Liability for Good-Character Statements
After Gonzaga University v. Doe:
One Theory Down, But How Many Remain?

IHELG Monograph

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Abstract

Colleges and universities are often required by law to make "good moral character" statements about students entering state-licensed professions. A student who does not receive a positive statement may assert numerous theories of liability against the institution. In 2002 the U.S. Supreme Court removed one such theory in *Gonzaga University v. Doe*, holding that the Family Educational Rights and Privacy Act of 1974 (FERPA) does not support individual lawsuits against alleged institutional violators. Nonetheless, an institution that refuses to provide a positive character statement may still be liable for invasion of privacy, defamation, breach of contract, and other claims. This article explores the *Gonzaga* litigation and suggests ways to minimize liability while maintaining the institution's obligations to the public.
Liability for Preprofessional Character Statements After Gonzaga University v. Doe: One Theory Down, But How Many Remain?

During its 2001-2002 term, the Supreme Court settled long-standing uncertainty over whether the Family Educational Rights and Privacy Act of 1974 (FERPA)\(^1\) supports lawsuits by individual students over alleged violations. In Gonzaga University v. Doe (2002), the Court's answer was a resounding no. What the Supreme Court did not address, however, were the numerous other privacy-related legal grounds on which the student in Gonzaga had sued and won in state court. Even without a FERPA cause of action, Gonzaga=s refusal to provide a character reference on the student=s behalf to a state teacher-certification agency led to significant civil liability. Similar character-reference requirements are a part of life for any institution that offers professional programs in many areas, including law, medicine, counseling, and teaching. When concerns arise about a student's fitness to enter the profession he or she is training for, how does the institution balance its obligations to the student and the profession? This article reviews the Gonzaga litigation and suggests a number of approaches for minimizing an institution's liability while maintaining its commitment to candor and responsibility to the professions it serves.

Background: The Gonzaga Litigation

A. Facts

In late March 1997, after a lengthy trial and more than three years of pretrial litigation, a jury awarded $1.1 million to John Doe, a former education student at Gonzaga University. Lengthy as it was, the trial was merely the first stage in an appellate odyssey that saw the judgment first substantially reversed, then substantially reinstated, then in part reversed again by the U.S. Supreme Court.

\(^1\) 20 U.S.C. § 1232(g).
Identified as "John Doe" in the litigation, the student brought his lawsuit after the Gonzaga School of Education disclosed to Washington's teacher-certification agency allegations of sexual misconduct and then refused to provide him with an institutional certification of "good moral character." A state administrative rule required the school to consult with faculty and to provide the certification only if school officials had "no knowledge that the applicant has a history of any serious behavioral problems."\(^2\)

The road to litigation began in 1993 when an official in Gonzaga's college of education overheard a student worker complaining that Gonzaga did not take allegations of date rape seriously. She discussed events that had happened the previous year before she was a resident advisor in a Gonzaga dormitory. She stated that an education student, identified only as "Jane Doe" in the litigation, had complained about alleged sexual misconduct made by John Doe. In a subsequent meeting with administrators in the School of Education, this student reported that Jane Doe had indicated that John Doe had raped her at least three times. The official relayed the news to other administrators in the School of Education, who were concerned that the allegations were serious enough to affect the institution's ability to provide the character recommendation John Doe would need for certification as a teacher.

Multiple telephone conversations were then held with the state certification agency, in which John Doe was identified by name and linked with a possible date rape. Gonzaga administrators met with Jane Doe and with one of her instructors, but not John Doe. Although Jane Doe refused to comment on the relationship or make a written statement, she did not affirmatively deny the allegations reported to her, and the instructor stated that Jane Doe had told him she had been stalked by John Doe and that she was afraid of him. (Jane Doe would later deny most of these statements under oath.) On the basis of all she had heard, the dean of the

college decided not to provide the moral-character reference. She called John Doe to her office shortly before graduation and gave him a letter informing him of the decision. He was not told who made the allegations. When he asked about appeal procedures, he was told there were none.

