

**ADR ENCOURAGES ACCURATE AND TIMELY EMPLOYMENT  
REFERENCES IN AN INCREASINGLY VIOLENT WORKPLACE**

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"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough."

--Abraham Lincoln

**INTRODUCTION**

Asking for and providing job references has been a standard employment practice for years in both the private and public sectors.<sup>1</sup> However, in today's business world, reference providers generally refuse to give more than "name, rank, and serial number"<sup>2</sup> references. They avoid giving meaningful references because they fear the costs associated with losing lawsuits resulting from giving job references.<sup>3</sup> Giving a job reference, even an honest one, can expose a reference provider to a judgment in various causes of action including defamation,<sup>4</sup> interference with business relations,<sup>5</sup> and

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<sup>1</sup> See MARK A. ROTHSTEIN, ET AL., EMPLOYMENT LAW § 1.7 (2d ed. 1999), (noting that "[a]long with application forms and interviews, the use of references is a standard element of the hiring process.")

<sup>2</sup> Christopher Graham, Comment, *H.B. 2274: Encouraging Employment References*, 30 ARIZ. ST. L. J. 221, 225 (1998) (pointing out that "a publication from the Fifteenth Annual Institute on Employment Law suggests that employers only provide 'name, rank, and serial number'; that is, only the fact of employment, the dates of employment, and the position held.")

<sup>3</sup> Connie Swemba, *To Tell the Truth, the Whole Truth, and Nothing But the Truth: Employment References and Tort Liability*, 33 U. TOL. L. REV. 847 (2002) (pointing out that "over the past two decades employers have increasingly refused to continue using these valuable tools [employment references] due to fear of defamation suits"); J. Hoult Verkerke, *Legal Regulation of Employment Reference Practices*, 65 U. CHI. L. REV. 115 (1998) (indicating that "[a]ccording to the conventional account, employers refuse to provide candid references because they fear defamation liability and perceive only the most speculative benefits from exposing themselves to the risk of suit"); Ramona L. Paetzold & Steven L. Willborn, *Employer (Ir)rationality and the Demise of Employment References*, 30 AM. BUS. L.J. 123, 134 (1992); Bradley Saxton, *Flaws in the Laws Governing Employment References: Problems of "Overdeterrence" and a Proposal for Reform*, 13 YALE L. & POL'Y REV. 45, 51-53 (1995); DIANE ARTHUR, RECRUITING, INTERVIEWING, SELECTING & ORIENTING NEW EMPLOYEES 231 (Amacom 2d ed. 1991); WAYNE F. CASCIO, MANAGING HUMAN RESOURCES – PRODUCTIVITY, QUALITY OF WORK LIFE, PROFITS (McGraw-Hill 6<sup>th</sup> ed. 2003); ROBERT L. MATHIS & JOHN H. JACKSON, HUMAN RESOURCE MANAGEMENT (Thomson-South-Western 10<sup>th</sup> ed. 2003).

<sup>4</sup> *Vinson v. Linn-Mar Community School District*, 360 N.W.2d 108, 117-18 (Iowa 1984) (affirming a finding of reference provider liability for defamation).

providing deceptively positive references.<sup>6</sup> Although reference providers usually successfully defend themselves against suits based on these causes of action, they seek to avoid any litigation brought by aggrieved former employees because of high costs associated with successfully defending themselves.<sup>7</sup>

Recognizing that reference providers fear giving useful job references, legislatures have created “shield statutes” in an effort to encourage more job references; however, for the most part, this legislation has not had the desired result. These statutes focus on strengthening common law protections, but they ignore the main reason that references are not being provided: avoidance of legal expenses associated with defending against possible suits. Because the passage of new legislation for the most part provides no protection from legal expenses, the willingness of business persons to give helpful job references has not substantially increased.

Today’s workplace is dangerous. Studies show that workplace violence in public and private organizations is up 750% since 1998.<sup>8</sup> During the 1990s there was an average of 20 workplace homicides every week. A 1999 survey found that workplace violence was the number one employment security threat, up from number two in 1998.<sup>9</sup> With the workplace becoming increasingly violent, reference recipients have a legitimate interest in obtaining accurate information from previous employers so that they can avoid criminals, sexual predators, and deviants known to reference providers. Frequently, perpetrators have demonstrated their dangerous propensities during their past employment. In many cases, these dangerous tendencies were the reasons for their discharge. Without greater access to the job performance of prospective job applicants, prospective employers are not able to effectively screen applicants with violent or risky personalities. This has been a contributing factor for continued workplace violence.

Defamation waivers have been used to require job applicants to waive their rights to bring a legal action against reference providers when such references are given in accordance with contract provisions. Defamation waivers are based on contract law

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<sup>5</sup> Alex B. Long, *Tortious Interference with Business Relations: “The Other White Meat” of Employment Law*, 84 MINN. L. REV. 863, 900 (2000).

<sup>6</sup> *Randi W. v. Muroc Joint Unified School District*, 14 Cal 4th 1066, 929 P2d 582 (Cal 1997) (court held that plaintiffs could state claims for negligent and intentional misrepresentation when positive references were given for a teacher without mention of his sexual misconduct); *Gutzan v. Altair Airlines, Inc.*, 766 F2d 135, 141 (3d Cir 1985) (imposing liability on an employment agency for misrepresenting the circumstances surrounding a job candidate's prior rape conviction in a military court).

<sup>7</sup> Graham, *supra* note 2 at 224.

<sup>8</sup> Jane Hass Philbrick et al., *Workplace violence: The legal costs can kill you*, AM. BUS. REV., 1/1/03, at 84 (citing P. Viollis, *A wake-up call for not only terrorist threats*, JOURNAL OF ORGANIZATIONAL EXCELLENCE, 2002, at 21, 25-29); see also Tom Hardin, *Violence In the Workplace: The Number One Killer of the American Worker*, BENEFITS & COMPENSATION SOLUTIONS, July 2002 at 42 (noting that “Each year employers report 2,000,000 assaults in the workplace; 51,000 rapes or other sexual assaults; and 1,000 murders. However, experts tell us that there are four more violent occurrences for every one assault reported. Countless thousands of employees are harassed, intimidated, threatened, and verbally abused every day.”).

<sup>9</sup> Larry Chavez, *A Workplace Violence Guide for the Media, Press Releases on Workplace Violence Incidents, Survey Rates Workplace Violence Top Concern of Business Professionals*, Pinkerton Inc., at <http://members.aol.com/hrtrainer/guide-for-media.html> (Mar. 17, 1999).

principals and have strong arguments in their favor. Allowing defamation waivers promotes important public policy objectives. Using defamation waivers promotes honest references about good and dangerous former employees, and the workplace will be safer because dangerous employees can be eliminated from the applicant pool.<sup>10</sup> But, they have had spotty acceptance by business owners and managers, and there is resistance by the courts to recognize waivers in cases where federal protections apply such as cases involving alleged employment discrimination. This article proposes combining waivers with alternative dispute resolution (hereafter referred to as ADR) methods to alleviate fears by previous employers in providing candid assessment of former employees. Three ADR paradigms are proposed for use during various stages of the employment relationship: 1. Pre-employment agreements, 2. Agreements in anticipation of termination – Mediation in the Middle, and 3. Post-employment agreements.

