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NATIONAL SCHOOL BOARDS ASSOCIATION

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Legal Considerations in the Superintendent Search Process: No Lemons, No Surprises©

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By

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Introduction

Selection of a Superintendent of Schools is often the most important choice a school board makes. The superintendent is the most visible representative of the school district in the greater community, and his or her decisions are rightly perceived as directly affecting the district, its students, its employees and the community. The superintendent is charged with carrying out the directives of the school board and therefore speaks on the board's behalf in a multitude of situations. A school board's selection or retention of a superintendent who is not supported by the school community may lead to voter rejection of sitting board members, not to mention the impact on the educational operations of the district.

While no one can predict exactly how a chosen superintendent will perform, even after the most exacting and exhaustive search, applying solid, well tested search parameters and guidelines offers the board's best opportunity to make the right choice. Even when a search consultant is retained, the board is responsible (and will be held accountable) for the final decision. To protect the board and the district against the potentially disastrous consequences of a poor hire, that decision must be based on careful scrutiny of past employment and accomplishments, and the character and career objectives of the individual candidate. Because such scrutiny may raise privacy concerns, legal counsel should be consulted regarding the law in your state as it applies to references and background checks.

Employment References: Enhancing Their Value and Limiting Liability

An array of legal theories can inhibit employers from providing references on current or former employees. Depending on state law, the most significant legal concerns typically involve claims of defamation, the tort of "intentional interference with prospective economic advantage," and statutory provisions prohibiting "blacklisting." Each theory is briefly discussed.

Defamation

Defamation is the "invasion of the interest in reputation and good name." *Prosser and Keeton on the Law of Torts*, 5th Ed. (1984 & 1988 Supp. 771). Defamation can take the form of either a written statement (libel) or an oral statement (slander). Courts have recognized defamation claims in connection with employment references for many years. (See, e.g., *Manguso v. Oceanside*

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School District (1984) 153 Cal.App.3d 574, 200 Cal.Rptr. 535 [teacher sued former administrator and former school district, claiming administrator defamed her in a reference letter to teacher's prospective employer]; *Lesperance v. North American Aviation, Inc.* (1963) 217 Cal.App.2d 336, 31 Cal.Rptr. 873 [employee sued former employer claiming employer's written response to prospective employer's reference inquiry was defamatory]; *Muniz v. City of Harlingen* (5th Cir. 2001) 247 F.3d 607 [former employee alleged that defendants violated his right to due process of law by making defamatory statements when asked for references by a prospective employer].)

State law may recognize a *privilege* for certain communications, exempting those communications from claims of defamation under some circumstances. California Civil Code section 47, for instance, creates a qualified privilege for current or former employers who are asked to provide information on the performance or qualifications of a job applicant. By amending section 47 in 1994, the California legislature sought to provide legal protection that would encourage employers to be more willing to provide reference information. (See Assembly Committee on Judiciary, Bill Analysis of AB 2778 as amended May 18, 1994.) As one court recently recognized:

> "'To the extent that no comment and "name, rank and serial number" policies protect employers, the protection comes at the expense of communication in the job market. Employers' silence policies arrest the flow of positive information as well as negative information that most typically creates the risk of being sued. The consequences of employer silence affect the employers who seek references as well as job seekers who would benefit from receiving positive references.'" (*Noel v. River Hills Wilsons* (2003) 113 Cal.App.4th 1363, 1374, 7 Cal.Rptr.3d 216, quoting Cooper, Job Reference Immunity Statutes: Prevalent But Irrelevant (2001) 11 Cornell J.L. & Pub. Policy 1, 10.)

Other states may apply similar rules, whether statutory or judicially created. For example, in a libel case, the Illinois Supreme Court applied a conditional privilege to statements by a former employer to a potential mortgagor, because the subject matter "affected an important interest of the recipient" and the statements were "within generally accepted standards of decent conduct" and were "made in response to a request." (*Zeinfeld v. Hayes Freight Lines, Inc.* (Ill. 1968) 243 N.E.2d 217.)

Key Points to Remember

- To be privileged, the communication or employment recommendation must be made *in good faith and without malice*.
- The privilege applies only to communications made "upon request of" the prospective employer. The current or former employer may not be protected if he or she provides *unsolicited* information on a job applicant.
- The communication must be based on credible information.
- The statute will not protect communications regarding a job applicant's constitutionally protected speech or activities.