B. The Litigation

In the University's view, the meetings and conversations of the 1993-1994 academic year must have been a reasonable effort by responsible university officials to get to the bottom of serious allegations affecting John Doe's fitness for the profession. In John Doe's view, they were an irresponsible elaboration of gossip and hearsay by university employees who had no business investigating him in the first place. He sued in state court on a total of five legal theories: (1) invasion of privacy, when Gonzaga inquired into his sexual activities and shared them with the state agency; (2) negligence, when Gonzaga undertook to investigate him and did it irresponsibly; (3) breach of contract, specifically the Gonzaga student handbook's promise to give students a chance to respond before any adverse action was taken against them; (4) defamation, when Gonzaga officials communicated falsehoods about him among themselves and to the licensure board; and (5) violation of his civil rights, when Gonzaga violated FERPA's prohibition against disclosing material in his educational record. Although FERPA itself does not say that students can sue institutions for violating their privacy rights, courts had held that such a lawsuit could be based on 42 U.S.C. 1983, a federal law that permits legal actions for money damages against any "person" (including corporate entities) who, "under color of law," denies the plaintiff any right secured under the U.S. Constitution or a federal statute. Doe won on each theory, and the jury awarded him a total of $1,155,000.

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The university promptly appealed. The state appeals court reviewing the case seemed to be considerably swayed by its sympathetic understanding of Gonzaga's conflicting obligations under state administrative rules, as well as its reading of the evidentiary record, particularly what it understood to be Jane Doe's ambiguous statements about what had happened to her. The court eviscerated John Doe's judgment: it held that the jury had been mis-instructed on defamation, requiring retrial on that issue, and it reversed outright on the other four theories.⁵

Doe then appealed to the Washington Supreme Court. In reviewing the same record, that court reached legal conclusions that almost completely contradicted the lower appellate court's. The Washington Supreme Court's basic view was that the obligation to provide a moral-character statement neither requires nor privileges any inquiry into the candidate's past. As far as the state's highest court was concerned, in investigating John Doe's personal life Gonzaga enjoyed approximately the same legal status that someone peeping into his bedroom window would have had. The court gave back to John Doe most of what he had lost in the intermediate appeal: the negligence award was still gone, but the privacy, contract, and FERPA awards were reinstated, and the defamation claim was preserved without the need for retrial.⁶

Gonzaga then appealed to the U.S. Supreme Court on the FERPA liability issue only. (Doe's other claims raised no issues of federal law, so the Supreme Court could not consider them.) The decision was a victory for Gonzaga: the Court held that although FERPA unquestionably protects student-record confidentiality, a student whose confidentiality has been violated is not entitled to sue the offending institution.⁷

This apparently paradoxical ruling is based on the Supreme Court's understanding of the scope of

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1983. The Court had previously held that that not every federal statute supports a 1983 claim; such lawsuits can only be based on federal statutes that create an "individual right." FERPA is usually understood as giving students a right to privacy; why is this not an "individual right" for purposes of 1983? The Court's analysis turned on its determination that such a right depends on Congressional intent, which, if not clearly expressed in the statute, can be inferred only by the unambiguous logical implications of the statute's text and structure. For the majority of the Court, FERPA did not meet that high standard. The Court reasoned that FERPA's enforcement mechanism -- withholding federal funds from offending institutions -- made it a piece of "spending legislation"; that its benefits to students were merely incidental to the spending aim; and that the centralization of enforcement duties in the Department of Education's Family Policy Compliance Office (FPCO) indicated a legislative concern that FERPA should not be subject to multiple, inconsistent judicial interpretations. In dissent, Justices Stevens and Ginsburg noted FERPA's many mentions of student and parent "rights" and argued that the majority's reasoning created a judicial limbo of federally-created rights for which there could be no individual remedy.

