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# Narrowing the Scope of Absolute Judicial Immunity from Section 1983 Suits: The Bar Grievance Committee and the Judicial Function

## I. INTRODUCTION

State bar grievance committees are charged with the responsibility of ensuring that only those lawyers who meet the stringent standards of professional qualification and personal honesty are allowed to serve in the profession. Yet, public confidence in lawyers appears to be declining.[1] The public now views professional misconduct as more than a series of isolated problems but rather as a general failure of the legal system.[2]

The grievance committees are often the only protection the public will receive from unqualified lawyers.[3] Thus, the committees are under strong pressure from the public to discipline the bar, but improper committee action might violate the constitutional rights of attorneys or the public. The grievance committees themselves have come under attack because of a public perception that the committee is part of a corrupt network of predatory lawyers designed to facilitate the abuse of an innocent public.

In order to protect grievance committee members from suits, grievance committee members have traditionally been afforded absolute judicial immunity from section 1983 suits. However, this immunity effectively insulates the committee from liability for unconstitutional acts. This comment will examine the history and purpose of the bar grievance committee in Part II. Part III of this comment explores the development of the immunity doctrine and recent limitations on absolute immunity. The policy considerations which justify absolute immunity for judges will be considered in light of the grievance committee functions in Part IV. In Part V this comment concludes that absolute im-

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1. *See generally* Weber, *"Still in Good Standing" The Crisis in Attorney Discipline*, 73 A.B.A. J. 58 (1987).

2. *See id.*

3. An abused client may lack the resources required to successfully sue an attorney. Some clients may not even realize they have an actionable claim against an attorney because that attorney may blame the client, the system or other attorneys for that attorney's own failure to protect the client's rights.

munity may be unjustified and unwarranted for grievance committee members.

## II. The Structure of the Bar Grievance Committee

### A. *Early Disciplinary Control*

The first grievance or disciplinary committees were formed by local bar associations in the 1870s and 1880s. For the next century, local bar associations retained control over any disciplinary sanctions imposed on local attorneys.[4] The authority of the bar to regulate itself came under increasing attack from a public dissatisfied with the lack of real protection from incompetent or unscrupulous lawyers.

In 1967, the American Bar Association (ABA) created the Special Committee on Evaluation of Disciplinary Enforcement to study lawyer discipline. After a three-year study, the Committee found that disciplinary action in many jurisdictions was practically nonexistent and recommended changes in the system.[5] In 1970, the Michigan Supreme Court took the lead in assuming control of lawyer discipline by creating a statewide disciplinary system accountable only to the court.[6] This began a nationwide trend to shift responsibility for lawyer discipline away from the local bar associations to the state supreme courts.[7] Since that time, almost all jurisdictions have restructured their disciplinary procedures to better protect the public.[8]

### B. *Modern Disciplinary Systems*

The ABA has formed a permanent committee, the Standing Committee on Professional Discipline, which monitors disciplinary procedures and prepares annual statistics. These statistics reveal the enormous size of the disciplinary task. A recent committee report shows 820,180 lawyers were licensed to practice law in the United States. A total of 93,622 complaints were re-

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4. This authority of self-regulation was highly valued because of the autonomy from external control which it provided. Powell, *Professional Divestiture: The Cession of Responsibility for Lawyer Discipline*, 1986 Am. B. Found. Res. J. 31, 33.

5. American Bar Association, Problems and Recommendations in Disciplinary Enforcement 1 (1970).

6. Powell, *supra* note 4, at 34-35.

7. *Id.*

8. *See* American Bar Association, Survey on Lawyer Discipline Systems (1988). By 1983 the state supreme court or a court-appointed body administered the disciplinary system in a strong majority of jurisdictions. Powell, *supra* note 4, at 35 n.16.

ceived by state grievance systems against those lawyers of which 53,573 were investigated. 2,002 lawyers were privately sanctioned and 1,848 were publicly sanctioned.[9] In spite of the great number of public complaints, the average state budgets only $55 per licensed lawyer per year to fund its disciplinary system.[10]

### C. *The American Bar Association Model Rules*

The American Bar Association has promulgated model rules for state disciplinary systems.[11] Many states have statewide systems inspired by the ABA model.[12] Thus, an examination of the ABA model will be helpful in understanding typical systems.

The ABA model and most disciplinary systems rely on a multi-level review system to investigate lawyer misconduct. These levels typically consist of an office of bar counsel, a hearing or grievance committee, a statewide disciplinary board, and the state supreme court.[13] The office of bar counsel is responsible for investigating complaints and presentation of cases.[14] The hearing or grievance committee is often composed of a mixture of lawyers and non-lawyers who hear the initial cases and decide on an appropriate sanction.[15] The statewide disciplinary board then reviews the action of the grievance committee and either dismisses the case, imposes sanctions, or recommends suspension or disbarment to the state supreme court. This panel also typically consists of both lawyers and public members.[16] The state supreme court has final authority for reviewing the recommendations of the disciplinary board since only the highest court may suspend or disbar an attorney.[17] An attorney sus-

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9. AMERICAN BAR ASSOCIATION, SURVEY ON LAWYER DISCIPLINE SYSTEMS (1988).

10. Typical sources of the funds are bar association dues, court-assessed fees, supreme court budget allocations or legislative appropriations. *Id.*

11. *See* MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT (1989); MODEL STANDARDS FOR IMPOSING LAWYER SANCTIONS (1986).

12. *See, e.g.*, McGowan & Caton, *The Illinois Judicial Disciplinary System: An Overview*, 77 ILL. B.J. 314 (1989); Schwartz & Dubin, *Recent Changes in Michigan Disciplinary Procedure: A Job Unfinished*, 66 U. DET. L. REV. 411 (1989); Comment, *Ohio's Legal Disciplinary Procedures and Rules*, 12 U. DAYTON L. REV. 359 (1986).

