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LIABILITY OF INDIVIDUALS WHO SERVE ON PANELS REVIEWING ALLEGATIONS OF MISCONDUCT IN SCIENCE

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I. INTRODUCTION

RECENTLY public debate has increased about the best way to detect and address misconduct in science. The United States District Court for the Western District of Wisconsin addressed this issue in *Abbs v. Sullivan*.[1] In *Abbs*, the court evaluated under the United States Constitution and the Administrative Procedure Act the adequacy of procedures used by the Public Health Service to investigate whether a federally funded researcher falsified or fabricated certain published research results.[2] The science and popular presses have reported extensively on investigations into the activities of such prominent researchers as Robert Gallo, David Baltimore and Thereza Imanishi-Kari, as well as on cases of confirmed misconduct by researchers such as Stephen Breuning and John Darsee.[3] While the increased public attention to both misconduct in science and the attempts to resolve these allegations may encourage individuals charged with resolving such cases to conduct more thorough and fair inquiries, this attention

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1. 756 F. Supp. 1172 (W.D. Wis. 1990), *vacated*, 963 F.2d 918 (7th Cir. 1992).

2. *Id.* at 1177. Dr. James H. Abbs, a college professor conducting research funded by the Public Health Service, allegedly "published certain curves in the journal *Neurology* that were traced from curves he had published previously, rather than being from two different patients" as Abbs represented. *Id.* *Abbs* was the first case in which a court addressed a challenge to the federal agency's procedures for investigating allegations of misconduct in science against a federally-funded researcher. The Seventh Circuit vacated this decision on grounds that the district court lacked jurisdiction over the challenge to the procedures. *Abbs*, 963 F.2d at 928.

3. *See, e.g.*, Leon Jaroff, *Crisis in the Labs*, TIME, Aug. 26, 1991, at 45 (discussing demise of science funding and describing recent examples of scientific misconduct).

will also increase the vulnerability of those individuals to legal challenge.

Research institutions generally use peer review committees to investigate allegations of misconduct in science. These committees must do their job effectively to preserve the integrity of research, and to ensure that federal grant money is spent in an appropriate manner. Faced with this duty, scientists may perceive participation on these committees as too risky to their own careers because of the substantial possibility of becoming involved in expensive, time-consuming litigation. One university attorney described "academic fraud" as a new and growing area in college and university law, costly for both the individuals and the institutions.[4] A participant of a misconduct committee remarked: "One of the things we talked about at our first committee meeting was are we going to get sued or are we liable for anything."[5] Because participation on committees is voluntary, this perceived risk of liability may completely discourage scientists from serving. Should this occur, it would severely compromise the ability of the scientific community to address and resolve occurrences of misconduct in science.

This Article addresses the legal concerns of those individuals who might become committee members.[6] The authors believe

4. Thomas H. Wright, *Faculty and the Law Explosion: Assessing the Impact—A Twenty-Five Year Perspective (1960-1985) For College and University Lawyers*, 12 J.C. & U.L. 363, 369 (1985) (discussing increasing impact of law on academia).

5. *Maintaining the Integrity of Scientific Research, 1989: Hearings Before the Subcomm. on Investigations and Oversight of the House Comm. on Science, Space, and Technology*, 101st Cong., 1st Sess. 73 (1989) (statement of Dr. Paul Friedman, Professor of Radiology and Associate Dean for Academic Affairs at University of California at San Diego, in Summary of Hearing at 11).

6. While this Article addresses the liability of members of committees, in many cases the institutions themselves may also be liable, and similar law will apply. The plaintiff's lawyer makes the decision about whom to sue based on both the state respondeat superior law and what litigation strategy will offer a more favorable settlement. Under the doctrine of respondeat superior, both public and private institutions might be liable in whole or in part for the tortious acts of their agents within the course of the agent's employment. *See, e.g.*, Aiello v. Ed Saxe Real Estate, Inc., 499 A.2d 282, 285 (Pa. 1985) (holding real estate broker liable for agent's fraudulent misrepresentations about which broker did not know). For a court to hold an academic institution liable, the institution must have exercised sufficient control over the "agent." *See, e.g.*, Mazart v. New York, 441 N.Y.S.2d 600, 605 (Ct. Cl. 1981) (holding institution not liable for acts of its agents when institution has "no right of control" over agent).

The doctrine of respondeat superior does not offer the agent complete protection, because the institution will always make the defense that the agent's acts were outside the scope of the agent's authority. *See Aiello*, 499 A.2d at 285. The institution is generally not liable for acts committed by an agent outside of the actual or apparent scope of the agent's authority. *Id.* The institution may, how-

that their conclusions should alleviate fears that potential committee members might have about liability stemming from participation on review committees.

II. BACKGROUND

A. *How Research Institutions Handle Cases of Possible Misconduct in Science Under the Aegis of Federal Funding*

The misconduct addressed in this Article is defined by federal regulations that apply to institutions receiving grant money from federal agencies such as the National Science Foundation (NSF) and the Public Health Service (PHS).[7] This Article focuses on the procedures employed by the NSF to deal with allegations of misconduct in science.[8] Many of these procedures are similar to procedures used by other governmental agencies and the principles apply government-wide.[9] The NSF's regulations define misconduct as "fabrication, falsification, plagiarism, or other serious deviation from accepted practices in proposing, carrying out, or reporting results from activities funded by NSF," or retaliation against whistleblowers.[10]

Institutions receiving federal funding for scientific research

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ever, choose or be forced to accept liability for acts outside the scope of an agent's employment because the institution "ratified" these acts. *See, e.g., In re* Banker's Trust Co., 752 F.2d 874, 882 (3d Cir. 1984) (holding that principal not liable under Pennsylvania law for alleged forgery or fraud of agent unless principal adopted or ratified agent's acts).

The elements and defenses in the law of torts are the same for both institutional and individual liability, with some minor exceptions. *See* WILLIAM. A. KAPLIN, THE LAW OF HIGHER EDUCATION 75 (2d ed. 1985) (outlining personal responsibility of trustees, administrators and agents). One difference is that individuals sued in their personal capacities would not be protected by the sovereign immunity doctrines that apply to state schools. *Id.* at 75-78.

This Article focuses on the law in terms of individuals' liability, but when no equally persuasive case law exists, some points of law developed in the institutional context are cited.

7. The NSF's regulations are located in 45 C.F.R. Part 689 (1992), and the PHS's regulations are located in 42 C.F.R. §§ 50.101-.105 (1992).

8. For a discussion of these procedures, see *infra* notes 11-25 and accompanying text.

9. Of the many federal agencies that fund scientific research, only the NSF and the PHS have promulgated regulations specifically addressed to misconduct in science.

10. 45 C.F.R. § 689.1(a)(1)-(2). Except for the provision regarding retaliation against whistleblowers, the PHS's definition is substantively identical to the NSF's: "*Misconduct* or *Misconduct in Science* means fabrication, falsification, plagiarism, or other practices that seriously deviate from those that are commonly accepted within the scientific community for proposing, conducting, or reporting research. It does not include honest error or honest differences in interpretations or judgments of data." 42 C.F.R. § 50.102.

must have policies and procedures explaining how they will address allegations of misconduct in science in connection with federally funded research.[11] The NSF's regulations stipulate that there will be no finding of misconduct until an inquiry and investigation are conducted by the NSF, another federal agency, or the institution that received the award.[12]

When allegations of misconduct in science are received, either by a sponsoring research institution or by the NSF, they trigger a series of events.[13] NSF officials first establish the agency's jurisdiction, and then may conduct an inquiry to determine whether an investigation is required.[14] In most cases, the NSF will notify the authorized representative at the sponsoring research institution of the allegation and ask whether the institution would prefer to conduct its own inquiry and, if necessary, investigation.[15] If the institution requests to conduct the inquiry, then the NSF formally "defers" to that body.

Whether the allegation is received directly by the research institution or referred by the NSF, the institution must complete an "inquiry" within ninety days.[16] If the allegation is determined not to have substance, and the allegation originated with the institution, the matter can be closed and the institution is not required to notify the NSF.[17] If the allegation is determined to have sub-

11. The NSF's regulation requires that institutions receiving funds "maintain and effectively communicate to their staffs appropriate policies and procedures relating to misconduct, which should indicate when NSF must or should be notified." 45 C.F.R. § 689.3(d). Institutions receiving grant money from the PHS must annually supply the PHS with "institutional assurances" stating their established procedures for handling incidents of misconduct. 42 C.F.R. § 50.103.

12. 45 C.F.R. § 689.1(c) ("NSF will find misconduct only after careful inquiry and investigation by an awardee institution, by another Federal agency, or by NSF."). For a discussion of the procedure and substance of such an inquiry and investigation, see *infra* notes 16-20 and accompanying text.

13. This explanation is taken from the "Dear Colleague" letter that the NSF distributes to its grantee institutions. The letter incorporates many provisions from the NSF regulations. A copy may be obtained by writing to the Office of Inspector General, NSF, 1800 G Street NW, Washington, DC 20550. The version referenced in this Article is dated August 16, 1991.

14. 45 C.F.R. § 689.4(c)-(d).

15. *Id.* § 689.4(d) (permitting Office of Inspector General to "[i]nform the awardee institution of the alleged conduct and encourage it to make an inquiry"). The regulation also notes that "[i]n most instances, NSF will rely on awardee institutions to . . . [i]nitiate an inquiry into any suspected or alleged misconduct." *Id.* § 689.3(a).

16. *Id.* § 689.3(c). "An 'inquiry' consists of preliminary information-gathering and preliminary fact-finding to determine whether an allegation or apparent instance of misconduct has substance." *Id.* § 689.1(c).

17. *See id.* § 689.3(b)(1), (c).

stance based on the initial inquiry, the institution is expected to conduct its own investigation and, in addition, must notify the NSF.[18] Most institutions routinely use peer panels of their faculty to conduct such investigations. Generally, these peer investigation committees are required to provide the NSF with a written report of their conclusions.[19] If the investigation committee concludes that the subject committed misconduct in science, the subject's institution generally imposes a sanction, ranging from a reprimand to termination of the subject's employment.[20]

The NSF can either accept the findings of the institution, in whole or in part, and/or proceed with its own investigation.[21] NSF oversight officials in the Office of Inspector General assess investigation reports received from institutions before accepting them, and give the subject an opportunity to comment on the report.[22] Ultimately, if there is a strong case for misconduct, the NSF's Office of Inspector General issues a final investigation report to the NSF's Deputy Director.[23] This report and the subject's comments on the report are used as the basis for the Deputy

18. *Id.* § 689.3(b)(1), .1(c). "An 'investigation' is a formal examination and evaluation of relevant facts to determine whether misconduct has taken place or, if misconduct has already been confirmed, to assess its extent and consequences or determine appropriate action." *Id.* § 689.1(c). The regulations state:

> In most instances, NSF will rely on awardee institutions to promptly . . . (1) Initiate an inquiry into any suspected or alleged misconduct; (2) Conduct a subsequent investigation, if necessary; and (3) Take action necessary to ensure the integrity of research, the rights and interests of research subjects and the public, and the observance of legal requirements or responsibilities.

Id. § 689.3(a).

19. *Id.* § 689.3(b)(4).

20. *Id.* § 689.2(a) provides a list of possible sanctions, dividing them into three groups according to severity. Group I actions (minimal restrictions) include (i) sending a letter of reprimand to the institution or individual; (ii) requiring special NSF approval of particular activities; and (iii) requiring those guilty of misconduct to certify the accuracy of future reports. *Id.* § 689.2(a)(1).

Group II actions (more severe restrictions) include (i) restricting activities or expenditures under an award; and (ii) requiring reviews of all requests for funding from the effected individual or institution. *Id.* § 689.2(a)(2).

Group III actions (most severe restrictions) include (i) immediate suspension or termination of an active award; (ii) debarment or suspension of the individual or the institution from NSF programs for a specified time; (iii) prohibition as an NSF advisor, reviewer or consultant for a specified time. *Id.* § 689.2(c)(3).

21. *Id.* § 689.8(a) ("[The Office of Inspector General] will either recommend adoption of the findings in whole or in part or . . . initiate a new investigation.").

22. *Id.* § 689.8(c)(2)(i). If the Office of Inspector General (OIG) determines there is no misconduct, the subject is notified; if it confirms misconduct, the subject has an opportunity to submit comments or rebuttal, and, if debarment is considered, to contest such action. *Id.* §§ 620.313, 689.8.

23. *Id.* § 689.8(c)(2)(ii).

Director's decision that misconduct has occurred and for any sanction the NSF may impose.[24] NSF's sanctions range from letters of reprimand to debarment, which prohibits the subject from receiving funds, directly or indirectly, from any federal agency for a specified period of time.[25]

B. *Factual Predicate*

In the type of lawsuit discussed in this Article, the "plaintiff" is a scientist accused of fabrication, falsification, plagiarism or other misconduct.[26] The "defendant" is usually either a sponsoring research institution, members of an investigation committee established at such an institution, or both.[27]

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24. *Id.* § 689.9(c)(2)(iii) ("The Deputy Director will review the investigation report and OIG's recommended disposition.").