For courts and legal scholars, the Supreme Court's decision is a milestone in civil rights jurisprudence and signals an end to the "crazy quilt of inconsistent decisions" regarding the use of § 1983 claims where a federal statute has allegedly been violated. For the more immediate concerns of Gonzaga University and John Doe, the decision marked the end of the litigation. John Doe lost his jury award for the FERPA violation, but the state litigation still netted the

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aggrieved student a total of $655,000 for the institution's alleged misdeeds. Gonzaga's win in the Supreme Court was certainly an important victory for school officials, who now can concentrate of the Department of Education's interpretation of FERPA and need not contend with novel interpretations formulated by disgruntled students acting in a "private attorney general" capacity. But the rest of the litigation remains a cautionary tale for any institution that is charged by statute or administrative rule with providing character references for its professional students. What, if anything, could Gonzaga have done differently?

Approaching Institutional Recommendations after Gonzaga

A. The Unique Role of Character Recommendations

Licensure of the professions is a traditional function of state government.11 "Moral character" requirements are extremely common in professional licensure schemes. Almost any profession that is licensed or certificated includes a requirement that the practitioner be of good moral character.12 The universe of professions that may require a character reference from the candidate's professional school is smaller, but not by much: lawyers, doctors, and many others are required by statute or administrative rule to have their schools provide such letters. In some cases, refusal to provide such a letter spells the end of the candidate's quest for licensure or certification; in others, it merely triggers an investigation by an agency, which retains final authority to decide the candidate's fate. In still others, a statement about the student may not be initially required by law, but may be requested by a licensing or certificating agency on the basis of concerns raised in other ways, for example by a notation of suspension on the transcript.

These character statements differ significantly from ordinary letters of recommendation. The state legal framework means that anything the institutional recommender does has legal consequences. Ordinarily, professors who hesitate to write a letter of recommendation can simply decline the request without prejudice to the student. This path is not open where there is a legal duty to declare what one knows, or does not know. Second, the institutional recommender is not free to finesse or obscure known problems, unlike faculty who may simply accentuate the positive and say nothing about weaknesses.

The institution's freedom to act is also straitened by conflicting interests. On the one hand, the school has an interest in maintaining a high acceptance rate for its students entering the profession; moreover, it is never easy to admit that a student has been accepted into a program, paid tuition, received passing grades, and yet now may be unfit to do what he was trained for. At the same time, as a gatekeeper for the profession the institution has a strong interest in full disclosure. In fact, it is conceivable that failure to disclose negative information about a candidate could actually create financial liability for the institution. In recent years, employers who sought to avoid a libel suit by providing a falsely positive reference have found themselves sued for "negligent referral" by plaintiffs later harmed by the employee in his new job.\textsuperscript{13} The standard advice is therefore to say nothing at all, or to eschew evaluation altogether and provide only the bare facts of the ex-employee's position and salary. In at least one instance, a university has found itself sued for negligent referral of a problem faculty member.\textsuperscript{14} There is no reason to suppose that the theory could not extend to a professional whose tortfeasing tendencies were known but not disclosed by his institution.

\textsuperscript{14} Courtney Leatherman, \textit{Some Colleges Hush Up Charges to Get Rid of Problem Professors}, \textsc{Chronicle of Higher Education}, December 6, 1996, available at \url{http://www.chronicle.com}.
B. Threshold institutional concerns

Thus an institution with concerns about a professional student may face liability by either providing or withholding a character reference. The dilemma is further exacerbated by three forms of uncertainty: what counts as a reportable problem, what evidence suffices to infer a problem, and what procedures, if any, must be employed to "know" that a problem exists.

As to what constitutes a behavioral problem, a regulatory agency=s stated criteria for "good moral character" may be extremely unhelpful. In the Gonzaga litigation, Washington=s regulation never defined a "serious behavioral problem." Thus at the threshold of the analysis there is often considerable uncertainty as to whether information about some disclosed incident -- drug use, classroom cheating, sexual harassment, etc. -- justifies a negative conclusion about the candidate=s character.