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Civil Code section 47(c) protects a current or former employer from a defamation suit by a former employee. It is not clear whether the qualified privilege would apply to tort actions brought by a third party, such as a claim for negligent or intentional misrepresentation. (*Id.* at p. 1081.)

Interference with Prospective Economic Advantage

To state a claim of tortious interference with a prospective economic advantage, a claimant must prove: (1) he or she had a reasonable expectation of entering into a valid business relationship; (2) the defendant (in this context, the previous employer) *knew* of the expectancy; (3) the defendant *purposefully interfered* to prevent the expectancy from being fulfilled; and (4) damages resulted from the interference. (*Delloma v. Consolidation Coal Co.* (7th Cir. 1993) 996 F.2d 168, 170.)

As with defamation, a privilege may apply. If the interference is *privileged*, the claimant must prove the defendant's conduct was *malicious*. In this context, the term "malicious" does not carry the ordinary meaning of vindictive or malevolent; it means intentionally and without justification. *Privilege* exists if the defendant acted in good faith to protect an interest or uphold a duty. The defendant's statement must be limited in scope to that purpose, and must be made on a proper occasion, in a proper manner and only to proper parties.

Blacklisting

Blacklisting is a form of retaliation for a former employee's conduct to which the employer objects, such as the filing of complaints. (See, e.g., *Bailey v. USX Corp.* (11th Cir.1988) 850 F.2d 1506 [alleging former employer gave unfavorable reference to prospective employer in retaliation for former employee's having filed sex discrimination suit]; *Pantchenko v. C.B. Dolge Co., Inc.* (2d Cir.1978) 581 F.2d 1052 [alleging former employer refused to furnish letters of recommendation in retaliation for former employee's having filed discrimination charges with EEOC); *Rutherford v. American Bank of Commerce* (10th Cir.1977) 565 F.2d 1162 [alleging that in retaliation for filing sex discrimination charge against former employer, it advised prospective employer of charge].)

Some states, including California, prohibit blacklisting by statute. California Labor Code section 1050 makes it a *misdemeanor* to make a misrepresentation that prevents or attempts to prevent a former employee from obtaining employment. Labor Code section 1052 extends the criminal penalty to *any person* who knowingly causes, suffers, or permits an agent or employee to violate section 1050, "or who fails to take all reasonable steps within his power to prevent such violation." Labor Code section 1054 authorizes civil penalties, including *treble damages*, against employers who violate the anti-blacklisting provisions.

Negligent Misrepresentation

In California, a 1997 state Supreme Court case held school districts liable for negligent misrepresentation, where they provided unqualified glowing letters of recommendation for an administrator who was known to behave inappropriately with young female students. After the administrator was hired on the basis of those recommendations, he molested a student, who sued not only his current employer but the districts that provided the recommendations. (*Randi W. v. Muroc Joint Unified School District* (1997) 14 Cal.4th 1066, 60 Cal.Rptr.2d 263.) The California Supreme Court held the writer of a letter of recommendation owes a duty to prospective employers and third

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persons not to misrepresent the qualifications of a former employee if to do so would "present substantial, foreseeable risk of physical injury to prospective employers or third persons." (*Id.* at p. 1081.)

Keeping Reference Providers' Identity Confidential

The *provider* of an employment reference, who communicates the information under an expectation that it will remain confidential, is protected in that communication by the privacy provisions of the California Constitution. (*Board of Trustees of Leland Stanford Junior University v. Superior Court* (1981) 119 Cal.App.3d 516, 528, 174 Cal.Rptr. 160; see also *Johnson v. Winter* (1982) 127 Cal.App.3d 435, 439, 179 Cal. Rptr. 585 [to the extent sheriff applicant's file contained "matters obtained with the understanding implicit or explicit that such matters could be kept confidential," disclosure was properly denied].) That right of privacy extends to the person's name, address, and "identifying characteristics." Other states' privacy provisions may differ.

Seeking References In a Cautious Community

In this climate of litigious applicants and wary former employers, the quest for reliable, useful, and honest employment references becomes increasingly difficult. Yet *no* hiring decision, and certainly not one as important as a Superintendent or cabinet-level administrator, should be made without this vital information. The extra effort involved in obtaining first-hand references is more than justified by a good hiring decision or avoidance of a bad one.