13. AMERICAN BAR ASSOCIATION & BUREAU OF NATIONAL AFFAIRS, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 201:301 (1984) [hereinafter ABA/BNA MANUAL].

14. MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT Rule 4 (1989).

15. MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT Rule 3 (1989).

16. MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT Rule 2 (1989).

17. *See* MODEL STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS (1979); ABA/BNA MANUAL, *supra* note 13, at 101:2003.

pended or disbarred by a state court will often be similarly sanctioned by a federal court.[18]

### *D. The Nature of the Disciplinary Proceeding*

Disciplinary systems are distinct from both civil and criminal proceedings.[19] Disciplinary proceedings are not lawsuits between the parties, but rather an inquiry into the conduct of the lawyer.[20] As one court stated:

> They are not for the purpose of punishment, but rather seek to determine the fitness of an officer of the court to continue in that capacity and to protect the courts and the public from the official ministration of persons unfit to practice. Thus the real question at issue in a disbarment proceeding is the public interest and the attorney's right to continue to practice a profession imbued with public trust.[21]

The allocation of responsibility for lawyer discipline is also different than for criminal or civil proceedings. The state's highest court has ultimate and exclusive responsibility for the lawyer discipline system. In some states, this inherent power of the court is evidenced by a provision of the state constitution.[22]

## III. THE DEVELOPMENT OF THE IMMUNITY DOCTRINE

### *A. Section 1983 Historical Background*

Following the civil war and the adoption of the thirteenth, fourteenth and fifteenth amendments, racial hatred was wide-

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18. The federal court, while not bound by the findings of the state court, may afford a rebuttable presumption to the findings of the state court. *See* FED. R. APP. P. 46(b). A federal court's obligation to conduct a de novo review is limited to three issues: 1) whether due process notice and opportunity to be heard were afforded; 2) whether there was a patent defect in the proof of the case; and 3) whether there is any overriding reason why the federal court should not disbar. *See* Note, *Disbarment in the Federal Courts*, 85 YALE L.J. 975 (1977).

19. How a jurisdiction characterizes the nature of its disciplinary proceedings determines the standard of proof and the evidentiary rules that will be followed. A majority of states have determined that the proper standard of proof is "clear and convincing evidence." ABA/BNA MANUAL, *supra* note 13, at 101:2101.

20. The ABA Model includes the following statement of purpose:

> The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely properly to discharge their professional duties to clients, the public, the legal system, and the legal profession.

MODEL STANDARDS FOR IMPOSING LAWYER SANCTIONS Rule 1.1 (1986).

21. *In re* Echeles, 430 F.2d 347, 349 (7th Cir. 1970).

22. *E.g.*, Alaska, Florida, New Jersey.

spread. Throughout the South, blacks were subjected to violence and intimidation.[23] The state police and the state courts seemed unable or unwilling to control the problem. The issue of racial intolerance and unequal protection under the law was widely debated in Congress and finally resulted in the passage of section 1983. It provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the Jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[24]

The "real" intent of Congress in passing the statute has been widely debated by the courts charged with interpreting section 1983.[25] However, it is clear that "[t]he very purpose of section 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative or judicial."[26] Personal liability of state officials for illegal conduct was believed to be the only way to effectively protect the rights of the public.

Section 1983 itself does not mention immunities. It's terms are absolute: "Every person . . . shall be liable to the party injured in an action at law."[27] Yet, it would make little sense to strictly enforce the statute without any immunity, even for good faith violations.[28] The question then becomes, to what extent should immunity be recognized?

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23. This violence was often under the leadership of the Ku Klux Klan. Wilson v. Garcia, 471 U.S. 261, 276 (1985).

24. 42 U.S.C. § 1983 (1988).

25. The Supreme Court has stated:

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance, or otherwise, state rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

Monroe v. Pape, 365 U.S. 167, 180 (1961) (overruled by Monell v. Dep't of Social Servs., 436 U.S. 658 (1978)).

26. Mitchum v. Foster, 407 U.S. 225, 242 (1971) (citations omitted).

27. 42 U.S.C. § 1983 (1988).

28. Scheuer v. Rhodes, 416 U.S. 232, 240 (1974). Without some form of immunity from suit, few individuals would be willing to work for governmental entities because of the personal liability under section 1983 which might result from their seemingly inno-

### *B. The Development of Immunity*

In early English law, appeal from one court to a higher court to challenge the basis of the original decision was completely unknown. A dissatisfied litigant challenged the decision by bringing an accusation against those who decided the case. As the hierarchal appellate procedure was developed, judicial immunity was recognized as a method of discouraging collateral attacks and encouraging formal appeals as the proper method for correcting judicial error.[29] By the time the American courts were established, judicial immunity was a well-established doctrine.[30]

In deciding the extent of a governmental official's immunity, the Supreme Court has traditionally taken a "functional" approach when the immunity is not grounded in an express constitutional or statutory provision. Under this functional approach, the Court examines the nature of the functions a particular official performs, and attempts to determine the likely effect on the performance of those functions that potential personal liability would have.[31] The officials themselves have the "burden of showing that such an exemption is justified by overriding considerations of public policy."[32]

The Court has recognized two basic types of immunity from section 1983 suits: absolute immunity and qualified immunity. While both types of immunity are similar in that they attach rather narrowly to the function performed and not to the office held by the official, the procedural difference between the immunities is critical. An absolute immunity defense defeats the suit at the outset of the case, while a qualified immunity defense is dependant upon the facts and circumstances of the case.[33]

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cent acts.

29. Block, Stump v. Sparkman *and the History of Judicial Immunity*, 1980 DUKE L.J. 879.

30. Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1872) (Judicial immunity was "the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country.").

31. *See* Butz v. Economou, 438 U.S. 478, 512 (1978).