Distinct from the question of what should be reported is the question of how the institution knows about it. What evidence suffices to persuade the recommender that the incident occurred, and what procedural assurances are there that the conclusion is fairly drawn from all the evidence available? The Washington Court of Appeals suggested that the absence of any legal definitions or requirements would permit an institution to base "knowledge" on a good-faith inference from practically any kind of evidence.\(^\text{15}\) However, most courts would probably intuitively feel that there is some evidentiary threshold below which one might harbor private suspicions but should not, even in good faith, express them. Thus, assuming no further regulatory guidance about what should be reported, recommenders are drawn in two irreconcilable directions: abandon all scruples about due process and report any character problems one subjectively believes to exist and to be significant; or abandon all scruples about responsibility to the profession and report no concerns that have not been proved in an official

proceeding. There is a middle path: conduct as much of an investigation as possible to
determine the truth of one's concerns. Reasonable as it may seem, that is the path Gonzaga took,
and its experience was not a good one.

With respect to these threshold concerns about definitions, evidence, and procedure, the
following recommendations can be made.

Concentrate on actions, not traits. However much terms like "moral character,"
"behavioral problem" or "turpitude" may seem to refer to the candidate=s personality or
proclivities, one should assume that they can be established only in terms of observable behavior.
This is not to say that the student=s demeanor or words are irrelevant, for they are also kinds of
conduct. But in reaching a global assessment about a student -- for example, that a student is a
pedophile, or an alcoholic, or a sociopath -- it is important to consider the specific examples of
conduct, verbal or otherwise, that justify this conclusion.

Know the applicable definitions of professional misconduct and identify supplemental
guidelines. It is crucial to know how relevant state law defines the terms with which
recommenders must work. With luck, all such terms will be exhaustively defined in terms that
leave no discretion for the reporter. Then providing a recommendation is merely a matter of
determining whether or not the candidate has been found guilty of a misconduct code violation,
academic integrity violation, and the like. In the more common situation, terms that remain
undefined may be fleshed out in two ways. The university=s legal counsel may be able to
identify precedent in the jurisdiction that amplifies the meaning of the terms. Additionally, most
professions have a code of ethics that specify what species of conduct may be sanctioned by
expulsion or decertification. It is probably safe to assume that conduct that can get someone
expelled from the profession will generally prevent licensure in the first place. Do not assume
that any activity that is illegal is also sufficient: professional codes may restrict sanctionable
crimes to those that are relevant to professional conduct. Relevance can be quite broad; for example, tax evasion may be general evidence of dishonesty. But to cite just one counterexample, homosexual activity is still illegal in many states, but would furnish a highly questionable ground for refusal to provide a reference. Finally, if there is no exact match, analogize from specifically prohibited professional conduct to the behavior of concern. Even though a professional may have no opportunity to cheat on classroom tests, for example, scholarly misconduct in publications may be specified as cause for professional sanction.

To the extent possible, include as grounds for institutional discipline all behaviors that would count as professional misconduct. Professional schools may prohibit off-campus misconduct that is sufficiently related to professional conduct. Some behavior, for example unprofessional conduct in internships, may escape sanction by the university but still deserves a penalty under the more exacting standards of a professional program. Thus, it is prudent to establish for any professional program within the institution clear policies prohibiting "unprofessional" conduct, i.e., conduct violating the norms of the profession for which students are candidates. Putting such a policy in place, accompanying it with appropriate due process procedures, and applying it consistently will reduce the uncertainty over how to address alleged improper behavior when a professional recommendation is called for. Second, but no less important, it will minimize claims of bad faith and surprise arising from the institution's failure to prosecute claims promptly and methodically.

It is important that any departmental or college policies regarding preprofessional misconduct should cohere with university policies. For example, university policies may

guarantee procedural rights, such as the right to counsel, that the program will have to respect. Additionally, the program's procedures and sanctions may be limited in other ways, for example, if a university case against the student has already been dismissed, settled, or concluded with no penalty.