To avoid the pitfalls of reference checking discussed above, ask *all* candidates to:

- Complete and sign an employment application;
- Provide three to five references, which must include individuals who have been in a direct employment relationship to the applicant;
- Sign a release permitting current or former employers to provide full and accurate reference information (see attachment);
- Acknowledge in writing that reference information and the identity of those providing it will remain confidential, even from the applicant;
- Sign a waiver of the right to receive a copy of any public record obtained as part of the employment reference and background check (see attachment);
- Provide evidence of qualifications that may be required by law, such as teaching credentials, advanced degrees, and other criteria;
- Provide fingerprints for any state-mandated criminal background check, such as that required by the California Education Code.

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Other Means of Locating Background Information

The availability of vast stores of information on the Internet, in news archives, and through public agency records allows prospective employers to augment the information provided by former employers and personal references. Sought and used properly, this type of information can help create a total picture of the candidate's background. Some restrictions may apply under state law, as discussed below.

The Internet

Search engines like Google™ and Yahoo® can lead to a wide variety of online information about an individual, particularly one who has spent any portion of his or her career in the public eye. Such information does not constitute "public records" under the definition provided in California law, but the law in other states may differ.

Internet data is notoriously unreliable, however. For one thing, *anyone* with a computer and modem can access the world wide web and post information with no scrutiny whatever. A person with a grudge against, or simply a misunderstanding about, another person or agency can wreak havoc with reputation and morale. Any information found through an Internet search should be verified through live sources.

Additionally, a Google entry, for example, will trigger a search of the entire web, and simple search terms will generate tens of thousands of results. It is important to confirm that the results pertain to the person you are researching, and not someone else with the same name.

Newspapers

Local newspapers from your candidate's region may provide a wealth of information. It is unlikely a school superintendent could serve in a community without appearing in the local media. Many newspapers have online search capabilities and even offer their archives over the Internet. If an online search proves fruitless, a personal visit to a library or the newspaper office may yield more data.

Editorial policies and positions will affect a newspaper's reporting on a district or individual, so as with any information found in print, it is preferable to confirm it with live sources. An editor, the reporter who wrote a story, or a source quoted in the story may all serve this function.

Unions

It may seem incongruous to be contacting the union for information. Considering the importance of labor relations in a school district, though, the superintendent's reputation with the employees' representatives reveals a great deal. Do the unions respect the candidate despite their sometimes adversarial relationship? Is the candidate considered weak, nasty, or unreasonable? Or committed, professional, and thoughtful?

Personal grudges, a layoff, an unfair practice charge, or a season or two of particularly difficult negotiations may all color the information union officers provide. The best way to

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distinguish between situational animosity and a genuine lack of respect is to ask for *concrete examples* of the objectionable behavior. And of course, it is imperative that confidentiality be assured when speaking with union representatives, like any other sources.

Plaintiff-Defendant Indexes

Researching civil and criminal court indexes is a relatively simple matter when an individual has spent much of his or her career in the same city or county. A professional search service will, for a fee, visit the appropriate courthouses, either in person or online, to locate lawsuits involving a person as plaintiff or defendant. Information on an individual who has relocated several times will be more difficult and expensive to gather.

The results of such a search should be used sparingly. The search would, for example, reveal personal information such as divorces, bankruptcies, contested wills, and liens on property. Additionally, the fact that a person has been sued reveals little about his or her character. Similarly, arrests or criminal charges should not be relied on; only a record of *convictions* is an appropriate criterion for a hiring decision. In California, Labor Code section 432.7 prohibits the use in *any* employment decision of an arrest that did not result in a conviction.

Finally, information gleaned from court indexes is a "matter of public record" for purposes of the consumer investigative reporting law discussed below. Therefore, unless the candidate signs a *waiver* of the right to receive it, he or she must be provided (at least in California) with a copy of any information located through a search of court records. If you rely on an investigative consumer reporting agency to locate background information on a candidate, that agency will be subject to additional legal requirements. (See California Civil Code section 1786.10 et seq.) The district must certify to the investigative consumer reporting agency that it has made the required disclosures to the applicant. (California Civil Code section 1786.16(a)(4).)

Investigative Reporting Laws

California's Investigative Consumer Reporting Act (Civil Code section 1786.10 et seq.) requires that employers inform employees and applicants whenever the employer obtains an "investigative consumer report" concerning that person's "character, general reputation, personal characteristics or mode of living" for "employment purposes," for example, a background check. (Civil Code section 1786.16.)