### THE RELUCTANT REFERENCE PROVIDER

Since the early 1990's, reference recipients have faced increasing difficulty obtaining accurate and useful past employment references about job applicants.<sup>11</sup> Today, if reference providers are willing to give references at all, they usually limit them to basic, neutral information. Reference providers' reticent attitude comes from a justifiable fear of being sued by former employees for defamation,<sup>12</sup> interference with business relationship,<sup>13</sup> and a number of other creative causes of action.<sup>14</sup> Of all defamation cases, employees and ex-employees currently account for approximately one-third,<sup>15</sup> thus, it is

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<sup>10</sup> Mike Lafferty, *Big Brothers Had Screened Rape Suspect*, Columbus Dispatch (Ohio), 9/12/02 at 03D (Scott A. Wagner, 34, of Newark, was charged with raping a 12-year-old boy visiting Wagner's home as a client of Big Brother Big Sister. In the Big Brother Big Sister program, volunteer mentors who meet one on one with children undergo checks for criminal activity and driving violations. They also are interviewed, and a home assessment is conducted. However, it does not appear that reference providers are contacted. After being discovered in this case, it is suspected that Wagner has molested at least six other children going as far back as 1997. Captain Rod Mitchell, who is working on the Wagner case pointed out that "These people often place themselves in positions where they'll be in contact with children. It's not unusual.")

<sup>11</sup> Markita D. Cooper, *Beyond Name, Rank, and Serial Number: "No Comment" Job Reference Policies, Violent Employees and the Need for Disclosure-Shield Legislation*, 5 VA. J. SOC. POL'Y & L. 287, 292-93 (1998) (stating that reference provider routinely provided employment references for past employees until the 1980s when "highly publicized defamation cases" caused them to stop); *See also* Graham, *supra* note 7, at 224 (indicating that a survey of executives from the one thousand largest companies in the United States revealed that sixty-eight percent thought it was harder to obtain reference information in 1992 than it was in 1989).

<sup>12</sup> Philbrick, *supra* note 8, (pointing out that "Fear of lawsuits by former employees who claim their employers have provided inaccurate references interferes with the exchange of information between current and former employers. 'This fear is well placed. Over 10,000 such suits have been filed since 1983. In 70 percent of the cases, the recipient of the bad reference prevails, and the average award is over \$500,000'" quoting Noe, R. A., Hollenbeck, J.R., Gerhart, B., & Wright, P.M. (2000). *Human Resource Management*, 3rd Ed., McGraw-Hill/Irwin Publishing Co. p. 194.)

<sup>13</sup> Long, *supra* note 5, at 900.

<sup>14</sup> Wendy Dare, *Avoiding 'Truth or Dare' in Reference Checks*, HRFocus, May 2000, available at LEXIS, Legal Research Library, Legal News File.

<sup>15</sup> Markita D. Cooper, *Between a Rock and a Hard Case: Time for a New Direction of Compelled Self-Publication*, 72 NOTRE DAME L. REV. 373 (1997). *See also*, Nicholas Lockley, *References take on new*

not surprising that a survey conducted by the Society of Human Resource Management in 1998 indicated that forty-five per cent of the respondents indicated they did not give references.<sup>16</sup>

Fear of losing lawsuits is not the only reason corporate executives keep tight-lipped.<sup>17</sup> Even companies that successfully defend defamation suits are likely to incur legal fees anywhere from \$20,000 in the simplest of cases to \$80,000 or more for cases that go to trial.<sup>18</sup> One commentator noted that “[r]ather than fearing losing, employers fear the legal expenses associated even with lawsuits they successfully defend.”<sup>19</sup>

Although past and prospective employers would benefit by giving honest references, past employers apparently feel that any general benefits to the industry as a whole are outweighed by the individual liability they are likely to face if they do provide references. Practically speaking, companies gain nothing directly by providing a reference, yet they expose themselves to enormous potential losses if they do. Consequently, attorneys generally advise their clients to respond to job reference requests with “no comment.” While such advice provides the greatest protection for individual companies, a collective unwillingness to share useful information causes serious risks to prospective employers, and the public at large, who unknowingly hire and encounter dangerous or otherwise inept job applicants.<sup>20</sup>

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*meaning*, Fin. News 3/16/03 (noting that “Now, an increasingly litigious culture leaves employers less room for maneuver if they include an evaluation of an employee’s performance in the reference. A negative appraisal can close the door to future employment and open the lawyer’s casebook.”)

<sup>16</sup> Dare, *supra* note 14. See also Deborah A. Ballam, *Employment References – Speak No Evil, Hear No Evil: A Proposal for Meaningful Reform*, 39 AM. BUS. L. J. 445 (2002) (noting that “surveys show that in spite of the grants of legislative immunity and all of the support for reform in this area, rather than becoming easier, increasingly it is becoming even more difficult to obtain references.”)

<sup>17</sup> See (SECOND) OF TORTS: ABSOLUTE PRIVILEGE IRRESPECTIVE OF CONSENT § 584, tit. B (1979) ((stating that the law gives some people absolute immunity because “it is necessary for them to be protected not only from civil liability but also from the danger of even an unsuccessful civil action”). Even honest reference providers face three serious problems in giving employment references: (1) the cost of defending even an unsuccessful claim; (2) the possibility that a jury will rule mistakenly in favor of the plaintiff; and (3) the possibility that the reference provider inadvertently will give false information. The threat of mistaken liability in this context most likely deters even honest reference providers from giving any negative references. Presumably, this deterrence acts as the rationale for a grant of absolute immunity in certain circumstances. See Edward R. Horkan, *Contracting Around the Law of Defamation and Employment References*, 79 Va. L. Rev. 517, 534 (1993)).

<sup>18</sup> Terry Ann Halbert & Lewis Maltby, *Reference Checks Gridlock: A Proposal for Escape*, 2 Emp. Rts. & Emp. Pol’y J. 395, 409 (1998).

<sup>19</sup> Graham, *supra* note 2, at 224.

<sup>20</sup> 2003 WL 16071433 Minnesota Lawyer Commentary: *Senate action will decide tort reform’s fate*. (3/17/03) (Noting that a “[l]ack of information about past performance of employees can affect the safety of the workplace and the public. (This is particularly true in day care settings, long-term care for vulnerable adults, and service sectors where employees work in private homes.)”). See also, Michael Losey, Society for Human Resource Management, A NewsHour with Jim Lehrer, Transcript, *Workplace Violence*, September 4, 2000. <[http://www.pbs.org/newshour/bb/business/july-dec00/workviolence\\_9-4.html](http://www.pbs.org/newshour/bb/business/july-dec00/workviolence_9-4.html)> (last visited May 30, 2003). “The corrective action starts with mak[ing] sure you know who you’re hiring because people like this [violent employees] have usually done things like this before. If you’re not reference checking, then the very first thing you’ve done is wrong. You must know, you have that responsibility.”

## AN INCREASINGLY VIOLENT WORK PLACE

A 1999 survey of Fortune 1000 companies found that workplace violence was the number one security threat in the workplace, moving up from number two in the 1998 survey.<sup>21</sup> The U.S. Bureau of Justice provides the following statistics which support the 1999 survey:

While working or on duty, U.S. residents experienced 1.7 million violent victimizations annually from 1993 to 1999 including 1.3 million simple assaults, 325,000 aggravated assaults, 36,500 rapes and sexual assaults, 70,000 robberies, and 900 homicides. Workplace violence accounted for 18% of all violent crime between 1993 to 1999.<sup>22</sup>

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<sup>21</sup> Larry Chavez, *A Workplace Violence Guide for the Media, Press Releases on Workplace Violence Incidents, Survey Rates Workplace Violence Top Concern of Business Professionals*, Pinkerton Inc., at <http://members.aol.com/hrtrainer/guide-for-media.html> (Mar. 17, 1999).