Instituting such policies is not a matter of legal necessity. Some courts, e.g. the Washington Court of Appeals in Gonzaga, might hold that subjective good-faith belief in the rightness of one's recommendation is all it takes to inoculate the recommender against most liability. It is also true that even the best and most complete policy will not dispose of all cases in which there may be cause for concern. But all in all, preprofessional misconduct policies do promote fairness to the student and minimize the appearance that the institution is making potentially career-destroying statements in an arbitrary or capricious way. As Gonzaga illustrates, a general feeling that the student was treated unfairly or capriciously can drive both jury verdicts and appellate review. Further considerations for minimizing liability for professional recommendations are best considered under the specific theories that plaintiffs may use.

C. Theories of Liability Illustrated in Gonzaga

FERPA: If education records must be disclosed, get the student's written consent. After Gonzaga, institutions need no longer fear individual lawsuits premised only on a claimed violation of FERPA. However, that does not end an institution's FERPA concerns. The statute is still enforceable through action by the FPCO, and even though that office has never yet wielded its biggest enforcement tool -- denial of all federal funds to an offending institution -- the mere threat of FPCO displeasure is ample motivation for institutions to take their FERPA obligations very seriously. Two issues should be mentioned here.

First, release of sensitive information may not implicate FERPA at all. FERPA is not a
general confidentiality statute. It very specifically prohibits the release of student records, a term minutely defined in the statute, but the FPCO does not read it to prohibit dissemination of knowledge about a student that school officials have from personal experience, or from sources other than student records.\textsuperscript{20} Indeed, the director of the FPCO has stated that the agency would not have considered FERPA to have been implicated in the Gonzaga litigation if the only information released outside the university had been learned by word of mouth.\textsuperscript{21} But in typical cases this technical consideration may not be much help. It is a rare university that does not conduct a good part of its business by written memoranda or e-mails, and any such writings about a student will probably be considered part of the education record. Unless the institution's knowledge about a student is contained entirely in its employees' firsthand knowledge and oral communications, FERPA is likely to apply and prohibit dissemination of any such knowledge outside the institution except as permitted by the statute itself. This likelihood is increased if, as suggested above, the program channels all allegations of misconduct through a set of review procedures well in advance of the time for the professional recommendation.

FERPA=s rules for permissable dissemination are the second consideration here. FERPA pre-empts state law.\textsuperscript{22} Thus, no matter what any state statute or administrative rule expressly or implicitly requires or permits, in the absence of an emergency or a subpoena an institution should always get a student=s written permission before disclosing anything contained in the student=s record. (Logically this caution should extend to negative pronouncements about what is not in a student's record, but a student who has just been given a clean character recommendation is not likely to file a complaint with the FPCO.)


\textsuperscript{21} Interview with L. Rooker, Director, FPCO, in Oklahoma City, Oklahoma (July 8, 2002).

\textsuperscript{22} United States v. Miami Univ., 294 F.3d 797 (6th Cir. 2002).
The other legal determinations reached in Gonzaga are binding only in the state of Washington, but they are highly suggestive of what theories are likely to emerge in similar litigation elsewhere.

**Negligence claims are unlikely to succeed.** Negligence occurs when the defendant breaches a duty of care and foreseeable harm to the plaintiff results.\(^{23}\) Negligence is probably out as a viable theory in most cases where a negative recommendation is provided: unless a statute expressly creates it, no duty of care to the student is likely to be found -- that is, no duty to the student to conduct any particular type of investigation before making a recommendation.\(^{24}\) However heatedly an aggrieved student may characterize a decisionmaking process like Gonzaga's as sloppy or irresponsible, these flaws will likely be analyzed through the lens of contract or defamation, not negligence.

**Contract:** *Follow all published policies regarding adverse action against students.* The Gonzaga litigation also illustrates that an institution may well be contractually bound by its published policies. Universities sometimes insert disclaimers in student handbooks that the policies therein do not constitute a contract. Those disclaimers are not always effective.\(^{25}\) Thus statements that a student will get some level of process prior to any adverse institutional action should be carefully attended to before a negative recommendation is made. It is embarrassing at the very least to argue that such statements, often published in documents with names like "student bill of rights," are not actually binding on the institution.