The ICRA requires anyone who collects or receives consumer information for employment purposes that constitutes *matters of public record* to provide that information to the consumer (i.e., the applicant). "Public records" are defined in the ICRA as "records documenting an arrest, indictment, conviction, civil judicial action, tax lien, or outstanding judgment." (Civil Code section 1786.53(a)(3).)

If the employer takes any "adverse action" in response to the information, it must give the applicant a *copy* of the public record. The employer must also provide information on job application forms to permit the applicant to *waive* the right to receive the information. (Civil Code section 1786.53(b)(2).)

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Employers should take advantage of the waiver provision in ICRA or other states' privacy laws, particularly in searches for sensitive, top-level positions such as superintendent of schools. Candidates for such high visibility public service positions should be held to the highest standards, and therefore should not balk at a request to sign a waiver. If an otherwise stellar candidate refuses to sign a waiver, the search consultant or committee may explore the individual's reasons (which may be legitimate) and decide, after consultation with the board, whether to proceed with consideration of that candidate.

Some Practical Considerations

Your superintendent search is too important to be done hastily, left to chance or whim, or finalized prematurely. The future of the district and the board may depend on making the right decisions. Applying these pragmatic guidelines can assist in shaping your search, culminating in a well chosen leader.

1. Know what you are looking for in your superintendent. Does your district require a peacemaker to bring together alienated factions of employees or community members? A disciplinarian to get factions under control and lead them away from their personal agendas? An inspirational leader to guide future achievement? Knowing the commodity you are looking for will determine how the board conducts the search.

2. To what extent will your search procedures permit or invite employee, union, and community input? Will the local self-appointed enforcer of the state open meeting law attack the process as being secretive and clandestine?

3. Prior to beginning the search, outline the board's thinking about the requirements of the superintendent's employment contract, given the board's vision of the ideal superintendent. This is definitely subject to change! A prospective superintendent who meets the board's exact specifications may make unanticipated compensation demands. It is imperative that the board outline its general parameters in advance before becoming attached to the personality of a particular candidate.

4. If previous issues or concerns have arisen with a superintendent's employment, they should be clearly considered by the entire board before negotiating with the finalist. Learn from past mistakes: what inadequacies characterized the former superintendent or his/her employment contract? How should these issues be remedied *before* making an offer to the preferred candidate?

5. Require your search consultant or school attorney, or other individual representing the board, to conduct a compensation and benefit survey of neighboring and comparable districts.

6. Communicate frequently and clearly with your search consultant. If an outstanding applicant has unreasonable expectations, these need to be addressed earlier rather than later. It is agonizing to reject a finalist at the last moment who has a fundamental difference that cannot be overcome.

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7. Keep in mind that a candidate who makes contract demands that appear to be at odds with the district's interests, particularly as to termination or "buyout" clauses, may have an agenda that will not serve your district well. Demands far beyond what the board finds reasonable should trigger reconsideration of the candidate.

8. Recognize the differing and important roles of the search firm and the school board's lawyer in negotiating and drafting the superintendent's employment contract. The search consultant has different functions, ideals, and skills than the board's lawyer. The lawyer is attuned to the legal problems, if any, with a previous superintendent, the board's ongoing goals, and recent experience. These issues need to be addressed and incorporated into the new superintendent's contract.

9. Know the precise value of non-salary benefits, including health coverage pre- and post-retirement, and annuity and retirement contributions. Even if the actual cost of benefits is not spelled out in the contract, it is important to know the total price tag.

10. Appoint an interim superintendent who will meet the board's needs until the new superintendent is available to start work. Resist the urge to micro-manage by committee.

11. Clearly identify legal notice and agenda requirements for negotiations and approval of the superintendent's contract. Must the superintendent be excluded from closed session discussions of his/her compensation? Must final action be taken in open session? (In California, the answer to both questions is yes.) How must the action be agendized under your applicable state law? Must the interview be conducted in public?

12. ***Do not*** appoint a superintendent and try to work out the contractual details later.

13. Allow legal counsel to review each draft of the contract. State law may impose restrictions on items such as buyout clauses, bridge loans, or bonuses. Continual review by counsel can preclude illegal or questionable terms from finding their way into the contract. Remember that the superintendent's contract, once approved, is a public record and must be disclosed upon request.

14. Allow enough time to complete contract negotiations prior to setting the date for board action to appoint the superintendent and approve the contract.

15. Do not announce the new superintendent prematurely. The process can be derailed by last-minute glitches in negotiations or skeletons suddenly emerging from closets.

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