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LICENSING A LIE: THE PRIVILEGE ATTACHED TO THE FORM U-5 SHOULD REFLECT THE REALITIES OF THE WORKPLACE

DAYNA B. TANN[†]

INTRODUCTION

As the stock market plunged, Ahmad Baravati, an account executive in the Chicago branch of a New York securities dealer, scrambled to respond to his panicking clients.¹ Despite his requests to cancel his client's stock interests, several of his clients nevertheless remained on the company's purchase list.² His countless attempts to rectify the situation were ignored by his supervisors.³ Finally, after consulting with a securities attorney about the matter, Baravati was promptly fired.⁴ To his surprise, his termination form falsely stated that he was fired for "wrongful taking of firm property."⁵ In response, Baravati filed an arbitration claim for defamation with the NASD.⁶

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¹ See *Baravati v. Josephthal Lyon & Ross Inc.*, 834 F. Supp 1023, 1025 (N.D. Ill. 1993), *aff'd*, 28 F.3d 704 (7th Cir. 1994).

² *Id.* Regardless of Baravati's notification to his office manager, the names of his clients remained on the company's list to purchase stock that the clients previously requested to cancel. *Id.*

³ *Id.*

⁴ *Id.* at 1026.

⁵ *Id.* (internal quotation mark omitted).

⁶ *Id.* "NASD" is an acronym for the National Association of Securities Dealers. See BLACK'S LAW DICTIONARY 1050 (8th ed. 2004). The NASD is a "self-regulatory organization that oversees the registration, compliance and activities of member brokerage firms." Laurin Blumenthal Kleiman & Carla G. Teodoro, *Forming, Organizing and Operating a Mutual Fund: Legal and Practical Considerations*, in PRACTISING LAW INSTITUTE, CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES: THE ABCS OF MUTUAL FUNDS 9, 32 n.34 (2007). *But cf.* About the Financial Industry Regulatory Authority, <http://www.finra.org/AboutFINRA/index.htm> (last visited Apr. 20, 2009) (noting that in July 2007, the NASD and "the member regulation, enforcement and arbitration functions of the New York Stock Exchange" consolidated to form the Financial Industry Regulatory Authority ("FINRA")—the

Fortunately for Baravati, an NASD arbitration panel rejected his employer's absolute immunity defense and awarded him damages on the basis that he was maliciously defamed for blowing the whistle on the company's fraud.⁷

Today, brokers like Baravati may not have such good fortune. In *Rosenberg v. MetLife, Inc.*,⁸ the New York Court of Appeals granted brokerage firms absolute immunity from liability for statements published on the Form U-5.⁹ As a result of this decision, many brokers are seemingly defenseless against their employers' malicious attempts to retaliate against them.

A securities broker's termination form is what is known in the securities industry as the Form U-5 (the Uniform Termination Notice for Securities Industry Registration).¹⁰ This form is filed in a central reporting system governed by FINRA.¹¹ Under this system, an employer is required to file a form whenever an employee associated with such self-regulatory organization is either registered or terminated as an investment broker.¹² The Form U-4 (the Uniform Application for Securities Industry Registration or Transfer) is the official form to register individuals with FINRA.¹³ The Form U-5, by contrast, is the official form to terminate employment.¹⁴

"largest non-governmental regulator for all securities firms doing business in the United States").

⁷ See *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994). The arbitrators concluded that the broker's termination resulted from Baravati's consultation with an SEC attorney about the company's refusal to release clients from the company's stock-purchase list. *Id.* at 705-06.

⁸ 8 N.Y.3d 359, 866 N.E.2d 439, 834 N.Y.S.2d 494 (2007).

⁹ *Id.* at 361-62, 866 N.E.2d at 440, 834 N.Y.S.2d at 495.

¹⁰ See Jeffrey L. Liddle & Ethan A. Brecher, *Form U-5 Defamation Claims: The End of the Line? Not So Fast*, in PRACTISING LAW INSTITUTE, CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES: SECURITIES ARBITRATION 2007: ARBITRATORS AND MEDIATORS-WINNING THEIR HEARTS AND MINDS 673, 677 (2007).

¹¹ *Id.*; see About the Financial Industry Regulatory Authority, *supra* note 6 (explaining that FINRA encompasses the NASD and the regulation and enforcement functions of the New York Stock Exchange).

¹² See Liddle & Brecher, *supra* note 10, at 677-78; see also Seth Taube, *Regulatory Reporting Requirements*, in BROKER-DEALER REGULATION 20-3 (2009) (noting that the employer has a mandatory requirement to file the Form U-4 and Form U-5).

¹³ See Taube, *supra* note 12.

¹⁴ *Id.* at 20-4. The Forms U-4 and U-5 regulate all employees associated with FINRA. See Bruce Schaeffer, *Defamation and Form U-5*, in PRACTISING LAW INSTITUTE, CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES: SECURITIES ARBITRATION 553, 558-59 (1997) (referring to the regulatory authority of the NASD before it was folded into FINRA). Accordingly, stockbrokers are not the only ones

The Form U-5 is comprised of a series of questions addressing the reasons for an investment broker's termination.¹⁵ After completion, the employer must file the form in a central registration system that is available for review by any member firm¹⁶ and, in some instances, the general investing public.¹⁷ As one can imagine, even one negative statement on the Form U-5 may hamper the broker's job opportunities.¹⁸ In fact, most big brokerage firms "take a pass" on brokers with more than one complaint on their Form U-5.¹⁹ As a result, "[f]ormer employees who are dissatisfied with the information" on this form "often assert defamation claims in the context of a wrongful termination."²⁰

Privilege is a defense to defamation; however, the degree of privilege afforded to the Form U-5 varies among the states.²¹ States have generally implemented either an absolute or qualified privilege.²² An absolute privilege protects an employer from liability regardless of motive,²³ while a qualified privilege may be "vitiated upon a showing that the communication was made with actual malice."²⁴ Traditionally implemented on public

who initiate defamation suits arising from statements on these forms. Any registered brokerage house personnel—including financial planners and investment advisors—may bring such a claim. *Id.* at 558.

¹⁵ FINRA, FORM U-5: UNIFORM TERMINATION NOTICE FOR SECURITIES INDUSTRY REGISTRATION 5 (Oct. 2005) [hereinafter FINRA FORM U-5], available at <http://www.finra.org/web/groups/industry/@ip/@comp/@regis/documents/appsupportd/ocs/p015114.pdf>.

¹⁶ See Anne H. Wright, *Form U-5 Defamation*, 52 WASH. & LEE L. REV. 1299, 1305 n.22 (1995).

¹⁷ See *infra* text accompanying notes 51–60 for a discussion of "BrokerCheck."

¹⁸ See *Dawson v. N.Y. Life Ins. Co.*, 135 F.3d 1158, 1164 (7th Cir. 1998).

¹⁹ See Karen Donovan, *A License To Lie*, REGISTERED REP., May 1, 2007, at 51.

²⁰ See Thomas J. Kavalier, Thomas M. Campbell, Robert J. Rubinson & Marcy A. Siskind, *An Overview of Industry Arbitration*, in PRACTISING LAW INSTITUTE, CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES: SECURITIES ARBITRATION 669, 704 (1991).

²¹ Compare *Rosenberg v. MetLife, Inc.*, 8 N.Y.3d 359, 362, 866 N.E.2d 439, 440, 834 N.Y.S.2d 494, 495 (2007) (applying an absolute privilege to the Form U-5), with *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 708 (7th Cir. 1994) (applying a qualified privilege to the Form U-5).

²² See Schaeffer, *supra* note 14, at 563.

²³ See Adam J. Safer, *Absolute Immunity for U-5 Statements*, N.Y. L.J., June 5, 2007, at 4.

²⁴ *Fahnestock & Co. v. Waltman (In re N.Y. Stock Exch. Arbitration)*, 935 F.2d 512, 516 (2d Cir. 1991); see also *Garson v. Hendlin*, 141 A.D.2d 55, 64–65, 532 N.Y.S.2d 776, 782 (2d Dep't 1988) (establishing that an allegation of malice requires demonstration of "personal spite, ill will or culpable recklessness").

policy grounds, the absolute privilege “insure[s] freedom of speech where it is essential that freedom of speech should exist.”²⁵ As a result, the privilege extends to “all persons participating in judicial proceedings.”²⁶ Many states have now extended this privilege to quasi-judicial proceedings.²⁷

Proponents of the absolute privilege argue that the filing of a Form U-5 constitutes a “preliminary step” in a quasi-judicial proceeding.²⁸ Accordingly, they conclude that the absolute privilege that typically attaches to such proceedings shall also extend to the Form U-5.²⁹ In contrast, those in support of a qualified privilege contend that the Form U-5 is not a preliminary step in the quasi-judicial process, but rather is a mere filing formality.³⁰ They agree that there is a crucial interest in protecting the public against unscrupulous brokers; yet they nevertheless maintain that the grant of absolute immunity is an extreme remedy.³¹

This Note will evaluate the hotly contested legal debate concerning the degree of privilege afforded to statements made on the Form U-5 and the impact on the securities industry of New York’s recent decision in *Rosenberg v. MetLife, Inc.* Part I provides an overview of the Form U-5 and its filing formalities. Part II offers a brief outline of defamation and details the policies behind the absolute and qualified privilege. Part III describes the case history that led to New York’s decision and the impact of that decision on the industry as a whole. Part IV argues that the qualified privilege is the “wiser policy”³² because it balances both the public’s entitlement to disclosure and the employee’s right to seek redress for untruthful statements.

²⁵ Van Vechten Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 COLUM. L. REV. 463, 469 (1909).

