's response that there is no purpose in what he says, or he detects that the information is merely words of spite and hatred, such that the speaker wickedly ascribes false accusations to the subject and defames him out of sheer hatred, listening is prohibited....

With regard to any of these exceptions that we have discussed with regard to listening [to Lashon Hara] one should take great care not to definitively believe it when it is heard, but only to suspect its veracity. [The listener should follow this guideline carefully] so that he is not also caught in the snare of the sin of accepting Lashon Hara.³⁸

Such suspicion of negative reports about an applicant is especially important in two circumstances: (1) when the applicant does not know who is being asked for a reference, and (2) when the applicant knows the source of a reference but is not allowed to see the evaluation. In both cases, the applicant cannot explain or defend him/herself with regard to the negative information reported. Recipients should be especially suspicious of general assessments of the applicant (negative or positive) and should depend instead on specific examples of what the

³⁸ *Ibid.* 6:3.

applicant did or did not do in circumstances relevant to the job or school for which s/he is applying.

Note that here the Jewish tradition demands more honesty than what currently happens under American law, where many employers are reticent to share negative information – and sometimes even positive information – about a former employee lest they be sued. Similarly, teachers will write honestly about a former student – or agree to write at all – only if the student waives his or her rights under the Buckley Amendment to see the letter of recommendation. Jewish law requires people who have been asked about a person applying for a job or for acceptance to a school to be honest and forthcoming about both the positive and negative things they know because such information has practical implications for the potential employer or school. To refuse to do that, or to lie in favor of the person, ultimately harms the third party, and that we may not do.³⁹

At the same time, another Jewish value comes into play here. We are, after all, required to help those in need,⁴⁰ and, as Maimonides' famous ladder of *tzedakah* asserts,⁴¹ the highest form of doing that is employing that person or, by extension, educating the person to be able to succeed at a job. Thus, if the candidate has some negative qualities vis-à-vis the school or job for which s/he is applying, but they do not rise to the level of completely disqualifying the person or making it dangerous for the school to admit him/her or for the employer to hire her/him, then the evaluator can and should say, if it is true, that the person will benefit from the kind of support

³⁹ Another kind of situation in which a person should say something negative about someone else is if that person is doing something wrong. That is precisely the case where the Torah demands that we reprove someone. In the extreme, where the person is misleading people into worshipping other gods, the Torah demands that even the closest of relatives shun the person and contribute to the person's death (Deut. 13:7-12). This is not directly relevant, though, to our topic in this responsum.

⁴⁰ Among the many verses in the Torah that require that we assist others in attaining the basic necessities of life, see, for example, Leviticus 19:9-10 and Leviticus 25 and Deuteronomy 15 generally. For a discussion of this obligation, see Elliot N. Dorff, *The Way Into Tikkun Olam (Repairing the World)* (Woodstock, VT: Jewish Lights, 2005), ch. 5.

⁴¹ M.T. Laws of Gifts to the Poor 10:7-14.

that the school or employer can give him/her in carrying out the required tasks. Many schools now offer such support to students with special needs, and, in part because of the Americans with Disabilities Act, more and more employers are making accommodations for some forms of disability as well. So evaluators should definitely identify whatever negative qualities will affect the job or academic performance of the candidate, but they should also note when specific forms of support can enable him/her to succeed in the school or job for which s/he is applying.⁴²

Oppressive Speech (ona'at devarim)

Aside from lies and slander, which one might have guessed would be banned in Jewish law, and aside from telling tales, negative truths, and even the “dust” of such language, about which readers might not have thought previously, Jewish law bans another form of speech that it calls “oppressive.” The foundation for this prohibition is two verses in the Torah that assert that we must not wrong one another: וְכִי־תִמְכְּרוּ מִמְכָּר לְעַמִּיתְךָ אוֹ קָנָה מִיַּד עַמִּיתְךָ אֶל־תּוֹנוּ אִישׁ אֶת־אָחִיו “When you sell property to your neighbor, or buy any from your neighbor, you shall not wrong one another” (Lev. 25:14); and וְלֹא תוֹנוּ אִישׁ אֶת־עַמִּיתוֹ “Do not wrong one another” (Lev. 25:17). The Rabbis, following the interpretive principle that nothing in the Torah is superfluous or redundant, determine that the first verse applies to wronging one another in material goods, as the context suggests, and the second, which actually ends the same section about buying and selling, nevertheless refers to wronging people through words:

תנו רבנן : (ויקרא כ"ה) לא תונו איש את עמיתו - באונאת דברים הכתוב מדבר. אתה אומר באונאת דברים, או אינו אלא באונאת ממון? כשהוא אומר (ויקרא כ"ה) וכי תמכרו ממכר לעמיתך או קנה מיד עמיתך - הרי אונאת ממון אמור, הא מה אני מקיים (ויקרא כ"ה) לא תונו איש את עמיתו - באונאת דברים.

Our Rabbis taught: “Do not wrong one another” (Lev. 25:17), Scripture refers to verbal

⁴² We would like to thank Rabbi Susan Grossman for pointing out this aspect of the situation to us.

wrongs. – You say verbal wrongs, but perhaps that is not so but rather monetary wrongs is meant? – When Scripture says “You shall not wrong one another” (Lev. 25:14), monetary wrongs are already dealt with. Then to what can I refer “Do not wrong one another” (Lev. 25:17)? To verbal wrongs.⁴³

The Mishnah then defines what is included in this ban on verbal oppression:

כשם שאונאה במקח וממכר. כך אונאה בדברים. לא יאמר לו בכמה חפץ זה. והוא אינו רוצה לקח. אם היה בעל תשובה. לא יאמר לו זכור מעשיך הראשונים. אם הוא בן גרים. לא יאמר לו זכור מעשה אבותיך. שנאמר (שמות כב) וגר לא תונה ולא תלחצנו :