32. Forrester v. White, 484 U.S. 219, 224 (1988).

33. A denial of immunity is immediately appealable since the immunity represents a right not to stand trial and not just a right not to pay damages. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

*1. Absolute immunity*

Officials who perform legislative, judicial, executive and prosecutorial functions may claim absolute immunity and may not be sued for damages or injunctive relief for their actions taken within the normal scope of their function. Legislative officials are granted immunity by the Speech or Debate Clause[34] which is perhaps the strongest grant of immunity.[35] Yet, even this specific constitutional guarantee has been limited in scope to provide immunity no greater than is necessary.[36]

Judges are afforded absolute immunity from money damages for their judicial acts.[37] The only exception to this general rule is when the judge acts in the "clear absence of all jurisdiction."[38]

Executive immunity is a form of absolute immunity which protects the President of the United States from suits arising from official acts.[39] The presidency is considered to be a unique office and absolute immunity is regarded as necessary so that the President may be free to make essential decisions without fear of suit. Even so, this immunity protects only the President and may not be extended to other high executive officials.[40]

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34. U.S. CONST. art. I, § 6, cl. 1.

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; *and for any Speech or Debate in either House, they shall not be questioned in any other Place.*

*Id.* (emphasis added).

35. Legislators are absolutely immune from suits for damages, injunctive or declaratory relief for acts performed in their official function. Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 732 (1980).

36. The immunity is recognized only to the extent that the legislator acts "in a field where legislators traditionally have power to act." Temmey v. Brandhove, 341 U.S. 367, 379 (1951). Legislative aids are immune only to the extent that the legislator would have been protected had the legislator performed the act. Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975). *See also* Gravel v. United States, 408 U.S. 606, 625 (1972).

37. Butz v. Economou, 438 U.S. 478 (1978) (administrative law judge receives immunity for judicial findings); Pierson v. Ray, 386 U.S. 547, 554 (1967); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871).

38. Stump v. Sparkman, 435 U.S. 349, 357 (1978). *See also infra* notes 51-54 and accompanying text.

39. Nixon v. Fitzgerald, 457 U.S. 731 (1982).

40. *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982) (President's personal aides not protected by executive immunity); Mitchell v. Forsyth, 472 U.S. 511 (1985) (cabinet level

Public prosecutors are absolutely immune from suits for money damages but may always be sued for injunctive and declaratory relief.[41] Absolute immunity is considered essential because "harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust."[42] As with other grants of absolute immunity, the prosecutor is not protected beyond the scope of her official responsibility.[43] Not all functions typically performed by a public prosecutor entitle the prosecutor to absolute immunity from suit while performing them. For example, a prosecutor performing investigatory activities may only claim qualified immunity.[44]

### 2. *Qualified or "good faith" immunity*

Under certain circumstances, a grant of absolute immunity is unwarranted and leads to unfair results. As a result, the Supreme Court has recognized a category of "qualified" immunity that avoids unnecessarily extending the common law absolute immunity.[45] The Court has stated that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[46] In application, this principle means that as long as a reasonable person would not have known that the conduct complained of violated clearly recognized rights, the government actor is entitled to qualified

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officers not protected by executive immunity); Scheuer v. Rhodes, 416 U.S. 232 (1974).

41. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279 (1987).

42. Imbler v. Pachtman, 424 U.S. 409, 423 (1976) (prosecutor absolutely immune from suit even if he knowingly used perjured testimony to send an innocent man to jail for nine years).

43. *Mitchell*, 472 U.S. at 511 (Attorney General entitled only to qualified immunity when performing national security function).

44. Briggs v. Goodwin, 569 F.2d 10 (D.C. Cir. 1977), *cert. denied*, 427 U.S. 904 (1978).

45. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800 (1982); Butz v. Economou, 438 U.S. 478 (1978); Scheuer v. Rhodes, 416 U.S. 232 (1974).

46. *Harlow*, 457 U.S. at 818. A previous test denied qualified immunity if the official knew or should have known that the action violated constitutional rights or if the official acted with malicious intent to deprive the plaintiff of constitutional rights. Wood v. Strickland, 420 U.S. 308 (1975). This test was abandoned in *Harlow* as unmanageable and disruptive of court procedures. 457 U.S. at 816-17.

immunity.[47] Therefore, to overcome qualified immunity, a plaintiff must prove a deliberate abuse of governmental authority.[48] The mere negligence of a governmental official is insufficient.[49] Since absolute immunity is recognized in relatively few instances, most executive branch and administrative officials can claim only qualified immunity.[50]

### C. *Immunity and the Judicial Function*

The leading case on judicial immunity from civil liability is *Stump v. Sparkman*.[51] Judge Harold D. Stump was asked by a mother to sign a petition to have her fifteen year old daughter sterilized. The mother claimed her daughter was sexually active and that a tubal ligation was necessary "to prevent unfortunate circumstances."[52] Judge Stump granted the petition on the same day without appointing a guardian *ad litem* to represent the daughter's interests and without a hearing.[53] Eight days later, the daughter was sterilized, after being told she was to undergo an appendectomy. Two years later she married. It was not until four years after the operation that she realized she had been sterilized. The daughter and her husband brought suit against Judge Stump under section 1983. The Court ruled that Judge Stump was absolutely immune from suit finding that he merely acted in excess of his jurisdiction, not in the clear absence of all jurisdiction.[54]

*Stump* illustrates the extraordinary scope of protection which absolute judicial immunity provides. The extent of a judge's impropriety is immaterial so long as the act was within the court's jurisdiction. Because of the unusual protection which absolute immunity affords, courts tend to construe the immunity narrowly.

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47. *See* Werle v. Rhode Island Bar Ass'n, 755 F.2d 195, 199 (1st Cir. 1985).

48. Mitchell v. Forsyth, 472 U.S. 511 (1985). The denial of qualified immunity, like a denial of absolute immunity, is an immediately appealable order.

49. Schweiker v. Chilicky, 487 U.S. 412 (1988); Daniels v. Williams, 474 U.S. 327 (1986).

50. E. CHEMERINSKY, FEDERAL JURISDICTION § 8.6.3, at 414 (1989).

51. 435 U.S. 349 (1978).

