MEMORANDUM OF LAW

DATE: October 25, 1995

TO: Kent Lewis, Assistant Director, Personnel Department

FROM: City Attorney

SUBJECT: References Provided by Employers

QUESTIONS PRESENTED

You have asked a series of questions regarding California Civil Code section 47(c) as amended in 1994. Those questions are:

1. What is a privileged communication?
2. How is "malice" defined in the statute?
3. What does "credible evidence" mean? Does it have to be written? Does the employee have to be told about the information to be given before it is released?
4. Does the statute protect both the employer and the individual providing the information?
5. Is there any protection for individuals who are not prior employers, such as personal references, co-workers, subordinates, unions, or business acquaintances?
6. What is the effect of the exclusion on constitutionally protected speech, speech protected by Section 527.3, of the Code of Civil Procedure, and any other provision of law?
7. Are there any other pitfalls to be aware of?

BACKGROUND

The City of San Diego is frequently asked for the employment history of former City employees by prospective employers. Similarly, the City often seeks employment histories of applicants for City employment. However, as a result of the litigious nature of today's society, employers are hesitant to provide references or histories of their former employees. Because an unsatisfactory recommendation could lead to a costly defamation lawsuit, many employers refuse to provide any substantive information about their employees to anyone.

To address this growing problem, on August 26, 1994, Governor Pete Wilson signed into law Assembly Bill 2778 (Murray). This law, codified in Cal. Civil Code section 47(c), became effective January 1, 1995. It states that the privilege applicable to certain communications:

> ┌Aσpplies to and includes a communication concerning the job performance or

> qualifications of an applicant for employment, based upon credible evidence, made without malice, by a current or former employer of the applicant to, and upon request of, the prospective employer. This subdivision shall not apply to a communica-tion concerning the speech or activities of an applicant for employment if the speech or activities are constitutionally protected, or otherwise protected by Section 527.3 of the Code of Civil Procedure or any other provision of law.

Cal. Civil Code Section 47(c)(3).

Previously, pursuant to Personnel Regulation J-4(2)(c)5, the City of San Diego had limited the scope of information it would provide to prospective employers about current or former City employees to the dates of the employment relationship and the employee's classification. The City would also provide specific information regarding the reasons for an employee's resignation or discharge if, in the opinion of the Appointing Authority, such disclosure was necessary for public safety.

The subject of this memorandum is the effect the amendment to California Civil Code section 47 has on the liability of current and former employers, including the City, for providing information regarding former employees to prospective employers. All references are to the California Civil Code unless otherwise noted.

DISCUSSION

Based upon the amendments to the statute, the Assistant Personnel Director has submitted a series of questions concerning how the amendment can or will affect the City's current personnel regulations or policies. These questions will be answered in a seriatim fashion.

Question No. 1:

What is a "privileged communication?"

Answer to question No. 1:

A "privileged communication" is an oral or written statement that cannot become the basis of a defamation lawsuit. Public policy establishes certain situations where the need or importance of a communication outweighs the potentially damaging effect the statement may have on an individual. Communications that are treated as privileged under California statutes are listed in section 47 of the Civil Code.

Case law further distinguishes the types of privileged communications. The courts note two types of privileged communications: absolute and qualified (or conditional). "The distinction between absolute and qualified privileges is essentially that an absolute privilege confers immunity regardless

of motive while a qualified privilege can be lost if the defendant acted out of malice." Lundquist v. Reusser, 7 Cal. 4th 1193, 1206 at n.12 (1994) (citations omitted). Absolutely privileged communications include statements made in the proper discharge of an official duty, in legislative proceedings, in judicial proceedings, or in any other official proceeding authorized by law. Cal. Civil Code Sections 47(a) and (b). A qualified privilege applies to communications made to an "interested person" by (1) someone who is also interested, (2) someone with a relationship to the interested person that affords a reasonable ground for supposing the motive for the communication is innocent, or (3) someone who provides the information at the request of the interested person. Cal. Civil Code Section 47(c).