Just as there is wronging others in buying and selling, so too there is wronging others done by words. [So, for example,] one must not ask another, “What is the price of this article?” if he has no intention of buying. If a person repented [of his sin], one must not say to him, “Remember your former deeds.” If a person is a child of converts, one must not say to him, “Remember the deeds of your ancestors,” because it is written [in the Torah], “You shall neither wrong a stranger nor oppress him” (Exod. 22:20).⁴⁴

The Mishnah’s second example is what is relevant to our question. The Jewish tradition demands quite a lot of someone who has harmed another person in requiring the wrongdoer to complete the process of return (*teshuvah*) described in Jewish sources. That process includes acknowledgment of one’s wrongdoing, remorse expressed in words to the harmed party, compensation to the victim to the extent that that is possible, and ultimately better behavior when the same kind of situation arises again.⁴⁵ Once a person has completed the process of *teshuvah*, however, this Mishnah demands that people in society not even mention the person’s former troubles with the law, for that would be to engage in oppressive speech. Why? Because one thereby labels the person by his or her former offense, undermines and distrusts the process of

⁴³ B. *Bava Metzia* 58b.

⁴⁴ M. *Bava Metzia* 4:10 [58b].

⁴⁵ M.T. *Laws of Return (Hilkhot Teshuvah)*, chs. 1-2. For an exposition of this process, see Elliot N. Dorff, *Love Your Neighbor and Yourself: A Jewish Approach to Modern Personal Ethics* (Philadelphia: Jewish Publication Society, 2003), Chapter Six. For a discussion of how these norms might apply to one community forgiving another for past or present wrongs (the case discussed is Catholics asking Jews for forgiveness for what the Catholic Church did and failed to do during the Holocaust), see Elliot N. Dorff, *To Do the Right and the Good: A Jewish Approach to Modern Social Ethics* (Philadelphia: Jewish Publication Society, 2002), Chapter Eight.

return, and denies the person the possibility of righting his or her former wrong and taking on a new, better identity – writing a new personal script, as it were. This Mishnah thus starkly contrasts with the practice in many American states, where former convicts have to list their convictions on any job application, are ineligible to apply for any government job, and, in some states, lose the right to vote.

Similar to what we saw earlier with regard to negative but true speech, however, there is an exception to this rule. If the person applies for a job that entails dealing with situations similar to the one in which he or she committed the offense and thus would tempt him or her to do the same thing again, people who know of the person's past may describe the offense, and potential employers may refuse to take the chance of exposing the person to the same temptations again. In fact, such people have a duty to take these steps to protect other people and even the applicant, for the Rabbis interpret the principle of *lifnei ivair* (before the blind), that is, “Do not place a stumbling block before the blind” (Lev. 19:14), to include not only those who are physically blind, but those who are morally blind as well.⁴⁶ So, for example, people may and should tell potential employers in a school, camp, or youth group that they should not hire a given person because he or she has abused children in the past.⁴⁷ For that matter, someone with a history of child abuse should not apply for such a position because the principle of *livnei ivair* applies to each individual Jew and not only to employers. Similarly, someone with a record of embezzlement should not seek, and should not be hired, to work in a company's financial office. In general, then, people should not put themselves or others in positions where they will be sorely tempted to do something wrong, and if they do, it is the responsibility of potential employers to deny them such jobs.

⁴⁶ B. *Pesahim* 22b; B. *Mo=ed Katan* 17a; B. *Bava Metzia* 75b. See also note 33 above.

⁴⁷ So B. *Pesahim* 22b; B. *Mo=ed Katan* 17a; B. *Bava Metzia* 75b. So Elliot Dorff ruled in his responsum for the CJLS, “Family Violence,” http://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/19912000/dorff_violence.pdf (accessed 9/3/12), reprinted in Dorff, *Love Your Neighbor and Yourself* (at note 45 above), pp. 155-206.

This category of forbidden language has another important implication for our question. How much personal information may/should the evaluator reveal about the applicant? American law forbids asking about personal matters in job or school interviews or in the materials submitted as part of an application to a school or job with one exception – namely, applicants to religious institutions may be asked questions relevant to the religious purposes of the institution.⁴⁸ Thus a religious institution may ask about a person’s religious beliefs and actions in a way that secular institutions may not. As a result, this question becomes especially difficult with regard to references for Jewish institutions: When may or should personal information be revealed, and of what type, and when, on the other hand, does revealing such information violate the ban on oppressive speech, similar to the examples in the Mishnah of asking about a person’s former misdeeds or his or her ancestors?⁴⁹ It is easiest to justify revealing actions for which the

⁴⁸ Title VII of the Civil Rights Act of 1984 prohibits, among other things, religious discrimination in employment and therefore, as a general matter, employers are advised not to question applicants about their religious beliefs or practices. Section 702(a) of Title VII, however, creates an exception for religious corporations, religious associations, and religiously-affiliated educational institutions with respect to the employment of individuals of a particular religion to perform work connected with the organizations’ or institutions’ activities. 42 U.S.C. § 2000e-1(a). See also Section 703(e)(2) of Title VII, 42 U.S.C. § 2000e-2(e)(2) (“It shall not be an unlawful employment practice for a school, college, university or educational institution . . . to hire employees of a particular religion if such . . . institution of learning is, in whole or in substantial part, owned, supported, controlled or managed by a particular religion or . . . if the curriculum of such school . . . is directed toward the propagation of a particular religion.”)

In addition, under First Amendment principles, courts have held that clergy members cannot bring claims under the federal employment discrimination laws, including Title VII, the Age Discrimination in Employment Act, the Equal Pay Act and the Americans with Disabilities Act, because “the relationship between an organized church and its ministers is its lifeblood.” *McClure v. Salvation Army*, 460 F.2d 553, 558-60 (5th Cir. 1972). This “ministerial exception” to the federal anti-discrimination laws ensures that the government will not impede the free exercise of religion and become impermissibly entangled in religious authority. Thus, courts will not ordinarily consider whether a church or synagogue’s employment decisions concerning its clergy were based on discriminatory grounds. See, e.g., *Rweyemamu v. Cote*, 520 F.3d 198 (2d Cir. 2008) (Title VII race discrimination claim by African-American priest was barred by ministerial exception); *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006) (ministerial exception bars sex discrimination claim by female Catholic chaplain against school, alleging that she was forced out as chaplain after she advocated on behalf of alleged victims of sexual harassment).