52. *Id.* at 353.

53. Block, *supra* note 29, at 911 (quoting Brief for Respondents at 3, Stump v. Sparkman, 435 U.S. 349 (1978)).

54. *Stump*, 435 U.S. at 358. For a more complete discussion of *Stump*, see Block, *supra* note 29; Rosenber, Stump v. Sparkman: *The Doctrine of Judicial Immunity*, 64 VA. L. REV. 833 (1978).

### *D. Absolute Immunity Typically Afforded Grievance Committees*

It is well established that administrative boards have absolute judicial immunity from section 1983 suits while they are performing judicial functions.[55] The difficulty comes about in determining whether a particular board, including a grievance committee, is acting in a quasi-judicial role.

Using the judicial function rationale, bar grievance committees are often afforded absolute immunity for their official acts.[56] If the grievance committee is organized as an administrative agency of the judicial department, the committee may be viewed as an arm of the state supreme court entitled to the same immunity as the court would have in policing the bar.[57] *Slavin v. Curry*[58] is typical of this type of reasoning by the courts. Frank Slavin filed a pro se complaint against twenty individuals, including bar grievance committee members, alleging a massive conspiracy and coverup involving his trial on a charge of indecency with a child. Slavin claimed he had been framed and that his court-appointed attorney had been involved. Slavin's allegations against his attorney had been investigated by the bar grievance committee which found no violation of the code of professional responsibility.[59] The fifth circuit found the grievance committee members absolutely immune from suit. Reasoning that since Texas law characterized the grievance committee as an arm of the state supreme court, the court held that the

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55. Butz v. Economou, 438 U.S. 478 (1978).

56. The ABA Model rules include the following provision relating to immunity:

> Communications to the board, hearing committees, or disciplinary counsel relating to lawyer misconduct or disability and testimony given in the proceedings shall be absolutely privileged, and no lawsuit predicated thereon may be instituted against any complainant or witness. Members of the board, members of hearing committees, disciplinary counsel, and staff shall be immune from suit for any conduct in the course of their official duties.

MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT Rule 12(A) (1989).

57. *See, e.g.*, State v. Sewell, 487 S.W.2d 716, 719 (Tex. 1972) (construing TEX. REV. CIV. STAT. ANN. art. 320a-1 (Vernon 1973 & Supp. 1978)).

58. 574 F.2d 1256, *modified on other grounds*, 583 F.2d 779 (5th Cir. 1978). *Slavin* was overruled by Sparks v. Duval County Ranch Co., 604 F.2d 976 (5th Cir. 1979), insofar as it extended a derivative immunity to private persons who conspire with judges. Because the grievance committee members in *Slavin* were afforded absolute immunity as an arm of the state supreme court and not as coconspirators with a judge, the *Slavin* court's reasoning as to the grievance committee members would appear to be unaffected by *Sparks*.

59. *Id.* at 1266.

committee should be entitled to the same immunity the judges would have received had they performed the same functions.[60]

Other courts allow grievance committee members absolute judicial immunity because of their prosecutorial functions.[61] If, however, the committee member serves as an investigator rather than a prosecutor, the member is entitled to a lesser, qualified immunity afforded to other state investigators.[62]

In *Simons v. Bellinger*,[63] the court relied on a multi-factor analysis to determine if absolute immunity was warranted for an administrative committee. Morton and Barbara Simons brought suit against the members of the District of Columbia Court of Appeals Committee on Unauthorized Practice of Law alleging the members of the committee had violated the Simons' constitutional rights by harassing them during the course of a committee investigation.[64] The trial court ordered summary judgment in favor of the committee members based upon a finding of qualified immunity.[65] On appeal, the Simons claimed that summary judgment was inappropriate because of disputed facts in the case. Nevertheless, the Court of Appeals for the District of Columbia rejected the Simons' argument, finding that the committee members were entitled to absolute immunity.

The *Simons* court relied on a three-factor analysis to determine whether a particular government official should be granted absolute immunity: first, the functional comparability of an official's acts to those of a judge; second, the prospect of future harassment or intimidation by disappointed litigants; and, third, the procedural safeguards in the system to guard against the need for private damages to control unconstitutional conduct.[66]

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60. *Id.*

61. *E.g.*, Kissell v. Breskow, 579 F.2d 425 (7th Cir. 1978) (bar association official immune from recommendation of disbarment to disciplinary commission); Ginger v. Circuit Court for County of Wayne, 372 F.2d 621 (6th Cir. 1967) (bar association officials immune because they acted within statutory powers), *cert. denied*, 387 U.S. 935 (1967); Clark v. Washington, 366 F.2d 678 (9th Cir. 1966) (bar association immune from suit as an integral part of the judicial process); Schneider v. Colegio de Abogados de Puerto Rico, 546 F. Supp. 1251 (D.P.R. 1982); *but see* Dacey v. New York County Lawyers' Association, 423 F.2d 188 (2d Cir. 1969), *cert. denied*, 398 U.S. 929 (1970) (denying prosecutorial immunity where non-lawyer brought suit against bar association).

62. *See, e.g.*, McSurely v. McClellan, 697 F.2d 309 (D.C. Cir. 1982).

63. 643 F.2d 774 (D.C. Cir. 1980).

64. *Id.* at 776.

65. *Id.* at 777.

66. *Id.* at 778 (citing Butz v. Economou, 438 U.S. 478, 512 (1978)). A careful reading of *Butz* reveals that these factors were considered by the Court as part of a general policy argument but were not established as a static multi-prong test.

Applying this analysis, the court determined that the actions of the committee members were sufficiently similar to judicial acts to warrant a grant of absolute immunity.