25. *See id.* § 689.2 (listing range of sanctions). For a discussion of these sanctions, see *supra* note 20.

26. For a discussion of the definition of "misconduct" in the PHS and the NSF, see *supra* note 10 and accompanying text.

27. This Article focuses on the liability faced by institutional misconduct committees. In cases in which a federal agency forms its own committee to assist the agency's resolution of allegations of misconduct, the legal implications are very different. These committees would be federal entities, and the committee members would be agency employees, and thus exempt from individual liability under the Federal Tort Claims Act (FTCA). *See* 28 U.S.C. §§ 2671-2680 (1988).

The right to sue the United States Government is established in 28 U.S.C. § 1346(b) (1988). Jurisdiction in such suits is granted to the district courts. *Id.* However, § 2680(h) of Title 28 makes an exception for various tort claims arising out of acts of government employees, including "malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." *See* 28 U.S.C. § 2680(h). While this exception does not include "investigative or law enforcement officer(s)," the statute defines such officers as those with authority to search, seize and arrest. *Id.* Peer review committee members thus do not fall within this definition and are not excluded from the exception. *Id.*; *see also* Art Metal—U.S.A., Inc. v. United States, 753 F.2d 1151, 1156 (D.C. Cir. 1985) (barring injurious falsehood claims against General Services Administration officials under exclusion of claims of slander or libel in 28 U.S.C. § 2680(h)).

Section 2680(a) also specifically excludes from the coverage of § 1346(b) any claim based upon the act or omission of an employee of the government exercising due care in the execution of a statute or regulation or based upon discretionary duty. *Id.* § 2680(a). "[E]mployee of the government" is defined to include "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in service of the United States, whether with or without compensation." *Id.* § 2671.

Under this definition, members of misconduct committees created by the NSF would likely be government employees. The FTCA protects government employees from suit in the same situations in which the government itself is protected, a kind of inverse governmental respondeat superior. Furthermore, for purposes of the FTCA, "governmental employee" has included unpaid volunteers such as people in the Peace Corps and Navy trainees. *See* McManus v. McCarthy, 586 F. Supp. 302, 305 (S.D.N.Y. 1984). Thus, the committee mem-

An important factor in the assessment of liability is whether the institution that convenes the misconduct committee is public or private. This distinction is important in two ways. First, the Eleventh Amendment to the United States Constitution precludes suits in federal court against public institutions, including state universities, and their employees acting in an official capacity, unless the state has waived its immunity.[28] Second, public institutions and their officers are responsible for respecting the rights of individuals accorded by federal and state constitutions. Accordingly, public institutions and their officers must abide by the Fourteenth Amendment's due process protections when any deprivation of liberty or property occurs.[29]

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bers, even if they are not paid by a federal agency, would be absolutely protected by the FTCA from suits for slander, libel or interference with contractual rights.

28. U.S. CONST. amend. XI. The Eleventh Amendment states that "[t]he 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." *Id.* A state may waive this immunity. Edelman v. Jordan, 415 U.S. 651, 673 (1974) (holding waiver valid only when stated expressly or by overwhelming implication); *see also* West v. Keve, 571 F.2d 158, 163 (3d Cir. 1978) (applying Delaware law and barring suit against state prison officials acting in official capacity when damages would be paid with state funds); Vaughan v. Regents of Univ. of Cal., 504 F. Supp. 1349, 1354 (E.D. Cal. 1981) (holding regents of state university entitled to Eleventh Amendment immunity). *But see* Samuel v. University of Pittsburgh, 538 F.2d 991 (3d Cir. 1976) (holding state universities liable for damages and costs for illegal exaction of tuition fees without discussing immunity). It is not necessary for the state to be named as a defendant for the Eleventh Amendment protection to apply; the issue is whether the damages would have to be paid out of state funds. Pennsylvania Dept. of Envtl. Resources v. Williamsport Sanitary Auth., 497 F. Supp. 1173, 1194-95 (M.D. Pa. 1980) ("The Eleventh Amendment bars an action by a private party seeking to impose a liability which must be paid from public funds in the state treasury."). The exact scope of sovereign immunity is determined by state law. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 8522 (1982) (waiving sovereign immunity in government negligence actions). *See generally* Smith v. Department of Pub. Health, 410 N.W.2d 749 (Mich. 1987) (discussing possible exemption from state immunity statute for claims alleging violation by state of right conferred by state constitution), *aff'd*, 491 U.S. 58 (1989).

29. The application of these constitutional protections to public institutions may be limited, however, as the denial of tenure at a public institution has been held to invoke neither a property interest nor a liberty interest. For example, in *Keddie v. Pennsylvania State University*, the federal district court for the Middle District of Pennsylvania held that the discharge of a professor without a pretermination hearing did not violate due process. Keddie v. Pennsylvania State Univ., 412 F. Supp. 1264, 1272-73 (M.D. Pa. 1976). The court determined that the plaintiff, an assistant professor of Labor Studies with five years of academic probationary service credit toward tenure, had only a "subjective expectancy of continued employment" that did not constitute a property interest. *Id.* at 1272. The court held that for such an interest to exist, a plaintiff must have "an objective expectancy based on a specific or implied contract right, a statutory entitlement, . . . or a *de facto* tenure system." *Id.* The court went on to hold that while a

III. COMMON LAW PROTECTIONS FROM LIABILITY FOR DEFAMATION

The most likely cause of action against an institution or its misconduct committee members is defamation.[30] Defamation is defined as a communication that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[31]

There are two kinds of defamation: oral, known as slander; and written, known as libel.[32] Unlike slander, libel is usually ac-

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professor does not have a liberty interest in a particular teaching position, the professor does have a liberty interest in his or her good name such that the state cannot impair this interest without appropriate procedures. *Id.* at 1273. The court noted that deprivation of this interest requires more than mere dismissal: "[e]ven a dismissal based on a finding of professional incompetence would not constitute a deprivation of 'liberty' under the fourteenth amendment so as to invoke procedural due process." *Id.* at 1274. Similarly, the findings of scientific misconduct committees should not invoke a liberty interest requiring higher standards for due process than those already in NSF regulations. These regulations are set out at 45 C.F.R. § 689 (1991).

30. There are, however, other causes of action that might be brought against individuals on misconduct committees: wrongful interference with contractual relations; intentional infliction of emotional distress; and discrimination based on race, sex, or national origin in violation of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-2(a) (1988). In *University of Pennsylvania v. EEOC*, the Supreme Court interpreted Title VII as not providing any privilege to institutions to withhold confidential peer review materials from the EEOC. University of Pa. v. EEOC, 493 U.S. 182, 201 (1990). A defamation claim may be accompanied by one or more of these claims, and similar defenses are available for at least the first two causes of action. *See, e.g.*, Kassman v. American Univ., 546 F.2d 1029 (D.C. Cir. 1976) (plaintiffs alleging libel and wrongful interference with contractual relationships). Because the analysis of these causes of action is analogous to that of defamation, this Article focuses on the latter. This section includes areas of law in which statutes exist but are so general that their scope has been defined almost entirely by the courts. For example, several states' codes contain sections entitled "defamation" in their civil proceedings titles, but the substance of these statutes has been determined by court interpretation. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 8343 (1982) (establishing burden of proof, located within the Civil Actions and Proceedings title in subchapter entitled "Defamation").

31. RESTATEMENT (SECOND) OF TORTS § 559 (1977). This language has been adopted nearly verbatim by courts addressing defamation claims. *See, e.g.*, Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072, 1078 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985); *Keddie*, 412 F. Supp. at 1276; Corabi v. Curtis Pub. Co., 273 A.2d 899, 904 (Pa. 1971); Beckman v. Dunn, 419 A.2d 583, 586 (Pa. Super. Ct. 1980).

Pennsylvania courts have decided several recent cases in the tenure review context that are closely analogous to the issue of misconduct review. *See, e.g.*, *Keddie*, 412 F. Supp. at 1264. As Pennsylvania's cases are not obviously contrary to any perceptible national trends, this Article concentrates on that state's defamation law.

32. *See, e.g.*, Sobel v. Wingard, 531 A.2d 520, 522 (Pa. Super. Ct. 1987) (outlining distinction between slander and libel).

tionable without proof of harm.[33] Courts have held that if "[t]he words themselves . . . are so obviously hurtful to the plaintiff . . . damages may be presumed."[34] When such a presumption is made, the statement is said to be "libelous per se."[35]

In a defamation action, the plaintiff must prove that the statement is false, harmful to the plaintiff's reputation and made with the intent to defame.[36] In determining whether a statement is defamatory, the allegedly defamatory words must be read in context.[37] The crucial consideration is the nature of the audience, not the interpretation of the plaintiff.[38] In Pennsylvania, the

33. Zeinfeld v. Hayes Freight Lines, 243 N.E.2d 217, 220 (Ill. 1968).

34. *Id.*

35. *Id.* Most courts view a publication that could be interpreted as harmful to a person's reputation as actionable without explicit proof of harm. However, this interpretation is not universal. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 621 (1977) (declining to state whether harm should be presumed in absence of proof that defendant published defamatory matter with knowledge of falsity or reckless disregard for its falsity).

This area of law has been in flux recently. In *Gertz v. Robert Welch, Inc.*, the Supreme Court required that actual harm be proven for the plaintiff to win punitive damages. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974). In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, however, the Court appears to have reinstated the common law rule that damage to reputation can be presumed by virtue of publication, at least for matters of purely private concern. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 757-61 (1985). While Pennsylvania courts appear to have accepted this rule in practice, the state statute places the burden on the plaintiff of proving "[s]pecial harm resulting to the plaintiff from [the statement's] publication." 42 PA. CONS. STAT. ANN. § 8343(a)(6) (1982). However, in *Agriss v. Roadway Express, Inc.*, the court held that "a plaintiff in libel in Pennsylvania need not prove special damages or harm in order to recover; he may recover for any injury done his reputation and for any other injury of which the libel is the legal cause." Agriss v. Roadway Express, Inc., 483 A.2d 456, 474 (Pa. Super. Ct. 1984) (citing RESTATEMENT (SECOND) OF TORTS § 621 & cmts.). In one case, a plaintiff's testimony that he was "frustrated, distraught, upset, and distressed about the article and its effect on his family and friends" was sufficient evidence of actual damages under Pennsylvania law and *Gertz*. Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072, 1080 (3d Cir.) *cert. denied*, 474 U.S. 864 (1985).

36. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 559 (1977).

37. *See* MacRae v. Afro-American Co., 172 F. Supp. 184, 186 (E.D. Pa. 1959), *aff'd*, 274 F.2d 287 (3d Cir. 1960) ("To determine the meaning of the article it must be read as a whole and each word must be read in the context of all the other words.").

38. Rutt v. Bethlehem's Globe Pub. Co., 484 A.2d 72, 76 (Pa. Super. Ct. 1984) ("The test is the effect the article is fairly calculated to produce, the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate.") (quoting Corabi v. Curtis Pub. Co., 273 A.2d 899, 907 (Pa. 1971)); *see also* Beckman v. Dunn, 419 A.2d 583 (Pa. Super. Ct. 1980). In *Beckman*, the allegedly defamatory statement was a university professor's communication to the ombudsman about a graduate student's performance that had been evaluated as inadequate by the departmental examining committee on two separate occasions. *Id.* at 585-86. The statement was found not to be defamatory because it fell within the scope of a conditional privi-

threshold issue of whether a statement is capable of defamatory meaning is a question of law for the court, not a question of fact for the jury.[39] If the court concludes that such a meaning is possible, it is for the jury to decide whether the audience interpreted the statement in a defamatory way.[40]

While courts differ in defining the precise elements of a defamation cause of action, the substance of the definitions is similar. Pennsylvania courts, for example, require the plaintiff to prove: the defamatory character of the communication; its publication by the defendant; its application to the plaintiff; an understanding by the reader or listener of its defamatory meaning; an intent to refer to the plaintiff; special harm; and abuse of a conditionally privileged occasion.[41] Also, Pennsylvania courts have held that harm can include exposing a person to public hatred or ridicule.[42] Other courts have also found harm when statements injure a plaintiff in his or her business or profession.[43]

Under this definition, findings of misconduct by an institution's investigation committee could be considered harmful to a

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lege: "the intended audience is a limited one and not one . . . that would ostracize and shun [the plaintiff] as a result of these statements." *Id.* at 586-87.

Comment e to § 559 of the Restatement (Second) of Torts has a less stringent definition of defamation, requiring only that statements affect the opinions of a "substantial and respectable minority" of those in community or associates. RESTATEMENT (SECOND) OF TORTS § 559 cmt. e (1981).

39. U.S. Healthcare, Inc. v. Blue Cross, 898 F.2d 914, 923 (3d Cir.); *cert. denied*, 498 U.S. 816 (1990) (citing Corabi v. Curtis Pub. Co., 273 A.2d 899, 907 (Pa. 1971)).

40. *U.S. Healthcare*, 898 F.2d at 923 ("[I]f the Court decides [the statement] is capable of a defamatory meaning, then it is for the jury to decide if the statement was so understood by the reader or listener.").