⁴⁹ We would like to thank Rabbis Susan Grossman and Jonathan Lubliner for bringing this issue

person has been convicted in a court of law – sexual abuse, for example – but Jewish institutions might legitimately want to know personal information beyond violations of the law, as, for example, that the candidate married a non-Jew, believes that Jesus is the Messiah, or eats nonkosher foods.

Here again the pragmatic test suggested by the Hafetz Hayyim and by American law seems appropriate – namely, people should be asked only about that personal information that is relevant to the job or school for which s/he is applying. So, for example, it is both fair and proper to ask about a person's religious practices and beliefs – and even the religious identity of the candidate's spouse -- if the candidate is applying to rabbinical school or for a job to become a teacher or youth leader at a synagogue, but not if the person is applying to be a secretary, custodian, or accountant for the synagogue.

Revealing Positive or Negative Bias⁵⁰

Part of telling the truth about a candidate involves telling the truth about the evaluator too. For example, if the evaluator is a relative of the candidate, s/he must disclose that. Similarly, if the candidate owes the evaluator money, the evaluator must disclose that as well.

The Mishnah makes relatives ineligible to serve as witnesses, and, by extension, judges, and that is later Jewish law as well.⁵¹ In addition, any party who has a vested interest in the case, whether on the side of the plaintiff or defendant, may not testify in court.⁵² In the case of writing an evaluation, the evaluator is indeed making a judgment about a person, and he or she may indeed have a positive or negative bias toward the candidate. The evaluator's opinion, however, is usually only one of several that are procured by the school or employer, and so no evaluator alone has the authority to determine the outcome. Furthermore, as serious as it may be for a

to our attention.

⁵⁰ We would like to thank Mr. Jerry Abeles for bringing this issue to our attention.

⁵¹ M. *Sanhedrin* 3:4; M.T. Laws of Evidence 13.

⁵² M. T. Laws of Evidence 15:1.

person's life to get or be denied a job or a place in a school, that is not a legal penalty. So even though relatives and those with a vested interest are ineligible to serve in the legal capacities of either judge or witness, they may serve as evaluators, as long as they disclose this fact to the potential employer or school.

Rationales for Fudging the Truth or Outright Lying: Tact, Peace, or Hope

The Jewish tradition values truth very highly, not only for the practical reason that social relations depend upon being able to trust what others say, but also because God demands it and is even the paradigm of truth-telling: “The seal of God is truth”⁵³; “God hates the person who says one thing with his mouth and another with his mind.”⁵⁴ As a result, the general Jewish maxim is that one should tell the truth: “Rabbi Jose ben Judah said: “Let your ‘yes’ be yes and your ‘no’ be no.”⁵⁵

Rabbinic literature, though, describes some exceptions.

Tact

When there is no practical purpose requiring the truth and those hearing it will only have their feelings hurt, the Rabbis tell us to choose tact over truth, especially when the truth is a matter of judgment in the first place. The following excerpt is very problematic in its sexism – it assumes that only brides, not grooms, are to be evaluated for their looks, and, worse, evaluating the beauty of brides is juxtaposed with evaluating something someone has bought in the market, thus making a bride seem like an object that the groom has bought. This is clearly a product of the historical context in which it was written, and in modern times we clearly disavow these attitudes. That said, the Rabbis in this source are clearly struggling with balancing truth with

⁵³ See note 4 above.

⁵⁴ B. *Pesahim* 113b (cf. B. *Sotah* 42a, B. *Bava Metzia* 49a.

⁵⁵ B. *Bava Metzia* 49a.

tact, and the School of Hillel, which determines the later law on this, prefers tact over truth when someone's feelings, self-esteem, and joy will be hurt and there is no practical gain in doing that because the marriage or business deal has already taken place:

תנו רבנן : כיצד מרקדין לפני הכלה? בית שמאי אומרים : כלה כמות שהיא, ובית הלל אומרים : כלה נאה וחסודה. אמרו להן ב"ש לב"ה : הרי שהיתה חוגרת או סומא, אומרי' לה, כלה נאה וחסודה? והתורה אמרה : (שמות כ"ג) מדבר שקר תרחק אמרו להם ב"ה לב"ש : לדבריכם, מי שלקח מקח רע מן השוק, ישבחנו בעיניו או יגננו בעיניו? הוי אומר : ישבחנו בעיניו, מכאן אמרו חכמים : לעולם תהא דעתו של אדם מעורבת עם הבריות.

What words must be used when dancing before the bride? The School of Hillel said: "Say, 'O bride, beautiful and gracious.'" The School of Shammai said: "If she is lame or blind, is one to say, 'O bride, beautiful and gracious'? Does it not say in the Torah, 'Keep far from lying?'" (Exod. 23:7). The Hillelites said, "Then, if someone makes a bad purchase in the market, is one to commend it or run it down? Surely one should commend it." Hence the wise say, "Always make your disposition sympathetic to that of your neighbor."⁵⁶

Peace

A second exception to the requirement to tell the truth is when one is engaged in an effort to bring peace. The Rabbis deduce this exception from the very words of God, who changed Sarah's words to say that she was worried that she was too old to have children rather than that Abraham was too old; from the lie Joseph's brothers told Joseph after Jacob's death to try to attain his forgiveness and peace among the brothers; and from God's advice to Samuel to lie to Saul that he was coming to bring a sacrifice even though his real purpose was to tell him that God had decided to wrest the throne from him and give it to David.⁵⁷ The ultimate principle, then, is that "All lies are forbidden unless they are spoken for the sake of making peace."⁵⁸

Clearly, there are some important limits to this. Lies have a way of being discovered, and so lying even in the interests of making peace may not only fail to work, but may make both

⁵⁶ B. *Ketubbot* 16b-17a.