Still other courts seek to avoid the problem of determining what level of immunity is justified in a particular case by determining whether the acts complained of would be protected by the lesser, qualified immunity. In *Werle v. Rhode Island Bar Association*,[67] Dr. Michael Werle, a psychologist, brought a section 1983 action against the members of the Rhode Island Bar Association Committee on Unauthorized Practice of Law alleging the committee violated his constitutional rights by demanding that he discontinue his divorce mediation service. The committee claimed Dr. Werle's business involved him in the unauthorized practice of law in violation of state law.[68] Dr. Werle claimed that the committee's actions had a chilling effect on the exercise of his constitutional rights.[69] The first circuit found it unnecessary to determine whether absolute or qualified immunity applied to the committee. Since there was no evidence the committee's actions violated clearly established statutory or constitutional rights, the committee was immune from suit under the lesser, qualified immunity.[70]

### *E. Recent Limitations on Judicial Immunity*

Judges are absolutely immune from civil suit only for judicial or adjudicatory functions, but not for executive or administrative actions.[71] While this rule seems intrinsically defendable, it is often difficult to differentiate between these functions.

In *Forrester v. White*,[72] the Supreme Court held that a state-court judge does not have absolute immunity from a section 1983 damages suit for his decisions to demote and dismiss a court employee. Judge Howard Lee White hired Cynthia Forrester as an adult and juvenile probation officer.[73] When Forrester was subsequently demoted and ultimately discharged by

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67. 755 F.2d 195 (1st Cir. 1985).

68. *Id.* at 196.

69. *Id.* at 198.

70. *Id.* at 200.

71. Forrester v. White, 484 U.S. 219 (1988). Judges also receive absolute immunity when performing legislative or prosecutorial functions which also warrant absolute immunity. *See* Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980).

72. 484 U.S. 219 (1988).

73. *Id.* at 221.

Judge White, she filed suit claiming Judge White had discriminated against her on account of her sex.[74] A jury awarded Forrester $81,818.80 damages under section 1983.[75] The district court granted Judge White's motion for a new trial finding the verdict was against the weight of the evidence. Judge White then filed a motion for summary judgment claiming he was entitled to "judicial immunity." The motion was granted and Forrester appealed.[76] On appeal, the seventh circuit affirmed the grant of summary judgment holding that judges must be free from the threat of such suits to protect the judge's decisionmaking.[77] A unanimous Supreme Court reversed, ruling that the firing of Forrester was administrative, not judicial, and that Judge White was not entitled to absolute immunity.[78]

Traditional notions of absolute judicial immunity were dealt another serious blow in *Pulliam v. Allen*[79] where the Supreme Court ruled that state court judges[80] can be subject to liability for attorneys' fees[81] in a case in which the judge could not be required to pay other money damages.

*Pulliam* has been strongly criticized by those who believe that any monetary award against a judge, whether deemed to be damages or attorneys' fees, has the same chilling effect on judicial independence.[82] Supporters of the decision emphasize that an award of attorneys' fees is not to punish, but to make sure

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74. *Id.* Forrester alleged violations of Title VII of the Civil Rights Act of 1964, 78 Stat. 252 (codified as amended at 42 U.S.C. § 200e (1988)), and section 1 of the Civil Rights Act of 1871, Rev. Stat. § 1979 (codified as amended at 42 U.S.C. § 1983 (1988)). 484 U.S. at 221.

75. *Id.* at 221-22.

76. *Id.* at 222.

77. *Id.* This case illustrates a flaw in the rationale of absolute judicial immunity. If a judge is entitled to absolute immunity, the protection to the system is in not requiring a judge to go to the time and expense of defending a case. If this rationale is to be taken seriously, a claim of absolute judicial immunity should be considered at the inception of the case or not at all. *See also infra* text accompanying note 113.

78. *Id.* at 231.

79. 466 U.S. 522 (1984).

80. Federal judges might also be liable for attorneys' fees under similar circumstances. *See* Weisberger, *The Twilight of Judicial Independence*—Pulliam v. Allen, 19 SUFFOLK U.L. REV. 537, 557-58 (1985); Zaluda, Pulliam v. Allen: *Harmonizing Judicial Accountability for Civil Rights Abuses with Judicial Immunity*, 34 AM. U.L. REV. 523, 553-55 (1985).

81. 42 U.S.C. § 1988 (1988) authorizes a court, in its discretion, to award the prevailing party a reasonable attorney's fee as part of the costs of section 1983 actions.

82. *Pulliam*, 466 U.S. at 551 (Powell, J. dissenting) ("The burdens of having to defend such a suit are identical in character and degree, whether the suit be for damages or prospective relief.").

that the suits can be brought. Unless the fees are available, the reality is that valid suits may not be pursued because the bar is unable to subsidize the system.

### *F. Attempts to Restore Absolute Judicial Immunity*

These recent narrowings of the scope of absolute judicial immunity have been resisted. In 1988, the 100th Congress introduced three bills which would have restored, at least partially, the absolute judicial immunity lost in the wake of *Pulliam*.[83] These three bills worked their way through the judiciary committee, and hearings were held to assess their probable impact.[84] Support was expressed by the Justice Department,[85] the ABA and others. One bill ultimately passed in a modified form, but without the provision which would have restored immunity.[86]

In 1989, the 101st Congress considered yet another bill to reverse the impact of *Pulliam*.[87] This proposed legislation was supported by the ABA, the Judicial Conference of the United States, the Conference of Chief Justices and the American Judges Association.[88] Despite such broad support, the bill was blocked by the last minute efforts of two key senators.[89] Despite

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83. S. 1482, S. 1512 & S. 1515, 100th Cong., 1st Sess. (1988). The Supreme Court has expressly recognized the authority of Congress to alter the judicial immunity doctrine. *Pulliam*, 466 U.S. at 543-44 ("[I]t is for Congress, not this Court, to determine whether and to what extent to abrogate the judiciary's common-law immunity.").

84. *A Judicial Immunity: Hearing on S. 1482, S. 1512 and S. 1515 Before the Comm. on the Judiciary*, 100th Cong., 1st Sess. (1988) [hereinafter *Immunity Hearings*].

