A nurse, Charles Cullen, 43, has confessed to killing as many as 40 patients over a 16-year career at hospitals and a nursing home in New Jersey and Pennsylvania, which, if his story is borne out, would make him one of the most prolific serial killers in American history, according to The New York Times.

Cullen has been charged with attempted murder of a 40-year-old woman and a 68-year-old priest at Somerset Medical Center in Somerville, NJ. The causes of death appeared to be lethal doses of digoxin.

The case has exposed troubling flaws in the system for screening health care professionals. The New York Times found employers did not report him to one another, to oversight agencies, or to law enforcement.

Hospitals who hired Cullen said they learned nothing unfavorable about him when checking references, though he had been fired by previous employers and had a history of suicide attempts and psychiatric hospitalizations. At two hospitals, he left amid criminal investigations. Yet hospitals that hired him after that said when they asked for references, there were no “red flags.”

Knowing what you can say in references is difficult. Legal precedents dating from the 1980s make employers fearful of being sued if they say anything about an employee that a jury could consider defamatory.

What information is it safe to give, and what information can you expect from former employers?

Wendy Bliss, JD, a human resources consultant and author of Legal, Effective References: How to Give and Get Them (Society for Human Resource Management, 2001. www.shrm.org/shrmstore) offered suggestions in an interview with OR Manager. Though she would not comment specifically on the Cullen case, she addressed general principles.

Q. What can a manager share about a former employee without risking being sued?

Bliss: My personal opinion is that the fear of defamation has created some counterproductive practices in reference giving. A 1998 survey by the Society for Human Resource Management found only 1% of employers had been sued because of references they gave, but 45% said their organization had at some time refused to give a reference for fear of being sued.

It is important to note that 35 states have laws that provide immunity to previous employers who give references in good faith even if the reference is negative. (See page 15.)

Here are some general guidelines for giving references:

• Make sure the person requesting the information has a legitimate need for it. Does the request come from an organization with a bona fide job opening? Be aware there are firms that do reference checks for job seekers. These firms are sometimes hired by job seekers who are having difficulty finding a job and think it may be because of bad references from a former employer. So respond only to legitimate requests from prospective employers.

• Make sure the former employee has signed a written reference authorization form. Most application forms ask for a blanket consent to check references, and many employers ask departing employees to sign a form allowing the employer to give reference information to prospective employers.

• Give only truthful information. Truthful information is a defense in a defamation claim. Ideally, the information provided should be supported by documentation. Say someone had several negative performance appraisals. Then you could say, “This person was rated below expectations for the past 2 years.” That fact-based statement puts the reference checker on notice of potential performance issues.

• Give only job-related information. Do not include information about an
employee’s personal life, such as their medical conditions or sexual orientation, for example.

• Do not gratuitously give out negative information. Give such information only in response to direct questions.

Q. What if an employee was fired? Can an employer disclose that information?
Bliss: Yes, but this information should not be disclosed without written consent from the former employee. Many employers have employees sign a form as they go out the door. Hiring employers also need a signed consent to check references.

The reference authorization form should contain two key provisions:
• a provision for an individual to consent to reference checks
• a provision for an individual to waive liability against any employer and the employer’s agents involved in giving or getting references about the person.

Q. But would employees sign a consent if they were fired?
Bliss: If an applicant doesn’t sign the consent to check references on the application form, that is a red flag. If you are the former employer, and the person did not sign a consent before leaving, you could say in response to a request for a reference: “We have a policy that we will share information if the individual signs a consent. This individual did not sign a consent form.”

That is a tip-off to the hiring employer to say, “Oh, oh. We need to dig deeper into this person’s background before making a hiring decision.”

Q. Have employers been sued because they did not share negative information about a former employer who went on to do harm on a new job?
Bliss: I am not aware of any case where the courts said there was an affirmative duty to warn future employers. There have been cases, however, where former employers were sued for a “negligent referral”—that is, they painted a glowing picture about someone they knew had done harm. There is a California case where a school administrator resigned under a cloud of suspicion about sexual improprieties with junior high students. Despite that, he was given glowing recommendations by the school district, was hired by another district, did wrong there, and that district sued the former employer.

The message is either to give fair and balanced information about former employees who demonstrated dangerous behavior or to provide no information in response to a reference check except the person’s “name, rank, and serial number.”

If you have information about an employee who has done harm, such as being violent or embezzling, when working for your organization, my suggestion is to ask your attorney before responding to a reference request.

Q. With the nursing shortage, facilities may be tempted to hire nurses without complete information. What is your advice for managers?
Bliss: Employers have to exercise reasonable care or they can expose themselves to being sued for negligent hiring, which means failure to exercise due care in hiring. Even if you hit a brick wall in requesting references, you need to make and document your attempts to investigate applicants’ backgrounds before hiring for due diligence. Particularly if you are hiring employees to work with vulnerable people like patients or children, you would need to prove you did an adequate investigation to avoid staffing disasters and negligent hiring claims.

Q. Do you see any shift in attitudes about sharing references?
Bliss: I have been speaking on this subject for many years. Years ago, I would often hear, “Our hands are tied when it comes to giving references. Our attorneys have told us only to verify basic facts.” But I have seen the pendulum swinging back toward fuller disclosures. More companies and human resources professionals are trying to share information about former employees’ performance and work behavior, while still taking steps to minimize exposure. I don’t think there
is a widespread willingness yet to share substantive information, but I have definitely seen a shift in what some organizations are doing.

If you are not sharing substantive, truthful, job-related information, you should be aware that the losers are going to be your good former employees because other employers can’t learn about the good things they have done, and prospective employers lose because they cannot get the good information they need to make sound hiring decisions. Even former employers lose because if they won’t provide positive references that will help their good employees get new jobs, say in the case of downsizing, their unemployment insurance premiums may go up, and morale may be lower because employees realize no one will vouch for their work performance when they leave. The only person who wins is the person with something to hide about his or her work history.

Laws in these states provide immunity to employers who give references in good faith: Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Montana, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wisconsin, and Wyoming.