⁵⁷ Sarah: *Genesis Rabbah* 48:18, based on Genesis 18:11-14. Joseph's brothers and God's advice to Samuel: B. *Yevamot* 65a, based on Genesis 50:16-17 and I Samuel 16:2.

⁵⁸ *Baraita Perek Ha-Shalom*.

parties angry at the peacemaker. Moreover, lies cannot cover up realities; if the parties really hate each other, no false reports will magically make things right. On the contrary, both parties, upon finding out about the false report, may now not only be reconfirmed in their animosity toward each other but also distrust the reporter who was trying to make peace. Peace, if it is to be had, must rest on stronger foundations than lies, so one must take these biblical precedents with the proverbial grain of salt. One surely can and should omit nasty comments if one is trying to make peace; one can speak of each party's benign, broader intentions; and one can even interpret remarks made by one party about the other more positively than the speaker probably meant them; but actually changing what someone said is asking for trouble, even if it is in the name of making peace.

Hope

Finally, rabbinic literature records some rabbis who condone and even demand that those visiting very sick people lie to them about the seriousness of their disease so as to help them retain hope for recovery. Those who take this position base themselves on the biblical stories of Elisha's lie to the emissary of Benhadad, King of Aram (2 Kings 8:8-10, 14), and the change of fate of King Hezekiah (Isaiah 38:1-7; also 2 Kings 20:1-7; *Ecclesiastes Rabbah* on Ecclesiastes 5:6), for in both cases the patient recovers despite predictions of their demise. The Rabbis extend the concern about maintaining hope and the determination to fight illness to patients hearing about others' death:

תנו רבנן : חולה שמת לו מת - אין מודיעין אותו שמת, שמא תטרף דעתו עליו.

Our Rabbis taught: If the close relative of a sick person dies, we do not inform the sick person lest he be emotionally overwhelmed (*titaref da'ato*).⁵⁹

These sources elevate the value of retaining hope for recovery over truth, both because

⁵⁹ B. *Mo'ed Katan* 26b. B. *Mo'ed Katan* 26b; see S.A. *Yoreh De'ah* 338:1.

one never really knows whether the patient will get better or worse, and also to avoid depriving the patient of hope. Despite the wise warning in these sources about negative prognoses, in modern times, when the advances in medicine may give patients and their families unrealistic hope for recovery, we should not exaggerate what medicine can do either. Rather, one should be truthful with patients so that they do not lose trust in what their physicians and family are telling them, for deceiving patients about their diagnosis or prognosis will surely produce a feeling of betrayal and abandonment. One *should* point out what the patient can realistically hope for and help the patient realize those hopes, if possible – hopes, for example, of reducing pain through more or different medication, of reconciling with someone before death, or completing an ethical will. Pretending that the patient’s physical condition is not as bad as it is, however, or that the prognosis is something other than what it is, ultimately serves neither the patient nor the value of truth.⁶⁰

This concern for fostering hope – but only realistic hope – applies to providing references as well. In doing so one may indicate how a person may overcome deficiencies in their qualifications with appropriate help, and one should do so when there are reasonable grounds to believe that specific interventions will indeed resolve particular problems in the person’s candidacy. The recommender, though, should not suggest that such interventions will work when s/he does not have realistic grounds to believe that that hope can be realized.

Providing a Reference for Someone You Do Not Know Well

How well do you need to know a person to provide a reference without misleading the recipient? Our knowledge of everyone, including those whom we think we know well, is always incomplete. The remedy for that is to indicate clearly how we know the applicant and for how

⁶⁰ For more on how this concern applies to the prognosis that physicians offer patients and how they offer it, as well as what visitors say to patients, see Elliot N. Dorff, *Matters of Life and Death: A Jewish Approach to Modern Medical Ethics* (Philadelphia: Jewish Publication Society, 1998), Chapter Ten, and Elliot N. Dorff, *The Way Into Tikkun Olam (Repairing the World)* (Woodstock, VT: Jewish Lights, 2005), pp. 93-98.

long and then to indicate what we do not know about the applicant that is probably relevant to his or her candidacy for the school or job. That general rule suffices for most cases, for following it provides the truth about both what one knows and what one does not know. As indicated earlier, one should also state that what one does not know is not necessarily a negative evaluation of the candidate in that aspect of the qualifications for the school or job; it is simply a lack of knowledge on the recommender's part.

Once in awhile, though, one is asked to provide a letter of reference for someone one does not know well. For example, one may be the candidate's employer but not his or her immediate supervisor or the principal of a school but not the student's teacher. Under those circumstances, one should decline to provide the reference altogether or indicate in the reference the limited knowledge one has about the applicant.

In a fascinating responsum, Rabbi Menasheh Klein, one of the authors of responsa during the Holocaust and the author of *Mishneh Halakhot*, applies this rule even to someone asking for a letter affirming that he is indeed poor and that others should therefore give him food or money. Even though, as the author points out, we generally have a rule that we should provide a day's worth of food to those who ask for it with no questions asked, if you affirm in a letter that this person is poor and you do not know that he is, your letter in the case that the person is not really poor, is both deceiving potential donors and aiding the beggar to steal from them.⁶¹ So even in such a case, where we have a special duty to a class of people, we must be sure that what we say is accurate and limited to what we know about the applicant.

Summary of the Jewish Side of this Issue

How, if at all, do these factors that mitigate the duty to tell the truth affect someone giving a reference? They inform the way one tells the truth but do not justify distorting the truth.

So one may and should express any reservations about the candidacy of the person being evaluated in respectful and even tactful terms, but ultimately the evaluator must tell the truth about the candidate's weaknesses for the school or job in question as well as his or her strengths. Peace, although a very important value of our tradition, is not really relevant here because although negative comments about the candidate will probably upset the candidate if he or she ever comes to know them, the failure to communicate them will definitely upset the recipient of the reference if the person is admitted or hired based on the incomplete reference and then later demonstrates that she or he is not fit for the school or job. Hope is also an important part of our tradition, but it must be realistic. Thus although one can always hope that people overcome their weaknesses and one may even suggest to the school or employer the kind of support that would help the candidate do that, failing to note a person's weaknesses for a school or job out of hope that the person will in the future be able to overcome her/his weaknesses is not appropriate in a reference. None of the exceptions to the tradition's mandate to tell the truth, then, excuse an evaluator from telling the truth, although they do inform how that should be done.