85. *Id.* at 52-65 (statement of Kevin Jones, Deputy Assistant Attorney General, Office of Legal Policy). The Justice Department favored S. 1482 as the most simple method of restoring traditional judicial immunity because it permitted an award of attorney's fees only where the judge was held liable for damages. S. 1512 and S. 1515 also would have limited the award of attorney's fees, but instead of tying fees liability to damages liability would have created a separate substantive immunity. This separate immunity would have posed new questions as to its scope and interpretation. *Id.*

86. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988).

87. S. 590, 101st Cong., 1st Sess. (1989), reproduced in *Judicial Immunity: Hearing Before the Subcomm. on Courts and Administrative Practice of the Comm. on the Judiciary*, 101st Cong., 1st Sess. 4-5 (1989).

88. McMillion, *Restoring Judicial Immunity*, 76 A.B.A. J. 107 (1990).

89. Senator Edward M. Kennedy, D-Mass. and Senator Howard M. Metzenbaum, D-Ohio objected. Although conceding that judges should not be held personally liable for attorneys' fees, they insisted that attorneys' fees in suits against judges must be available from some source, such as a state indemnification agreement, so that citizens could find attorneys to represent them in such actions. *Id.*

this most recent failure of immunity legislation, supporters have pledged to continue the fight in the 102nd Congress.[90]

While the failure of these legislative proposals should not be construed as congressional approval of the recent narrowing of absolute immunity, it does illustrate the controversy surrounding the issue. While many judges remain dissatisfied with the current level of immunity afforded them, the present immunity standards may represent what society deems essential to the judicial function. Under the law as it exists today, even absolute judicial immunity provides less than absolute protection for judges.

## IV. Application of Immunity Doctrine to Grievance Committees

The recognition or denial of absolute immunity is the result of many policy considerations. Those considerations which are compelling for one group of state officials may or may not remain valid when applied to the grievance committee. Those considerations applicable to grievance committee members may be categorized for examination as those relating to the judicial function performed by the committee and general policy considerations which, while unrelated to the judicial function, might still warrant immunity.

### *A. The Judicial Function*

Grievance committee members may be afforded absolute judicial immunity as an arm of the state supreme court. To the extent that the committee performs the same function as the court, the same immunity should be recognized only if the original policy considerations for granting absolute immunity to the court also apply to the grievance committee.

#### *1. Protect the finality of judgments*

Absolute judicial immunity protects the finality of judgments by establishing the appellate procedure as the only method of challenging judicial error. To allow suits against

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90. Senator Howell Heflin, D-Ala., chairman of the Senate Judiciary Subcommittee on Courts and Administrative Practice, has assured the ABA that immunity legislation would again be considered early in 1991 when action could be carried out without the pressures of the final days of a congressional session which doomed S. 590. *Id.*

judges would potentially allow collateral attack of every decision.[91] Grievance committee members, like judges, are required to make unpopular decisions. Yet, only the state supreme court has authority to suspend or disbar a lawyer.[92] All state disciplinary systems have built-in procedures for the automatic appeal of these sanctions against lawyers.[93]

While the decisions of the grievance committee are somewhat similar in appearance to judicial decisions, they more closely resemble the decisions made by state administrative agencies. If the establishment of an appellate procedure alone is sufficiently important to justify absolute immunity for the decisionmaker, then all government officials whose decisions are subject to appeal or review should also receive absolute immunity from suit. There are numerous government officials, other than grievance committee members, who make appealable decisions that have great contact with the public and whose acts may violate the rights of the public. If all state decisionmakers were immune from suit, there would be little recourse for those individuals whose rights have been violated, and section 1983 would have no real application. Only those employees who made no decisions would be subject to suit. Clearly, this is not the result intended by Congress in enacting section 1983. Thus, while the establishment of effective appellate procedures is of significant concern, it alone cannot justify a grant of absolute immunity to grievance committee members.

### 2. *Protect the independence of the judiciary*

In our legal system, the judge must play an impartial role in the resolution of disputes. The judge must be free to make rational decisions based upon the evidence presented to the court. If a judge loses the ability to decide issues impartially, the integrity of the entire legal system is threatened. Justice Edwin J. Peterson, Chief Justice of the Oregon Supreme Court, relates that after having been assessed $35,000 in attorneys' fees in a section 1983 suit, he found himself ruling in favor of defendants who might raise a similar claim.[94] He explained, "I can tell you

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91. *Cf.* Block, *supra* note 29.

92. *See supra* note 17 and accompanying text.

93. *See supra* notes 11-16 and accompanying text.

94. *Immunity Hearings*, *supra* note 84, at 84-85 (1988) (statement of Hon. Edwin J. Peterson).

with all sincerity that my independence had been substantially fettered."[95] Justice Peterson tells of an Oregon Court of Appeals judge who asked that he not be assigned to hear any cases involving a particular attorney because of the potential for an award of fees against the judge.[96] Justice Peterson explained that "[i]t's just the threat of being sued, the threat, to say nothing of the threat of attorneys' fees—[which] does substantially impair the exercise of independence by judges."[97]

The availability of review by a higher authority is a traditional justification for a grant of immunity. It is believed that since a party affected by the ruling of a judge may seek review of that decision, she is not without a remedy if improperly injured by the decision. The independence of the judge is thus preserved by effectively insulating the judge from retaliation by litigants. A similar argument about the effect of suits on independence can be made about many executive branch officials. Still, with the exception of the President, the Supreme Court has refused to provide any special grant of immunity not available to all government officials.[98] Executive branch officials often make decisions that are incapable of being effectively reviewed and which significantly affect the public. A grant of absolute immunity to the grievance committee would allow the committee an extra measure of independence. However, it is not clear that this additional independence is advisable or necessary. Without accountability, excessive independence may actually promote unconstitutional behavior by state officials. A state official who has no personal accountability for her actions is less likely to be cautious about potential violations of the constitutional rights of others. She may act without careful consideration because she personally has nothing to lose. If, however, the official may be found personally liable for the violation of the constitutional rights of others, her decisions are more likely to be carefully measured to prevent such potential liability.