41. 42 PA. CONS. STAT. ANN. § 8343(a) (1982). Section 8343(a) states that

> [i]n an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised: (1) The defamatory character of the communication. (2) Its publication by the defendant. (3) Its application to the plaintiff. (4) The understanding by the recipient of its defamatory meaning. (5) The understanding by the recipient of it as intended to be applied to the plaintiff. (6) Special harm resulting to the plaintiff from its publication. (7) Abuse of a conditionally privileged occasion.

Id. Rather than expressly address each requirement in the statute, Pennsylvania courts generally apply a test similar to the one in the statute. *See, e.g.*, *U.S. Healthcare*, 898 F.2d at 923.

42. *Rutt*, 484 A.2d at 76 (finding harm when newspaper article implying that man did not love his son contributed to son's suicide).

43. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760 (holding publication that plaintiff is bankrupt can be defamatory); Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072, 1078, *cert. denied*, 474 U.S. 864 (1985) (publication that plaintiff attorney contributed to "grass transactions" capable of defamatory meaning); Elbeshbeshy v. Franklin Inst., 618 F. Supp. 170, 171 (E.D. Pa. 1985) (holding that employer's statement that employee lacked cooperation was potentially defamatory).

subject's reputation. A scientist found to have committed misconduct can expect that colleagues will be less eager to work with him or her, perhaps because they fear that he or she will discredit the sponsoring institution or collaborators. Furthermore, findings of misconduct following an institutional investigation will be communicated to the subject's source of funding, potentially interfering with continued funding.

Other state courts apply a different definition of harm to reputation, with many state courts finding mere negative statements insufficient to constitute defamation. For example, in *Rubenstein v. University of Wisconsin Board of Regents*, the court held that calling someone "an old biddy," saying that "she is not suitable for promotion" and that she is "just out to make trouble," in the context of academic tenure review, were not harmful to the reputation of the reviewee, as such statements are capable of both defamatory and nondefamatory meaning, or "innocent construction."[44] On the other hand, in *Ollman v. Evans*, the court noted that "a scholar's academic reputation among his peers is crucial to his or her career."[45] The court acknowledged that if a statement criticizing the views of a professor of political science as Marxist appeared "in an academic publication that purported to rate status within a given discipline," instead of on the editorial page of a newspaper, the statement would probably have been defamatory.[46]

Under this standard, a court could find that the report of a misconduct committee injured a subject's professional reputation. Comments by committee members concluding that some act by the subject constituted misconduct would fall into the category of remarks that are harmful to a subject's reputation.

Notably, courts have distinguished institutional committees, whose actions lead to loss of tenure or termination for cause,

44. Rubenstein v. University of Wis. Bd. of Regents, 422 F. Supp. 61, 64 (E.D. Wis. 1976); *see also* Howard Univ. v. Best, 484 A.2d 958, 989 (D.C. 1984) ("[A]n allegedly defamatory remark must be more than unpleasant or offensive; the language must make the plaintiff appear 'odious, infamous, or ridiculous.' ") (quoting Johnson v. Johnson Pub. Co., 271 A.2d 696, 697 (D.C. 1970)).

45. Ollman v. Evans, 750 F.2d 970, 989 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

46. *Id.* at 990; *see also* Byars v. Kolodziej, 363 N.E.2d 628 (Ill. App. Ct. 1977) (holding statements by department chair that plaintiff's work was not of quality or quantity to justify tenure was opinion and thus not actionable in defamation); Johnson v. Board of Junior College Dist. #508, 334 N.E.2d. 442 (Ill. App. Ct. 1975) (holding that student statements that professor should be transfered not defamatory as matter of law).

from those committees that merely fail to promote.[47] Debarment from federal grants or loss of a research position at an institution limits the scientist's future employment prospects and can destroy the scientist's credibility. The severity of these sanctions may be considered substantively more akin to termination for cause than denial of tenure. As such, statements resulting in disruption of federal funding could well fall within the range of statements that are interpreted as injuring reputation.

Having demonstrated harm to reputation, a plaintiff must also show that the allegedly defamatory statement was published.[48] Statements by misconduct committee members usually appear in a report from the committee to the head of the institution, which is then provided to NSF or PHS. Some jurisdictions have held that internal communications do not constitute publication for purposes of defamation.[49] For example, the United States Court of Appeals for the District of Columbia Circuit held that a report circulated among university employees stating that the plaintiff would not cooperate with the dean was not a publication sufficient to support a defamation cause of action.[50] The District Court for the Middle District of Pennsylvania held that communications within the university administration concerning the reasons for denying plaintiff tenure did not constitute publication and thus were not defamatory.[51] Finally, the Georgia Supreme Court held that discussions between two college faculty members about incidents of theft from student dorms did not constitute publication.[52]

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47. *Compare* Baker v. Lafayette College, 504 A.2d 247, 253 (Pa. Super. Ct. 1986) (holding that college's decision not to reappoint professor to another term was justified and that publication of evaluation of professor was not libelous), *aff'd*, 532 A.2d 399 (Pa. 1987) *with* Clark v. McBaine, 252 S.W. 428 (Mo. 1923) (holding statement that professor's dismissal was justified because he was unfit to teach on law school faculty constituted libel).

48. *See* RESTATEMENT (SECOND) OF TORTS § 559 (1977).

49. For a discussion of jurisdictions supporting this approach, see *infra* notes 50-52 and accompanying text.

50. Howard Univ. v. Best, 484 A.2d 958 (D.C. 1984). The court held that "[b]ecause [the plaintiff] failed to identify a single person who received or read the report outside the University . . . [the plaintiff] failed to meet her burden of proving publication." *Id.* at 989.

51. Keddie v. Pennsylvania State Univ., 412 F. Supp. 1264, 1276-77 (M.D. Pa. 1976) (noting such communications were privileged and made without malice).

52. Walter v. Davidson, 104 S.E.2d 113 (Ga. 1958). The court held that statements made within the hearing of another sharing similar authority "are the legal equivalent of speaking only to one's self and are not publications." *Id.* at 116.

Thus, in many jurisdictions, statements made orally or in writing to a committee composed of other employees of the institution constitute internal communications, not publications. The subject of the committee's deliberations is therefore precluded from establishing a prima facie case of defamation, unless there was some other form of publication. Under this definition, an institution's sending of an investigation report to a federal agency would also constitute an internal communication. Federal regulations require the submission of a report, and agencies maintain the confidentiality of their misconduct cases unless and until a formal finding of misconduct is made.[53] Thus, the filing of an investigation report would not constitute a publication. In some states, however, only one other person besides the alleged defamer must be present for publication to occur; in such a jurisdiction the submission of an investigation report to the NSF or the PHS could establish the publication element for a prima facie case of defamation.[54]

Another component of the prima facie case of defamation is the defendant's intent to defame.[55] The standard used to determine intent varies depending on the status of the plaintiff and whether the matter is one of public concern.[56] To demonstrate intent, public officials and figures must demonstrate a higher degree of fault than private individuals, referred to as "actual malice."[57] Actual malice is defined as making a statement with "knowledge that it was false or with reckless disregard of whether it was false or not."[58] In contrast, private figures, to prove intent, need only show that statements were made negligently, that is, with a "want of reasonable care and diligence to ascertain the truth."[59]

53. *See* 45 C.F.R. § 689.4 (1992); 42 C.F.R. § 50.103 (1992).

54. *See, e.g.*, Brewer v. American Nat'l Ins. Co., 636 F.2d 150, 153 (6th Cir. 1980) (finding that Kentucky "implicitly assumes that communications from one supervisor to another or to a secretary are publications"); *accord* Elbeshbeshy v. Franklin Inst., 618 F. Supp. 170, 171 (E.D. Pa. 1985) (communication to one other person, even if that other person is defamer's agent, constitutes publication) (citing RESTATEMENT (SECOND) OF TORTS § 577, cmt. c (1977)).

55. *See* RESTATEMENT (SECOND) OF TORTS § 559 (1977).

56. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). The Supreme Court requires plaintiffs who are public figures to meet a higher burden of proof of actual malice—demonstrating knowledge of falsity or reckless disregard of the truth—instead of mere negligence on the part of the defamer. *Id.* at 279-80. Pennsylvania's defamation statute does not explicitly address the private/public plaintiff distinction. 42 PA. CONS. STAT. ANN. § 8343(a) (1982).

57. *New York Times Co.*, 376 U.S. at 279-80.

58. *Id.* at 280.

59. Rutt v. Bethlehem's Globe Pub. Co., 484 A.2d 72, 83 (Pa. Super. Ct.

Plaintiffs also bear an increased burden of proof if the alleged defamation relates to a matter of public concern or interest.[60] The status of a statement is determined by its "content, form and context."[61] The statements of misconduct committees evaluating certain research practices of one scientist or laboratory would often not be a matter of public concern requiring the higher standard.[62] While misconduct in science can be viewed as a misuse of public funds because they are federal grant funds, only in relatively rare circumstances, such as with a subject who was already publicly known, or misconduct that affected public health or safety, would such misconduct be held a matter of public concern.

1981) (confirming that, when matter is not of public concern, private citizen plaintiff must establish only negligence in regard to falsity).

In *Gertz v. Robert Welch, Inc.*, the Court noted that people can become public figures voluntarily if they "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved . . . [and] invite attention and comment." Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

Scientists can be public figures. For example, Linus Pauling, a Nobel prize winning research scientist, was considered to be a public figure for defamation purposes when he led an international movement to stop nuclear bomb testing. Pauling v. Globe-Democrat Pub. Co., 362 F.2d 188, 197 (8th Cir. 1966), *cert. denied*, 338 U.S. 909 (1967). In *Pauling*, the court noted that the plaintiff, "by his public statements and actions, was projecting himself into the arena of public controversy and into the very 'vortex of the discussion of a question of pressing public concern,' " and therefore was required to prove "actual malice". *Id.* at 195. It is the issue raised by the statement, not the position of the plaintiff, which determines if a person is a public figure. Johnson v. Board of Junior College Dist. #508, 334 N.E.2d 442 (Ill. App. Ct. 1975) (citing *Gertz*, 418 U.S. 323). In *Johnson*, several junior college professors were classified as public figures when they became involved in a local controversy over their alleged failure to use textbooks written by racial minorities. *Id.* at 447. The court concluded that "while . . . not public figures for all purposes, plaintiffs clearly had become public figures within the . . . College Community, which was the community served by the publication." *Id.* at 447; *see also* Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979) (holding that receipt of public research grants did not make director of research at state mental hospital public figure in regards to content of studies, as director "did not thrust himself or his views into public controversy to influence others").

60. Connick v. Myers, 461 U.S. 138 (1983) (holding that questionnaire circulated among assistant district attorneys concerning office morale was not matter of public concern, as questions did not suggest wrongdoing on part of District Attorney, but rather discontent among employees). In Pennsylvania, the defendant bears the burden of proving that the subject matter is one of public concern. *See* 42 PA. CONS. STAT. ANN. § 8343(b) (1982).

61. *Connick*, 461 U.S. at 147-48.

62. *But cf.* Chonich v. Ford, 321 N.W.2d 693, 697 (Mich. Ct. App. 1982) (holding statements about alleged misuse of millions of dollars of college funds by defendant, chairman of board of trustees of county community college was "matter[] of public concern in regard to which . . . [defendants] should be allowed to express their views . . . without fear of repercussions," and as such absolutely privileged).

After establishing a prima facie case by demonstrating that the defendant published false statements of fact with the requisite level of intent, the plaintiff may have to contend with several defenses, such as truth, fair comment (also known as the opinion doctrine), and various privileges and immunities.[63] The most complete defense to a defamation suit is truth, but this defense is rarely used because it is difficult to prove that a statement is absolutely true. A review of recent Pennsylvania case law reveals no cases in which a court held for the defendant on the grounds that the statement proved to be true.[64]

A. *Fair Comment Doctrine*

The second defense to a defamation suit is the "fair comment doctrine," which provides constitutional protection for expressions of opinions.[65] In *Gertz v. Robert Welch, Inc.*, the Supreme Court established a First Amendment presumption that there is no such thing as a false idea, and therefore opinions are absolutely immune from defamation actions.[66]

In the aftermath of *Gertz*, courts have struggled to distinguish between facts and opinions. Some courts have stated that verifiable statements are facts, while those that are not verifiable are opinions.[67] Professors Prosser and Keeton have suggested three types of defamatory opinions: "deductive opinions," in which the publisher implies misconduct on the basis of true information; "evaluative opinions," in which the publisher passes judgment on

63. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 8343(b) (1982). For a discussion of each of these defenses, see *infra* notes 65-81 and accompanying text.

64. For example, in U.S. Healthcare, Inc. v. Blue Cross, 898 F.2d 914 (3d Cir.), *cert. denied*, 111 S. Ct. 58 (1990), the court referred to truth as a defense, but it ambiguously cited a Pennsylvania case, *Dunlap v. Philadelphia Newspapers, Inc.*, that placed the burden of proving falsity on the plaintiff. *U.S. Healthcare*, 898 F.2d at 923 (citing Dunlop v. Philadelphia Newspapers, Inc., 448 A.2d 6 (Pa. Super. Ct. 1982)).

65. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974) ("Under the First Amendment, there is no such thing as a false idea."). This principle was set forth in dicta, but lower courts have since accepted it as law. *See, e.g.*, Ollman v. Evans, 750 F.2d 970, 974-75 (D.C. Cir. 1984) ("*Gertz* elevated to constitutional principal the distinction between fact and opinion, which at common law had formed the basis of the doctrine of fair comment.").

66. *Gertz*, 418 U.S. at 339-40. In *Gertz*, the Court stated that "[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the compilation of other ideas." *Id.*

67. *See, e.g.*, Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir.), *cert. denied*, Hotchner v. Doubleday & Co., Inc., 434 U.S. 834 (1977) (noting that context of assertion may give rise to liability if underlying facts are implied, but that "[a]n assertion that cannot be proved false cannot be held libelous").

one's conduct (actionable only if the publisher does not believe the opinion or believed it unreasonably); and "informational opinions," which imply underlying facts known to the publisher (actionable if no such facts exist).[68]

In *Ollman v. Evans*, the United States Court of Appeals for the District of Columbia Circuit developed a four-part test to distinguish fact from opinion, examining: (1) the common usage or meaning of the specific language of the challenged statement to determine if that language has precise meaning; (2) the verifiability of the statement; (3) the full context of the statement; and (4) the broader context in which the statement appears.[69] In the tenure evaluation context, courts have dismissed or disposed of cases at the summary judgment stage because the statements of committee members were found to be opinion.[70]

The fair comment doctrine is often used by courts in their evaluations of defamation actions arising from decisions to deny academic promotions or tenure.[71] For example, in *Belliveau v. Renick*, the Rhode Island Supreme Court determined that an evaluation by a department chairperson recommending against plaintiff's promotion was not actionable as defamation, because it was based on a difference in opinion between the department chair and the professor on what constituted publishing experience.[72]

Similarly, in *Baker v. Lafayette College*, Baker, a college art professor in Pennsylvania, who was not reappointed at the end of his

68. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 113A, at 813-14 (5th ed. 1984).

69. Ollman v. Evans, 750 F.2d 970, 979 (D.C. Cir. 1984). The court felt that readers would be "less likely to infer facts from an indefinite or ambiguous statement than one with a commonly understood meaning." *Id.*

70. *See, e.g.*, McConnell v. Howard Univ., 621 F. Supp. 327 (D.D.C. 1985), *aff'd*, 818 F.2d 58 (D.C. Cir. 1987) (granting summary judgment when university officials charged plaintiff with "neglect," as "neglect" is opinion, not false statement of fact); Baker v. Lafayette College, 532 A.2d 399 (Pa. 1987) (affirming dismissal of action concerning statements made by professor in evaluation of plaintiff that were directed to provost); Belliveau v. Rerick, 504 A.2d 1360 (R.I. 1986) (affirming summary judgment when opinion was based on facts supplied by plaintiff); Byars v. Kolodziej, 363 N.E.2d 628 (Ill. App. Ct. 1977) (affirming dismissal on grounds that statements on plaintiff's qualifications for tenure were opinion); Gernander v. Winona State Univ., 428 N.W.2d 473 (Minn. Ct. App. 1988) (affirming summary judgment when writing style and intended audience of memo supported interpretation that it was opinion).

71. *See, e.g.*, Colson v. Stieg, 433 N.E.2d 246 (Ill. 1982) (rule of fair comment on matters of public concern applied to allegedly defamatory comments made during personnel committee meeting regarding tenure decision); *Belliveau*, 504 A.2d at 1360.

72. *Belliveau*, 504 A.2d at 1360.

term, sued the college for defamation.[73] The claim was based on a report written by the dean of another art school who was asked by Lafayette College to evaluate Baker by examining the work of his students.[74] The court found that the report contained two types of statements, opinion and fact.[75] The court held that the evaluation portion, which contained a recommendation not to rehire Baker, was opinion, and therefore not actionable.[76]

In *McConnell v. Howard University*, the United States District Court for the District of Columbia held that statements by university personnel to the effect that actions indisputably taken by the plaintiff constituted a neglect of his professional duties were "evaluative opinions."[77] The court said that such opinions would be actionable only if the personnel "did not entertain the opinion expressed and [were] misstating [their] own state[s] of mind or if a reasonable and fair-minded person could not have entertained the derogatory opinion on the basis of the information on which [they] relied."[78]

In light of these cases, misconduct committee members' statements could be held to consist in whole or in part of opinion, entitling them to some protection under the opinion doctrine.[79] Alternatively, the findings of the misconduct committee could be held to contain both fact and opinion, and therefore warrant some protection under the opinion doctrine.[80]

Finally, a misconduct committee's recommendations could also be protected if considered "evaluative opinions," that is,

73. Baker v. Lafayette College, 504 A.2d 247 (Pa. Super. Ct. 1986), *aff'd*, 532 A.2d 399 (Pa. 1987).

74. *Id.* at 248. Two other letters by the art department head were privileged because the plaintiff consented to their publication. *Id.* at 249. Additionally, a nonprivileged memo was found to lack defamatory meaning and, therefore, was not actionable. *Id.* at 250-56.

75. *Id.* at 252.

76. *Id.* The court held that the factual statements contained in the report were "incapable of a defamatory meaning" and therefore were also not actionable. *Id.*

77. McConnell v. Howard Univ., 621 F. Supp. 327, 331 (D.D.C. 1985), *aff'd*, 818 F.2d 58 (D.C. Cir. 1987) (citing KEETON ET AL., *supra* note 68, § 113A, at 814). *McConnell* involved a professor who was dismissed from a tenured position for refusing to teach until a student apologized for calling him a racist. *Id.* at 328.

78. *Id.* at 332 (quoting KEETON ET AL., *supra* note 68, § 113A, at 814).

79. *See, e.g.*, Belliveau v. Renick, 504 A.2d 1360 (R.I. 1986). For a discussion of *Belliveau*, see *supra* notes 71-72 and accompanying text.

80. *See, e.g.*, Baker v. Lafayette College, 504 A.2d 247 (Pa. Super. Ct. 1986), *aff'd*, 532 A.2d 399 (Pa. 1987). For a discussion of *Baker*, see *supra* notes 73-76 and accompanying text. *See also infra* notes 114-15 and accompanying text.

evaluations based on facts, actionable only if the defendant did not entertain the opinion expressed or if a reasonable and fair-minded person could not have found misconduct based on the data the person examined.[81]

While most misconduct committee evaluations likely will contain some form of opinion, courts may consider portions of the reports actionable statements of fact. The committees' evaluations are less "purely subjective" than the statements discussed in the tenure cases above because part of the committees' goal is to establish objective truth with regard to the factual elements of the allegations. The misconduct committees then proceed to evaluate the facts to arrive at an opinion about whether those facts constitute misconduct in science. In contrast, tenure committee decisions are based almost entirely on subjective elements, such as how well a professor will work with other department members, or whether the department will benefit from the professor's abilities. Therefore, although the factual conclusions of misconduct committees in establishing the objective truth may be actionable, the conclusions regarding misconduct should not be.

B. *Absolute Privilege*

Privilege, sometimes called immunity, is a third defense to a defamation claim.[82] "Privilege" refers to otherwise actionable conduct that escapes liability because "the defendant is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation."[83] There are two types of privileges: absolute and qualified.[84]

Absolute privilege protects the speaker regardless of what the speaker says in the few situations in which policy considerations favor complete freedom of expression, regardless of motive.[85] The most common absolute immunity is accorded to

81. *See, e.g.*, *McConnell*, 621 F. Supp. at 327. Misconduct committee evaluations may be based on information such as notebooks or other research records, some of which the individuals accused of misconduct may have provided to the committee. In such a case, the data or other information provided to the committee, although it might ultimately prove to be untrue, could constitute nonactionable "fact" because it was supplied by the plaintiff.

82. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 8343(b)(2) (1982).

83. KEETON ET AL., *supra* note 68, § 114, at 815. Some courts limit privilege to when a defendant may speak with immunity, but the terms do not differ in principle and therefore are used interchangeably.

84. *Id.* §§ 114-15.

85. *Id.* § 114.

certain individuals involved in the judicial process, such as judges, jurors and prosecutors.[86] Since the late 1800s courts have agreed that a judicial officer, even when acting maliciously, corruptly, or in excess of jurisdiction, is immune from civil suit for acts committed in the course of the judicial officer's duties.[87] The rationale for this immunity is that "a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself."[88]

In 1978, the Supreme Court held in *Stump v. Sparkman* that the question in deciding whether to grant absolute immunity to a judge was whether the judge was acting within his jurisdiction, and not whether or not his activity was a "judicial" act.[89] That same year, in *Butz v. Economou*, the Supreme Court extended absolute immunity to an Executive Branch administrative law judge, holding that it is the nature of the judgments and not the location of the judges within a particular branch of government that gives rise to absolute immunity.[90] The Court held that the judge was not disqualified from absolute immunity because of his status as an executive branch employee.[91]

In *Cleavinger v. Saxner*, the Court set out several factors used to determine whether a function is sufficiently judicial to receive the absolute privilege.[92] These factors are:

(a) the need to assure that the individual can perform his

86. *Id.*

87. *See* Butz v. Economou, 438 U.S. 478, 508-11 (1978) (recounting history of law of providing absolute immunity for judges, federal prosecutors, state prosecutors and jurors).

88. Stump v. Sparkman, 435 U.S. 349, 356 (1978) (citing Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871)).

89. *Id.* at 357, 360. The Court held that a county circuit court judge who cursorily approved a parent's petition for a minor's sterilization was absolutely protected from liability in an action by the sterilized woman for violation of her civil rights under 42 U.S.C. § 1983. *Id.* at 364. The Court held that the judge was "immune from damages liability even if his approval of the petition was in error." *Id.*

90. *Butz*, 438 U.S. at 514. The Court explained that "the cluster of immunities protecting the various participants in judge-supervised trials stems from the characteristics of the judicial process rather than its location." *Id.* at 512.

91. *Id.* at 514.

92. Cleavinger v. Saxner, 474 U.S. 193 (1985). *Cleavinger* dealt with a suit by prisoners against prison officials for violation of various constitutional rights. *Id.* at 198. Three prisoners were found guilty by the prison's discipline committee of encouraging work stoppages. *Id.* at 194-95. Those findings were the basis of the plaintiffs' suits. *Id.* at 198. The Court held that the prison officials were entitled to qualified immunity. *Id.* at 206.

> functions without harassment or intimidation; (b) the presence of safeguards [other than potential liability] that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the [agency] process; and (f) the correctability of error on appeal.[93]

After analyzing the facts of *Butz*, the Court in *Cleavinger* concluded that adjudication within a federal administrative agency had enough characteristics of the judicial process so that those involved in such adjudication should be granted qualified immunity from suits for damages.[94]

The Supreme Court has been reluctant to grant absolute immunity to nonjudicial bodies with quasi-judicial functions. In *Cleavinger*, the Court found that officials who served on the Institution Discipline Committee (that hears cases against inmates for rules infractions) of a federal prison were entitled only to qualified immunity.[95] The Court analogized the decisions of the prison discipline committee to those of school board committees, and emphasized that the latter receive only qualified immunity.[96] The Court reasoned that the operation of the prison discipline committee was less formal than the federal administrative proceeding that warranted absolute immunity in *Butz*.[97] In addition, the prison committee's members were not independent, professional, hearing officers, but rather prison officials serving outside their regular duties.[98] Furthermore, the procedural safeguards applied in *Butz* were not present in *Cleavinger*: prisoners were neither afforded lawyers nor independent nonstaff representatives; prisoners had no right to compel witness attendance, cross-examination, or discovery; no verbatim transcript was kept; and the information presented was often hearsay.[99] The Court held that the combined effect of these factors demonstrated that the

93. *Id.* at 202 (citing *Butz*, 438 U.S. at 512).

94. *Id.* at 206. The Court acknowledged that the line between qualified and absolute immunity is not always an easy one to draw. *Id.*

95. *Id.*

96. *Id.* The Court compared the regulatory nature of the decisions made by the two types of boards and concluded that they both deserved only qualified immunity. *Id.*

97. *Id.* at 203-04. In *Butz*, the Court held that the special functions of some executive officials within the Department of Agriculture warranted absolute immunity from liability. *Butz*, 438 U.S. at 508.

98. *Cleavinger*, 474 U.S. at 206.