<sup>22</sup> [http://www.ojp.usdoj.gov/bjs/cvict\\_c.htm](http://www.ojp.usdoj.gov/bjs/cvict_c.htm) (last visited on Mar. 04, 2004). See also, Diana Jean Schemo, *Predator Teachers Turning Up at New Schools, Educators Find*, 6/18/02 Chi. Trib. 12 (Basing her figures on an analysis of nine independent studies, Charol Shakeshaft, a professor of education administration at Hofstra University, estimates that 15 percent of the country's 50 million schoolchildren will be sexually abused by a teacher or other school employee.). See also, Larry J. Chavez, 18 *Workplace Violence Incidents Since September 11th: For the Workplace Killer, It Is Business as Usual*, Join Together Online <<http://192.12.191.21/gv/news/alerts/reader/0,2061,551473,00.html>> (last visited June 2, 2003) (noting the following workplace violence from 9/11/01 – 5/29/02: “09-12-2001, after making a bomb threat to his employer, a large retail chain store in Tampa, police were sent to the residence of the perpetrator to follow up the investigation. The perpetrator pulled a knife on a police officer and was shot to death. 09-12-2001, a distraught Denver Fire Captain allegedly gunned down his supervisor before turning the gun on himself. 09-25-2001, a grieving widow whose husband died under doctor's care tried to kill the Miami-based doctor but shot a technician instead. She was captured and detained at the scene of the incident. 09-26-2001, at a Detroit auto parts plant, a man chased his former girlfriend through her workplace killing her then turned the gun on himself. 10-12-2001, a military policeman who had been relieved of duty at his Fort Dix, New Jersey post, allegedly shot 2 soldiers, 2 police officers and was shot to death by police. 11-05-2001, a supervising Tallahassee firefighter allegedly shot and wounded a fellow employee in a love triangle situation. 12-06-2001, an employee of a large wood products manufacturing company in Goshen, Indiana, who was pending termination shot and killed 1 employee, wounded 6 others before committing suicide. 01-16-2002, following academic dismissal at a Virginia law school, a former law student allegedly killed 2 professors, one student and wounded 3 before being subdued by bystanders. 01-18-2002, in a Fort Lauderdale, Florida community college, a man allegedly shot his ex-girlfriend to death then turned the gun on himself. 01-30-2002, at a school district bus garage in Zanesville, Ohio, a school bus driver allegedly walked into a co-worker's bus and opened fire killing her, then killed himself. 02-05-2002, at a Mobile, Alabama newspaper office, a mailroom worker shot a fellow employee to death and fled. Police later captured him. 03-01-2002, a worker at a Silicon Valley biotech firm, shot and killed his former boss at her residence then later turned the gun on himself. 03-22-2002, fearing impending termination, a worker at an aviation parts manufacturing plant in South Bend, Indiana shot 3 employees to death, wounded another 4 employees and later committed suicide. 04-05-2002, at a worldwide telecommunications firm in Raleigh, North Carolina, a disgruntled employee, allegedly made threats to fly his airplane into his workplace. He was fired and arrested for terrorist threats. 04-10-2002, a police officer in Dover Township, New Jersey allegedly gunned down and killed 5 of his neighbors, drove to the residence of the police chief, with whom he had worked for years and wounded him. He fled and committed suicide. 04-15-2002, in a medical clinic in the City of Industry, California, a technician allegedly shot and killed 3 clinic members including one doctor then turned the gun on himself. 04-19-2002, a fired temporary worker returned to a Miami Beach construction site and shot his former supervisor in the chest with a spear gun. 05-29-2002, a 20-year old

Sadly, honest job references could have prevented some of the workplace violence that occurred during the last fifteen years. Frequently, employees who commit crimes have previously demonstrated their violent or criminal propensities to a potential reference provider.<sup>23</sup> In many cases, dangerous tendencies were the very reason a violent employee was discharged from a previous job. However, fearing lawsuits, former employers gloss over, or omit evidence of violent tendencies in their references, if they give references at all, to prospective employers.

For example, Paul Calden is a criminal who could have been stopped had an honest, cautionary reference been given. Paul Calden worked for Allstate Insurance for nine months, during which time he made death threats against coworkers, confronted peers and supervisors, and brought a pistol to the office. After being fired by Allstate, Calden sought employment with Fireman's Fund Insurance. As part of its hiring process, Fireman's Fund requested a job reference from Allstate. Although Allstate's company policy prohibited giving references of any kind, for some reason that policy was not followed in Calden's case. Instead, Allstate gave Fireman's Fund a reference letter explaining that Calden had voluntarily resigned as part of a corporate restructuring. Allstate chose not to mention Calden's history of violent conduct.

Based in part on Allstate's reference, Fireman's Fund hired Calden only to discharge him after a short period of time. Angered by his discharge, Paul Calden returned to the Fireman's Fund building and shot five of his former supervisors during their lunch break. The survivors and families of those killed sued Allstate, alleging that the insurance company knew Calden had engaged in violent behavior during his employment with the firm. The complaint charged that Allstate had fraudulently failed to disclose Calden's true work history and failed to warn Fireman's Fund of the danger he posed. After more than a year of litigation, Allstate settled the case for an undisclosed sum.<sup>24</sup>

Cooper<sup>25</sup> points out the evident weakness of the current job reference system, noting that if Allstate had followed the popular practice of providing no reference or of providing basic, neutral employment information, the firm would have been immunized from suit.<sup>26</sup>

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defendant in a criminal case in Milwaukee grabbed a bailiff's gun and wounded him and was shot to death by a plain-clothes police officer.").

<sup>23</sup> Louis A. Tyska, CCP, senior managing director of Pinkerton Consulting & Investigations reported that "research on workplace violence reveals that as many as two-thirds of these violent acts are preceded by behavioral 'red flags' and might have been prevented had coworkers or management acted on their observations or instincts." See <http://members.aol.com/endwvp/pinkerton-survey.html> (last visited February 26, 2003).

<sup>24</sup> Cooper, *supra* note 11.

<sup>25</sup> *Id.*

<sup>26</sup> See, Moore v. St. Joseph Nursing Home, 459 N.W.2d 100 (Mich. App. 1990) (employee discharged after 24 disciplinary warnings for violence and drug and alcohol use. At new job employee savagely beat and murdered a co-worker. The court held that in the absence of a special relationship between the new employer and the victim, there was no duty to disclose information about employee's violent tendencies. Although defendant asserts it was never contacted by the new employer, defendant freely conceded that it

Like Allstate, many companies do not give sufficiently cautionary references, and the number of preventable workplace crimes continues to increase, especially sexual crimes.<sup>27</sup> For example, another preventable tragedy occurred in a New Mexico hospital. In *Davis v. Board of County Commissioners of Dona Ana County*, 987 P.2d 1172 (N.M. Ct. App. 1999) a hospital patient was sexually assaulted by a hospital employee. Although the hospital employee had been suspended from his last job for sexual indiscretions, he received a letter of recommendation that gave no indication that he was a potential threat to others. Like Allstate, the reference provider was sued.