Furthermore, the three factors that we have been discussing – tact, peace, and hope -- establish limits to the duty to telling the truth, and they thereby express a reticence to communicate negative facts about a person even if true and even if they are potentially harmful to the recipient. Thus they reasonably establish *a middle ground*.⁶² That is, one must clearly not tell lies about a person. One must also avoid communicating impressions, whether positive or negative, that are unsubstantiated by facts that can be and are delineated. One must also refuse altogether to respond to a request for an evaluation if the job description or school program is not

⁶¹ *Mishneh Halakhot* 12:145.

⁶² We would like to thank Rabbi Daniel Nevins for pointing out the need to find this middle ground in providing evaluations.

clear, for then one will likely be saying things about the person that are irrelevant and possibly even utter forbidden slurs unless the candidate is applying to multiple schools or jobs and specifically asks for a general letter of reference. At the same time, one is required to tell relevant truths about the candidate because none of the excuses to avoid doing so directly applies.

These three factors that limit truth telling in the Jewish tradition and the general values and laws guiding our speech described above, however, indicate that the evaluator is not necessarily obligated to tell the whole truth. Instead, one should be guided by the questions being asked. When first asked for a reference, one might say to the school or employer, “What do you want to know?” and respond only to those questions. The one exception to this approach – and it is an important one – is if there is something about the candidate that would make him or her dangerous in the school or job for which she or he is applying, for then one has a duty to warn the questioner about that danger based on Leviticus 19:16, לֹא תֵעָמַד עַל־דַּם רֵעֶךָ “Do not stand idly by the blood of your brother.” Short of that, however, one has no duty to reveal everything that one knows about the person, positive or negative. Similarly, if one is not listed by the candidate as a potential evaluator but one nevertheless finds out that the candidate is applying for the school or job, one does not have either the right or the duty to contact the school or employer to provide an evaluation of the candidate, especially a negative one, unless the candidate will pose a significant danger to the school or job.⁶³ This middle ground – telling the truth but not revealing everything unless some characteristic or past action of the candidate poses a significant danger – is, on one hand, a recognition of the great value that the Torah itself and the rest of the Jewish tradition place on both telling the truth and protecting people from harm and, on the other

⁶³ We would like to thank Rabbis Adam Kligfeld and Elie Spitz for reminding us to address this

hand, a reflection of the reluctance that Jewish sources express about saying anything negative about a person and also an acknowledgement that past actions many years ago do not always predict current or future behavior.

In providing references one should also state clearly what one does not know. Sometimes, though, “No comment” with regard to a person’s performance is taken to be a negative reaction because the listener thinks that the recommender is trying to hide something, and so when the recommender does not know something about the candidate, he or she should also clearly state that his or her lack of knowledge about some aspect of a person’s candidacy is not intended to be a negative reflection on the candidate, but rather just a statement of the limits of the recommender’s knowledge about that person. The recommender might even suggest that the questioner ask someone else who is likely to know more about the candidate’s performance in the area in question.

The result of these considerations, then, is that the overarching demand of Jewish law to tell the truth applies to references. Especially because references inevitably involve evaluations about which people working with the candidate can legitimately disagree, one must support one’s evaluation with concrete examples of the candidate’s past actions that lead one to evaluate the person in the way s/he does so that the evaluation can as much as possible avoid being simply one’s unsubstantiated, subjective opinion and thus potentially harmful to either the candidate or the recipient. At the other end of the spectrum, one should also avoid unjustified superlatives about the person, for truth requires a realistic assessment of the positive aspects of a person’s candidacy as well as the negative ones.⁶⁴

Recipients of evaluations also have duties under Jewish law. They must investigate to determine whether what they are hearing about a person is indeed true. Otherwise they may be

situation.

⁶⁴ We would like to thank Rabbi Jonathan Lubliner for pointing out this aspect of telling the truth.

listening to outright lies, assertions based on rumors or unsubstantiated assumptions, or irrelevant, even if truthful, speech, thereby illegally aiding the evaluator to violate the law (*mesaye'ah l'davar aveirah*) and probably also harming the candidate. Thus recipients of recommendations should not believe whatever they find on the internet about the person, and they should consult with several people who know the candidate in order to confirm what any one of them says.

American Law on References

Whether Jews own their own companies or work for a company or nonprofit agency owned and operated by Jews or non-Jews, they clearly have a duty to avoid actions that will harm the company or agency by making it liable to pay a significant amount of money in a lawsuit or bring down the company or agency altogether. Aside from the American laws regarding fiduciary duties,⁶⁵ Jewish law also forbids harming both oneself and others, not only physically but monetarily.⁶⁶ So how would following Jewish law in telling the truth about a candidate for a job or school, as delineated above, fare in, for example, American law?

⁶⁵ See Section 801 of the Restatement (Third) of Agency: “An agent has a fiduciary duty to act loyally for the principal’s benefit in all matters connected with the agency relationship.” Comment G makes it clear that this general fiduciary principle applies to employees: “As agents, all employees owe duties of loyalty to their employers.” See also *Combs v. PricewaterhouseCoopers*, 382 F.3d 1196, 1200 n.2 (10th Cir. 2004) (“an employee normally owes fiduciary duties to his employer”).

⁶⁶ This is the topic of much of *Bava Kamma*, *Bava Metzia*, and *Bava Batra* in both the Mishnah and Talmud. So, for example, Jewish law provides penalties for assaulting others (M. *Bava Kamma* 8:1) and for damaging their property (e.g., M. *Bava Kamma* 1:1), and Jewish laws governing bailments (M. *Bava Metzia* 7:8) make the various kinds of bailees responsible to varying degrees for the property under their temporary control. See also the sources in n. 6 above, according to which people need to take care of themselves first, then their family, then their community, and only then others in concentric circles of responsibility.