²⁶ *Id.*

²⁷ Joshua B. Orenstein, *Absolute Privilege from Defamation Claims and the Devaluing of Teachers’ Professional Reputations*, 2005 WIS. L. REV. 261, 263–64 (2005); see also VINCENT R. JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* 1022 (3d ed. 2005) (noting that arbitration hearings and proceedings conducted by administrative agencies constitute quasi-judicial proceedings).

²⁸ See, e.g., *Rosenberg v. MetLife, Inc.*, 8 N.Y.3d 359, 364, 866 N.E.2d 439, 442, 834 N.Y.S.2d 494, 497 (2007).

²⁹ See *id.*

³⁰ See, e.g., *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 708 (7th Cir. 1994).

³¹ See *id.*; see also Wright, *supra* note 16, at 1302.

³² See *Dawson v. N.Y. Life Ins. Co.*, 135 F.3d 1158, 1164 (7th Cir. 1998).

I. AN OVERVIEW OF THE FORM U-5

The Form U-5 is the official form to file a broker's termination.³³ Brokerage firms must file this form with FINRA's Central Registration Depository ("CRD") within thirty days of the broker's dismissal.³⁴ The employer must also provide the broker with a copy.³⁵ The broker is then given the opportunity to submit a written response that is filed along with the form.³⁶ Additionally, the employer is required to file any subsequent amendments within thirty days.³⁷

Sections 3 and 7 of the Form U-5 provide the basis for most defamation actions.³⁸ Section 3 inquires into the general reasons for termination, and section 7 concerns disclosure questions.³⁹ Under section 3, an employer must check a box indicating whether the employee's termination is classified as: "Voluntary," "Deceased," "Permitted to Resign," "Discharged," or "Other."⁴⁰ If any of the last three are indicated, an explanation is required.⁴¹ Section 7 is a lengthier section comprised of a series of "yes" or "no" questions relating to the disclosure of investigations,⁴² internal review,⁴³ criminal convictions,⁴⁴ regulatory actions,⁴⁵

³³ See FINRA, INSTRUCTIONS FOR FORM U-5: UNIFORM TERMINATION NOTICE FOR SECURITIES INDUSTRY REGISTRATION 1 (Oct. 2005) [hereinafter FINRA, INSTRUCTIONS TO FORM U-5], available at <http://www.finra.org/web/groups/industry/@ip/@comp/@regis/documents/appsupportdocs/p015113.pdf>. See also FINRA FORM U-5, *supra* note 15.

³⁴ See Kavalier, Campbell, Rubinson & Siskind, *supra* note 20, at 701 (citing NYSE, Inc., Rules § 345.17(a) (2009), available at <http://www.nyse.com/Frameset.html?displayPage=http://rules.nyse.com/NYSE/Help/Map/rules-sys355.html>) (describing the requirement before the NASD folded into FINRA).

³⁵ See *id.*

³⁶ See Frederick Wertheim, *Broker-Dealer and Associated Person Registration*, in 1 BROKER-DEALER REGULATION § 2:3.4 (Clifford E. Kirsch ed. 2008).

³⁷ See Taube, *supra* note 12, at § 20:2.1.

³⁸ See Liddle & Brecher, *supra* note 10, at 680–81.

³⁹ See FINRA FORM U-5, *supra*, note 15, at 1, 5.

⁴⁰ *Id.* at 1.

⁴¹ *Id.*

⁴² See Question 7A on the Form U-5. *Id.* at 5 (inquiring whether the individual was the "subject of an investigation or proceeding by a domestic or foreign governmental body or self-regulatory organization with jurisdiction over investment-related businesses").

⁴³ See Question 7B on the Form U-5. *Id.* (inquiring as to whether the individual was or is "under internal review for fraud or wrongful taking of property, or violating investment-related statutes, regulations, rules or industry standards of conduct").

customer complaints,⁴⁶ and terminations regarding resignations.⁴⁷ A caution in red capital letters at the top of the section mandates that “if the answer to any of the following questions in section 7 is ‘yes’, complete details of all events or proceedings on appropriate DRP(s).”⁴⁸ The Internal Review Disclosure Reporting Page (“DRP”) is then attached and submitted to the CRD along with the Form U-5.⁴⁹

Member firms have access to the CRD and are required to review the Form U-5 before making any hiring decisions.⁵⁰ Additionally, the investing public has indirect access to certain information provided on the form through the CRD component, “BrokerCheck.”⁵¹ BrokerCheck is a tool designed to “help investors check the professional background of current and former FINRA-registered securities firms and brokers” and to aid them in their decision “whether to do business with a particular broker or brokerage.”⁵² Through this program, the NASD releases “disclosure information” relating to criminal actions, civil actions, customer complaints, and securities-related terminations provided on the Form U-4.⁵³ Nevertheless,

⁴⁴ See Question 7C on the Form U-5. *Id.* (inquiring as to whether the individual was ever convicted or pleaded guilty to a felony or was convicted or pleaded guilty to a misdemeanor in “investment-related business”).

⁴⁵ See Question 7D on the Form U-5. *Id.* (inquiring as to whether the individual was ever involved in any disciplinary action with jurisdiction over “investment-related businesses”).

⁴⁶ See Question 7E on the Form U-5. *Id.* (inquiring as to whether the individual was ever named as a representative or defendant in one or more “sales practice violations” that are still pending, resulted in a judgment or arbitration award against the defendant, or were settled for an amount of \$10,000 or more).

⁴⁷ See Question 7F on the Form U-5. *Id.* (inquiring as to whether the individual resigned or was permitted to resign from the firm after allegations that the individual was involved in violating investment-related regulations, wrongful taking of property, or failure to supervise in connection with investment-related regulations).

⁴⁸ *Id.* (original text appears entirely in capital letters); see also FINRA, INSTRUCTIONS TO FORM U-5, *supra* note 33. “DRP” stands for “Disclosure Reporting Page(s).” *Id.*

⁴⁹ See Schaeffer, *supra* note 14, at 561.

⁵⁰ See *id.*

⁵¹ See *Rosenberg v. MetLife, Inc.*, 8 N.Y.3d 359, 362 n.3, 866 N.E.2d 439, 441 n.3, 834 N.Y.S.2d 494, 496 n.3 (2007).

⁵² FINRA BrokerCheck, <http://www.finra.org/Investors/ToolsCalculators/BrokerCheck/p085698> (last visited Apr. 16, 2009).

⁵³ See *Rosenberg*, 8 N.Y.3d at 362 n.3, 866 N.E.2d at 441 n.3, 834 N.Y.S.2d at 496 n.3 (internal quotation marks omitted). The NASD originally released this information through e-mail; however, in March 2007, the SEC expanded the

information from the Form U-5 may still indirectly appear on BrokerCheck.⁵⁴ This is possible through the broker's responses to questions on the Form U-4 pertaining to prior employment.⁵⁵ For example, question 14J on the Form U-4 requires a broker to state whether his discharge resulted from allegations of "violating investment-related statutes, regulations, rules, or industry standards."⁵⁶ The response to this question will then be subject to disclosure through BrokerCheck.⁵⁷

In March 2007, the SEC expanded the availability of information to the investing public.⁵⁸ Notably, "Historic Complaints" (that is, customer complaints, arbitrations or litigations) before March 19, 2007, became available for review through BrokerCheck.⁵⁹ The NASD, however, assured brokers that although it would release information published on the Form U-5, it would not disclose information relating to "Internal Review Disclosure" in section 7 or "Reason for Termination" information reported in section 3.⁶⁰

As a result of the disclosure permitted by BrokerCheck, any negative comment on a broker's Form U-5 may cause the broker to lose prospective or current clients.⁶¹ Such a comment may also provide the basis for an employer's refusal to hire the broker.⁶² Nonetheless, the broker has little recourse. Before registering with FINRA, a securities broker must sign an arbitration agreement included in the Form U-4 in which the broker "agree[s] to arbitrate any dispute, claim or controversy that may arise between [the broker] and [his] *firm*, or a customer, or any

availability of information and provided instantaneous retrieval of the information without first making an e-mail request. *See infra* note 58 and accompanying text.

⁵⁴ *Rosenberg*, 8 N.Y.3d at 362 n.3, 866 N.E.2d at 441 n.3, 834 N.Y.S.2d at 496 n.3.

⁵⁵ *Id.*

⁵⁶ *Id.* (internal quotation marks omitted).

⁵⁷ *Id.*

⁵⁸ *See* Press Release, FINRA, New, Improved NASD BrokerCheck Goes Live Online Today (Mar. 19 2007), <http://www.finra.org/Newsroom/NewsReleases/2007/P018835>.

⁵⁹ *See* NASD, NOTICE TO MEMBERS 3 (Feb. 2007), <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p018666.pdf>.

⁶⁰ *See id.*

⁶¹ *See infra* notes 167–70 and accompanying text.

⁶² *See infra* notes 167–70 and accompanying text.

other person.”⁶³ As a result of this agreement, the broker is left with limited options—to initiate a defamation action or simply do nothing and ultimately concede that the remarks are true.

II. DEFAMATION DEFENSES: QUALIFIED AND ABSOLUTE IMMUNITY

Undoubtedly, a false statement on a broker's Form U-5 constitutes an act of defamation. A defamatory communication is a statement that “tends to hold the plaintiff up to hatred, contempt or ridicule, or to cause him to be shunned or avoided. . . . [I]t necessarily . . . involves the idea of disgrace.”⁶⁴ Generally, to establish an actionable defamation claim, there must exist defamatory language on the part of the defendant that is “of or concerning the plaintiff,” publication of this language by the defendant to a third person, and damage to the reputation of the plaintiff.⁶⁵

A false accusation leading to a broker's termination is defamatory language that impairs the “reputation of [a] tradesm[an].”⁶⁶ “The law has always been very tender of the reputation of tradesmen, and therefore words spoken of them in the way of their trade will bear an action that will not be actionable in the case of another person.”⁶⁷ Furthermore, given that the employer is the only one who is permitted to submit the Form,⁶⁸ the defamatory language is certainly “on the part of the defendant.” Additionally, the Form U-5 is comprised of a series of questions inquiring into a particular broker's performance,⁶⁹ and therefore, is necessarily “of or concerning the plaintiff.” Moreover, the Form U-5 undeniably passes the publication requirement given that the Form U-5 is filed with a central registry system that is available for review by all member

⁶³ See FINRA, FORM U-4: UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER 13 (Oct. 2005) [hereinafter FINRA, FORM U-4], available at <http://www.finra.org/web/groups/industry/@ip/@comp/@regis/documents/appsupportdocs/p015112.pdf>.