99. *Id.* The Court concluded that the committee members were not truly

prison hearing committee members were not "independent" and thus not entitled to absolute immunity.[100]

The Supreme Court's holding in *Cleavinger* has been distinguished by some federal courts.[101] In *Shelly v. Johnson*, the District Court for the Western District of Michigan held that a Michigan prison hearing officer was entitled to absolute immunity from liability for his or her quasi-judicial acts because such immunity was "essential to preserve the independence which judicial and quasi-judicial officers must enjoy to properly discharge their duties."[102] The *Shelly* court distinguished *Cleavinger* on several grounds. First, the court addressed the professional nature of the Michigan hearing officers.[103] The court noted that unlike the discipline committee members in *Cleavinger* who served on an ad hoc basis, the Michigan prison hearing officers served in a statutorily defined official position, in a full-time capacity.[104] The function of the Michigan hearing officers was more clearly adjudicatory than the officers in *Cleavinger* because, pursuant to statute, the officers must be attorneys, testimony must be heard, and facts must be found and issued in writing.[105]

In another departure from *Cleavinger*, the United States District Court for the District of Nebraska granted absolute immunity to members of a state prison disciplinary committee appeals board, which had upheld sanctions against an inmate for rules infractions.[106] In *Shaddy v. Gunter*, the court distinguished the position and function of the appeals board members from those of the *Cleavinger* officials.[107] The main difference the court noted was that the Nebraska officials served on the appeals board as a regular function and, thus, were more independent than the commit-

independent and stated that "the members had no identification with the judicial process of the kind and depth that has occasioned absolute immunity." *Id.*

100. *Id.*

101. *See* Shaddy v. Gunter, 690 F. Supp. 860 (D. Neb. 1988); Shelly v. Johnson, 684 F. Supp. 941, 944 (W.D. Mich. 1987), *aff'd*, 849 F.2d 228 (6th Cir. 1988); *see also* McCutcheon v. Moran, 425 N.E.2d 1130 (Ill. App. Ct. 1981); Baker v. Lafayette College, 504 A.2d 247 (Pa. Super. Ct. 1986).

102. *Shelly*, 684 F. Supp. at 943.

103. *Id.* The court noted that "unlike the members of the discipline committee in *Cleavinger*, the Michigan prison hearing officer is an attorney especially appointed to conduct prison disciplinary hearings as a full time judicial officer." *Id.*

104. *Id.*

105. *Id.* The court held that the role of the Michigan prison hearing officer is "similar to that of an administrative law judge and as such should be entitled to absolute judicial immunity . . . ." *Id.*

106. *Shaddy*, 690 F. Supp. at 865.

107. *Id.* at 864-65.

tee members in *Cleavinger* who were forced to choose between their superior, the warden, and the prisoners.[108]

In *McCutcheon v. Moran*, the Illinois Court of Appeals upheld a grant of absolute immunity to a janitor's statement at the school board hearing concerning a teacher accused of battery by that janitor, holding that the school board was functioning as a "quasi-judicial body."[109] The court held that the janitor's statement to the school board was absolutely privileged because the board's proceedings could "be regarded as judicial in nature," and because the board had "powers of discretion in applying the law to the facts."[110]

Based on an application of this analysis, misconduct in science review committee members may well be accorded absolute immunity. As discussed above, these misconduct investigations are undertaken by sponsoring research institutions pursuant to the requirements of the federal granting agencies' regulations, under procedures that are subject to annual submission to and review by the PHS. The existence of these established procedures, under the aegis of the federal regulations, should lead to the granting of absolute immunity under the principles set forth in *Butz*.[111] Institutional committees proceed with investigations of allegations of misconduct in science only after the federal government has "deferred" to them; in every case, the federal agencies could choose to proceed with the investigation themselves.[112] Thus, even misconduct in science committees at private institutions are closely allied with the federal government and their actions in that context are clearly "judicial in nature." Furthermore, according to general institutional procedures, misconduct committee members should not serve if they have conflicts of interest, a factor that provides for the independence that was absent in *Cleavinger*.[113]

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108. *Id.* at 865.

109. McCutcheon v. Moran, 425 N.E.2d at 1130, 1133 (Ill. App. Ct. 1981).

110. *Id.* at 1133.

111. For a discussion of the *Butz* principles, see *supra* notes 90-94 and accompanying text.

112. *See, e.g.*, 45 C.F.R. § 689.3(a) (1992). For a discussion of this regulation, see *supra* notes 7-25 and accompanying text.

113. *See, e.g.*, JOHNS HOPKINS UNIVERSITY SCHOOL OF MEDICINE, PROCEDURES FOR DEALING WITH ISSUES OF PROFESSIONAL MISCONDUCT, *in* FACULTY POLICIES HANDBOOK 15, 19 (1990) (stating that investigation is conducted by ad hoc committee comprised of *disinterested* members of Standing Committee on Discipline and other appropriate faculty members). For a discussion of *Cleavinger*, see *supra* notes 92-100 and accompanying text.

On the other hand, serving on a misconduct in science committee generally is not a regular function of institution employees. Members of the committee may be coworkers of both the accused scientist and the institution. This "independence" problem could be rectified by insuring that no committee members have conflicts of interest or by adding "service to a misconduct committee" to position descriptions of scientists at institutions. With these added safeguards, institutional committee members should be completely immune from civil suits under the Michigan court's analysis in *Shelly*.

Another way in which the activity of committee members may be absolutely privileged is through the doctrine of consent by the subject scientist to misconduct investigations. In *Baker v. Lafayette College*, the Pennsylvania Superior Court held that comments on a professor's qualifications by a fellow art professor were absolutely privileged because by signing his employment contract, the employee agreed to submit to regular evaluations by his colleagues.[114] The court also indicated that comments by a professor at another art school might be protected by an absolute privilege under a consent theory, when the school's published procedures explicitly permitted the solicitation of advice from outsiders.[115] Under this analysis, if an institution's policies, which the subject is required to read before accepting employment, mention the participation of fellow employees and outside experts in misconduct review, the institution's misconduct committee members could be protected by an absolute privilege.

C. *Qualified or Conditional Privilege*

Under some circumstances, a court may find that although the defendant did not have an absolute privilege, the defendant's statement deserved protection; in such case, the notion of quali-

114. Baker v. Lafayette College, 504 A.2d 247, 249 (Pa. Super. Ct. 1986), *aff'd*, 532 A.2d 399 (Pa. 1987).

115. *Id.* at 251. The court in *Baker* held that the report by a dean of another art school to the provost at the plaintiff's school was not covered by the absolute privilege of consent because there was some question as to whether the report was within the scope of consent the plaintiff originally gave when he signed his employment contract, and whether the consent was revoked by the plaintiff before the report was issued. *Id.* The issue was moot in this case, as the court ruled that the report was not capable of defamatory meaning. *Id.* The court dismissed the scope of consent issue in dicta. The court indicated that it might have awarded the report an absolute privilege if other factors had not been present, including that the report from the outsider was obtained after the decision not to reappoint the plaintiff had been made. *Id.*

fied privilege is applied.[116] Historically, a qualified privilege existed when the defendant sought to vindicate an interest sufficiently important to justify some latitude for making mistakes. Unlike an absolute privilege, however, a qualified privilege can be lost through abuse or bad faith publication.[117]

In Pennsylvania, a qualified privilege arises if two criteria are met. First, the statement must be made in good faith.[118] Second, the statement must involve one of the following interests: (1) an interest of the person who publishes defamatory matter; (2) an interest of the person to whom the matter is published or some other third person; or (3) a recognized public interest.[119] The general rule in the tenure review context is that an evaluating official who makes a "good faith substantiated judgment that a faculty or staff member does not merit reappointment, promotion or the award of tenure or permanent employment" is protected

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116. *See, e.g.*, Smith v. Greyhound Lines, Inc., 614 F. Supp. 558, 562 (W.D. Pa. 1984), *aff'd*, 800 F.2d 1139 (1986) (holding that discussion between various employees, managers and union representatives constituted conditionally privileged occasion because they had legitimate interest in proceedings that concerned money shortage and plaintiff's impending discharge).

117. KEETON ET AL., *supra* note 68, § 115, at 825. "In all . . . cases, the privilege is lost if [the publisher] says more than reasonably appears to be necessary, or if the publication is made to a person who apparently is in no position to give legitimate assistance . . . ." *Id.* at 826.

118. The Pennsylvania Supreme Court has defined the good faith requirement as follows:

> [A] privileged communication is one made upon a proper occasion, from a proper motive, in a proper manner and based upon reasonable and probable cause, . . . and it is always for the court to determine whether the alleged defamatory publication is thus privileged; if found so to be, and if there is no intrinsic or extrinsic evidence of malice, it is the duty of the court to direct a nonsuit or give binding instructions for the defendant.

Dempsky v. Double, 126 A.2d 915, 917 (Pa. 1956) (citations omitted); *see also* Burns v. Supermarkets Gen. Corp., 615 F. Supp. 154, 158 (E.D. Pa. 1985); Baird v. Dun & Bradstreet, 285 A.2d 166, 171 (Pa. 1956); Beckman v. Dunn, 419 A.2d 583, 588 (Pa. Super. Ct. 1980).

119. *Burns*, 615 F. Supp. at 158; *Beckman*, 419 A.2d at 588. In contrast, Prosser and Keeton list five interests that give rise to a qualified privilege: interest of the publisher; interest of others (for instance an employer's interest); common interest; communication to one who may act in the public interest; and fair comment on matters of public concern. KEETON ET AL., *supra* note 68, § 115, at 825-832. In practical terms, these categories create privileges under the same circumstances as do Pennsylvania's laws. Thus, while Pennsylvania does not explicitly mention common interest, its three categories implicitly include what this Article and Prosser and Keeton refer to as "common interest."

Although other states define the parameters of the privilege differently, the effect is the same. For example, Michigan recognizes as privileged "all bona fide communications concerning any subject matter in which a party has an interest or duty owed to a person sharing a corresponding interest or duty." Rosenboom v. Vanek, 451 N.W.2d 520, 522 (Mich. Ct. App. 1989).

from a defamation suit by the qualified privilege doctrine.[120]

Whether a misconduct committee member can likewise benefit from the qualified privilege doctrine largely depends upon what interest is at stake and what duty the member owes to the public. The committee member may be granted a qualified privilege when (1) there is a common interest in the subject matter of the statement between the committee member and the recipient of the information; (2) there is a sufficient third-party interest in the committee member's statement; and (3) the committee member had a duty to disclose the information to the public.

A qualified privilege arises when the publisher and the recipient have a common interest in the subject matter of the statement and the context is one in which the statement is designed to further that interest.[121] The existence of an employer—employee qualified privilege also depends on the particular circumstances of the alleged defamation. For example, a qualified privilege existed when an employer informed the employee's fellow workers that the employee had been discharged for violating the rules against sexual harassment.[122] The court reasoned that the employer and the other employees had a common interest in understanding the definition of sexual harassment and company rules so as to avoid future violations.[123]

Qualified privilege was applied in the academic context as

120. Francis T. Bazluke, Defamation Issues in Higher Education, NACUA 11 (1990). The standard for applying the qualified privilege doctrine in the tenure review context parallels the standard applied in Pennsylvania and suggested by Prosser and Keeton. Many courts shield performance evaluations from defamation suits if (1) the evaluation is undertaken by the appropriate university official, as prescribed by established procedures or customary practice; (2) communications in the evaluation are relevant to the employment issue under review; and (3) the evaluation is conveyed only to persons with a legitimate interest in or duty regarding the subject matter. *Id.*

121. KEETON ET AL., *supra* note 68, § 115, at 828. Prosser and Keeton note that a common interest most often arises "in the case of those who entered upon or are considering business dealings with one another, or where the parties are members of a group with a common pecuniary interest." *Id.*

122. Garziano v. E.I. Du Pont De Nemours & Co., 818 F.2d 380, 387 (5th Cir. 1987). The case involved a libel and slander action against Du Pont by an employee who had been discharged for sexual harassment. *Id.* at 382-84. The contested communication was a bulletin defining the company's sexual harassment policy, which did not mention the employee by name. *Id.* The bulletin referred to "[t]he recent sexual harassment incident which resulted in an employee's termination." *Id.* at 384.

123. *Id.* at 392. The court found that once a common interest was established, a presumption of good faith arose. *Id.* at 388. In this case, the employee did not have sufficient evidence of malice or bad faith to overcome this presumption. *Id.* at 389-94.

early as 1923, when the Missouri Supreme Court held that statements by law school professors regarding the dismissal of another professor were privileged.[124] In *Clark v. McBaine*, a law school professor attempted to have the university's president fired by writing letters critical of him to the local newspaper.[125] Other professors, who were the defendants in the case, responded by writing a letter, which they sent to a local newspaper and various private individuals, stating that it was their belief, based on facts known to them, that the plaintiff had been dismissed because he "had ceased to be a useful member of the faculty."[126] The court held that the entire faculty, including the defendants, had a common interest in the matter, and that the public had a right to expect that they would not remain passive on the subject.[127] In 1989, the Mississippi Supreme Court affirmed the continuing validity of qualified privilege in the academic context.[128] In *Staheli v. Smith*, the court noted in dicta that a university dean's comments regarding the dismissal of a faculty member to that member's fellow employees were not actionable because of the dean's "qualified privilege in the employment context."[129]

The only federal case that explicitly applied a privilege of common interest in employment to the university setting and held that as a result of the privilege the defamation claim fails was *Greenya v. George Washington University*.[130] In *Greenya*, a part-time instructor who had been fired alleged civil rights violations and defamation by the university and its officials.[131] The alleged defamation was the statement "Do Not Staff" on an index card in the office of academic staffing that had been prepared at the direction of one of the defendants, the chairman of the English depart-

124. Clark v. McBaine, 252 S.W. 428 (Mo. 1923).

125. *Id.* at 430-31.