Tragically, victims have a hard time stating a cause of action against reference providers unless they have received a falsely positive or negative references on which to base their claim. Consequently, courts only see a fraction of the preventable workplace violence cases.<sup>28</sup> A company is potentially liable if it gives a falsely positive reference, but generally the victim has no action if the reference provider remains silent.<sup>29</sup> Apparently, reference providers are satisfied to remain silent in an effort to avoid legal liability while still running the less likely risk that a Paul Calden will show up during their lunch hour; however, this attitude increases the chances reference recipients will continue to hire violent and generally unsavory individuals in positions where they will be in close contact with those they seek to victimize.<sup>30</sup>

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would have provided no further information other than St. Clair's dates of employment had it been contacted.)

<sup>27</sup> See also, *Randi W. v. Muroc Joint Unified School District*, 929 P.2d 582 (Cal. 1997). (The plaintiff, Randi W. (Randi), a student at Livingston Middle School (Livingston), claimed that Robert Gadams (Gadams), the school's vice-principal, molested her. Randi sued Gadams, Livingston and various other school districts that had provided Gadams with favorable recommendations despite their knowledge of numerous complaints involving sexual misconduct at his prior employment.); *Golden Spread Council, Inc. v. Akins*, 926 S.W.2d 287 (Tex. 1996) (a scoutmaster made sexual advances towards several children including the plaintiff. These allegations were made known to the Golden Spread Council of the Boy Scouts of America (GSC). However, shortly thereafter, GSC recommended Estes to a local church group that had started Troop 223. In reliance on GSC's recommendation, the church group hired Estes. After being made scoutmaster of Troop 223, Estes resumed molesting the plaintiff, who had recently joined Troop 223.); *Cohen v. Wales*, 518 N.Y.S.2d 633 (N.Y. App. Div. 1987) (the plaintiff's claim of negligence against the defendant was based on the fact that defendant recommended a former employee for a position as a grammar school teacher without disclosing the fact that he had been charged with sexual misconduct. Eleven years later, the teacher caused injury to the plaintiff.); *Janssen v. Am. Hawaii Cruises, Inc.*, 731 P.2d 163, 165 (Haw. 1987) (employee who had been sexually assaulted by another employee sued the and the union who had referred the assaulting employee); *Murdock v. Higgins*, 559 N.W.2d 639, 641-42 (Mich. 1997) (volunteer at county social services department, who was sexually assaulted by a department employee, brought negligence action against employee's former supervisor at another department, alleging that supervisor failed to warn department to which employee transferred regarding allegations of sexual misconduct with young males); and *Hayes v. Baker*, 648 N.Y.S.2d 158 (N.Y. App. Div. 1996). (Hayes, the plaintiff, an infant, was sexually abused by the defendant, Ross Baker, while Baker was babysitting the plaintiff. Baker had been hired by plaintiff's mother after the mother obtained Baker's name from a community service referral program sponsored by the Department of Parks and Recreation of the defendant Village of Rockville Centre.)

<sup>28</sup> Halbert, *supra* note 18.

<sup>29</sup> Cooper, *supra* note 11.

<sup>30</sup> See cases *supra* note 27; see also Julie Kay, *Big Chill on Job References with More Job-Seekers Suing Over Bad References, Hiring Managers Develop Creative Ways to Get Information*, MIAMI DAILY BUS. REV. 10, 11/11/2002 (reporting that "Cook Inc., an Indiana-based company, gave employee Walter Kevin

### COMMON LAW: INADEQUATE TO CALM THE FEAR

If past employers provide candid job references, potential harm to innocent victims could be reduced if not averted. However, informative references are not being provided because employers are paralyzed with the fear of legal expenses and have nothing of practical value to gain by providing a reference. In effect, the party who assumes most or all of the risk—the past employer—receives little or none of the benefit by providing a reference.

Unfortunately, the common law provides inadequate encouragement for reference providers because its protections are unclear and because it allows vast liability risks to remain with the party who receives no benefit. The truth is always a defense to defamation claims.<sup>31</sup> In addition, even if the reference provider gives inaccurate information, as long as the information provided about an employee was not given negligently, the common law qualified privilege defense provides reference providers with immunity from defamation liability for providing job references.<sup>32</sup> However, the privilege disappears if reference providers give information about the employee to someone that does not need to know it or if the reference provider acts with malice and provides the information out of ill will or spite.<sup>33</sup>

Common law privileges are strong defenses, and reference providers tend to win defamation cases.<sup>34</sup> Nevertheless, since there are circumstances that would cause a reference provider to lose its immunity, plaintiffs are generally able to file lawsuits.<sup>35</sup> As indicated above, it is really “the fear of lawsuits and the attendant expense, more than the fear of losing the lawsuit, that deters reference providers from providing references.”<sup>36</sup> Thus, because the common law provides protection from liability but not from legal expenses, it is insufficient to calm reference provider’s fears about providing references.<sup>37</sup>

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Scott a good reference. It failed to say that Scott was a convicted identity thief. On the basis of the reference, the state Public Employees Retirement Fund hired Scott as its chief benefits officer - a position that gave him access to personal information on more than 200,000 working and retired public employees, according to a report released by Indiana Gov. Frank O'Bannon.”)

<sup>31</sup> RESTATEMENT (SECOND) TORTS § 581A (1979).

<sup>32</sup> Ballam, *supra* note 16, at 455 (2002) (citing WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS § 115 (5th ed. 1984)).

<sup>33</sup> Ballam, *supra* note 16 (quoting: Ramona L. Paetzold & Steven L. Willborn, *Employer (Ir)rationality and the Demise of Employment References*, 30 Am. Bus. L.J. 123, 131 (1992)).

<sup>34</sup> John K. Ziegler, *Note, Employment Law—An Employer's Duty to Third Parties When Giving Employment Recommendations—Davis v. Board of County Commissioners of Dona Ana County*, 30 N.M.L. REV. 307, 322 (2000) (citing Alex B. Long, *Note, Addressing the Cloud Over Employee References: A Survey of Recently Enacted Legislation*, 39 WM. & MARY L. REV. 177, 180-89 (1997)).

<sup>35</sup> Ziegler, *supra* note 34.

<sup>36</sup> *Id.* at 322 (noting that “the costs and time expended in defending [defamation] suits are a deterrence to employers providing employment references.”)

<sup>37</sup> *Id.* (noting that “[a]lthough a qualified immunity privilege is helpful, it may not be an adequate remedy when compared to the burden of the defamation suits.”)



One expert correctly points out, “[t]he common law privilege... provides no motivation or incentive to provide references; nor does it give any assurance that providing references will be a low-risk proposition, considering the cost of defending lawsuits.”<sup>38</sup> Legislators have begun to recognize that the common law alone does not provide reference providers with enough protection to make them feel safe providing references. Therefore, in order to have a free-flow of job-reference information, former employers must be immunized from potential litigation when providing references, and the risk of liability should be shifted to the party who will benefit from the reference – the employee. Several states have enacted new legislation to extend further protection to reference providers.