⁶⁴ See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111 (5th ed. 1984).

⁶⁵ See RESTATEMENT (SECOND) OF TORTS § 558 (1977).

⁶⁶ See KEETON ET AL., *supra* note 64, § 112.

⁶⁷ *Id.* § 112.

⁶⁸ See *supra* note 34 and accompanying text.

⁶⁹ See *supra* note 15 and accompanying text.

firms.⁷⁰ Finally, a false statement on the Form U-5 damages the reputation of the plaintiff who may lose clients or fail to attain employment as a result of the statement.⁷¹

Nevertheless, there are several defenses to a defamation claim. Truth is an absolute defense.⁷² Quite simply, truthful statements are not defamatory.⁷³ Statements may also be immune by privilege.⁷⁴ Whether a statement is privileged depends upon whether the defendant is acting in furtherance of some interest of societal importance.⁷⁵

Absolute privilege is conferred where society's interest in the free flow of a particular type of information is so strong that communicators are granted complete immunity from defamation liability Qualified privileges, by contrast, are conferred when society's interest in encouraging the flow of certain types of information is strong, but not sufficiently compelling to warrant protecting persons who defame out of highly improper motives or in a particularly egregious way.⁷⁶

Accordingly, privileged communication rests on public policy considerations.⁷⁷ The absolute privilege applies to statements that society deems so essential they are "impervious to proof."⁷⁸ In fact, "[c]ommunications afforded an absolute privilege are perhaps more appropriately thought of as cloaked with an immunity, rather than a privilege."⁷⁹ The qualified privilege, in

⁷⁰ See *supra* note 16 and accompanying text. Also see the discussion of BrokerCheck, *supra* notes 51–60 and accompanying text (noting that in some situations, information from the Form U-5 may be available to the public).

⁷¹ See *infra* note 170 and accompanying text.

⁷² See KEETON ET AL., *supra* note 64, § 116.

⁷³ See *id.*

⁷⁴ See *generally id.* § 114–15.

⁷⁵ See *id.* § 114, at 815.

⁷⁶ See Wright, *supra* note 16, at 1325–26.

⁷⁷ See *Lewis v. Equitable Life Assurance Soc'y of the U.S.*, 389 N.W.2d 876, 889 (Minn. 1986), *superseded by statute on other grounds*, MINN. STAT. §§ 181.933(2), 181.962(2) (2006), *as recognized in Emery v. Ne. Ill. Reg'l Commuter R.R. Corp.*, 880 N.E.2d 1002, 1011 (2007) (holding that a Minnesota statute has superseded *Lewis* on the doctrine of compelled self-defamation).

⁷⁸ See *Park Knoll Assocs. v. Schmidt*, 89 A.D.2d 164, 168, 454 N.Y.S.2d 901, 904 (2d Dep't 1982), *rev'd on other grounds*, 59 N.Y.2d 205, 211, 451 N.E.2d 182, 185, 464 N.Y.S.2d 424, 427 (1983) (quoting *Stukuls v. State*, 42 N.Y.2d 272, 275, 366 N.E.2d 829, 831, 397 N.Y.S.2d 740, 742 (1977)) (internal quotation marks omitted).

⁷⁹ *Toker v. Pollak*, 44 N.Y.2d 211, 218, 376 N.E.2d 163, 166, 405 N.Y.S.2d 1, 4 (1978).

contrast, applies to communications that may not necessarily merit absolute immunity but still warrant protection from malice.⁸⁰

The absolute privilege is implemented in those rare instances where "there is an obvious policy in favor of permitting complete freedom of expression without any inquiry as to the defendant's motives."⁸¹ Virtually all jurisdictions agree that statements made in judicial proceedings are one such instance.⁸² In this limited situation, an absolute immunity will protect the "robust, adversarial litigation process [that] is deemed so essential to the American form of government, and depends so heavily on relevant information being brought into court"⁸³ This privilege ensures that governmental officials can carry out their duties without fear of a defamation suit, which could inhibit their public function to speak freely.⁸⁴ Additionally, absolute immunity protects statements made by all persons regardless of their governmental status as long as they were "integral parts of the judicial process."⁸⁵ "The law gives to all who take part in judicial proceedings, judge, attorney, counsel, printer, witness, litigant, a *right* to speak and to write, subject only to one limitation, that what is said or written bears upon the subject of litigation."⁸⁶

Based on the above reasoning, some courts have extended absolute immunity to quasi-judicial proceedings.⁸⁷ A proceeding is traditionally determined quasi-judicial when it implements "procedures like those used in judicial proceedings to ensure the integrity and good faith of its participants. Such judicial safeguards include notice provisions, the opportunity to request a hearing, the judge's control over the proceeding, the opportunity

⁸⁰ See *Park Knoll*, 89 A.D.2d at 168–69, 454 N.Y.S.2d at 904–05; see also *infra* notes 90–91 and accompanying text (defining malice).

⁸¹ See Liddle & Brecher, *supra* note 10, at 684 (quoting KEETON ET AL., *supra* note 64 at § 114).

⁸² See JOHNSON & GUNN, *supra* note 27, at 1021.

⁸³ *Id.*

⁸⁴ See *Toker*, 44 N.Y.2d at 219, 376 N.E.2d at 166, 405 N.Y.S.2d at 4.

⁸⁵ *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983).

⁸⁶ *Park Knoll Assoc. v. Schmidt*, 89 A.D.2d 164, 170, 454 N.Y.S.2d 901, 905 (2d Dep't 1982), *rev'd on other grounds*, 59 N.Y.2d 205, 211, 451 N.E.2d 182, 185, 464 N.Y.S.2d 424, 427 (1983) (internal quotation marks and citation omitted).

⁸⁷ See DAVID A. ELDER, *DEFAMATION: A LAWYER'S GUIDE* § 2:5 (2008).

for appellate review, and the threat of prosecution for perjury.”⁸⁸ Nevertheless, the absolute privilege will only apply if the statement is “at all pertinent to the litigation.”⁸⁹

In contrast to the absolute privilege, a qualified privilege entitles the speaker to some degree of immunity; however, this privilege will be lost if the speaker abuses that immunity.⁹⁰ The qualified privilege will not protect the speaker if he acted with common law malice (ill will, spite, vindictiveness, or revenge) nor will it protect the speaker if the plaintiff proves actual malice (reckless disregard for the truth).⁹¹

III. THE HISTORY AND IMPACT OF NEW YORK’S APPLICATION OF ABSOLUTE IMMUNITY

Whether an absolute or qualified privilege applies to the Form U-5 is a hotly contested issue that has evaded uniform resolution. These non-uniform laws permit a broker in one state to secure redress but bar another in a different state from an identical claim on the same Form U-5.⁹² Thus, brokerage firms that have offices around the country are subject to different liability standards.⁹³ Moreover, not only is there disagreement among the states, but decisions within a state often conflict.⁹⁴

⁸⁸ See Orenstein, *supra* note 27, at 264 (noting that although “[m]ost states have incorporated some version of the quasi-judicial doctrine into their defamation law . . . there is no uniform standard by which courts define what is quasi-judicial”).

⁸⁹ *Mosesson v. Jacob D. Fuchsberg Law Firm*, 257 A.D.2d 381, 382, 683 N.Y.S.2d 88, 89 (1st Dep’t 1999). According to most courts, this pertinence requirement can be satisfied by a standard of good faith with all doubts resolved in favor of the defendant. See *KEETON ET AL.*, *supra* note 64, § 114; see also *Ginsburg v. Black*, 192 F.2d 823, 825 (7th Cir. 1951) (noting that the test is whether the matter has reference and relation to the subject matter of the action, rather than whether the matter is legally relevant); *Bleecker v. Drury*, 149 F.2d 770, 772 (2d Cir. 1945) (noting that “the privilege embraces anything that may possibly be pertinent”) (internal quotation marks omitted); *Johnson v. Dover*, 143 S.W.2d 1112, 1113 (Ark. 1940) (stating that “[i]t is sufficient if the words are uttered under an honest belief that they are relevant and pertinent, whether they are so in fact or not”).

⁹⁰ *JOHNSON & GUNN*, *supra* note 27, at 1023–24.

⁹¹ *Id.* at 1024–25.

⁹² See *Liddle & Brecher*, *supra* note 10, at 676.

⁹³ See *id.* Accordingly, although an absolute privilege may protect an employer’s statements in a company’s New York branch, a qualified privilege may only attach to an employer’s statements in that company’s Chicago office.

⁹⁴ See *Ralph DeSena, ‘Rosenberg’ Is Big Victory for Securities Firms*, N.Y.L.J., Apr. 9, 2007, at 4 (noting that the *Rosenberg* case settled the long debate concerning whether a qualified or absolute privilege applies to the Form U-5 under New York law).