The large majority of employers⁶⁷ in the United States follow what is known as an NRS (“Name, Rank, and Serial number”) Policy in response to requests for references from prospective employers. That is, they give out only neutral information such as the dates of employment and title without commenting on performance, attendance, or expertise -- the very subjects that employers are most interested in learning about. This practice not only undermines articulated public policy, but also – as discussed above – contravenes important Jewish values and in certain circumstances may be at odds with obligations imposed by Jewish law. The question, then, is what does American law actually require, and if the law does not require such reticence, why do employers adopt the NRS policy?

Providing employment references implicates a variety of common law and statutory duties. First and foremost, is the law of defamation from which the vast majority of legal claims relating to employment references arise. Under common law principles of defamation, an employer may be held liable if he or she (1) makes a false and defamatory statement of fact concerning a present or former employee (2) to a prospective employer or other third party (3) in at least a negligent manner (4) causing injury to the employee.⁶⁸ From this list of elements, it is clear that truth is an absolute defense to a defamation claim and opinions, as opposed to statements of fact, are not actionable at all. What is more, an employee cannot successfully maintain an action for defamation where he or she has authorized the employer to discuss the

⁶⁷ Middle schools, high schools, and universities usually require that potential students provide transcripts, and colleges, graduate programs, and some high schools also require test scores and letters of recommendation that disclose much more information than NRS. Some schools also require that students sign the Buckley Amendment waiver that indicates that the student waives his or her right to see the recommendation for the recommendation to be taken seriously and count as a recommendation. With regard to employees, however, schools and universities may follow the same NRS policy as many businesses do. We would like to thank Rabbi Pamela Barmash for reminding us of these practices among schools and universities.

⁶⁸*Restatement (Second) of Torts*, § 558 (1977).

information with a prospective employer, as often occurs.

In spite of these protections, employers have been reluctant to take advantage of them because of the expense and disruption of litigation which may result from providing a negative reference. In fact, the 1980s saw a rash of lawsuits brought by employees who claimed that they had been denied jobs because of negative references and as a result employers largely adopted policies that prohibited their managers from providing substantive references. State legislatures, concerned that discouraging candid references was poor public policy, began to pass legislation granting employers a “qualified privilege” when providing employment references. Currently, more than forty states have passed such legislation and most of the remaining states have developed a common law “conditional privilege” that provides employers with protections similar to those provided by statute in other states.

In general, the qualified or conditional privilege provides that employers will not be liable for defamation claims when providing references, unless the employer knowingly or recklessly provided false information, acted out of malice or excessively published the information to a broader audience than necessary. For example, the Texas legislature found that “the disclosure by an employer of truthful information regarding a current or former employee protects relationships and benefits the public welfare.”⁶⁹ Therefore, the legislature enacted a statute that creates immunity for solicited employment references pertaining to an employee’s job performance “unless it is proven by clear and convincing evidence that the information disclosed was known by that employer to be false at the time the disclosure was made or that the disclosure was made with malice or in reckless disregard for the truth or falsity of the

⁶⁹ Tex. Lab. Code § 103.001

information disclosed.”⁷⁰ By imposing both a significantly higher standard of proof (“clear and convincing evidence” as opposed to the usual “preponderance of the evidence” standard) and by requiring knowing fabrication or reckless disregard for the truth (as opposed to simple negligence), this statute and others like it were intended to give employers the comfort and encouragement to provide candid employment references.⁷¹

These statutory and common law qualified immunities have not been effective in encouraging substantive employment references for several reasons. First, the qualified nature of the immunity means that one has to be careful to stay within the boundaries of the protected conduct. For example, the North Carolina statute applies only to solicited references where the response is limited to information about job performance or job history.⁷² Information that falls outside of those categories or which is volunteered rather than solicited would not qualify for the immunity. As a practical matter, in large companies, it is extremely difficult and time consuming to train managers to stay within these types of boundaries and even with the best training some managers will inevitably stray from the protected limits. What is more, even though it is more difficult to overcome the limited immunities created by statute and common law, it is not impossible to do so and therefore employers remain exposed to the expense, reputational harm,

⁷⁰ Tex. Lab. Code § 103.004

⁷¹ See also R.I. Gen. Laws § 28-6.4-1 (2012) (immunity from civil liability under Rhode Island statute unless reference is knowingly false, deliberately misleading, disclosed for malicious purpose or violative of the employee’s civil rights); N.C. Gen. Stat. § 1-539-12 (2011) (under North Carolina statute, employer is immune from liability for statements regarding job performance unless the statements were false and the employer knew or reasonably should have known that the information was false). See also *Conway v. Herman Smerling et al.*, 37 Mass. App. Ct. 1, 7-8 (1994) (under Massachusetts common law, employers providing references are immune from liability, even if the statements contain false information, unless the employer acted in bad faith or maliciously); *Erickson v. Marsh & McClennan Co.*, 569 A.2d 793, 805 (N.J. 1990) (New Jersey common law provides a qualified privilege to an employer who responds in good faith to the specific inquiries of a third party regarding the qualifications of an employee).

⁷² N.C. Gen. Stat. § 1-539-12 (2011)

and diversion of management resources inherent in defending a defamation case. Better to play it safe, reason many corporate managers, than to expose the company to those types of costs, even if the employer would ultimately prevail at trial.⁷³

State defamation claims are not the only risks employers may face in providing candid employment references. Title VII of the Civil Rights Act as well as other employment discrimination and retaliation statutes have generally been interpreted to cover former as well as current employees. Therefore, when an employer provides a negative reference, former employees have a potential claim that the reference constitutes an adverse employment action improperly motivated by their membership in a protected class (e.g., race or gender) or their protected activity (e.g., filing a discrimination complaint).⁷⁴

Claims for invasion of privacy and tortious interference⁷⁵ have also been asserted in

⁷³ Businesses can purchase insurance against defamation claims either as part of a general liability policy or a special slander and libel policy. Although such insurance policies may provide a level of protection against attorneys' fees and settlement costs (up to policy limits), they do not relieve the business distraction and diversion of management resources which is endemic to this type of litigation. Moreover, such policies often have exceptions (e.g., for intentional defamation) which may expose a business to the full threat of monetary damages.