### RECENT LEGISLATION – INADEQUATE AND INEFFECTIVE

Responding to the need for more and better job references, nearly three-fourths of state legislatures have enacted legislation intended to strengthen reference provider immunity through "shield" statutes.<sup>39</sup> Shield statutes generally provide a rebuttable presumption that reference providers are acting in good faith when they provide references.<sup>40</sup> In most states, if needed, the former employee is allowed to prove by a preponderance of the evidence that the reference provider acted in bad faith thus rebutting the presumption; however, a few states require the rebuttal meet the clear and convincing standard.<sup>41</sup> The logic behind these statutes is that if reference providers have more protection, they will feel safer and thus provide more informative job references, which in turn will help reduce risks to the public. However, “surveys show that in spite of the[se] grants of legislative immunity and all of the support for reform in this area, rather than becoming easier, increasingly it is becoming even more difficult to obtain references.”<sup>42</sup> In fact, many attorneys and commentators have branded current shield statutes as failures because reference providers simply have not shown any increased willingness to provide references.<sup>43</sup> Although these statutes attempt to strengthen the common law privilege by more closely refining it, they do not eliminate the requirement

<sup>38</sup> Ballam, *supra* note 16.

<sup>39</sup> See ALASKA STAT. §09.65.160; ARIZ. REV. STAT. ANN. §23-136; ARK. CODE ANN. §11-3-204; CAL. CIV. CODE §47; COLO. REV. STAT. ANN. §8-2-114; DEL. CODE ANN. tit. 19, 709; FLA. STAT. ANN. §768.095; GA. CODE ANN. §34-1-4; HAWAII REV. STAT. ANN. §663-1.95; IDAHO CODE §44-201; 745 ILL. COMP. STAT. ANN. 46/10; IND. CODE §22-5-3-1; IOWA STAT. § 91B.2; KAN. STAT. ANN. §44-119A; LA. REV. STAT. ANN. §23:291; 26 ME. REV. STAT. §598; MD. CODE ANN., CTS. & JUD. PROC. 5-423; MICH. COMP. LAW ANN. §423.452; MT CODE ANN. §27-1-737; N.M. STAT. ANN. §50-12-1; NORTH DAKOTA CODE § 34-02-18; N.C.G.S.A. § 1-539.12; NEVADA REV. STAT. §41.755; OHIO REV. CODE ANN. §4113.71; OKLA. STAT. tit. 40, 61; OR. REV. STAT. §30.178; R.I. GEN. LAWS §§28-6.4-1 ET SEQ.; S.C. CODE ANN. §41-1-65; S.D. CODIFIED LAWS §60-4-12; TENN. CODE ANN. §50-1-105; TX LAB. CODE § 103.003; UTAH CODE ANN. §34-42-1; VIRGINIA CODE ANN. §8.01-46.1; W.VA. CODE §31A-4-44(A); WASH. CODE ANN. §74.39A.210; WIS. STAT. §895.487; WYO. STAT. §27-1-113.

<sup>40</sup> Halbert, *supra* note 18 at 410.

<sup>41</sup> Ballam, *supra* note 16; and Attachment 1.

<sup>42</sup> Ballam, *supra* note 16.

<sup>43</sup> Halbert, *supra* note 18 at 411 (noting that existing evidence suggests that the early statutes have had no impact on reference practices. Florida adopted one of the early statutes in 1992. As of 1996, Florida's Society for Human Resource Management reported that most businesses still followed the "name, rank, and serial number" approach.)

that the reference provider act reasonably.<sup>44</sup> Thus, these statutes leave open a window of opportunity for ex-employees to bring a cause of action (e.g., by claiming that the reference provider acted unreasonably). When the possibility of legal action exists, reference providers are reluctant to provide references because they fear legal fees, especially since there is no penalty for limiting the reference to basic information or no information at all. Thus shield statutes do not significantly change the existing law immunity.<sup>45</sup>

In addition, shield statutes generally fail to address reference providers' greatest concern: the cost of defending a lawsuit.<sup>46</sup> Only Kansas has a statute acknowledging that fear of legal expenses is at the heart of the problem. The Kansas legislature has given absolute immunity to reference providers who provide reference seekers with date of employment, pay level, job description and duties, and wage history information.<sup>47</sup> This protection is more illusory than real, however, since most reference providers would provide that information based simply on common law protections.<sup>48</sup> Simply put, this type of information does not lead to defamation suits.<sup>49</sup> The Kansas statute is a step in the right direction, because it also provides absolute immunity to reference providers who provide written employee evaluations, copies of which have to be provided to the employee upon request, and by disclosing in writing "whether the employee was voluntarily or involuntarily released from service and the reasons for the separation."<sup>50</sup> Despite the fact that the Kansas statute is the most helpful statute currently in force, it does not go far enough because "unless the employee was dismissed for violent behavior or sexual harassment, or information relating to such issues appeared in the written

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<sup>44</sup> See, e.g., Ballam, *supra* note 16 (citing Armstrong Teasdale LLC, *New Missouri Reference Request Law--For What It's Worth*, MO. EMP. L. LETTER, June 1999, available at LEXIS, Legal Research Library, Legal News File commenting on a Missouri statute: "Sure, as lawyers we may be able to use the statute as a defense in a lawsuit in an after-the-fact kind of way. But the statute does not give any real justification for changing defensive practices, for it does not make it any less likely that some dispute will not end up in court").

<sup>45</sup> See, e.g., Ballam, *supra* note 16 (citing Terry E. Thomason & Carlsmith Ball, *Job References Revisited*, Pac. Emp. L. Letter, June 1999, available at LEXIS, Legal Research Library, Legal News File. (noting that with regard to a Hawaii statute: "The Job Reference Immunity Act doesn't radically change Hawaii's common law of defamation. The Act merely refines the privilege defense to strengthen your position if you give job references"). See also, Markita D. Cooper, *Job Reference Immunity Statutes: Prevalent but Irrelevant*, 11 Cornell J. L. & Pub. Pol'y 1, (Fall 2001) at 61, citing Robert S. Adler & Ellen R. Peirce, *Encouraging Employers to Abandon Their "No Comment" Policies Regarding Job References: A Reform Proposal*, 53 Wash. & Lee L. Rev. 1381 (1996) at 1426, explaining "prisoner [sic] dilemma is an abstract formulation of some very common ... situations in which what is best for each person individually leads to mutual [lack of cooperation,] whereas everyone would have been better off with mutual cooperation." (citing Robert Axelrod, *The Problem of Cooperation, in Negotiation: Readings, Exercises, and Cases 71-79* (Roy Lewicki et al., eds. 1983)).

<sup>46</sup> Ballam, *supra* note 16 at 456 (2002) (indicating that "The weakness with these statutes is that they simply do not deal with the major problem associated with the common law immunity--they still do not provide protection from lawsuits. Thus, they fail to provide incentives for employers to voluntarily provide meaningful references.")

<sup>47</sup> KAN. STAT. ANN. § 44-119 (2000); § 44-119b.

<sup>48</sup> Ballam, *supra* note 16 at 457.

<sup>49</sup> Soc. for Human Res. Mgmt., *Reference Checking Survey 31* (1998).

<sup>50</sup> KAN. STAT. ANN. § 44-119c (2000).

evaluations, absolute immunity is not provided for revealing such information.”<sup>51</sup> Thus, arguably, even the most employer-friendly statute could be improved to better facilitate the free flow of information that is required to reduce workplace violence.