New York is a prime example.⁹⁵ Indeed, just days before *Rosenberg v. MetLife, Inc.* upheld an absolute privilege, New York courts affirmed two arbitration awards allowing securities dealers to recover damages under a qualified privilege.⁹⁶

Although New York's application of the absolute privilege represents the minority view,⁹⁷ New York's decision is significant given that New York is "the heart of the securities industry in the United States."⁹⁸ New York City accounts for 90% of all securities jobs in the state and more than 22% of securities jobs in the nation.⁹⁹ In fact, the New York metropolitan area provided 230,000 jobs in the securities industry in 2006, far more than any other city.¹⁰⁰ Wall Street alone accounted for 41% of the jobs gained in New York City between 2003 and 2006.¹⁰¹

⁹⁵ See *infra*, notes 119–120.

⁹⁶ See DeSena, *supra* note 94, at 4. Judge Loretta Preska affirmed a \$12.5 million arbitration award to three Merrill Lynch brokers for their "pain and suffering" resulting from the firm's defamation on their U-5s. *Id.* Likewise, an NASD panel awarded a judgment on a U-5 defamation claim to a discharged representative whose Form U-5 noted that he had engaged in the sale of hedge fund products and was also aware that a market timing relationship existed with a third party. *Id.* (citing *In re Schaffran v. Alliance Capital Mgmt., L.P.*, No. 04-06498, 2007 WL 1001079 (N.A.S.D.) (Mar. 21, 2007) (Barak, McDonnell & Chiusano, Arbs.)) (internal quotation marks omitted).

⁹⁷ See Terry Weiss & Nathan Chapman, *Permission To Be Frank? The Debate Continues over an Absolute Versus Qualified Immunity in U5 Defamation Cases*, 39 SEC. REG. & LAW REP. 881, 881 (2007), available at <http://www.sutherland.com/files/Publication/84717058-65fd-48bb-9607-909e9cfd434/Presentation/PublicationAttachment/6daf8919-d097-43ac-ad02-522108cd0d67/BNA.pdf> (noting that before the *Rosenberg* case was decided, the "only state that accorded absolute immunity to Form U5 disclosure outside New York was California").

⁹⁸ See OFFICE OF THE STATE COMPTROLLER, THE SECURITIES INDUSTRY IN NEW YORK CITY 10 (Oct. 2007), <http://www.osc.state.ny.us/osdc/rpt5-2008.pdf> (last visited Mar. 19, 2009).

⁹⁹ *Id.* at 7.

¹⁰⁰ *Id.* at 10. Other than New York, Chicago and Boston have the largest concentrations of securities jobs, each providing around 46,000 jobs in 2006. *Id.*; see also Jon Jacobs, *Fed on Paycheck Destruction in N.Y.*, SEC. INDUSTRY NEWS (Oct. 23, 2008) (stating that "[e]ach New York securities industry job is estimated to generate 2.3 other jobs in fields such as legal services, software development, and real estate, as well as other services like hotels and restaurants"), http://news.careerzone.securitiesindustry.com/ITEM_FR/newsItemId-15671.

¹⁰¹ See OFFICE OF THE STATE COMPTROLLER, *supra* note 98, at 1.

A. *The Cases That Led to New York's Application of the Absolute Privilege*

Prior to *Rosenberg*, New York case law on this issue was in complete disarray. Two key decisions, *Fahnestock & Co., v. Waltman*¹⁰² and *Herzfeld & Stern, Inc. v. Beck*,¹⁰³ initiated the chaos.¹⁰⁴ These cases were decided within two months of each other, and each applied a different privilege—the former advocating for a qualified privilege and the latter favoring an absolute privilege.¹⁰⁵

Recognizing that New York typically attaches a qualified privilege to communications concerning an employee's termination, the district court in *Fahnestock* refused to grant absolute immunity to a brokerage firm that maliciously defamed its employee.¹⁰⁶ *Fahnestock & Co.* had hired Joseph Waltman to head its Retirement Trust Division and subsequently terminated him six years later when the firm closed the division.¹⁰⁷ Accordingly, Waltman's Form U-5 stated that he was terminated due to "business consolidation."¹⁰⁸ After the company could not locate some insurance files it believed Waltman possessed, it changed its answer from "no" to "yes" in response to a question inquiring whether the employee was under "internal review for fraud or wrongful taking of property."¹⁰⁹ The court found *Fahnestock & Co.* liable for displaying "flagrantly spiteful conduct, demonstrating its intent simply to injure Waltman's

¹⁰² 935 F.2d 512 (2d Cir. 1991).

¹⁰³ 175 A.D.2d 689, 572 N.Y.S.2d 683 (1st Dep't 1991).

¹⁰⁴ See *Fahnestock*, 935 F.2d at 516 (2d Cir. 1991); see also *Rosenberg v. MetLife, Inc.*, 453 F.3d 122, 125 (2d Cir. 2006), *aff'd*, 493 F.3d 290 (2d Cir. 2007) (contending that *Fahnestock* does not "definitively stand for the proposition that, under New York law, Form U-5 statements are entitled to a qualified privilege" but that the *Fahnestock* court simply gave deference to the arbitrator's decision and held that it "was not in manifest disregard of New York law").

¹⁰⁵ Compare *Fahnestock*, 935 F.2d at 516, with *Herzfeld*, 175 A.D.2d at 691, 572 N.Y.S.2d at 685. *Fahnestock* was decided in June 1991, and *Herzfeld* was decided in August 1991.

¹⁰⁶ See *Fahnestock & Co. v. Waltman*, No. 90 CIV. 1792, 1990 WL 124354, at *3 (S.D.N.Y. Aug. 23, 1990), *aff'd*, 935 F.2d at 519 (citing *Greenfield v. Kanwit*, 546 F. Supp. 220 (S.D.N.Y. 1982)).

¹⁰⁷ See *Fahnestock*, 935 F.2d at 514.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

reputation.”¹¹⁰ As a result of this malice, the qualified privilege did not protect the language on Waltman’s Form U-5, and Waltman was entitled to compensatory damages.¹¹¹

Conversely, *Herzfeld & Stern, Inc. v. Beck*,¹¹² decided only two months after *Fahnestock*, applied an absolute privilege.¹¹³ The court in *Herzfeld* focused on the Form U-5’s role in initiating an investigation.¹¹⁴ The Court found that the “New York Stock Exchange and, specifically, its Department of Enforcement clearly perform as a quasi-judicial body” given that the NYSE is authorized to inquire into a broker’s misconduct.¹¹⁵ Moreover, the court held that because the process is “adversarial in nature” and affords the individual the right to appeal, “it certainly conforms to the requirements of a quasi-judicial administrative proceeding.”¹¹⁶ The court therefore concluded that the absolute privilege attached not only to the information supplied in the investigation but to the actual Form U-5 that prompted the investigation.¹¹⁷ Consequently, the court barred any recovery regardless of the malice alleged.¹¹⁸

As a result of these conflicting cases, it remained uncertain which privilege applied. Some arbitrators continued to follow the *Fahnestock* decision and applied a qualified privilege,¹¹⁹ while

¹¹⁰ *Id.* at 516.

¹¹¹ *Id.* at 515. The court affirmed the district court’s decision to grant compensatory damages but vacated the punitive damages, holding that “the Arbitrators were prohibited from awarding punitive damages.” *Id.*

¹¹² 175 A.D.2d 689, 572 N.Y.S.2d 683 (1st Dep’t 1991).

¹¹³ See Wright, *supra* note 16, at 1322 (noting that *Herzfeld* reached the opposite conclusion after devoting no discussion to the *Fahnestock* decision).

¹¹⁴ *Herzfeld*, 175 A.D.2d at 691, 572 N.Y.S.2d at 685.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 690–91, 572 N.Y.S.2d at 684–85.

¹¹⁹ See *Acciardo v. Millennium Sec. Corp.*, 83 F. Supp. 2d 413, 421 (S.D.N.Y. 2000) (upholding an arbitrator’s decision to award a broker damages under a qualified privilege). Here, a New York stockbroker alleged that the defamatory language on his Form U-5 resulted from his refusal to “look the other way” or otherwise participate in his employer’s regulatory fraud. *Id.* at 415. The broker proved that his employer acted with malice and prevailed because “[t]he shield provided by a qualified privilege . . . dissolve[s] if [a] plaintiff can demonstrate that [the] defendant spoke with ‘malice.’” *Id.* at 421 (quoting *Lieberman v. Gelstein*, 80 N.Y.2d 429, 437, 605 N.E.2d 344, 349, 590 N.Y.S.2d 857, 862 (1992)). The court affirmed the award of \$100,000 in punitive damages. *Id.* at 422.

others followed the *Herzfeld* decision and applied an absolute immunity.¹²⁰

B. The Case That Resolved the Conflict

Rosenberg resolved the uncertainty by mandating an absolute privilege.¹²¹ In *Rosenberg*, a New York broker's employer accused him of accepting unauthorized third-party checks.¹²² As a result of this accusation, his employer wrote on his Form U-5: "Appeared to have violated company policies and procedures involving speculative insurance sales and possible accessory [sic] to money laundering violations."¹²³ In response, the broker submitted a statement that he was "terminated solely on account of the fact that [he is] a Hassidic Jew."¹²⁴ This response also appeared on his Form U-5.¹²⁵ Upholding an absolute privilege, the trial court ignored the broker's discrimination defense.¹²⁶

The court based its holding on two premises: (1) the Form U-5 is a preliminary step in the NASD's quasi-judicial process, and therefore deserves, the absolute immunity traditionally afforded

¹²⁰ See *Cicconi v. McGinn, Smith & Co.*, 27 A.D.3d 59, 62, 808 N.Y.S.2d 604, 607 (1st Dep't 2005) (relying on *Herzfeld* and concluding that the Form U-5 is protected by an absolute privilege). The court balanced the interests of the employer and employee and concluded that the assurance of an employer's accurate disclosure outweighed the harm to individual employees from defamatory language. *Id.* at 63, 808 N.Y.S.2d at 607.