⁷⁴ See *Robinson v. Shell Oil Co.*, 117 S. Ct. 843 (1997) (US Supreme Court held that former employee may sue for retaliation under Title VII when he was given a negative reference after he filed a discrimination charge against his former employer). Although some have argued that giving even neutral employment information for someone in a protected class could give rise to a discrimination claim where it can be shown that positive references were given by the same employer for non-protected class members, several courts have rejected that theory. See, e.g., *Cooper v. Charlotte-Mecklenburg Board of Education*, 2007 U.S. Dist. Lexis 1287, at *6 (W.D.N.C. 2007) (giving neutral and limited information about an employee where that is the employer's common practice is not an adverse employment action and therefore cannot form the basis for a retaliation or discrimination claim).

⁷⁵ Tortious interference claims are a variation on defamation claims and most of the principles that apply to defamation claims apply equally in this context. The principle distinction between the two claims is the requirement of malice in tortious interference claims. That is, the employee must show that the former employer's actions were malicious in the sense that the harm was inflicted intentionally and without justification or excuse. Because this is a difficult standard to meet, these claims typically fail in the ordinary context of a negative reference. See, e.g., *Friel v. Angell Care, Inc.* 440 S.E. 2d 111, 114 (N.C. Ct. App. 1994) (interference claim relating to

response to negative employment references, although much less frequently than defamation or discrimination/retaliation claims and with much less success. In general, invasion of privacy claims typically arise when an employer proactively reaches out to a third party to alert them of certain information regarding a prospective employee. Employers can avoid invasion of privacy claims by providing information about an employee only in response to a specific request and requiring the employee to sign a consent form if any substantive information is to be provided to potential employers. Moreover, because the new employer is usually contacting the former employer only after the employee authorized it to check his or her references, the employee's consent to the former employer's provision of that information is often implied even without a signed consent form.

While most claims arise from the provision of a negative reference, there have been some cases brought because of what is alleged to be an unwarranted positive reference. These cases are generally based on claims of misrepresentation and arise when a new employer (or someone in his or her business or institution) suffered harm from a new employee who was the subject of a misleadingly positive recommendation. If the former employer had provided truthful information and by doing so, the new employee would not have been hired, thereby preventing the harm, the actions of the former employer may be actionable. For example, in *Randi W. v. Muroc Joint Unified School District*, 14 Cal.4th 1066, 929 P.2d 582 (Cal. 1997), a student who alleged sexual abuse by a school employee successfully brought a claim against the school district in which that employee had previously worked. The employee had been forced to resign from that school district as a result of sexual misconduct towards students, but the school district gave him a positive recommendation anyway. The student claimed that if the school district had

reference fails absent evidence of malice by former employer).

not given such a reference, the new employer – another school district – would not have hired the employee as vice principal at the school where the student attended and where he was allegedly abused by the new employee.⁷⁶ It should be noted, however, that the law in this area is less uniform and prevalent, given that – under American law – employers do not have any duty to provide information in response to reference requests. In the absence of a duty to warn, courts have hesitated to find that employers have been negligent in performing that duty, except in egregious circumstances.

Summary: Balancing the Duty and Danger of Disclosure

In light of the Jewish and American laws on giving references, what should Jewish employers and employees do, and what policies should Jewish companies and nonprofit organizations have?

In general, in light of the strong mandate of Jewish law to tell the truth about candidates for schools or jobs and the protections in American law for those who do so when they support their assertions with a record of the candidate's actions, Jewish-owned companies and nonprofit institutions should adopt policies that abide by the guidance of this responsum. Furthermore, if a company or school, whether Jewish or non-Jewish, does not have a policy regarding references, Jewish employees should abide by the guidance of this responsum.

⁷⁶ See also *Singer v. Beach Trading Co.*, 876 A.2d 885, 890-94 (N.J. Super. Ct. App. Div. 2005) (discussing other states' approach and determining that under New Jersey law, a former employee asserting a misrepresentation claims must show that the former employer negligently disseminated false information).

Jewish employees working for Jewish or non-Jewish companies or nonprofit institutions, however, must abide by their employer's policy with regard to giving references for two reasons: morally, the employee accepted the conditions of employment in taking the job and thus effectively promised to abide by those conditions, including the employer's rules governing references; and pragmatically, the employee presumably does not want to be fired. Thus, if a Jewish or non-Jewish company, non-profit institution, or school has an NRS policy, a Jew must abide by it.

The only exception to this is if serious injury could result from following the NRS policy with regard to a particular candidate for a school or job. Under those circumstances, a Jewish employee asked for a reference should act in accordance with this responsum in disclosing the danger of harm despite the NRS policy. For example, if a Jewish school employee is asked for a reference for someone who was dismissed from a public or private school for sexually abusing a student, or if the candidate committed a felony, especially one relevant to the position for which s/he is applying, the Jewish person providing the reference is obligated to provide sufficient factual information to warn a potential employer, particularly where the employer is another school. Obviously, to keep one's job it would be prudent for the Jew asked for a reference in such a case to discuss the situation with his/her employer before taking such action with the goal of convincing the employer to make an exception in this case and possibly even to change the policy itself to permit warning in such cases of danger to the potential employer. Even without either of those ways to justify violating the NRS policy, however, the Jewish employee does have the duty to warn other schools or companies of the dangers involved in accepting such a student or hiring such an employee, even if doing so costs the Jew his/her job.

That said, one must recognize that there are many gray areas between someone convicted of a crime, where the danger has been demonstrated, and someone for whom there is mere suspicion of posing harms to a school or company. There is also a range of harms that a person might cause. These factors of the degree of certainty regarding the actions of the applicant and the degree of harm the applicant caused or is alleged to have caused must be taken into account when deciding whether to violate an NRS policy or not. More generally, these factors must also be considered when deciding what one says in providing any reference.