References provided by employers are protected by a qualified privilege. Civil Code section 47(c), which enumerates the qualified privileges, was amended to clarify that employer references are protected by the statute. Cal. Stat. ch. 700, Section 2.5 (1994). However, by specifying that employer references must be "made without malice," the legislature clearly intended to create only a qualified, and not an absolute, privilege.

Question No. 2:

How is "malice" defined in the statute?

Answer to Question No. 2:

Since employer references are protected by a qualified privilege, the employer may be liable for defamation only if the employer acts with malice. Malice is a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy, or injure another person. Lundquist, 7 Cal. 4th at 1204. If the employer is merely negligent in making the statement, there is no malice. Vackar v. Package Machinery Co., 841 F.Supp. 310, 314 (N.D. Cal. 1993); Rollenhagen v. City of Orange, 116 Cal. App. 3d 414, 423 (1981).

Generally, if a defendant claims a qualified privilege, the plaintiff has the burden of proving the defendant acted with malice. Lundquist, 7 Cal. 4th at 1208. Although malice can be difficult to prove, it can be inferred if the defendant had no reasonable belief the statement was true. Stationers Corp. v. Dunn & Bradstreet Inc., 62 Cal. 2d 412, 418 (1965); Vackar, 841 F.Supp. at 314. Alternatively, a defendant's good faith belief in the truth of the statement will defeat a claim of malice. Crane v. The Arizona Republic, 972 F.2d 1511, 1523 (9th Cir. 1992).

Question No. 3:

What does "credible evidence" mean? Does it have to be written? Does the employee have to be told about the information to be given before it is released?

Answer to Question No. 3:

Since the amendment to Section 47 is very recent, there has been no judicial interpretation of the term "credible evidence" in the context of employer references. In the ordinary sense, "credible evidence" means evidence that is capable of being believed or is trustworthy. Webster's New International Dictionary 532 (G. & C. Merriam, 3rd ed. 1965). In the legal sense, "credible evidence" is evidence that could be believed by a reasonable person.

Credible evidence need not be in writing. Personal observations by an employer may often be a more credible source of information than a written report made by a third person. Evidence may take the form of oral testimony or written documents. Credibility is not determined solely by the form of the evidence.

The reason employer references should be "based upon credible evidence" is to prevent employers from relying on unsubstantiated rumors when making a recommendation. However, there is nothing to indicate an employee must know of the evidence in advance for it to be credible. If there is a reasonable factual basis for the statements made in a recommendation, the communication is protected by a qualified privilege.

Question No. 4:

Does the statute protect both the employer and the individual providing the information?

Answer to Question No. 4:

A qualified privilege should protect both the employer and individuals acting on the employer's behalf. Section 47 identifies the types of communications that are privileged, not the identity of privileged speakers. Therefore, protection attaches to the communication, not to the individual speaker. A privileged communication will be protected regardless of the identity of the speaker.

This interpretation is supported by the legislative purpose behind the amendment to Section 47. The apparent purpose is to encourage employers to provide references for their former employees without fear of liability. This purpose would be thwarted if protection were extended only to the employer-entity, and not the individuals within the entity who may provide the information at the employer's direction. Without personal protection, individuals would still refuse to provide information for fear of personal liability. Therefore, granting immunity only to the employer-entity would have no effect on the availability of employer references.

Question No. 5:

Is there any protection for individuals who are not prior employers, such as personal references, co-workers, subordinates, unions, or business acquaintances?

Answer to Question No. 5:

Yes, other reference sources still have the same protection afforded prior to the amendment. Subsection (c) provides a qualified privilege for communications made without malice to interested persons by (1) someone who is also interested, (2) someone who has a special relationship with the interested person so the motive for the communication is presumably innocent, or (3) someone who provides the information at the request of the interested party. Cal. Civil Code Section 47(c). Communications made by any of the above named sources may be privileged if they fit into any of the three categories of subsection (c). For example, under category (3), anyone who is not a prior employer still has a qualified privilege for providing a reference if he or she communicated the information at the request of a prospective employer and the reference is given without malice.