**Invasion of privacy:** *Written policies should assign responsibility for any required investigation.* Invasion of privacy exists whenever a defendant inquires into private matters,


without consent or privilege, in a way that a reasonable person would find offensive.\textsuperscript{26} Many forms of misconduct relevant to professional recommendations involve extracurricular concerns, e.g. a student's sexual activities or finances. In the Washington Supreme Court's approach, a statute or regulation that requires reporting on such matters may nonetheless not privilege any inquiry into them. Without some other institutional policies that would privilege or create implied consent to the inquiry, institutional officials would then be required to remain mere passive recipients of knowledge, opinion, or speculation, with little ability to check the accuracy of what they are told. Here again, there is an advantage to institutional policies that prohibit any unprofessional conduct that would also be reportable. When an institution prohibits unprofessional conduct in its written policies, there is a much stronger argument that an investigatory privilege exists and that the student has implicitly consented by matriculating at the institution. In the absence of such policies the safest approach to investigating allegations of misconduct, albeit perhaps not the most subtle or effective, is to simply notify the student of the concerns and ask him to respond. As an aspect of due process, this step will probably be necessary for public institutions.

\textit{Defamation: establish pre-professional student disciplinary policies and limit knowledge of any investigation to essential personnel.} A theory sure to be included in any lawsuit involving a bad preprofessional recommendation is defamation: the publication of false, unprivileged, and damaging statements about the plaintiff.\textsuperscript{27} The first factor in limiting liability is to restrict publication. A statement is published whenever it is communicated to a third party, but courts have held that publication does not occur when the communication occurs between fellow employees in the course and scope of their employment.\textsuperscript{28} The second factor is to ensure that all

\textsuperscript{26} Keeton, \textit{supra} note 21, at § 116.

\textsuperscript{27} \textit{Id. at} * 111.

potentially defamatory communications are "privileged." Of the many legal privileges that exist, the most useful is the "common interest" privilege, which provides that parties with a common interest may make otherwise defamatory statements to each other as long as the communication is made in good faith. Courts have held that a qualified privilege exists where an otherwise defamatory statement is made to an institutional official who has a duty to investigate its truth.

Again, maintaining internal disciplinary policies that permit investigation of relevant misconduct helps structure the situation. In Gonzaga's case, there was no official designation that inquiries into Doe's behavior were part of anybody's job. Thus, publication occurred even before the statements were communicated to the certification agency, and many of the communications, beginning with the office worker's overheard comment, were found not to be privileged. More generally, if institutional inquiry is not expressly permitted by the relevant state regulation and is never mentioned in the institution's policies, establishing privilege can be a real problem. Thus, another advantage of establishing appropriate pre-professional disciplinary policies is the greater ease of limiting publication and establishing privilege against potential defamation claims.

Conclusion

The Supreme Court's decision in Gonzaga removes the possibility of FERPA liability for disclosures made pursuant to unfavorable character references made by institutions for professional licensing purposes. Even so, institutions must still carefully review their FERPA obligations when reporting on pre-professional students to licensing and certificating agencies.

Even without FERPA liability, many legal theories remain viable for pre-professional students aggrieved by an institution's refusal to provide a character recommendation for licensure. In the most difficult cases the institution will be faced with allegations or rumors of serious misconduct that was not previously established by any criminal or institutional disciplinary action. The institution may well be torn between its duty of candor to the agency and fairness to the student. Although a confidential ad-hoc investigation may appear the best solution, the liability incurred by Gonzaga University illustrates the danger of that approach. Two choices remain: undertake no investigation and subjectively determine whether or not to report; or else establish policies that make unprofessional conduct grounds for institutional discipline, and handle any allegations via those policies. While not a perfect solution, the latter approach helps to reduce the number of cases in which an ad hoc investigatory approach might give rise to serious liability.