¹²¹ *Id.* The court contended that *Fahnestock* does not mandate that the Form U-5 is subject to a qualified privilege but simply states that the arbitrators' decision to apply a qualified privilege was not in manifest disregard of New York law. *Id.* at 125.

¹²² See *Rosenberg v. MetLife, Inc.*, 8 N.Y.3d 359, 363, 866 N.E.2d 439, 441, 834 N.Y.S.2d 494, 496 (2007).

¹²³ See FINRA BrokerCheck Report for Chaskie Jacob Rosenberg, <http://brokercheck.finra.org/Individual/IndividualSummary.aspx?SearchGroup=Individual&FirmKey=-1&BrokerKey=2933320> (click on "View Full PDF Report") (original text appears in all capital letters).

¹²⁴ *Id.*; see also *Rosenberg*, 8 N.Y.3d at 364, 866 N.E.2d at 442, 834 N.Y.S.2d at 497 (noting that, although the district court denied MetLife's motion to dismiss the discrimination claims, the jury nevertheless found MetLife not liable for discrimination).

¹²⁵ See FINRA BrokerCheck Report for Chaskie Jacob Rosenberg, *supra* note 123.

¹²⁶ See *Rosenberg*, 8 N.Y.3d at 364, 866 N.E.2d at 442, 834 N.Y.S.2d at 497.

to judicial proceedings;¹²⁷ and (2) an absolute privilege protects the general investing public against the harm caused by unethical brokers.¹²⁸

To support its first foundation, the court noted that the absolute privilege has traditionally protected statements made in a judicial or quasi-judicial proceeding.¹²⁹ The court then maintained that the Form U-5 is a preliminary step in the NASD's quasi-judicial process given that the filing of the Form U-5 is a compulsory requirement and often serves as "the first indication that the NASD receives regarding possible misconduct."¹³⁰ As a result, the court concluded that the Form U-5 warrants absolute immunity.¹³¹ In further support of this conclusion, the court analogized the filing of the Form U-5 to the submission of a complaint with the grievance committee of a bar association, which the court previously determined was absolutely privileged.¹³²

To support its second premise, the court focused primarily on policy concerns. The court noted that the absolute privilege is the only standard that can effectively "enable the NASD to investigate, sanction and deter misconduct by its registered representatives."¹³³ Furthermore, the court argued that the absolute privilege best serves the NASD's objectives to ensure accurate and truthful responses on the Form U-5.¹³⁴ In an effort to assuage the harsh reality of its decision, the majority noted that those who are maliciously defamed are not completely without a remedy, as a broker may commence an arbitration proceeding to expunge the defamatory language.¹³⁵

In a vigorous dissent, Judge Pigott reminded the court that the absolute privilege is "afforded in very few situations."¹³⁶ The dissent disagreed with the majority's contention that the Form U-5 acts as a preliminary step in a quasi-judicial process: "[T]he majority's holding provides an absolute privilege to statements

¹²⁷ *Id.* at 366-67, 866 N.E.2d at 443-44, 834 N.Y.S.2d at 498-99.

¹²⁸ *Id.* at 367-68, 866 N.E.2d at 444, 834 N.Y.S.2d at 499.

¹²⁹ *Id.* at 365, 866 N.E.2d at 442, 834 N.Y.S.2d at 497.

¹³⁰ *Id.* at 367, 866 N.E.2d at 444, 834 N.Y.S.2d at 499.

¹³¹ *Id.* at 368, 866 N.E.2d at 444, 834 N.Y.S.2d at 499.

¹³² *Id.* at 365-66, 866 N.E.2d at 443, 834 N.Y.S.2d at 498.

¹³³ *Id.* at 367-68, 866 N.E.2d at 444, 834 N.Y.S.2d at 499.

¹³⁴ *Id.* at 370, 866 N.E.2d at 446, 834 N.Y.S.2d at 501.

¹³⁵ *Id.* at 368, 866 N.E.2d at 445, 834 N.Y.S.2d at 500.

¹³⁶ *Id.* (Pigott, J., dissenting).

made on a Form U-5 where no judicial or even 'quasi-judicial' proceeding is even contemplated." Further, "[t]he submission of the Form simply does not represent a preliminary or investigative stage in any quasi-judicial process"¹³⁷ but merely serves to notify the NASD "of a change in an employee's registration status."¹³⁸

Moreover, the dissent argued that the qualified privilege satisfies the majority's policy concerns.¹³⁹ Given that a broker can only overcome the privilege by showing that the statements were made with malice, the qualified privilege offers the employer "strong protection."¹⁴⁰ The qualified privilege, therefore, suits the financial industry's need for accurate and truthful disclosure; yet, unlike the absolute privilege, does not provide the brokerage firm with carte blanche power to defame its brokers.¹⁴¹

IV. THE QUALIFIED PRIVILEGE SATISFIES THE INTERESTS OF ALL PARTIES

The qualified privilege balances the interests of the employer and employee. In contrast, *Rosenberg* renders the broker seemingly defenseless against his employer's absolute immunity to defame him. The qualified privilege represents the majority view among the states, signifies a filing formality that does not warrant the protection of an absolute immunity, and satisfies policy concerns by balancing the needs of the employer and employee.¹⁴² Moreover, the Form U-5 is analogous to an employment reference, which the United States has long afforded a qualified privilege.¹⁴³ Additionally, two Model Code provisions

¹³⁷ *Id.* at 369–70, 866 N.E.2d at 446, 834 N.Y.S.2d at 501.

¹³⁸ *Id.* at 369, 866 N.E.2d at 445, 834 N.Y.S.2d at 500. The dissent distinguished the filing of a grievance committee complaint from the filing of a Form U-5 on the basis that the Form U-5 serves an informative, "primary purpose" that is publicly displayed. *Id.* The filing of a complaint to a grievance committee, by contrast, is confidential. *Id.*; see also *supra* note 6 (explaining that FINRA took over the NASD).

¹³⁹ *Rosenberg*, 8. N.Y.3d at 370, 866 N.E.2d at 446, 834 N.Y.S.2d at 501.

¹⁴⁰ *Id.*

¹⁴¹ See *id.* at 370–71, 866 N.E.2d 446–47, 834 N.Y.S.2d at 501–02.

¹⁴² See *infra* Part IV.A–C.

¹⁴³ See *infra* Part IV.D.

sanction such limited immunity.¹⁴⁴ Accordingly, a uniform qualified privilege best serves the realities of the workplace and should attach to the Form U-5.

A. *The Absolute Privilege Is a Minority View*

Although *Rosenberg* made the absolute privilege the binding rule in New York, the majority of states adhere to a qualified privilege.¹⁴⁵ In fact, California is the only other state to apply an absolute immunity.¹⁴⁶ *Baravati v. Josephthal Lyon & Ross, Inc.*,¹⁴⁷ one of the most widely cited decisions in favor of the qualified privilege, best summarizes the reasons why many states apply a qualified privilege to the Form U-5.¹⁴⁸ The Seventh Circuit put the brokerage firm's dilemma into perspective: "[I]f [members] state a reason [for termination] discreditable to the employee they may be sued for libel while if they lie about the reason they will be violating the association's rules."¹⁴⁹ The Seventh Circuit nonetheless determined that the filing of the Form U-5 is not a stage in the NASD's quasi-judicial regulatory process but "the means by which the NASD administers an employment clearinghouse."¹⁵⁰ Hence, the form simply serves an informative purpose: providing "potentially valuable information concerning the availability and suitability

¹⁴⁴ See *infra* Part IV.F.

¹⁴⁵ See *infra* note 204 (listing states that have adopted the qualified privilege by statute); *infra* notes 153–156 (listing states that have adopted the qualified privilege by judicial decision).

¹⁴⁶ See *Lawyer Launches Campaign To Fight U-5 Ruling*, COMPLIANCE REP., Apr. 13, 2007; see also *Fontani v. Wells Fargo Invs., L.L.C.*, 28 Cal. Rptr. 3d 833, 842–43 (Ct. App. 2005) (applying the absolute privilege to the Form U-5 in California), *overruled in part by* *Kibler v. N. Inyo County Local Hosp. Dist.*, 138 P.3d 193, 199 (Cal. 2006).

¹⁴⁷ 28 F.3d 704 (7th Cir. 1994).

¹⁴⁸ See *Andrews v. Prudential Sec., Inc.*, 160 F.3d 304, 307 (6th Cir. 1998) (applying Michigan law); *Dawson v. N.Y. Life Ins. Co.*, 135 F.3d 1158, 1162 (7th Cir. 1998) (applying Illinois law); see also *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132, 137 (6th Cir. 1996) (applying Tennessee law); *Prudential Sec., Inc. v. Dalton*, 929 F. Supp. 1411, 1418 (N.D. Okl. 1996) (applying Oklahoma law and noting that "*Baravati* is the better view"); *Wright*, *supra* note 16, at 1314 (noting the significance of the *Baravati* decision as one of the seminal cases advocating for a qualified privilege).

¹⁴⁹ See *Baravati*, 28 F.3d at 708 (7th Cir. 1994) (citing NATIONAL ASSOCIATION OF SECURITIES DEALERS MANUAL ¶ 1153 (1993) (art. IV, § 3(a) of the NASD's by-laws)); see also *Kavaler*, *supra* note 20, at 703 (noting that an employer's failure to file a Form U-5 may result in "administrative, civil, and even criminal penalties").