While the independence of judges is carefully guarded by procedural, evidentiary and ethical rules, most state officials are

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95. *Id.*

96. The attorney had filed a suit which had the potential of an award of attorneys' fees against the judges. The judge offered the following explanation for his request: "I cannot sit on any cases involving this lawyer because of the fear that if I do, I too, will be joined as a defendant." *Id.*

97. *Id.*

98. *See supra* notes 14-24 and accompanying text.

not similarly bound. Grievance committee members are often practicing members of the bar and may know of the general reputation of an attorney against whom a complaint has been lodged. The committee may have reviewed other complaints against a particular attorney and may unconsciously consider extraneous information in the disciplinary decision. The very purpose of the committee is to monitor complaints *against* lawyers. Thus, the committee's very purpose may slant its decisions. Because the committee operates without the same procedural, evidentiary and ethical rules designed to guarantee the independence of judicial decisionmaking, the committee should not be considered a truly independent decisionmaker.

*3. Preserve judicial authority to supervise the bar*

In *Forrester v. White*,[99] Justice O'Connor indicated that the inherent authority of the judiciary to supervise the bar is a function squarely within the traditional judicial domain protected by absolute immunity.[100] This inherent authority might allow a judge to disbar an attorney as a sanction for contempt of court and is clearly within the judicial function with corresponding absolute immunity from suit.[101]

However, promulgation of an attorney code of conduct is a legislative act and enforcement of the code is a prosecutorial act.[102] The grievance committee performs a mixture of these functions and relies upon statutory, not inherent judicial authority, to supervise the bar. The inherent authority of the court to supervise belongs exclusively to the courts. Therefore, it makes little sense to stretch the court's inherent authority to supervise the bar in order to immunize committee members acting under a specific grant of statutory authority even if the purpose of the committee is to assist in the supervision of the bar.

*4. Avoid overdeterrence*

A strong argument can be made that the best reason for affording immunity to government officials is to avoid overdeter-

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99. 484 U.S. 219 (1988).

100. *Id.* at 227 (citing Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 354 (1872)).

101. *Bradley*, 80 U.S. (13 Wall.) at 354 (1871) (inherent power of all courts to admit attorneys to practice).

102. Supreme Court of Virginia v. Consumers Union of United States, Inc., 446 U.S. 719 (1980).

rence. The award of damages against an individual state official who causes an unlawful deprivation of rights is intended to deter both that official and others from other intentional violations.[103] Yet, a real threat exists that government officials will be overdeterred by the prospect of personal liability for actions performed in their official capacities.

This problem is compounded because public officials are under a duty to act. While private individuals have the option of doing nothing, public officials do not have that option. Because virtually every act which aids one person may be adverse to another individual, public officials are subject to potential suits every time they act unless some measure of immunity exists. An official concerned with this potential liability might avoid all activities which could conceivably form the basis for a section 1983 suit.

Among the risks of being sued are the non-pecuniary costs. Even if an official is effectively insulated from personal liability by a state indemnification agreement or an insurance policy, the official may suffer other costs. A significant amount of time is required to defend against a suit. This time is invariably taken out of regular work and personal time. As a result, action may be more costly to the public official than inaction.[104] A grievance committee member concerned with this potential liability might recommend sanctions only in extreme cases. This reluctance to act would reduce the committee's effectiveness in protecting the public.

But this argument overlooks the fact that if committee members are not allowed absolute immunity, they may still claim qualified immunity. As a practical matter, this should be sufficient to protect committee members in most cases. Under the *Harlow* standard for qualified immunity, an official is protected from personal liability if she doesn't violate clearly established constitutional law.[105] To be shielded from personal liability, committee members need only refrain from those acts which a reasonable person would know violated another individual's rights. Such qualified immunity should be equally sufficient for the protection of grievance committee members as it is for all other state officials.

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103. *See supra* note 26 and accompanying text.

104. For a thorough discussion of the effects of overdeterrence on government officials, see P. SHUCK, SUING GOVERNMENT (1983).

105. *See supra* note 46 and accompanying text.

In the final analysis, the potential for overdeterrence is a problem that can only be balanced, not resolved.[106] Without personal liability for official acts, society is faced with the contrasting problem of underdeterrence. Personal liability under section 1983, coupled with qualified immunity for acts in good faith, may strike the most effective balance between under and overdeterrence. Such a balance would allow the committee to recommend sanctions in appropriate cases without fear of personal liability, but would deter many of the more serious violations of constitutional rights.

### *B. General Policy Arguments Affecting Absolute Immunity*

The policy considerations detailed above have dealt with reasons why judges should be immune from suit and why that same immunity should or should not be afforded grievance committees. Other considerations, independent of the justification for judicial immunity, must also be taken into account. These considerations will be addressed in turn.

#### *1. Bolster confidence in the legal system*

It is revealing to note that the very people who are charged with the protection of the integrity of the legal system would feel a need to exempt themselves from that system. The grievance committee first inherently represents to the public that the legal system is effective and next asks to be excused from personal involvement in the system. Absolute immunity effectively excuses state officials from liability for illegal conduct which other state officials must personally bear. To demonstrate confidence in the legal system, members of grievance committees should be willing to submit to the same rules of conduct as other officials. A grant of absolute immunity to grievance committee members, who are often prominent members of the local bar, perpetuates the public belief that lawyers take care of their own.

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106. Even if the states would consent to be sued in cases involving particular classes of officials, there would still be forces which might overdeter. The state may choose to dismiss officials whose conduct resulted in an award against the state. An official not fired by the state might be effectively barred from future positions because of a fear of similar conduct resulting in additional public liability.

*2. Valid suits should be allowed*

One complaint about state disciplinary systems is that they treat allegations of serious misconduct as disputes between attorney and client rather than assuming a broader public protection function.[107] This should not be surprising given the small amount the average state spends on its disciplinary system.[108] If grievance committee members are absolutely immune from suit, there may be little incentive to improve the state disciplinary system.