In addition to shield statutes, some states have enacted “service letter” statutes.<sup>52</sup> These statutes, provide that upon request of an employee, the reference provider must provide a letter indicating the former employee’s job title, dates of employment, and in some states, the reason for leaving employment.<sup>53</sup> While these statutes seek to improve the flow of reference information by requiring reference providers to provide references, they have two weaknesses. First, they only require reference providers to give the most basic information – information that in most cases the reference provider would be willing to give without the statute because it is not the type of information that will lead to a lawsuit. Second, because some of these statutes provide employees with legal remedies, possibly even punitive damages in some statutes,<sup>54</sup> when the service letter is not provided or when the letter is provided but contains inaccurate, biased information, reference providers are likely to give as little information as possible in an effort to protect themselves from possible legal actions.<sup>55</sup> Recognizing the failures and weakness of current legislative approaches, numerous commentators have proposed new reforms, but these proposals still do not effectively remedy the real problem.

### **REFORM PROPOSALS IGNORE THE REAL PROBLEM**

Although creative and potentially helpful, most proposals for reform fail to address reference providers’ fear of legal expenses and thus modify but don’t significantly improve common law protections. The most recent suggestions for reform include imposing a legal duty on reference providers to warn prospective employers if the ex-employee presents a danger of violence to the reference recipient, co-workers, or the public;<sup>56</sup> having reference providers and employees jointly create, just before the employee is to leave the company, a performance record that would become the job

<sup>51</sup> Ballam, *supra* note 16 at 457.

<sup>52</sup> See CAL. LAB. CODE §§1050-1056; IND. CODE ANN. §22-6-3-1; KAN. STAT. ANN. §§44-808(3); MO. REV. STAT. §290.140; MONT. CODE ANN. §39-2-801; NEB. REV. STAT. §§48-209, 48-211; N.C. GEN. STAT. §14-355; OKLA. STAT. tit. 40 §171 (public utilities only); TEX. REV. CIV. STAT. ANN. ART. 5196; WASH. ADMIN. CODE §296-126-050; WIS. STAT. §134.02.

<sup>53</sup> See, Attachment 2.

<sup>54</sup> *Id.*

<sup>55</sup> MISSOURI REV. STAT. §290.140 requires employers to provide ex-employees, when requested, a service letter stating the nature and character of service rendered, duration of service, and a true statement of the reason for termination of the employment. This statute also makes reference providers liable for compensatory but not punitive damages based on the content of the letter. It also provides nominal and punitive damages for failure to provide a letter. While this appears to solve the problem of not having a free flow of information because it statutorily requires such free flow, apparently it is not eliminating the problem. The Department of Public Safety of Missouri on its website

(<http://www.mcp.state.mo.us/study/wrkvio.htm>) (last visited 3/7/03) indicates that workplace violence is still a concern in Missouri and recites specific examples of recent workplace violence in the state.

<sup>56</sup> See, e.g., Cooper, *supra* note 11, at 325, 337 (Cooper defines violent conduct as follows: "battery, assault, threats of violence, physical fighting, possession of weapons, physical harassment, physical intimidation, sexual harassment involving physical intimidation, assault, or battery, and other violent conduct posing a threat of physical injury to persons."); see also Saxton, *supra* note 3, at 91.

reference;<sup>57</sup> federal legislation establishing a qualified privilege for reference providers that is stronger than the common law privilege and the establishment of alternative dispute resolution (ADR) mechanisms to resolve disputes regarding reference claims;<sup>58</sup> and the adoption of a model statute which would require reference providers to provide certain information<sup>59</sup> while requiring that references could be provided only with the employee's prior consent.<sup>60</sup>

While addressing some of the problems associated with references, all of these proposals continue to overlook the fear of litigation expenses, which, as seen above, is one of the most important reasons references are not given in the first place.<sup>61</sup> Even the last of the above suggestions, the Ballam model, which is the best at addressing the real reasons references are not given, has one important limitation – it requires employee consent for all references. Employees are not likely to consent to references from reference providers who would give the most important cautionary references. Further, employees are also not likely to consent to references from reference providers whom they know will give an untruthful negative reference of their former job skills, and yet these employees run the risk of having future employers presume that they are trying to conceal poor work history. While Ballam's suggestion is helpful, a more efficient mechanism is needed.

At least one commentator has drafted a proposal that seems to be in tune with what many reference providers are actually doing. This method<sup>62</sup> by-passes statutory reform in favor of allowing the parties to contract around the law of defamation.<sup>63</sup> Essentially, companies require job applicants to sign waivers that apply to all reference providers. The reference recipient subsequently sends a copy of the signed waiver with a request for a reference to a reference provider. The reference provider feels safe about providing references because the ex-employee has affirmatively waived his right to bring an action. As discussed *infra*, the power to contract around defamation is potentially a

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<sup>57</sup> Halbert, *supra* note 18 at 411-12.

<sup>58</sup> Robert S. Adler & Ellen R. Pierce, *Encouraging Employers to Abandon Their "No Comment" Policies Regarding Job References: A Reform Proposal*, 53 WASH. & LEE L. REV. 1381, 1468 (1996); *See also* Ballam, *supra* note 16 (for a more in depth analysis of the shortcomings of these proposals.)

<sup>59</sup> Ballam, *supra* note 16 at 460.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*, at 459.

<sup>62</sup> *See*, Kay *supra* note 30, (noting that "New York-based American Lawyer Media, which owns the Daily Business Review and Florida Lawyer, has a policy of providing a full reference through its human resources department only if the employee or former employee seeking the reference provides written authorization. Otherwise, the company only will confirm basic information, such as that the person was an employee, position, salary and dates of employment."); Beverly W. Garofalo, *Making Effective Use of Hiring Process: Tips for Success Hiring*, 2/17/2003 CONN. L. TRIB. 11 (noting that "If an employer opts to do its own reference check, it should have the applicant sign an authorization and release form.").

<sup>63</sup> Horkan, *supra* note 17; Robert D. Gatewood & Hubert S. Field, *Human Resource Selection* 402, 415 (1990); Jane Hass Philbrick et al., *Workplace Violence: The Legal Costs Can Kill You* 1/1/03 AM. BUS. REV. 84 (indicating that "a 'Release' granting the employer permission to check references and to contact former employers identified by the applicant/candidate should be included on a separate page of the application so that it can be sent to former employers and other references.")

very powerful protection for reference providers. For example, some courts have held that a waiver is valid even against statements that were made with malice.<sup>64</sup>

But the waiver system is not perfect. Because a waiver is often feared as a license to defame, Horkan<sup>65</sup> suggests limits be placed on a reference provider's ability to sign away the right to bring a defamation action. Particularly, Horkan would require reference providers to explain all relevant law to prospective employees and to inform them of the extent to which its privilege [i.e., extra protection for reference providers granted by the waiver] exceeds the minimum required by law.<sup>66</sup> Second, Horkan would continue to hold reference providers liable for defamation if they act with actual malice, but would never hold them strictly liable for defamation.<sup>67</sup>

While private contracts are widely used and should help the job-reference problem, they alone do not solve the problem in that employees can continue to bring suits if they allege actual malice. This fear of litigation will still lurk in would-be reference providers' hearts, and most likely, they will not be willing to run the risk that anything negative they say might be construed as malicious thus causing them large<sup>68</sup> legal fees in an attempt to prove that there was in fact no malice involved. This fear of litigation is indeed a real and pressing problem<sup>69</sup> and might very well be eased with the use of ADR<sup>70</sup> in conjunction with the defamation waiver.