P'sak Halakhah (Ruling)

1. *The general rule: tell the truth about the candidate.* On the Jewish side of this question, because none of the exceptions to the rule to tell the truth apply to the context of providing references, we are left with the demand to tell the truth. Evaluators are cautioned to limit their remarks to what they know well about the candidate and indicate when they do not know about salient aspects of the person's candidacy, emphasizing that their statement to that effect is not intended to be a negative reflection on the candidate, just a statement of the limits of the recommender's knowledge. To make this yet clearer, the recommender might suggest that the potential employer or school contact other people who know more about aspects of the candidate's work that the evaluator does not know. In accordance with the reluctance expressed in the Jewish tradition about saying negative things about people, and in recognition of the fact that past actions do not always predict future behavior, however, evaluators, whether listed by the candidate as people the school or job should contact or not, should respond to the questions asked and not volunteer negative information about a person except if that information clearly establishes that the person would be dangerous for the school or job (see paragraph 7 below). At the other end of the spectrum, one should also avoid superlatives about the person unsubstantiated by the candidate's specific actions, for truth requires a realistic assessment of

both the positive and negative aspects of a person's candidacy. Evaluators should phrase any comments, whether negative or positive, with reference to the candidate's specific *actions* rather than describe his or her character generally. Moreover, negative comments should be phrased in clear but respectful and tactful terms, and they should indicate what forms of support the school or employer might realistically offer to help the candidate overcome his/her weaknesses and thrive in the school or job. Even though providing a reference may include disparaging remarks about the person, this is not a form of prohibited slurs (*leshon ha-ra*) because the recipient has a practical need to know the disqualifications of the applicant for the school or job as well as the qualifications.

2. *Telling the truth about the evaluator:* Evaluators should disclose any positive or negative bias that they have toward the candidate, such as the fact that the candidate is a relative of the evaluator or owes him or her money.

3. *When to refuse to provide a reference:* People asked by a candidate to provide a reference for jobs or schools should refuse to do so if they cannot say anything substantive about the candidate. They should also decline to give a reference if the job description or the school program for which the candidate is applying is unclear, for then the evaluation is likely to include either irrelevant or unsubstantiated negative information about the candidate. An exception to this last rule occurs in those circumstances when the applicant is applying to a variety of different schools or for a number of jobs and requests a general letter of reference attesting to the applicant's academic or professional qualifications. If one is not listed by the candidate as a potential evaluator but nevertheless finds out that the candidate is applying for the school or job, one does not have either the right or the duty to contact the school or employer to provide an evaluation of the candidate, especially a negative one, or provide a reference without the consent of the candidate unless the candidate will pose a significant danger to the school or job, in which case one should inform the potential employer or school even if not asked (see paragraph 7 below). If one does not know the candidate well, one should generally refuse to

provide a reference; if, however, one is an obvious person to consult (e.g., one is the candidate's employer but not one's immediate supervisor), one must disclose the limits of one's knowledge of the candidate and his/her work in the evaluation and limit it to what one actually knows.

4. *Recipients of evaluations:* Recipients of evaluations also have duties under Jewish law. They must investigate to determine whether what they are hearing about a person is indeed true.

Otherwise they may be listening to outright lies or irrelevant, even if truthful, speech, thereby illegally aiding the evaluator to violate the law (*mesaye'ah l'davar aveirah*) and probably also harming the candidate. Recipients of recommendations should definitely *not* believe whatever they find on the internet about the person, and they should consult with several people who know the candidate in order to confirm what any one of them says.

5. *The effects of American law on this ruling:* Nothing in American common law or statutory law prohibits an employer or former employer from providing truthful information regarding an employee's job performance, evaluation history, or other substantive information, whether positive or negative. In fact, the overwhelming majority of states have passed legislation designed to protect employers who – particularly in response to specific requests – provide candid job performance assessments to potential employers. To the extent that Jewish law (as described above) requires such candid references, American law does not stand as an insurmountable obstacle. Nevertheless, in our litigious society, we must recognize that employers who provide substantive references beyond the NRS Policy adopted by most major companies risk facing the expense and disruption of the assertion of legal claims. Given the compelling values underlying Jewish law on this issue, however, we believe that those are risks that Jewish employers, employees, and nonprofit organizations must accept in fulfilling their halakhic obligations. In the rare circumstances where, based on legal advice, an employee of a Jewish organization reasonably believes that a reference will subject his or her employer to severe financial hardship, the employee – acting consistently with his or her fiduciary duty to the employer – should formulate the reference in a way that best serves the underlying purposes of

this responsum while protecting his or her employer.

6. *Jews working for a non-Jewish employer:* Jews working for non-Jewish employers should follow this ruling when their employer has no policy about references, with the same caveat about acting consistently with one's fiduciary duty to protect his or her employer when the risk of severe financial hardship is present. When the non-Jewish employer has an NRS policy, Jews should generally abide by it, but see the next paragraph of this ruling.

7. *A candidate who poses known risks of danger for a school or job:* Regardless of whether a Jewish employee's employer is Jewish or not, and regardless of the financial risk involved, if the person asking for a reference has engaged in sexual abuse of children, committed a felony, or acted in other significantly dangerous ways relevant to the school or job for which s/he is applying, the Jewish employee has the duty to warn the recipient of the reference of such dangers, spelling out the specific past behavior of the person that demonstrates such danger. If the employer has an NRS policy, the Jewish employee is advised to consult with his/her employer before revealing the significant risk that the candidate poses with the goal of convincing the employer either to make an exception to the NRS policy in this case or to amend the policy itself to permit a warning in such circumstances. Furthermore, a Jew who knows that a person will pose significant risk of harm to a school or job has a duty to inform the potential school or company even if not asked. In all such circumstances, however, one must recognize the range of certainty about the candidate's behavior and the degree of harm involved in deciding whether to violate or amend the NRS policy or to inform a potential school or employer without being asked.