¹⁵⁰ *Baravati*, 28 F.3d at 708.

of potential employees.”¹⁵¹ Moreover, the court cautioned that the “absolute privilege is strong medicine” and does not warrant extension “beyond the judicial and quasi-judicial context and into the termination notice.”¹⁵²

Courts in Connecticut,¹⁵³ Florida,¹⁵⁴ Oklahoma,¹⁵⁵ Arizona,¹⁵⁶ and Texas¹⁵⁷ have all ruled in favor of a qualified privilege. For example, in *Heldmann v. Tate*,¹⁵⁸ a Connecticut court applied a qualified privilege to the defamatory language on an employee’s Form U-5 relating to a salary miscalculation.¹⁵⁹ A broker erroneously computed her ten percent raise by calculating her annual bonus with her base pay.¹⁶⁰ Her boss did not anticipate the inclusion of the bonus and fired her for the miscalculation.¹⁶¹ The broker’s Form U-5 stated that she “intentionally and calculatedly misappropriat[ed] funds which were under her control,” an allegation tantamount to theft.¹⁶² Concluding that a report sent to a broker-dealer did not qualify as a quasi-judicial proceeding, the court applied a qualified privilege and denied the employer’s motion for summary judgment.¹⁶³

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See *Dickinson v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 431 F. Supp. 2d 247, 262 (D. Conn. 2006) (applying Connecticut law); see also *Galligan v. Edward D. Jones & Co.*, No. 389623, 2000 WL 1785041, at *13 (Conn. Super. Ct. Nov. 13, 2000); *Heldmann v. Tate*, No. CV 9559122S, 1999 WL 353476, at *2 (Conn. Super. Ct. May 20, 1999).

¹⁵⁴ See *Eaton Vance Distribs., Inc. v. Ulrich*, 692 So. 2d 915, 916 (Fla. Dist. Ct. App. 1997) (applying Florida law).

¹⁵⁵ See *Prudential Sec., Inc. v. Dalton*, 929 F. Supp. 1411, 1418 (N.D. Okl. 1996) (applying Oklahoma law).

¹⁵⁶ See *Wietecha v. Ameritas Life Ins. Corp.*, No. CIV 05-0324-PHX-SMM, 2006 WL 2772838, at *11 (D. Ariz. Sept. 27, 2006) (applying Arizona law).

¹⁵⁷ See *Wakefield v. SWS Sec., Inc. (In re Wakefield)*, 293 B.R. 372, 385 (N.D. Tex. 2003) (holding that statements on a Form U-5 are afforded a qualified immunity); see also *ContiCommodity Servs., Inc. v. Ragan*, 63 F.3d 438, 442 (5th Cir. 1995) (holding that under Texas law, an employer’s comments about an employee to an interested person are protected by a qualified privilege).

¹⁵⁸ 1999 WL 353476.

¹⁵⁹ *Id.* at *1.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at *2.

B. *The Filing of the Form U-5 Is Simply a Formality*

The Form U-5's filing requirement is too far removed from a judicial proceeding to form a "step" in a quasi-judicial proceeding. Although some courts may argue that the privilege applies to "every step" of the judicial proceeding,¹⁶⁴ mere informational filings are not part of the quasi-judicial process. For example, it is true that the filing of a police report can lead to an investigation and initiate a judicial proceeding;¹⁶⁵ however, the majority of states nevertheless hold that the filing of such a report is only protected by a qualified privilege.¹⁶⁶

The absolute privilege should not attach to the Form U-5 for the same reasons it does not attach to the filing of a police report. Although there is a vital public interest in ensuring that individuals report crimes to the police, there must also be sufficient protection of the accused's reputational interest. Likewise, there is a public interest in ensuring that the investing public has accurate and complete knowledge about its investors. Moreover, "[t]he countervailing harm caused by the malicious destruction of another's reputation by false accusation[s]"¹⁶⁷ from a false police report is no different than a false U-5 statement alleging employee misconduct. Both result in "irreparable consequences,"¹⁶⁸ including shame¹⁶⁹ and the resultant loss of job

¹⁶⁴ *Herzfeld & Stern, Inc. v. Beck*, 175 A.D.2d 689, 691, 572 N.Y.S.2d 683, 685 (1st Dep't 1991).

¹⁶⁵ See Peter Zablotsky, *From Undermining Child Protection Statutes To Creating Exceptions to Prohibitions Against Racial Discrimination in Public Accommodations: The Unsettling Consequences of Mischaracterizing the Police Reporting Privilege*, 32 OHIO N.U. L. REV. 317, 326 (2006).

¹⁶⁶ See *id.* at 325. "[A] qualified privilege is 'sufficiently protective of [those] wishing to report events concerning crime' . . . There is no benefit to society or the administration of justice in protecting those who make intentionally false and malicious defamatory statements to the police." *Fridovich v. Fridovich*, 598 So. 2d 65, 69 (Fla. 1992) (quoting *Fridovich v. Fridovich*, 573 So. 2d 65, 70 (Fla. Dist. Ct. App. 1990), *rev'd*, 598 So. 2d 65). In fact, an absolute privilege might actually entice the filing of malicious police reports. See *DeLong v. Yu Enters.*, 47 P.3d 8, 9-10 (Or. 2002) (applying a qualified privilege to an employee's defamation action against his employer for statements published on a police report). The employer had fired the employee after a heated dispute and filed a police report against the employee without cause. *Id.* at 9. The Oregon Supreme Court ruled in favor of the defamed employee. *Id.*

¹⁶⁷ *Gallo v. Barile*, 935 A.2d 103, 111 (Conn. 2007).

¹⁶⁸ *Id.*

¹⁶⁹ See Murray Schwartz, Davida S. Perry, Daren L. Hensley & Alexander M. Jeffrey, *Claims for Damage to an Employee's Reputation and Future Employment Opportunities*, in PRACTISING LAW INSTITUTE, LITIGATION AND ADMINISTRATIVE

opportunities.¹⁷⁰ Furthermore, the filing of a police report serves an informational purpose: To report a crime. It represents a mere filing requirement that is too far removed from the actual judicial proceeding to warrant the same immunity traditionally afforded to such proceedings. The filing of a Form U-5 likewise represents such formality—the simple purpose of informing FINRA of a “change in an employee’s registration status.”¹⁷¹

The New York Court of Appeals in *Rosenberg* failed to recognize the Form U-5’s informative purpose when it analogized the filing of the Form U-5 to the filing of a complaint with a grievance committee.¹⁷² The primary reason why New York affords a grievance complaint an absolute privilege is because it was originally presented to a court and was only later delegated to a grievance committee.¹⁷³ In contrast, complaints of misconduct on the Form U-5 are not intended to come before a general court.¹⁷⁴ The Form U-5 simply serves as a compulsory requirement to demonstrate a change in the broker’s registration status, regardless of whether or not misconduct is alleged.¹⁷⁵ As a result, a majority of the Form U-5 filings stem from a broker’s voluntary decision to leave his employment and do not lead to an

PRACTICE COURSE HANDBOOK SERIES: LITIGATION 745, 755–56 (1999) (“Psychological losses as a result of a wrongful termination have been documented . . . [T]he most significant and debilitating form[] of damage . . . is that the employee always carries the stigma of dismissal.”).

¹⁷⁰ *Id.* at 755 (noting that a “wrongfully dismissed employee may face a reduced lifetime earning capacity in comparison to other employees with similar credentials and characteristics”).

¹⁷¹ See *Rosenberg v. MetLife, Inc.*, 8 N.Y.3d 359, 369, 866 N.E.2d 439, 445, 834 N.Y.S.2d 494, 500 (2007) (Pigott, J., dissenting).

¹⁷² *Id.* at 365–66, 866 N.E.2d at 443, 834 N.Y.S.2d at 498 (majority opinion). Many states apply an absolute privilege to complaints alleging attorney misconduct but nevertheless apply a qualified privilege for defamatory language on the Form U-5. See, e.g., *Tobkin v. Jarboe*, 710 So. 2d 975, 978 (Fla. 1998); *Field v. Kirton*, 856 F. Supp. 88, 96 (D. Conn. 1994) (applying Connecticut law); *Drummond v. Stahl*, 618 P.2d 616, 620 (Ariz. Ct. App. 1980); *Muck v. Van Bibber*, 621 N.E.2d 1043, 1044 (Ill. App. Ct. 1993).

¹⁷³ See *Weiner v. Weintraub*, 22 N.Y.2d 330, 331, 239 N.E.2d 540, 541, 292 N.Y.S.2d 667, 668 (1968) (stating that “complaints charging professional misconduct of an attorney which, in the past, were presented to the General Term of the Supreme Court are now usually filed with the Grievance Committee of a bar association” (citation omitted)).

¹⁷⁴ See *supra* note 63. Although statements on the Form U-5 may be arbitrated, this constitutes a quasi-judicial proceeding at most.

¹⁷⁵ See *Rosenberg*, 8 N.Y.3d at 369, 866 N.E.2d at 446, 834 N.Y.S.2d at 501 (Pigott, J., dissenting).

investigation.¹⁷⁶ In contrast, the grievance committee is only instituted when misconduct is alleged. Accordingly, the purpose of the Form U-5 is informational while the purpose of the grievance committee is disciplinary.

Moreover, the Form U-5, unlike a complaint to a grievance committee,¹⁷⁷ acts as an employment reference.¹⁷⁸ Therefore, even assuming that an absolute privilege attaches to participants in FINRA investigations in the same manner as the privilege attaches to judicial proceedings, this privilege does not stretch so far as to cover a mere informative document.¹⁷⁹ The submission of a Form U-5 more closely resembles “an employment clearinghouse” through which member firms can obtain information regarding potential employees.¹⁸⁰ Although it is true that this form can initiate an investigation or even operate as evidence in a disciplinary proceeding against the broker, “any item of information could do that.”¹⁸¹ Besides, “the vast majority of the Forms, being merely informational, do not result in action on the part of any regulatory agency.”¹⁸²

C. Public Policy Favors a Qualified Privilege

The qualified privilege is the “wiser policy” that “adequately protects the interests of all parties concerned.”¹⁸³ The qualified privilege balances the broker’s reputational interest, the

¹⁷⁶ See *id.* at 369, 866 N.E.2d at 445–46, 834 N.Y.S.2d at 500–01 (Pigott, J., dissenting).