#### **ALTERNATIVE DISPUTE RESOLUTION (ADR): AN OPPORTUNITY FOR IMPROVEMENT**

The notable strengths of ADR in contrast to court litigation in conflict resolution are well known including lower costs, time efficiency with a quicker turnaround, and a private process.<sup>71</sup> In addition, ADR is more informal, relying less on rules of procedure, evidence and remedy. Each of these strengths is explained below.

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<sup>64</sup> See, *Patane v. Broadmoor Hotel, Inc.* 708 P.2d 473 1985 Colo. App. LEXIS 1318. See also, *Dominguez v. Babcock*, 696 P.2d 338 1984 Colo. App. LEXIS 1342.

<sup>65</sup> See, Horkan, *supra* note 17.

<sup>66</sup> Horkan, *supra* note 17.

<sup>67</sup> *Id.*

<sup>68</sup> See, e.g. John Bruce Lewis et al., *Defamation and the Workplace: A Survey of the Law and Proposals for Reform*, 54 Mo. L. Rev. 797, 798 (noting that verdicts of over \$1 million are no uncommon for defamation suits in the workplace arena).

<sup>69</sup> Michele L. Giovagnoli, *Comment: To be or Not to Be?: Recent Resistance to Mandatory Arbitration Agreements in the Employment Arena*, citing, Evan J. Spelfogel, *Legal and Practical Implications of ADR and Arbitration in Employment Disputes*, 11 HOFSTRA LAB. L.J. 247, 248 (1993). See also, Richard A. Bales, *Compulsory Arbitration of Employment Claims: A Practical Guide to Designing and Implementing Enforceable Agreements*, 47 BAYLOR L. REV. 593 (1995) (stating that employees are becoming more informed and aware of the possibility of compensation for damages).

<sup>70</sup> Giovagnoli, note 69, at 3. (stating that ADR serves as a mechanism to resolve, complement, or substitute for adjudication.)

<sup>71</sup> *Id.*, at 2.

1) Costs. In contrast to litigation, which can be expensive and unpredictable, for both the employer and employee,<sup>72</sup> ADR expenses are typically cheaper and the parties have considerable control over the outcome. Further, the sharing of costs can be determined in advance by contract. The parties can agree in advance on the issues, discovery costs can be contained, and ADR is effective in preserving the parties' due process rights. It is similar to having a discovery conference in litigation by anticipating the problems in advance, and then putting the mutually agreed upon terms in a contract.

2) Efficient and timely resolution.<sup>73</sup> If the parties to a dispute cannot settle the conflict, taking the matter to trial can take years. It is well known that the courts are backlogged and access to justice takes patience. In contrast to litigation, ADR provides faster turnaround to both hearing and resolving the dispute; and, employers already recognize advantages to all forms of ADR including mediation, fact-finding, and arbitration in resolving work place issues.<sup>74</sup>

3) Privacy. ADR provides confidentiality and privacy to the process. Many aspects of litigation, including the pleadings, the trial, and the judgment are a matter of public record unless the record is sealed which is uncommon. Newspapers and media coverage in high profile cases can create unwanted publicity for parties to the dispute. ADR is a reasonable venue that uses trained facilitators or decision-makers, as the case demands, who are knowledgeable in various forms of third party intervention. Also, when the dispute is resolved, those results are private, and not revealed except by agreement of the parties. This certainly appeals to the reference providing process. The reference provider and the ex-employee both agree what can be revealed and what should be concealed without fear of lawsuit or reprisal. Results of discovery and the agreed upon settlement terms and conditions are also private. Trade secrets can be preserved. Site agreements and customer data bases can be preserved without fear of becoming public.

#### **ADR AGREEMENTS – FOUR PROPOSALS**

Proposed are four employment agreements that contain ADR provisions: pre-employment agreements, mediation during the employment relationship, agreements in anticipation of job termination and post-employment agreements.

#### **Pre-employment Agreements**

Initiating pre-employment agreements, as a condition of employment, have several problems. Some states have ruled, as a matter of public policy, that one cannot contract away one's right to litigate in a pre-employment agreement.<sup>75</sup> Some stipulate

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<sup>72</sup> Tia Schneider Denenberg & R.V. Denenberg, *The Future of the Workplace Dispute Resolver*, 49 J. DISP. RESOL. 49 (1994).

<sup>73</sup> Kirstin Downey, *Trend is to Mediate, Not Litigate, Bias Cases*, The Wash. Post, Dec. 03, 2003.

<sup>74</sup> *Id.*, citing, Stephen B. Goldberg et. Al., DISPUTE RESOLUTION 5 (1985). See also, Downey, *supra* note 73.

<sup>75</sup> See, e.g., *Kellums v. Freight Sales Ctrs., Inc.*, 467 So. 2d 816, 817 (Fla. Dist. Ct. App. 1985).

that it is an absolute right, while others contend that it is acceptable if the contract is based on informed consent with no adhesion.<sup>76</sup> The Model Employment Termination Act, developed by the Uniform Law Commissioners, expresses a preference for arbitration and permits employers to obtain permission from employees to submit future disputes or claims to arbitration.<sup>77</sup> Due to the wide variety of case law in this area we propose a pre-employment application with disclaimers, releases, agreement to arbitrate, and a liquidated damage clause.

### **Agreements in Anticipation of Termination – Mediation in the Middle**

Employers know the high costs associated with hiring and training new employees. Before an employer considers terminating an employee, and subjecting his firm to the attendant employee turnover costs, including recruitment, selection and new employee training, the use of mediation by the parties would appear to be a prudent, cost effective strategy. The process is somewhat therapeutic in that it promotes and encourages communication between the parties.

Although employee turnover is an important issue, there are other reasons for acting quickly to bring resolution to workplace conflict. Many authors<sup>78</sup> have pointed out an obvious benefit to the parties: early intervention can prevent a minor problem from escalating into major conflict. Also, waiting often causes the spread of rumor, distrust, and ill will. If possible, same day mediation should occur preventing a small problem from compounding. Issues should be discussed before emotions and tempers flare. Having a third party, whom both employer and employee trust, helps the parties calm down so they can meet at the table together to discuss their employment problems.

Third party neutrals, such as mediators, charge fees for their services on an hourly basis or per diem. In this proposal relating to the use of a mediator, it is recommended that the employer underwrite the total cost.<sup>79</sup>

### **Negotiated Pre-termination Agreements**

The agreement in anticipation of termination is a method of employing ADR between the reference provider and the employee to determine what should go into the employee's personnel file upon termination of employment. Through open and frank discussion, the reference provider and the employee flesh out the contents of an agreement as to precisely what details about the employee will be provided to future employers in terms of a reference. If they agree on its contents, both parties sign a

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<sup>76</sup> See, e.g., Smith v. Holley, 827 S.W.2d 433, 436 (Tex. App. 1992).

<sup>77</sup> The Model Employment Termination Act, adopted August 8, 1991, National Conference of Commissioners on Uniform State Laws.

<sup>78</sup> Bales, *supra* note 69, at 592.