126. *Id.* at 431.

127. *Id.* at 432.

128. *See* Staheli v. Smith, 548 So. 2d 1299 (Miss. 1989).

129. *Id.* at 1305. The court applied Mississippi's qualified privilege standard to the tenure review context, stating that "a qualified privilege exists between those directly interested in the same matter and in the absence of malice no cause or action lies." *Id.* at 1305 (citations omitted) (quoting Hooks v. McCull, 272 So. 2d 925, 927 (Miss. 1973).

However, the court ultimately held that the trial court properly granted summary judgment on the governmental immunity issue. *Id.* at 1306. Evidence showed that the dean acted within the scope of his position, which was analogous to that of an employee. *Id.*

130. 512 F.2d 556 (D.C. Cir.), *cert. denied*, 423 U.S. 995 (1975).

131. *Id.* at 558.

ment.[132] According to the plaintiff, the existence of the card constituted defamation because it carried "an innuendo of either incompetence or dishonesty."[133] The D.C. Circuit Court opinion upheld the directed verdict in favor of the defendants on the grounds that a qualified privilege existed between officers and faculty members of educational organizations to discuss the qualifications and character of fellow officers and faculty members.[134]

A recent Maine decision, in accord with *Greenya*, granted a tenure committee professor a conditional privilege against a slander claim.[135] In *Gautschi v. Maisel*, Maisel, one of the defendants, told the committee that one of Gautschi's referees had admitted to Maisel that the positive reference he had given Gautschi was false.[136] The court held that Maisel's service as a college employee entitled him to a conditional privilege against slander claims.[137] The limited privilege required that Maisel be engaged in an activity of benefit to his employer. The court held that reviewing another employee's credentials constituted an activity beneficial to one's employer.[138]

Courts have applied the concept of "common interest in subject matter" often in the evaluation of educators.[139] In *McGowen v. Prentice*, a communication from a principal to a school board regarding the performance of a teacher was held protected by a qualified privilege because school officials had a "lawful interest . . . in the subject matter" on which the principal reported.[140]

132. *Id.* at 563.
133. *Id.*
134. *Id.*
135. Gautschi v. Maisel, 565 A.2d 1009, 1011 (Me. 1989).
136. *Id.* at 1010-11.
137. *Id.* at 1011.
138. *Id.* The court stated: "This conditional privilege entitled Maisel to immunity for slander unless he abused the privilege - for example by making the statement outside normal channels or with malicious intent." *Id.* Other courts recognize this conditional privilege when one employee reviews another employee's credentials to determine the grant of permanent employment. *See Greenya*, 512 F.2d at 563.
139. *See, e.g.*, McGowen v. Prentice, 341 So. 2d 55, 57 (La. Ct. App. 1976) (*supplemental op.*, Prentice v. McGowen, 346 So. 2d 1361 (La. Ct. App. 1977)).
140. *Id.* at 57. The alleged defamation was a letter that firmly recommended termination based on circumstances known to the principal. *Id.* This letter was written in response to a request by the superintendent of the school district who solicited defendant's recommendations regarding plaintiff's employment. *Id.*
The plaintiff in *McGowen* also argued that the principal's comment about the plaintiff to another teacher was defamatory. *Id.* The principal stated: "[T]hat's why you understand her so well, because you all are both nuts." *Id.* The court held that this did not constitute actionable defamation. *Id.* at 57-58.

The common interest the principal shared with the school board was the desire to choose the most qualified teachers for the public schools.[141]

Qualified privilege does not require the publisher to be an employee of the person to whom the communication was published.[142] For example, in *Buckley v. Litman*, the person to whom the negative evaluation was published was contemplating hiring the plaintiff.[143] Additionally, a duty establishing a privilege can be created by general institutional policies, published or unpublished, prohibiting the conduct in question. For instance, one case involved a university policy encouraging employees and students to report sexual assaults.[144] A woman reported an assault, and in the process allegedly destroyed the plaintiff's reputation.[145] She was held to have a qualified privilege in reporting the assault, even though she reported it to an inappropriate person.[146] The court acknowledged that while a strict interpretation of university policy might indicate that the defendant should have contacted the university's affirmative action office or her supervisor, her report should not be disregarded in light of the institution's policy encouraging all students and employees to report instances of sexual assault.[147]

Members of misconduct committees will almost certainly be given the same common interest qualified privilege as is given faculty members serving on tenure review committees. Institutions benefit as much from research misconduct investigations as they do from review of tenure qualifications. Specifically, most universities depend on federal funds for a large portion of their science and engineering research budget, and investigating misconduct in science is required by the regulations of many grantor agencies.[148] Hence, the efficiency and reputation of an institution

141. *Id.*

142. *See, e.g.*, Buckley v. Litman, 443 N.E.2d. 469 (N.Y. 1982) (involving publication by doctor to another doctor with whom he had continuing relationship of information about plaintiff in whom both had common interest was conditionally privileged).

143. *Id.* at 470. In fact, negotiations to run a family practice clinic were complete at the time the defendant sent the letter concerning plaintiff's criminal behavior. *Id.* at 470.

144. Rosenboom v. Vanek, 451 N.W.2d 520, 522 (Mich. Ct. App. 1989).

145. *Id.*

146. *Id.* Defendant reported the assault to the plaintiff's supervisor instead of to the university's affirmative action office or her own supervisor.

147. *Id.*

148. Federal research and development expenditures accounted for 60 percent of total fiscal year 1989 scientific and engineering expenditures at universi-

are common interests because these interests dictate whether that institution will receive funding. Courts are likely to consider the misconduct committee members' activities as beneficial to an institution. These activities are very important to an institution's reputation because they can help it to discover and eliminate any misconduct occurring under its auspices.

Furthermore, an employee's desire to avoid termination is an additional interest giving rise to a common interest privilege for the employer to communicate what behavior will warrant termination.[149] Likewise, the subject matter of misconduct committees should carry with it a qualified privilege for a similar reason: By serving on committees, members will learn how to carefully document their research in a way that will avoid even the appearance of misconduct in their future research behavior.[150]

A common interest may also arise out of a relationship between fellow employees.[151] Even if the committee members' evaluations were inaccurate, they may likely be entitled to a qualified privilege because of this relationship. For instance, the Rhode Island Supreme Court held that a communication between a professor and the vice president of academic administration regarding proposed faculty promotions within his department was privileged by virtue of the relationship among the faculty members.[152] Other kinds of "common interest" have been found between a general contractor and an employee supervising a subcontractor, and also between law schools and the Educational Testing Service, a company that administers the Law School Ad-

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ties and colleges. MARGE MACHEN, SELECTED DATA ON ACADEMIC SCIENCE/ENGINEERING R&D EXPENDITURES FY 1989, NSF 90-321 (National Science Foundation 1991).

149. Garziano v. E.I. Du Pont De Nemours & Co., 818 F.2d 380, 386 (5th Cir. 1987).

150. The Mississippi Supreme Court in *Staheli v. Smith* referred to the qualified privilege as existing "within the employment context." Staheli v. Smith, 548 So. 2d 1299, 1305 (Miss. 1989). One possible requirement for common interest qualified privilege remains untested: courts may require that the person sitting on the committee be an official employee of the institution in order to receive qualified immunity, not an expert recruited to voluntarily serve on the committee. *Id.*

151. The three categories of qualified privileges in Pennsylvania would include this privilege. For a discussion of these categories, see *supra* note 119 and accompanying text.

152. Belliveau v. Renick, 504 A.2d 1360, 1363 (R.I. 1986). Such a relationship required the defendant to "comment frankly upon the merits of applicants for promotion within his department and to evaluate the candidates for such promotion." *Id.*

missions Test (LSAT) exam.[153] If these relationships entail a common interest privilege, so too will the relationships between misconduct committee members and the sponsoring institutions.

The interest covered by a qualified privilege is not only a "common" interest but may also be an interest of a third party who receives the communication. A good example is an employer's interest in hiring honest and qualified people.[154] This qualified privilege requires that the third party interest be an important interest; the publication to the recipient be within generally accepted standards of decent conduct; and the statements be made in response to a request by the third party.[155]

The opinions of members of a misconduct committee satisfy all three of these requirements: an important issue, the continuing employment of the subject, exists; the members' ideas would be solicited, probably by the institutions for which they were serving on a committee; and their forum would be the only forum for misconduct investigations. Thus, the committee members should be eligible for a qualified privilege to protect that interest.

The duty or interest need not be legal but may be moral or social.[156] The Rhode Island Supreme Court explicitly has recognized a qualified privilege for false and defamatory statements of fact in cases in which "the publisher acting in good faith correctly or reasonably believes that he has a legal, moral, or social duty to speak out."[157] In *Ponticelli v. Mine Safety Appliance Company*, the court granted a qualified privilege to the supervisor of a manufacturing unit, who stated as a reason for dismissing a plaintiff employee, possibly incorrectly, that the plaintiff employee had falsified her production of records.[158] Even if scientists do not have a legal responsibility to sit on committees at their institu-

153. Johnson v. Educational Testing Serv., 754 F.2d 20 (1st Cir.), *cert. denied*, 472 U.S. 1029 (1985) (holding that educational testing service's reports to law school were protected by qualified privilege); Brewer v. American Nat'l Ins. Co., 636 F.2d 150 (6th Cir. 1980) (holding that employee's statements were subject to qualified privilege).

154. *See* Zeinfeld v. Hayes Freight Lines, Inc., 243 N.E.2d 217, 221 (Ill. 1968) (finding communication between former employer and potential employer regarding latter's inquiry about employment status of plaintiff conditionally privileged as matter of law).

155. *Id.* at 220.

156. Rosenboom v. Vanek, 451 N.W.2d 520, 522 (Mich. Ct. App. 1989). The court stipulated that a qualified privilege extended to "any subject matter in which a party has an interest or duty owed to a person sharing a corresponding interest or duty." *Id.*

157. Ponticelli v. Mine Safety Appliance Co., 247 A.2d 303, 305 (R.I. 1968).

158. *Id.* Such falsification was, however, denied by the employee. *Id.*

tions, they could be perceived as having a moral or social duty to promote the effective use of the public's tax dollars by preventing fraud and misconduct in science, thereby entitling them to a qualified privilege.[159]

When a misconduct committee member satisfies the requirements necessary to gain a qualified privilege, this privilege may still be lost.[160] A court may determine that the privilege was abused through overbroad publication or malice.[161] Additionally, it is possible to lose a privilege through negligence.[162]

Misconduct committee members would only benefit from a qualified privilege if they did not abuse it. The publication of any statements must not exceed the scope that was necessary.[163] Additionally, any malice or bad faith on the part of the publisher would be an abuse of the privilege resulting in its termination. Therefore, misconduct committee members would lose their qualified privilege in the employment context if the "publication occurred outside normal channels" or "if the normal manner of handling such information resulted in an unreasonable degree of publication in light of the purposes of the privilege."[164]

In *Staheli v. Smith*, the qualified privilege existed because consideration of the case by the faculty senate was an established step in the tenure review process.[165] Thus, no publication "outside the circle" occurred.[166] This holding indicates that written publication procedures should be established for misconduct committees in order to define participation so that no question will arise

159. For a discussion of the scientific community's extensive reliance on public funding, see *supra* note 148 and accompanying text.

160. *See* KEETON ET AL., *supra* note 68, at 832-35.

161. *Id.* at 832-33.

162. *See* Beckman v. Dunn, 419 A.2d 568 (Pa. Super. Ct. 1980). For a further discussion of the negligence standard in *Beckman*, see *infra* notes 185-86 and accompanying text.

163. *See* KEETON ET AL., *supra* note 68, § 115, at 832. Prosser and Keeton state:

> [Q]ualified privilege does not extend . . . to the publication of irrelevant defamatory matter with no bearing upon the public or private interest which is entitled to protection; nor does it include publication to any person other than those whose hearing of it is reasonably believed to be necessary or useful for the furtherance of that interest.

Id.

164. Greenya v. George Washington Univ., 512 F.2d 556, 563 (D.C. Cir.), *cert. denied*, 423 U.S. 995 (1975). In certain circumstances, such as when the defendant does not know the proper channels for communication, this rule is not strictly construed. For an example of such a situation, see *supra* notes 144-47 and accompanying text.

165. Staheli v. Smith, 548 So. 2d 1299, 1306 (Miss. 1989).

166. *Id.*

about the scope and reasonableness of the publication. To ensure that the privilege would not be destroyed, committee members could limit the publication of their written or oral comments to other committee members or perhaps to other employees of the institution. It may also be reasonable to limit publication of the final report.[167]

False statements that injure a subject's reputation are protected by a qualified privilege so long as the statements are motivated by good faith and not by malice.[168] The privilege ceases if the defendant "published the defamation in the wrong state of mind."[169] A Pennsylvania court, however, found no malice in a case in which "publication may have been inspired in part, by resentment or indignation at the conduct of the person defamed."[170] In *Ponncelli v. Demers*, the Rhode Island Supreme Court held that past disagreements between plaintiff and defendant did not amount to actual malice.[171] A shift supervisor remarked to the plaintiff's coworkers that the plaintiff had been discharged for "pushing a pencil," which was the plant's vernacu-

167. For an explanation of institutional reporting requirements, see *supra* notes 7-25 and accompanying text. Submitting a copy of the investigation report to the NSF, the PHS or another federal agency is required by law, and there is no reason to assert that such a submission would affect the privilege, but publication to other sources, such as the press or the subject's colleagues, should be avoided if the privilege is to be sustained. Institutions could provide a further level of protection to themselves and their committee members by requesting a subpoena from the federal agency before transferring the investigative report.

