Asset

A point of reference

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Next time a departing employee asks for a reference, think before you write - it could come back to haunt you.

So you have finally succeeded in pushing out the weak link in your team. They have resigned, or have accepted your invitation to do so. They make it clear that they still consider financial services the way of the future, and they are intent on rejoining the industry with one of your competitors. Privately, you pity the poor person who gives them a role in his organisation.

You make a mental note to be more careful with your future appointments and to act earlier. You feel quite relaxed with yourself until the latest member of your team to have their immediate future freed up speaks the words you dread: "I need a reference."

What do you do? Do you get them off your back by creating a reference that may help them find a new position within the financial services industry? Or do you give a reference that says, in effect, I pity the poor sucker who gives this person a position in his organisation? Before you think, "Not my problem", please think again. In our industry, we look after the future lives of millions of Australians - an awesome responsibility and privilege. Whether or not your social conscience will embrace it, money makes the world more comfortable for those who have it.

One of the next challenges for the industry will be to create early detection and protection measures against fraud and negligence, so your approach to a reference for a former employee or representative can provide a front-line barrier. If that unsatisfactory employee cannot get back into the industry, the harm that they can cause will have been avoided.

OK, so you still think it will be someone else's problem. Think again. Just what duty do you owe to the next poor sucker to interview your last piece of baggage?

To answer this question requires us to first examine industry professional standards. In effect, we are asking whether there is an industry-wide obligation to warn one another.

The Australian Council of Professions describes a profession as: "A disciplined group of individuals who adhere to ethical standards and uphold themselves to, and are accepted by the public as possessing special knowledge and skills in a widely recognised body of learning derived from research, education and training at a high level, and who are prepared to exercise this knowledge and these skills in the interest of others. It is inherent in the definition of a profession that codes of ethics govern the activities of each profession. Such codes require behavior and practice beyond the personal moral obligations of an individual. They define and demand high standards of behavior in respect to the services provided to the public and in dealing with professional colleagues.

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Furthermore, these codes are enforced by the profession and are acknowledged and accepted by the community."

If this is what you believe it is to be a financial planner or to operate an AFSL within the industry, then you regard yourself as part of a profession. For many, the codes mentioned above are found in the "Code of Ethics and the Rules of Professional Conduct" of the Financial Planning Association of Australia (FPA).

It should not come as a surprise that you can be held liable for loss suffered by the next poor sucker to interview your last piece of baggage when one of the influencing factors on employing him was your reference.

This is especially the case where you know that the position they seek is one of responsibility. In Ali v Hartley Poynton, the WA Supreme Court reaffirmed that a proper authority holder owes a fiduciary duty to clients. Justice Smith in that case stated that such a relationship of trust gives rise to "fiduciary obligation" and requires the highest level of integrity. "It has been held that such a relationship between stockbroker and client demands 'high standards of integrity'. The stockbroker acts 'not for himself but for his client'. It has been said that clients are 'entitled to expect from a broker not only competence, but also integrity and absence of conflicting personal interests. His position is one of trust and responsibility'."

You cannot claim that you did not know how important the reference may have been. After all, as part of the industry you are clearly aware of the trilogy of professionalism demanded of all: efficiency, honesty and fairness. There is also law that gives the "baggage" rights if your reference, whether in writing or verbal, harms their chances of re-engagement. The leading UK authority in this area is in the 1995 House of Lords decision of Spring v Guardian Assurance, which has been applied in a range of Australian cases.

You should not be surprised by any of this. If you are in the financial services industry, your business is built on the flow of information for which you are liable.And why shouldn't you be held responsible? What is a reference? It is a statement by you as to the qualities and attributes of a person, the known purpose of which is to affect the engagement of that person. People actually read what you write, listen to what you say and, in the absence of anything to the contrary, believe it. Honesty and competency are essential attributes for every person seeking a role in the financial services industry. From managing director through to financial planner and receptionist, all are dealing with OPM (other people's money); care on an industry-wide scale is required. The necessary degree of honesty and competency cannot be understated when dealing in OPM, whether it is ETP or IMA, the privilege of managing, advising and dealing in a client's FUM impacts directly on whether they achieve the status of an old gentleman or an old man. Do you know what the difference is? It is money. So when a licencee who relied on your reference as to the efficiency, honesty and fairness of a person within our industry faces a legal claim by a client who is condemned to retirement as an old man because of the inefficiency, dishonesty or unfairness of that person, why shouldn't the licencee want to pass some of that liability and responsibility to you? It simply becomes a question of how much (in dollar terms) you should contribute to compensate for your share of the ultimate responsibility.

But surely licencees must be responsible for their own actions? Shouldn't they make and rely on their own independent inquiries?

Yes, this is true, but it depends very much on the position being appointed. A reference detailing the highest of integrity and competency for the employment of administration staff is probably the entire inquiry the licencee needs to make. That is, virtual total reliance on your reference. The appointment

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of an authorised representative would likely involve more inquiries; your reference would be just one of the matters relied upon by the licencee.

The primary principle of law on which the new licencee could rely to seek compensation from you is under section 52 of the Trade Practices Act, which provides that "a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive". So if you want a simple standard to measure your reference against, it must not be misleading or deceptive or be likely to mislead or deceive, even if it is one of your competitors. What is the solution? The most common immediate reaction is to adopt a policy of no longer providing written references. Relying on the power of the "quiet word" or an off-the-record comment seems to be a practical approach, one that leaves no trail of discovery. However, this is where the Privacy Act can provide the smoking gun. Your records of a former or current employee are excluded from the operations of that Act, but information about a potential employee is not excluded and is therefore "discoverable".

In other words, a person who failed to secure the position they were after may, using the Privacy Act, seek the notes from that organisation that were made about your comments about them. So the problem does not go away by simply saying no to anything in writing.

Besides, the absence of a reference can be interpreted against the person who sought it in the first place, with the result that your refusal to provide a reference, if it damages their ability for re-engagement, may give rise to other problems.

There is an answer: be reasonable and accurate about what you say. In the 1995 House of Lords decision of Spring v Guardian Assurance, the court said that employers "are not being asked to warrant absolutely the accuracy of the facts or the incontrovertible validity of the opinions expressed, but to take reasonable care in compiling or giving the reference and in verifying the information on which it is based". The Lords acknowledged the importance of a reference as part of the modern workplace, and that it should be sufficiently robust as to express frank and honest views, provided it was prepared with reasonable care as to the facts and the opinions expressed within it.

Before you feel it is all too one-sided, there is a two-way street. You just have to know which way the traffic runs. The former employees or proper authority holders must not, under threat of defamation or misleading and deceptive conduct, denigrate or diminish their former employer or licencee/dealer. You should not do the same, although you can express an opinion that is not complimentary. You can also produce an opinion that is entirely unhelpful, provided it is accurate, as well as balanced and fair. You also have the additional responsibility to be honest to people you have never met who would reasonably be expected to rely on what it is you say in a reference. Applying this principle of Spring in the 1999 Australian case of Wade v State of Victoria, Justice Harper said that "to the extent that an assessment of character is not (as it often cannot be) based upon objectively ascertainable facts but is derived from one's subjective but honest (and therefore non-malicious) conclusions, then the prospective employer and the community have an interest in the free expression of that assessment".

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