<sup>79</sup> CPR PROGRAM TO RESOLVE EMPLOYMENT DISPUTES, EMPLOYMENT ADR: A PROGRAM TO RESOLVE EMPLOYMENT DISPUTES, SECTION A: CPR'S EMPLOYMENT ADR PROGRAM OPTIONS, at 3 (1998). See also, Ryan P. Steen, Comment, *Paying for Employment Dispute Resolution: Dilemmas Confronting Arbitration Cost Allocation Throw the Arbitration Machine into Low Gear*, 7 J. OF SMALL AND EMERGING BUS. L. 181 (2003).

settlement document guaranteeing immunity from a lawsuit to the reference provider as long as the reference is consistent with the contents of the agreement.

### **Post-employment Agreement**

In the situation where a former employee desires a reference, but has no prior agreement with the employer, we propose a possible waiver. The former employee could reach an agreement with the former employer about the contents of a job reference to be conveyed to any prospective employer who contacts the former employer. As part of this agreement the past employee waives his rights to sue the past employer in the future. The agreement would give permission to provide a reference with a clause in the agreement waiving liability and further providing that if the content of the reference is disputed, that the two parties will resolve those disputes using ADR.

### **ARBITRATION AGREEMENT**

Arbitration is considered the strongest form of ADR, particularly if the parties agree that the arbitrator's award is binding and final with no option for judicial appeal. In arbitration the parties mutually select the arbitrator. They agree that the arbitrator's award is either binding and final or non-binding and subject to future litigation in a court of law. The arbitral process appears somewhat like a court process; however, it is less formal in that the parties need not be represented by attorneys and can waive the use of the rules of evidence and procedure.<sup>80</sup> Arbitration in contrast to litigation is less costly,<sup>81</sup> faster, and more private.<sup>82</sup>

ADR is not an appropriate strategy for the parties to employ in all cases. Some cases should go to court to establish legal precedent.<sup>83</sup> Some past employers egregiously slander and defame ex-employees through false references that the only logical solution for the ex-employee is to sue for damages, including punitive damages.<sup>84</sup>

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<sup>80</sup> *Id.*, at 167, citing Legal Information Institute, Alternative Dispute Resolution (ADR): An Overview, at <http://www.law.cornel.edu/topic/adr.html> (last visited October 25, 2002). See also, James W. Fenton, Jr., and Donald E. Kelley, *Resurrection of an Old But Timely Proposal: Voluntary Arbitration of Employment Discharges*, SAM ADVANCED MGMT. J., Autumn 1994, 10, 12.

<sup>81</sup> Toni L. Wortherly, *Note: There's no Business Like Show Business: Alternative Dispute Resolution in the Entertainment Industry*, 2 Va. Sports & Ent. L.J. 162, 170, Winter, 2002.

<sup>82</sup> *Id.*, at 170. Citing Christine Lepera & Jeanie Costello, Benefits of Mediating Intellectual Property and Entertainment-Related Disputes, Metropolitan Corporate Counsel, August 1997, at 733, reprinted in What the Business Lawyer Needs to Know About ADR 733 (William L.D. Barrett, ed., Practising Law Institute 1998). See also, Wortherly, *supra* note 82, at 175 (stating how beneficial mediation/arbitration is in the Show Business Industry).

<sup>83</sup> Wortherly, *supra* note 82, at 174.

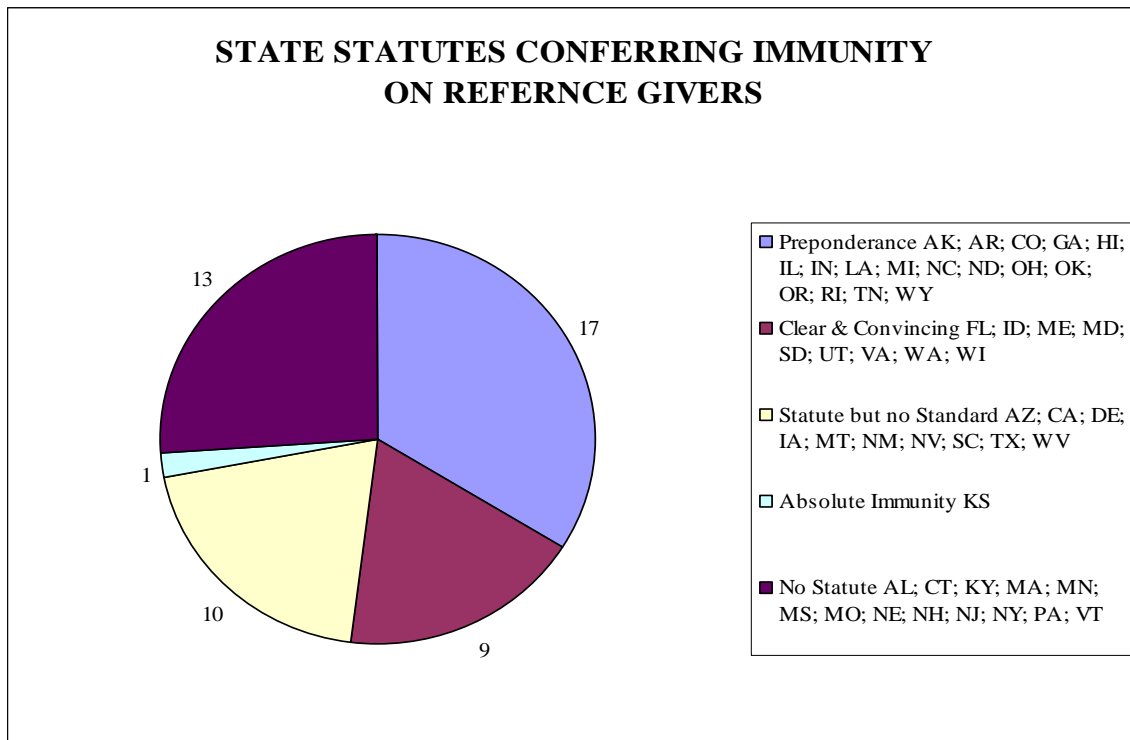
<sup>84</sup> Kent B. Scott and James B. Belshe, *Utah's Revised Uniform Arbitration Act: A Makeover for the Face of Arbitration*, UTAH BAR JOURNAL DECEMBER 2003 VOL 16 NO. 9, 26, 30.



**CONCLUSION**

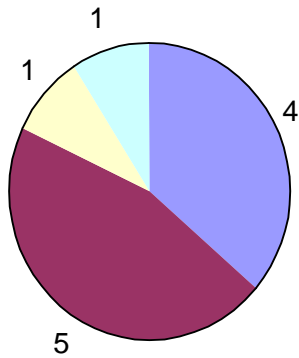
The importance of candid, accurate work references can not be disputed. They enhance the safety and efficiency of the work place and benefit the public in general. Unfortunately, the strategies and initiatives designed to address employer fears in providing references, including common law and state immunity legislation, have failed. We propose the use of a number of forms of alternative dispute resolution (ADR), in conjunction with waivers, as a useful, efficient and cost effective strategy for past employers and employees to adopt voluntarily. Former employees seeking new employment will benefit by finding it easier to obtain accurate job references from former employers. Simultaneously, former employers will find it easier to provide references without fear of potential defamation claims.

**ATTACHMENT 1**



**ATTACHMENT 2**

**Information Required by Statute In Service Letter**



- "Nature, Duration, Reason for Termination" (IND, NEB, OKLA, )
- Just "Reason for Termination" (MONT; NC; TEX; WASH; WIS)
- Just "Duration" (CA)
- "Tenure, Classification, Wage Rate" (KS)