168. KEETON ET AL., *supra* note 68, § 115, at 833.

169. *See* KEETON ET AL., *supra* note 68, at 833-34. Courts differ on whether malice constitutes an abuse of privilege that destroys the existence of the privilege, or whether it is the varying element that makes the privilege qualified in the first place instead of absolute. *Compare* Beckman v. Dunn, 419 A.2d 568 (Pa. Super. Ct. 1980) *with* Greenya v. George Washington Univ., 512 F.2d 556 (D.C. Cir. 1975). In either case, the result is liability for the publisher.

In a Pennsylvania case, the question of whether a defendant lost his privilege by acting with malice survived the defendant's motion for summary judgment because the plaintiff "presented some evidence that plaintiff was terminated for reasons of professional jealousy." Elbeshbeshy v. Franklin Inst., 618 F. Supp. 170, 172 (E.D. Pa. 1985). Although the court indicated that some evidence proved termination for professional jealously, the court did not provide for any factual basis for its decision or cite to the record. *Id.*

170. *Beckman*, 419 A.2d at 588. This decision was based on the specific facts presented. First, the opinions at issue were reached only after considerable exposure to plaintiff's work. *Id.* Second, the information was disseminated for a proper purpose. *Id.* Thus, although there may also have been a feeling of resentment between plaintiff and defendant, this was insufficient to overcome the other factors supporting a finding of a qualified privilege. *Id.*

171. Ponncelli v. Demers, 247 A.2d 303 (R.I. 1968). The court did not accord enough signifigance to these events to deny qualified immunity to the defendant.

lar for padding production figures.[172] The plaintiff alleged actual malice by referring to an incident two years earlier between plaintiff and defendant in which the plaintiff went over the defendant's head to request a transfer.[173] The plaintiff also claimed that the defendant resented plaintiff's salary because it almost equalled defendant's salary.[174] The court upheld dismissal of the plaintiff's slander complaint on the grounds that, while a jury might have inferred that the defendant was resentful towards the plaintiff, this does not lead to the conclusion that the defendant's primary motivation behind his conversation with her coworkers was ill will.[175] The court restated the rule for actual malice in Rhode Island: When a conditional privilege of common interest exists, the plaintiff must show that the primary motivating force for the communication was the publisher's ill will or spite towards the plaintiff.[176]

An allegation of bad faith by a committee member could occur in the misconduct arena. Professional jealousy undoubtedly exists, and even professional competitiveness surfaces in different forms, some of which could be interpreted as bad faith. Most courts agree that to be eligible for a qualified privilege the statements cannot be made with malice.[177] As indicated above, exactly what constitutes malice or bad faith sufficient to lose the privilege varies among jurisdictions.[178] In Mississippi, for example, the termination "at will" of an employee, telling him that he should "watch his p's and q's" after he filed a grievance for sick leave, and sequestering him during questioning were held not to indicate actual malice or bad faith for determining whether a qualified privilege existed.[179]

172. *Id.* at 305. Plaintiff admitted this discrepancy; however, she claimed she was not responsible for the inaccurate figures. *Id.*

173. *Id.* Plaintiff claimed that these incidents provided an evidentiary basis from which the jury could have concluded that the defendant's actions were motivated by malice. *Id.*

174. *Id.*

175. *Id.* at 309. The court held that "[t]he inferential possibilities considered in the light most favorable to the plaintiff are susceptible to no more than the conclusion that [defendant] may have derived an incidental gratification by reason of the disclosure of plaintiff's difficulties." *Id.*

176. *Id.* at 309.

177. *See, e.g.*, Garziano v. E.I. du Pont de Nemours & Co., 818 F.2d 380 (5th Cir. 1987) (qualified privilege does not exist when statement is excessive); Staheli v. Smith, 548 So. 2d 1299 (Miss. 1989) (summary judgment appropriate when no malice is found).

178. For a comparison of several courts' determinations as to what constitutes malice, see *supra* notes 56-58 and accompanying text.

179. *Garziano*, 818 F.2d at 390.

Malice is generally difficult to prove, and courts are reluctant to find it.[180] In one case, a professor was dismissed for cause after refusing to teach a class until a student apologized for calling him a "condescending, patronizing racist" in front of a class.[181] Statements made by his colleagues as part of their activity on a grievance committee asserting that "[n]o one representing the University seems inclined to do anything except to prefer charges against Dr. McConnell," were found insufficient to overcome the presumption of good faith.[182] The court found that the apparent negligence in researching the facts of the incident before dismissing the plaintiff was insufficient to establish malice.[183]

This decision indicates the plaintiff's burden of presenting evidence sufficient to cause defendant to lose a qualified privilege. In light of the evidence that the university acted in accordance with established procedures, the court found no prima facie case of malice.[184] The court's holding illustrates that when established procedures exist, a qualified privilege is preserved, even if there is an appearance of malice. Therefore, so long as there are established procedures, misconduct committee members should retain their qualified privilege unless they have a conflict of interest or clearly act in bad faith.

In addition to abuse or malice, a qualified privilege can be lost through negligence. In *Beckman v. Dunn*,[185] the court noted that the abuse of a conditional privilege included publications actuated by "malice or *negligence*, . . . a purpose other than that for which the privilege is given, . . . to a person not reasonably believed to be necessary for the accomplishment of the purpose of the privilege or [which] includes defamatory matter not reasonably believed to be necessary for the accomplishment of the purpose."[186]

Other jurisdictions hold that a defendant must show a "reasonable belief in the truth of the published information" for a

180. *See, e.g.*, McConnell v. Howard Univ., 621 F. Supp. 327 (D.D.C. 1985).

181. *Id.* at 328. The student called the plaintiff a "racist" after the plaintiff illustrated students' need to limit class hours by comparing their refusal to take a reduced course load to a "monkey" who gets his hand caught in a food jar but refuses to drop the food to save his hand. *Id.*

182. *Id.* at 332 n.16.

183. *Id.* at 332. Failure to establish malice resulted in summary judgment for the defendant. *Id.*

184. *Id.*

185. 419 A.2d 583 (Pa. Super. Ct. 1980).

186. *Id.* at 588 (emphasis added).

qualified immunity to be preserved.[187] For example, in *Zeinfeld v. Hayes Freight Lines, Inc.*, the court denied the defendant's motion for judgment on the pleadings, holding that the pleadings raised triable issues of fact regarding good faith and lack of knowledge of the defendant.[188] In that case, the defendant had written a letter critical of the plaintiff, a former employee, to a potential employer of the plaintiff.[189]

A negligence stipulation could be troublesome to defendants because plaintiffs could routinely allege negligence as a way of trying to destroy the qualified privilege. Still, in spite of these opinions, courts rarely find a defendant to have acted without reasonable care.[190] This potential problem can be avoided by adherence to institutional policies governing misconduct investigations. That is, committee members should be diligent in reviewing all relevant documents and examining all pertinent witnesses.

IV. STATUTORY PROTECTIONS

A. *Proposed Federal Legislation*

If the liability of institutional misconduct committee members were limited unambiguously by statute, institutions could be more aggressive in initiating their own misconduct investigations and the subject's peers would be more willing to serve as misconduct committee members. In response to these concerns and the need to offer whistleblowers protection from retaliation, the Subcommittee on Investigations and Oversight of the House Committee on Science, Space, and Technology drafted a model bill called the Science Research Protection Act.[191] In keeping with these concerns, the bill proposed limiting the liability of review committees. As long as the peer review committee meets the adequate notice and hearing requirements, "no cause of action shall

187. *See* Zeinfeld v. Hayes Freight Lines, Inc., 243 N.E.2d 217 (Ill. 1969) (holding qualified privilege may be lost if publisher does not believe in truth of defamatory matter or has no reasonable grounds for believing it to be true).

188. *Id.* at 221.

189. *Id.* at 219-20.

190. *See, e.g.*, *Beckman*, 419 A.2d at 583. In *Beckman*, the court failed to find a lack of reasonable care when the defendant's opinion of plaintiff was reached after "considerable exposure to her work" and there was no indication that there was a lack of diligence or reasonable care. *Id.* at 588.

191. STAFF OF HOUSE SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT, COMMITTEE ON SCIENCE, SPACE AND TECHNOLOGY, 101st Cong., 2d Sess., DISCUSSION DRAFT OF SCIENCE RESEARCH PROTECTION ACT OF 1990 9 (Comm. Print 1990).

lie against: (a) the peer review committee; (b) any person acting as a member or staff of that committee; (c) any person under a contract or other formal agreement with that committee; and (d) any person who participates with or assists that committee with respect to the investigation."[192]

Another provision of the bill protects those providing information to peer review committees as a witness or in any other respect, but with the qualification that the information cannot be false or that the person providing it does not know, and should not have known, that it was false.[193] The difference in language between these two provisions may illustrate that the authors of the legislation did in fact intend to provide absolute immunity to the misconduct committee members, although not to witnesses appearing before the committee.

In addition to the proposed Science Research Protection Act, which has not been enacted, there are other state and federal statutes that could serve as models for statutory protection of misconduct committee members. As discussed above, misconduct committee members will probably benefit from a qualified privilege.[194] Under this construction, however, plaintiffs may still allege bad faith, malice, or activity beyond the scope of the privilege, embroiling the misconduct committee member in litigation.

Statutes could provide committee members with additional protections in several respects. First, a federal statute could give them absolute immunity as advocated by the Science Research Protection Act.[195] Second, a federal statute could be helpful to misconduct committee members even if it were modeled after other statutes that provide only the qualified protections already existing under common law. A statute providing clear qualified immunity could, for example, reduce the amount of litigation over whether the context is one to which a qualified privilege applies and whether a communication is within the scope of that privilege for the misconduct committee members. Third, if a federal statute is not feasible, states could pass legislation clearly de-

192. *Id.*

193. *Id.*

194. For a discussion of why misconduct committee members will benefit from a qualified immunity privilege, see *supra* notes 148-55 and accompanying text.

195. For a discussion of the Science Research Protection Act, see *supra* notes 191-93 and accompanying text.

fining the qualified privilege for misconduct in science committee members.

B. *Statutory Protections for Medical Peer Review Committee Members*

1. *State Statutes*

An analogous statutory protection to that sought for misconduct committee members is the "immunity" given to those who participate in peer review evaluations of doctors. Presently, all fifty states have statutes giving a varying degree of protection to certain medical peer reviewers.[196] Most statutes expressly offer a qualified immunity for defamation suits while others provide "absolute immunity from all civil actions."[197] The absolute immunity statutes have additional requirements in order for the immunity to apply, which renders their privileges qualified as well.[198]

One example of an immunity statute is New Jersey's statute, entitled "Hospital or long-term health care facility committees; professional review committees; liability of members."[199] The statute applies to disputes involving specific kinds of health care workers as well as to "[a]ny person who serves as a member of, is staff to, under a contract or other formal agreement with, participates with, or assists with respect to an action of . . . a hospital or long term health care facility committee."[200] This legislation further specifies:

> [these individuals] shall not be liable in damages to any person for any action taken or recommendation made by him within the scope of his function with the committee . . . if such action or recommendation was taken or made without malice and in the reasonable belief after reasonable investigation that such action or recommendation was warranted upon the basis of facts disclosed.[201]

By protecting anyone who "assists" peer review committees,

196. AMERICAN MEDICAL ASSOCIATION, A COMPENDIUM OF STATE PEER REVIEW IMMUNITY LAWS 95 (1988).

197. David W. Jorstad, *The Legal Liability of Medical Peer Review Participants for Revocation of Hospital Staff Privileges*, 28 DRAKE L. REV. 692, 694 (1978-79) (discussing legal liabilities that might be incurred by medical peer review committee participants).

198. *Id.* "The statutes providing immunity from all civil liability are generally qualified by requiring that good faith, lack of malice or reasonableness govern members of peer review committees . . . ." *Id.* (footnotes omitted).

199. N.J. STAT. ANN. § 2A:84A-22.10 (West Supp. 1992).

200. *Id.* § 2A:84A-22.10a.