¹⁷⁷ See *id.* at 370, 866 N.E.2d at 446, 834 N.Y.S.2d at 501 (Pigott, J., dissenting) (noting that, in contrast to the confidential statements heard in the attorney’s grievance committee, the Form U-5 is “widely disseminated” and, therefore, can unfairly penalize an employee in seeking new employment).

¹⁷⁸ See *infra* notes 194–206 and accompanying text.

¹⁷⁹ See *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 708 (7th Cir. 1994).

¹⁸⁰ *Id.*; see *infra* Part D (explaining that the U-5 serves as an employment reference).

¹⁸¹ *Baravati*, 28 F.3d at 708.

¹⁸² *Rosenberg*, 8 N.Y.3d at 369, 866 N.E.2d at 445–46, 834 N.Y.S.2d at 500–01 (Pigott, J., dissenting). Richard Pullano, NASD Chief Counsel, reiterated this informational purpose when he urged brokerage firms not to “camouflage” their explanations as to why a representative left the firm: “It doesn’t matter if you’ve left the firm voluntarily, been fired or retired, the firm has to submit the U-5 to regulators within 30 days The notification lets regulators know that registered representatives have left the firm, . . . but also, and more importantly, why the person left.” See *Regulator Warns Firms To Explain Why Reps Leave*, COMPLIANCE REP. (May 5, 2006) (emphasis and internal quotations omitted).

¹⁸³ *Dawson v N.Y. Life Ins. Co.*, 135 F.3d 1158, 1164 (7th Cir. 1998).

“securities regulators’ need for accurate and complete information” regarding the employment history of “problem representatives,” and a “broker-dealer[’s] desire for protection against civil liability for good-faith errors in Form U-5 reporting.”¹⁸⁴ The qualified privilege assures individuals that “securities firms do not have free rein to report customer complaints in any way they like, exaggerating complaints or inventing them wholesale with absolute immunity to do so.”¹⁸⁵ The qualified privilege, a standard above negligence but short of absolute immunity, best meets the needs of all parties.

In contrast, an absolute immunity provides employers with an incentive to use the Form U-5 to retaliate against departing employees.¹⁸⁶ For example, in *Svigos v. Merrill Lynch*,¹⁸⁷ Merrill Lynch fired an Illinois broker, but nonetheless told him that he would have a “clean” U-5.¹⁸⁸ Indeed, his original Form U-5 stated that his termination was “voluntary.”¹⁸⁹ The employer altered this language when the employer discovered that he was seeking employment at a competing brokerage firm.¹⁹⁰ Consequently, Merrill Lynch changed his form to state that he was under “internal review” and that “Mr. Svigos was terminated after it came to management’s attention that Mr. Svigos had violated a Firm directive which did not involve customer accounts.”¹⁹¹ Applying a qualified privilege, the court awarded the broker damages and ordered Merrill Lynch to amend the form to state a “misunderstanding with superiors” as the reason for termination.¹⁹²

In states employing the absolute privilege, these damages would not be available. With an absolute privilege in place, employers have no incentive to provide good-faith, accurate responses. An absolute privilege will effectively “insulate the members from liability for the contents of their U-5s [and] would be tantamount to allowing a member of the NASD to blackball a

¹⁸⁴ *Cicconi v. McGinn, Smith & Co., Inc.*, 27 A.D.3d 59, 65, 808 N.Y.S.2d 604, 609 (1st Dep’t 2005) (Ellerin, J., dissenting) (quoting Wright, *supra* note 16, at 1330–31).

¹⁸⁵ *Dawson*, 135 F.3d at 1164.

¹⁸⁶ *Id.*

¹⁸⁷ No. 93-04516, 2000 WL 1808278 (Oct. 6, 2000) (Sugarman & Baer, Arbs.).

¹⁸⁸ See Liddle & Brecher, *supra* note 10, at 690 n.17 (discussing the *Svigos* case).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* (internal quotations omitted).

¹⁹² *Id.* (internal quotations omitted).

former employee from employment throughout the large sector of the industry that the membership of the association constitutes."¹⁹³

D. A Qualified Privilege Generally Applies to Employment References

The Form U-5 is essentially an employment reference.¹⁹⁴ Moreover, it is a reference that is not limited to release on request—a securities employer is *required* to examine the Form before making a hiring decision.¹⁹⁵ After reviewing the Form, many employers think twice before hiring a broker with a disparaging statement on his Form U-5.¹⁹⁶ Similar to a negative employment reference, “any embellishment [on a Form U-5] can only damage the agent’s professional reputation and make the job hunt more difficult.”¹⁹⁷ For example, in *Glennon v. Dean Witter Reynolds, Inc.*,¹⁹⁸ the disparaged broker alleged that as a result of his employer’s defamatory remarks, he could not obtain a comparable job.¹⁹⁹ The court ruled in the broker’s favor and concluded that it was reasonable to infer “that the difficulty [in finding employment] was attributable to the publication of the Form U-5.”²⁰⁰ As this case demonstrates, statements provided on the Form U-5 act as an employment reference to future employers. Accordingly, given that an employer must review the form before making a hiring decision, the Form U-5 warrants the same protection that attaches to general employment references—a qualified privilege.

Moreover, the qualified privilege benefits the securities industry by encouraging employers to give complete and accurate references. With the rise in the prevalence of defamation suits

¹⁹³ *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 708 (7th Cir. 1994).

¹⁹⁴ *Id.* (analogizing the Form U-5 to “an employer’s character reference”).

¹⁹⁵ See Liddle & Brecher, *supra* note 10, at 678–79.

¹⁹⁶ See, e.g., Donovan, *supra* note 19.

¹⁹⁷ *Dawson v. N.Y. Life Ins. Co.*, 135 F.3d 1158, 1164 (7th Cir. 1998); see also *Jordan v. Metro. Life Ins. Co.*, 280 F. Supp. 2d 104, 108 (S.D.N.Y. 2003) (explaining the irreparable harm that results from a negative Form U-5). “There is no doubt that [a] negative Form U-5 will substantially damage [the employee’s] reputation . . . [and] [a]s a result, [the employee], who is now deemed an unethical agent, will have difficulties attracting prospective employers and clients and maintaining his client base.” *Id.*

¹⁹⁸ 83 F.3d 132 (6th Cir. 1996).

¹⁹⁹ *Id.* at 138.

²⁰⁰ *Id.*

and the judgments recovered from such suits, employers are overly cautious of providing employee references in fear of costly litigation.²⁰¹ As a result, “[r]ather than risk a lawsuit, many employers have adopted a ‘no comment’ or ‘name, rank and serial number’” policy.²⁰² In an effort to persuade employers to provide more material information than these “no comment” references,²⁰³ several states enacted statutes to confer a qualified privilege on the employer.²⁰⁴ These statutes confer a “good faith” immunity on employers²⁰⁵ and can be rebutted upon a demonstration of malice.²⁰⁶

Additionally, whether or not a state statute has been enacted, case law in the United States generally “recognizes a qualified privilege between former and prospective employers as long as the statements are made in good faith and for a legitimate purpose.”²⁰⁷ For example, in *Wilson v. U.T. Health Center*,²⁰⁸ the Fifth Circuit held that Wilson, a defamed police officer, presented sufficient evidence to overcome her employer’s qualified privilege.²⁰⁹ After reporting an incident of sexual harassment against another employee, the officer’s employer reprimanded her for waiting approximately one month to report

²⁰¹ See John Ashby, *Employment References: Should Employers Have an Affirmative Duty To Report Employee Misconduct to Inquiring Prospective Employers?*, 46 ARIZ. L. REV. 117, 126 (2004).

²⁰² See Valerie L. Acoff, Note, *References Available upon Request . . . Not!—Employers Are Being Sued for Providing Employee Job References*, 17 AM. J. TRIAL ADVOC. 755, 756 (1994).

²⁰³ *Id.*

²⁰⁴ See Frank C. Morris Jr., *Workplace Privacy Issues: Avoiding Liability*, 1999 A.L.I.-A.B.A. COURSE STUDY 697, 755 (1999) (noting that most states adopted statutes “codify[ing] the common law qualified privilege”). Such states include: Alaska, Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Maine, Maryland, Michigan, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, West Virginia, Wisconsin, and Wyoming. *Id.* Louisiana’s statute also affords the employer a qualified privilege; however, the statute grants absolute immunity to “prospective employers from negligent hiring suits.” *Id.*

²⁰⁵ *See id.*

²⁰⁶ *Id.* at 748.

²⁰⁷ *Lewis v. Equitable Life Assurance Soc’y of the U.S.*, 389 N.W.2d 876, 889 (Minn. 1986), *superseded by statute on other grounds*, MINN. STAT. §§ 181.933(2), 181.962(2) (2006), *as recognized in* *Emery v. Ne. Ill. Reg’l Commuter R.R. Corp.*, 880 N.E.2d 1002, 1011 (2007).

²⁰⁸ 973 F.2d 1263 (5th Cir. 1992).