Question No. 6:

What is the effect of the exclusion of constitutionally protected speech, speech protected by Section 527.3 of the Code of Civil Procedure, and any other provision of law?

Answer to Question No. 6:

The language of the amendment which prevents a qualified privilege from attaching to communications about employee activity or speech protected by the Constitution or other provisions of the law is an area which should cause some concern. The scope of this exception is very broad and could conceivably cover information that, at first blush, would appear to be privileged. The fact that there has not been any judicial interpretation of this exception makes it even more treacherous.

At the very least, the following topics are not privileged:

A. Constitutionally protected activity and speech, which includes:
   * race or national origin
   * religious beliefs or activities
   * political views
   * membership in associations or groups unrelated to employment

B. Code of Civil Procedure section 527.3
   * statements made pursuant to a labor dispute
   * lawful conduct during a labor dispute

C. Other provisions of law
   * marital status
   * sexual orientation

Other possibilities include gender, age, disability or other medical conditions. See Government Code Section 12940(a). It is

difficult to be certain what will qualify absent judicial determination. To be safe, communications to prospective employers should be limited to the employee's job performance and accomplishments.

Although it was decided before the effective date of the amendment, Conkle v. Jeong, 853 F.Supp. 1160 (N.D. Cal. 1994), is a good example of the extent to which references are privileged. In Conkle, the former employer told prospective employersF

The prospective employers were actually friends of the plaintiff who pretended to be employers to see what the defendant's recommendation would be. Conkle, 853 F.Supp. at 1168.a that the plaintiff:

a. thought she knew everything,
b. was difficult as an employee,
c. led a strike against the market, but her own Union turned against her because she was too radical,F

Under the new amendment, this statement may no long privileged because it relates to a labor dispute under s 527.3 of the Code of Civil Procedure.

d. had many customer complaints, including some saying they would stand in another line two hours, rather than be waited on by her,
e. was more trouble than she was worth.

Id. at 1168.

The court held these statements were presumed privileged under Cal. Civil Code section 47(c). Id. at 1169. The plaintiff failed to rebut the presumption because she could not show actual malice of the defendant. Id.

Question No. 7:

Are there any other pitfalls to be aware of?

Answer to Question No. 7:

One other precaution employers should take is to not volunteer information about an employee unless it is requested by a prospective employer. The amendment specifies the subdivision applies to communications made "upon request of the prospective employer." By implication, the amendment might prevent the privilege from attaching to information provided to prospective employers without a request. Malice could be inferred if a current or former employer volunteers unfavorable information on his or her own accord.

There may be other pitfalls as well, but the problem with determining the effects and limitations of the amendment to Section 47 is the lack of judicial interpretation of its provisions. The amendment has only been effective since January 1, 1995. Without judicial

interpretation of the amendment, its precise meaning and the scope of the exceptions can only be theorized.

However, it appears the amendment was not meant to change the law, but merely to clarify its provisions. Employer references have been protected under Section 47(c) long before the amendment was adopted. See Neal v. Gatlin, 35 Cal. App. 3d 871, 877 (1973) (noting it is well established that communications from a former employer to a potential employer about an employee's fitness for employment are privileged). Reliance on existing case law may be the best way to predict how the amendment will be interpreted.

CONCLUSION

The amendment to Section 47(c) does not significantly change the existing law. Rather, the amendment clarifies that communications between present and prospective employers regarding an employee's performance are already privileged and protected from a defamation lawsuit. The amendment also protects employees by assuring the exercise of constitutional and statutory rights will not prejudice their prospects for future employment.

Due to the uncertainty of precisely what speech or activity is protected by the Constitution or "any other provision of law" and is therefore not privileged, references should be limited to the employee's position, performance and accomplishments. Employers should not volunteer information about employees, but should only respond to requests made by prospective employers.

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By
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