Lawsuits can be brought successfully only if the grievance committee members violate established constitutional rights. If those rights are violated, the suits should be brought. Unless injured parties are allowed to sue state actors, the civil rights of the public cannot be effectively protected. By allowing valid civil rights suits to be brought, public officials become more sensitive of other people's constitutional rights.

The Supreme Court has recognized that compensation for victims of official misconduct is "the basic purpose of a section 1983 damages award."[109] The question then becomes, who should pay? Victims are generally barred by the eleventh amendment[110] from collecting directly from the state or state agencies.[111] Consequently, a victim has no alternative but to sue an individual state official. If the deprivation of rights was caused more by a failure of the system than an intentional deprivation by an individual, the individual sued is asked to bear the cost of compensating the victim for the failure of the system. While this seems unfair to the individual state actor, it is the only way to ensure that injured parties receive compensation under our current constitutional standards.

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107. Committees sometimes fail to get the word out about disciplined attorneys. *See supra* notes 1-2 and accompanying text. The public has no choice but to rely on the judgment of the committee as to the ability of a particular lawyer to adequately protect their interests.

108. *See supra* text accompanying note 10.

109. Carey v. Piphus, 435 U.S. 247, 254 (1978).

110. The amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. However, a recent Supreme Court decision casts doubts on this principle of sovereign immunity as an absolute barrier to all suits in federal courts. *See* Pennsylvania v. Union Gas Co., 109 S. Ct. 2273 (1989).

111. *See* Scheuer v. Rhodes, 416 U.S. 232 (1974) ("It is well established that the amendment bars suits not only against the state when it is the named party but also when it is the party in fact.").

*3. Necessity of factual inquiry*

The decision to recognize or deny a claim of absolute immunity involves broad issues of public policy considered in light of the functions performed by the official. To make the proper decision, the court must be completely familiar with the functions of the individual claiming absolute immunity and the particular facts of the case. When a judge is sued for her judicial acts, it is relatively simple for the court to determine, at the beginning of the case, whether she was acting in a judicial capacity and therefore entitled to absolute immunity.

The level of immunity granted grievance committee members varies widely among courts. Whether absolute or qualified immunity is granted is dependent on the particular function the committee member was performing which gave rise to the claim. Some courts might rely on state statute or constitutional provisions to categorize committee activities as "judicial" or "administrative." While this examination is relevant, the inquiry should not end upon a finding that a state legislature declares that an administrative board's function is judicial in nature.[112] This would allow the states to circumvent the purposes of section 1983 by a mere legislative declaration that a particular group of state officials performed a judicial function.

Since grievance committees perform many non-judicial functions which deprive them of absolute immunity, it will not generally be possible for the court to determine if absolute immunity is warranted at the outset of the case. A major feature of absolute immunity is its ability to defeat a claim at the beginning of a case before time and money are spent defending the case.[113] If the case must proceed to establish the relevant conduct of the official before the proper level of immunity is determined, a grant of absolute immunity is unwarranted. The lesser, qualified immunity is sufficient in these cases to protect the interests of both the official and the public.

*4. Equality of agency immunity*

Grievance committee members may claim immunity based on their investigative functions or their adjudicative functions.

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112. Immunity from section 1983 is governed exclusively by federal law. Wood v. Strickland, 420 U.S. 308, 314 (1975). State immunity doctrine is irrelevant in construing this federal statute. Martinez v. California, 444 U.S. 277, 285 n.11 (1980).

113. *See supra* note 77 and accompanying text.

Prosecutors, acting in their investigative function, generally receive only a qualified immunity.[114] If the committee members perform the same function, they should be entitled to the same level of immunity. That level of immunity should remain constant among officials performing similar functions and should not vary because of the particular agency to which the official is attached. If bar grievance committees are allowed absolute immunity, a similar level of immunity should also be extended to the state agencies responsible for the supervision and licensing of other professionals such as medical doctors.[115]

Absolute immunity is granted only in those "exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of public business."[116] It is the official claiming the immunity which has that burden of proof.[117] Since many grievance committee functions are similar to those performed by state officials receiving only qualified immunity, it is difficult to understand why absolute immunity is necessary for grievance committee members, but not other officials.

## V. Conclusion

Section 1983 provides a federal cause of action in order to protect the public from the unconstitutional acts of state officials. The Supreme Court has recognized that certain officials must have an absolute or qualified immunity from such suits to effectively perform their governmental tasks.

Bar grievance committees have traditionally been afforded absolute immunity from section 1983 suits. Courts have generally relied on the similarity of committee acts to judicial acts to justify this level of immunity. In recent years, there have been several Supreme Court decisions which have effectively narrowed the scope of the traditional judicial immunity. The Court has recognized absolute immunity only in those rare situations where absolutely necessary to realize societal goals.

The policy considerations which support absolute immunity for judges are not as persuasive when applied to the grievance committee. Committee members perform a variety of acts which

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114. Windsor v. The Tennessiean, 719 F.2d 155, 164 (6th Cir. 1983).

115. *See* Manion v. Michigan Bd. of Medicine, 765 F.2d 590 (6th Cir. 1985) (recognizing qualified immunity for state board of medicine members performing investigative function).

116. Butz v. Economou, 438 U.S. 478, 507 (1978).

117. *Id.* at 506.

are similar to those performed by other state officials receiving only a qualified immunity from suit. The adjudicative functions performed by these committees are not sufficiently tied to essential judicial functions to warrant the extension of absolute judicial immunity to their members.

The extension of absolute immunity to grievance committee members does not further essential governmental purposes and might actually reduce the effectiveness of the legal system by promoting the public perception that lawyers are insiders, not subject to all the rules the general public must abide by. The recognition of the lesser, qualified immunity is sufficient to protect the members of the grievance committees and would allow the public to reach those individuals whose conduct has deprived them of a constitutional or statutory right.

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