²⁰⁹ *Id.* at 1271.

the harassment.²¹⁰ When she reported an additional instance of harassment, she was demoted and later fired.²¹¹ In retaliation for her complaints of sexual harassment, the employer portrayed the officer as a “forger and a liar” in her letter of termination.²¹² As a result of this retaliation, the employer’s statement was not entitled to qualified immunity, and the employer’s summary judgment motion was denied.²¹³ Similarly, in *Calero v. Del Chemical Corp.*,²¹⁴ the Wisconsin Supreme Court applied a qualified privilege to an employer’s false accusation in response to a prospective employer’s request for an employment reference.²¹⁵ The employer accused a former employee of “hiring away employees” and stealing confidential records to start his own business.²¹⁶ At trial, the employer admitted that these statements were based on a “pretty well-known office rumor” that he did not investigate.²¹⁷ The court applied a qualified privilege and affirmed the employee’s compensatory and punitive damages award on the basis that the employer’s reckless disregard for the truth amounted to malice to defeat the employer’s qualified immunity.²¹⁸

E. The Absolute Privilege Provides an Illusory Remedy

The majority in *Rosenberg* attempted to console defamed individuals by reminding them that they may bring an expungement action to remove defamatory statements from their Form U-5;²¹⁹ yet, the court failed to recognize the expense and delay of bringing such action. Expungement is an expensive

²¹⁰ *Id.* at 1266. Wilson was reprimanded for “undress[ing] [herself] of responsibility both mentally and administratively by alleging intimidation and by waiting twenty-eight days before taking any action and/or reporting the incident.” *Id.* Regardless of this reprimand, the offender was suspended for three days without pay. *Id.*

²¹¹ *Id.* at 1266–67. Wilson reported an additional officer’s harassment of two female employees. *Id.* at 266. Nevertheless, at a subsequent meeting and a later trial, this “victim” identified several exaggerations in Wilson’s report. *Id.* This chain of events prompted her demotion. *Id.*

²¹² *Id.* at 1271.

²¹³ *Id.*

²¹⁴ 228 N.W.2d 737 (Wis. 1975).

²¹⁵ *Id.* at 744.

²¹⁶ *Id.* at 740.

²¹⁷ *Id.*

²¹⁸ *See id.* at 751.

²¹⁹ *Rosenberg v. MetLife, Inc.*, 8 N.Y.3d 359, 368, 866 N.E.2d 439, 445, 834 N.Y.S.2d 494, 500.

process, and it is not certain whether brokers will have the financial wherewithal to bring such an action.²²⁰ Moreover, by the time the broker initiates the expungement proceeding, it might be too late.²²¹ At this point, the broker may have already lost all his clients. Furthermore, the victim cannot obtain money damages, which, in most situations, is the only way to redress the broker's injury.²²² Expungement is, therefore, a "pyrrhic" remedy.²²³ If a broker is in fact successful in getting a statement expunged, he may be out of work for years until the expungement actually occurs, and the harm at that point may be irreparable.²²⁴ Moreover, the broker's initiation of a "suit against the company may itself have future detrimental effects [because a] person who brings suit against a former employer is likely to be a less attractive employment candidate to prospective employers."²²⁵

F. Model Codes Hold for a Uniform Qualified Privilege

Two model provisions, the NASD's proposal to extend a qualified immunity to all covered forms²²⁶ and section 507 of the Uniform Securities Act, also advocate for a uniform qualified privilege.²²⁷

In 1998, in response to the number of defamation claims for alleged untrue or misleading statements made on the Form U-5, the NASD proposed a qualified uniform standard.²²⁸ The proposed rule provided for a qualified immunity in arbitration proceedings for statements made on both Forms U-4 and U-5.²²⁹ The NASD balanced the integrity of the Central Registration

²²⁰ See Liddle & Brecher, *supra* note 10, at 686–87.

²²¹ See *id.* at 687.

²²² See *id.*

²²³ *Id.*

²²⁴ See *id.*

²²⁵ See *Lewis v. Equitable Life Assurance Soc'y of the U.S.*, 389 N.W.2d 876, 891 (Minn. 1986), *superseded by statute on other grounds*, MINN. STAT. §§ 181.933(2), 181.962(2) (2006), *as recognized in Emery v. Ne. Ill. Reg'l Commuter R.R. Corp.*, 880 N.E.2d 1002, 1011 (2007).

²²⁶ See NASD, *supra* note 59, at 662. "Covered Forms" include both the Form U-4 and Form U-5. *Id.*

²²⁷ UNIFORM SECURITIES LAW § 507 (2002).

²²⁸ Press Release, Securities and Exchange Commission, NASD Rulemaking: Qualified Immunity in Arbitration Proceedings for Statements Made on Forms U-4 and U-5 (Apr. 21, 1998), <http://www.sec.gov/rules/sro/nd9818n.htm> (notice that the NASD had filed a proposed rule that NASD members have qualified immunity in arbitration proceedings made on the Form U-5 to the SEC).

²²⁹ See NASD, *supra* note 59, at 659.

Depository in preserving full and fair disclosure and adequate protection to employees from statements "designed . . . to penalize a departing employee" and came to the conclusion that a qualified privilege would "strike a balance" between the concerns of the employer and employee.²³⁰ The NASD also addressed judicial efficiency concerns and concluded that there is no need to protect the judicial docket because "the number of defamation cases relative to the NASD's overall arbitration caseload is small."²³¹

The proposal remained, however, just a proposal and was never passed.²³² The proposal's failure, nonetheless, is not attributable to its central premise that the Form U-5 warrants a qualified immunity, but rather to procedural conflicts based partly on concerns that the NASD lacked jurisdiction to impose a uniform standard that differed from local law.²³³ Nevertheless, the NASD's efforts were not entirely futile. In 2002, the commissioners of the Uniform Securities Act proposed a qualified privilege to Forms U-4 and U-5.²³⁴

The Uniform Securities Act is a model act proposed by the National Conference of Commissioners on Uniform State Laws ("NCCUSL").²³⁵ Section 507 is a qualified immunity provision designed to protect broker-dealers from defamation claims on information filed with the SEC or self-regulatory organization "unless the person knew, or should have known at the time that the statement was made, that it was false in a material respect

²³⁰ *Id.* at 662.

²³¹ See NASD, REGULATION REQUEST FOR COMMENT 97-77, at 661 (1997).

²³² See Curzon et al., *NY Court: Broker-Dealers Immune from Defamation Suits Based on Statements in Employment Termination Notices*, DECHERT ON POINT, Mar. 2006, at 1, available at http://www.dechert.com/library/FS_FSSL_Update_03-06.pdf.

²³³ See *id.*; see also *NASD Issues U-5 Immunity Rule*, REGISTERED REP., Dec. 1, 1997, available at http://registeredrep.com/mag/finance_nasd_issues_immunity/ (also attributing the proposal's failure to criticism over the proposed requirement that representatives be given a copy of their Form U-5 ten days before filing).

²³⁴ See UNIFORM SECURITIES ACT, § 507 cmt. 7 (2002).

²³⁵ See generally UNIFORM SECURITIES ACT. The Act was created by an organization made up of more than three hundred lawyers, judges, and law professors appointed to draft uniform state securities proposals to the legislature. See Press Release, The National Conference of Commissions on Uniform State Laws, New Uniform Securities Act Approved (Aug. 5, 2002), http://www.nccusl.org/nccusl/pressreleases/pr080502_SEC.asp.

or the person acted in reckless disregard of the statement's truth or falsity."²³⁶ The commissioners considered and rejected the application of the absolute privilege:

This Section . . . is consistent with most litigated cases to date and is a response to concerns that defamation lawsuits have deterred broker-dealers and investment advisers from full and complete disclosure of problems with departing employees. The Drafting Committee was also sensitive to the concern that such immunity could allow broker-dealers and investment advisers to unfairly characterize employees to protect their "book" of clients. Because of this concern the Drafting Committee rejected proposals for an absolute immunity.²³⁷

Prior to September 2002, immunity decisions were adopted only through judicial decisions.²³⁸ Since 2002, however, fourteen states and the U.S. Virgin Islands adopted section 507 of the Uniform Securities Act.²³⁹ Georgia and Wisconsin have bills pending to enact the Act in the near future.²⁴⁰

CONCLUSION

The qualified privilege strikes the appropriate balance between the securities industry's need for complete and accurate information and the protection of a broker's reputational interest. Unlike the absolute privilege, the qualified privilege does not provide the employer with absolute immunity to defame its employees. Moreover, given that the broker must overcome the difficult hurdle of proving malice in order to hold the employer liable, the qualified privilege still offers the employer adequate protection. Thus, by granting the employer limited liability, the qualified privilege adequately protects the broker, employer, and the investing public.

²³⁶ See UNIFORM SECURITIES ACT § 507.

²³⁷ See *id.* § 507 cmt. 6.

²³⁸ See *id.* § 507 cmt. 7.

²³⁹ MICH. H.R., SUMMARY OF HOUSE BILLS 5008–5020 AND 5022–5024 AS REPORTED FROM COMMITTEE (2008) (noting that Hawaii, Idaho, Indiana, Iowa, Kansas, Maine, Minnesota, Missouri, Oklahoma, South Carolina, South Dakota, Vermont, Wisconsin, and the U.S. Virgin Islands incorporated section 507 of the Uniform Securities Act into their state statutes), available at <http://www.legislature.mi.gov/documents/2007-2008/billanalysis/House/htm/2007-HLA-5008-3.htm>.

²⁴⁰ *States Issues: Model Uniform Securities Act*, SEC. INDUSTRY AND FIN. MARKETS ASS'N, Aug. 14, 2008, <http://www.sifma.org/legislative/state/model-uniform.html>.

The absolute privilege, by contrast, affords no such compromise. This complete immunity has been confined to "very few situations where there is an obvious policy in favor of permitting complete freedom of expression."²⁴¹ Few courts have extended this privilege to the Form U-5. As the Seventh Circuit noted in *Baravati v. Josephthal, Lyon & Ross, Inc.*, the grant of an absolute immunity is "tantamount to allowing a member of the NASD to blackball a former employee."²⁴² This protective shield bars all redress to the employee's tarnished reputation and ultimately provides employers with *carte blanche* power—in essence, a "license to lie."

²⁴¹ See KEETON ET AL., *supra* note 64, § 114.

²⁴² *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 708 (7th Cir. 1994).