201. *Id.* § 2A:84A-22.10e.

and by including all types of civil liability, New Jersey's statute has a wide scope. However, like the qualified privileges in the defamation context, the statute requires that the subject act without malice.[202] Unlike at common law, the statute demanding that the reviewer act more carefully in offering an evaluation, requiring that it be offered with "reasonable belief after reasonable investigation," instead of simply requiring good faith.[203] Reasonable investigation could be interpreted as requiring committee members to examine a certain amount or type of evidence before they draw conclusions, whereas good faith, although it is a subjective standard, will probably only require that misconduct committees do not knowingly make any mistakes.[204]

California also has a statute upon which a model misconduct committee statute could be based.[205] This statute provides immunity from liability to "any member of any peer review committee whose purpose is to review the quality of medical services."[206] The California Code limits the immunity of review committees or board members by requiring that they act without malice and only after making reasonable investigation.[207]

A code similar to the California statute could be applied to misconduct committee members, or the California statute could be amended to include misconduct committee members. Legislatures may choose the exact language carefully, and if the statute were modeled after the California statute, institutions would need

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202. The New Jersey statute requires action to be "taken or made without malice." *Id.*

203. *Id.*

204. Pennsylvania has a statute that is similar to New Jersey's requirement that committee members act with "due care" to receive the qualified privilege. *See* 63 PA. CONS. STAT. ANN. § 425.3(b)(1) (1992). *See generally* Andrew L. Merritt, *The Tort Liability of Hospital Ethics Committees*, 60 S. CAL. L. REV. 1239, 1266 & n.118 (1987). Merritt differentiates between privilege and immunity statutes. He distinguishes the former as more protective than the latter because privilege statutes shield committee members from the annoyance of even a limited involvement in civil litigation in which other persons are the named defendants. However, the language of the statutes often is not clear on which it is offering. *Id.* at 1253 n.63. For a discussion of the qualified privilege good faith standard, see *supra* notes 168-84 and accompanying text.

205. CAL. CIV. CODE § 43.7(b) (West 1992).

206. *Id.*

207. *Id.* Immunity attaches under the California statute if

> [the] member acts without malice, has made a reasonable effort to obtain the facts of the matter as to which he, she, or it acts, and acts in reasonable belief that the action taken by him, her, or it is warranted by the facts known to him, her, or it after the reasonable effort to obtain facts.

Id.

to carefully prescribe in their by-laws the formation and procedure of misconduct committees.

Other states provide different protections to members of review committees. Some statutes are written broadly enough that, as drafted, they appear to apply to misconduct committee members' activities. For example, New York's statute, "Proceedings in cases of professional misconduct," gives a three-step process for addressing allegations, including a state licensing board, a regents review committee, and court review.[208] One provision of this law stipulates that "consultants or expert witnesses" who help "the department" in investigations of alleged professional misconduct "shall not be liable for damages in any civil action or proceeding as a result of such assistance, except upon proof of actual malice."[209] This statute could also be construed to protect misconduct by committee members by including them in the definition of "professionals."[210]

2. *Federal Statute*

In 1986, Congress passed the Health Care Quality Improvement Act (HCQIA) to provide uniform minimum protection for activities of professional review organizations.[211] The HCQIA defines professional review activities and renders the body, the members, those under contract, and anyone participating or assisting the body "not liable in damages under any law of the United States or of any State."[212] The HCQIA specifies that review action may only be taken:

> (1) in the reasonable belief that the action was in the furtherance of quality health care, (2) after a reasonable effort to obtain the facts of the matter, (3) after adequate notice and hearing procedures . . ., (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after

208. N.Y. EDUC. LAW § 6510 (McKinney 1985).

209. *Id.* § 6510(7).

210. The statute itself does not specify the kind of professional misconduct proceedings to which its provisions apply, and it may refer only to proceedings involving professionals licensed by the board of regents of the state. See *id.* § 6510.

211. 42 U.S.C. §§ 11101-11152 (1988). The HCQIA was amended in 1989 to preempt state laws giving less protection to peer review participants than the federal law. Budget Reconciliation Act of Dec. 19, 1989, Pub. L. No. 101-239, § 6103, 103 Stat. 2208 (1989). The amendments appear at 42 U.S.C. § 11115(a) (Supp. II 1990).

212. 42 U.S.C. § 11111 (1988).

meeting the requirement of paragraph (3).[213]

The language in the HCQIA that defines "professional review action" could easily be amended to apply to the limited powers of the review committees. The HCQIA defines a professional review action as "an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician."[214] If this language were amended to include scientists, as well as physicians, the HCQIA could be interpreted as applying to committee members.

One shortcoming of modifying the HCQIA to apply to the scientific misconduct area is that the "reasonable effort to obtain facts" requirement would restrict the protections available to misconduct committee members. A statute containing this "reasonable effort" requirement in the misconduct in science area would not be fair to committee members because as scientific peers of the subject, they may not be experienced in conducting such investigations. Furthermore, the individual committee member does not directly determine the fate of the subject and may even disagree with the administrator's decision.[215] Therefore, tying immunity to whether the final action is warranted, as the HCQIA does, would be inappropriate in a statute addressing misconduct committees.

The legislative history of the HCQIA explains that "reasonable belief" replaced good faith as a standard because the drafters felt that good faith might require an interpretation of the subjective state of mind of the reviewers.[216] The new test is satisfied if the reviewers, with the information available to them at the time of the action, could have reasonably concluded that their action would restrict incompetent behavior.[217] In this regard, however, the two scenarios—medical and research—are different. The medical peer review committees may have a more specific charge with respect to the committee's deliberations, and more experience evaluating their colleagues. Consequently, they have more power to take formal "review actions."

213. *Id.* § 11112.

214. *Id.* § 11151(9).

215. Institutional procedures often provide for a panel to provide a report to an institutional administrator, who then has discretion whether to accept the panel's findings and conclusions.

216. H.R. REP. No. 903, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 6384, 6392-93.

217. *Id.*

The purpose of the medical peer review statutes is similar to the purpose of a statute that would govern misconduct committee members' liability. Thus, the latter could be drafted in a similar way to accomplish a similar goal. The expressed purpose of Maryland's statute, for example, was to further "the important public policy of protecting the welfare of patients by assuring the free exchange of information during the deliberations of medical review committees."[218] Likewise, the federal statute was designed to "improve the quality of medical care by encouraging physicians to identify and discipline other physicians who are incompetent or . . . unprofessional."[219] The purpose behind any immunity or qualified privilege for misconduct committee members would also be to promote honest, high quality research.

Maryland's statute is simple, and could serve as a model for a federal law giving immunity to misconduct committee members. Because the statute does not have a "reasonable belief" requirement, a misconduct committee statute based on this statute would produce less litigation. The pertinent part of the statute provides that

> a person who acts in good faith and within the scope of jurisdiction of a medical review committee is not civilly liable for any action as a member of the medical review committee or for giving information to, participating in, or contributing to the function of the medical review committee.[220]

This simple provision, without the requirement of "reasonable belief," should clearly give misconduct committee members a qualified privilege for their good faith activities as part of serving on the committees.

V. OTHER ALTERNATIVES

Under the common law of most states, or pursuant to any federal or state statute that legislatures might draft to apply to misconduct in science committee members, plaintiffs who allege malice or activity beyond the scope of any privilege may bring cases that could survive a motion for summary judgment.[221]

218. Sibley v. Lutheran Hosp. of Md., Inc., 709 F. Supp. 657, 661 (D. Md.), *aff'd*, 871 F.2d 479 (4th Cir. 1989).

219. 42 U.S.C. § 11111 (1988).

220. MD. CODE ANN. CTS. & JUD. PROC. § 5-393(b) (Supp. 1992).

221. This possibility is indicated in dicta of the court's opinion in Greenya

Other factors, however, should prevent a burgeoning of suits on this basis. For example, Rule 11 of the Federal Rules of Civil Procedure, as revised in 1983, empowers courts to sanction attorneys for filing frivolous suits. This sanction may deter the proliferation of these suits.[222] Federal courts have enforced these provisions in similar situations to one in which a scientist would allege malice based on insubstantial evidence.[223] If the Rule 11 sanctions are enforced they should act to prevent frivolous suits under both common law and statutes. Additional protections, such as indemnification, should also reduce the impact on individual misconduct committee members of any lawsuits that do occur.

A. *Indemnification*

One partial solution to the problem of liability of members of institutional misconduct committees is indemnification by the institutions sponsoring the committees.[224] This indemnification may occur in several ways. The committee members, if they are employees of the institution, may be indemnified by employment contracts, by-laws of the institution, or specific indemnification agreements.[225] Alternatively, the institution may have a policy of indemnifying those who serve the institution in any capacity. If not clearly indemnified, committee members should request such indemnification from their institutions.

While indemnification may protect the committee member from having to pay legal fees to defend against frivolous suits, indemnification agreements are only a partial protection against liability because they often contain the same good faith requirements as the common law.[226] Avoiding conflicts of interest is one way to keep within the purview of the indemnification agreements, just as it is a way to insure that qualified privileges remain

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v. George Washington Univ., 512 F.2d 556 (D.C. Cir. 1976). Further research has revealed no cases that have upheld allegations of bad faith.

222. FED. R. CIV. P. 11.

223. *See, e.g.*, Eastway Constr. Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985) (finding no reasonable grounds for lawsuit), *modified*, 821 F.2d 121 (2d Cir. 1987); Muthig v. Brant Point Nantucket, Inc., 838 F.2d 600 (1st Cir. 1988) (holding attorney fees were appropriate sanction against attorney for prosecution of frivolous claim against defendant).

224. KEETON ET AL., *supra* note 68, at 341 (defining indemnity as order requiring another to reimburse in full one who has discharged common liability).

225. *Id.* (describing grounds for indemnity).

226. *Id.* (stating that "there can be no indemnity in favor of the intentional or reckless tortfeasor").

an effective protection for misconduct committee members. The following is a review of two illustrative institutional policies.

1. *Harvard University's Policy*

Harvard has experienced no recent suits against its tenure committee members. The Sixteenth Statute (by-law) governing Harvard's Faculty of Arts and Sciences provides that

> indemnification of persons serving or who have served as officers, employees or other agents of the University, or at its request, as members, . . . employees, . . . or other agents of an . . . organization in which the University has an interest may be provided by the University whenever and to the extent authorized by a disinterested majority of the members of the Corporation or . . . of the Board of Overseers.[227]

The indemnification includes payment by the University of expenses incurred in defending an action.[228] This indemnification covers only good faith activities based on a reasonable belief that an action was in the best interest of the University.[229] While this is a relatively low threshold for coverage, the by-law still offers only partial protection.

2. *New York University's Policy*

New York University (NYU) indemnifies its professors in a similar fashion.[230] This protection, pursuant to the State Board of Regent's requirements, indemnifies persons involved in litigation through their service to NYU. The policy covers expenses, including attorneys' fees, and although it does not have an express good faith requirement, it does exclude proceedings in which it is adjudged that such person "is liable for negligence or misconduct in the performance of his duties."[231] Moreover, NYU's indemnification policy includes a provision specifically referring to "faculty members of other institutions of higher learning (who) often participate in tenure and promotion evaluations of members of the New York University Faculty."[232] In the event

227. HARVARD UNIVERSITY'S FACULTY OF ARTS AND SCIENCES, SIXTEENTH STATUTE, October 1987, at 8.
228. *Id.*
229. *Id.*
230. NEW YORK UNIVERSITY FACULTY HANDBOOK.
231. *Id.* at 109.
232. *Id.*

that these persons are not protected by their own universities, NYU gives them the same protection as it gives its own faculty.[233]

Notwithstanding the value of these programs, indemnification does not provide a complete defense for science committee members. Indemnification will only prevent the individual committee member from incurring the monetary costs of a defense, not the other negative aspects, such as inconvenience and perhaps unwanted publicity. Additionally, indemnification will likely contain some form of a good faith requirement.

B. *"Framework for Institutional Policies and Procedures to Deal with Fraud in Research"*

The "Framework for Institutional Policies and Procedures to Deal with Fraud in Research" was developed by a joint committee of the American Association for the Advancement of Science (AAAS) and the American Bar Association (ABA) at a 1989 meeting of the AAAS/ABA National Conference of Lawyers and Scientists. This "framework" refers generally to the potential liability of misconduct in science committee members but does not directly address the issue. The framework advises committee members to make sure that they have no real or apparent conflicts of interest. According to the framework, a conflict of interest is a factor that a plaintiff scientist could use to support an allegation of bad faith in a libel suit against individual misconduct committee members. Thus, the framework is a good example of a policy that, if adopted and adhered to by an institution, could help that institution's committee members avoid liability.

The framework also suggests that institutions consult their own legal counsel to minimize the risk of institutional liability for the actions taken after their inquiry and investigation.[234] Institu-

233. *Id.* at 110.

234. The Johns Hopkins University School of Medicine discusses the role of the School's Office of General Counsel in a section on "Procedures for Dealing with Issues of Professional Misconduct" in the 1990 "Faculty Policies" handbook. THE JOHN HOPKINS UNIVERSITY SCHOOL OF MEDICINE, FACULTY POLICIES 15 (1990). The duty of the Office of General Counsel is to render advice to the committees, including the Advisory Committee on Professional Misconduct, the Standing Committee on Professional Misconduct, and various ad hoc committees, all composed entirely of school faculty members or administrators. *Id.* at 23. According to the policy, "individuals serving in any of these capacities are encouraged to seek legal guidance regarding any procedural question, particularly in connection with the preparation of written reports of actions taken, or before any action is taken with respect to any person believed to have made an accusation in bad faith." *Id.* This probably reflects the University administrators' perception that actions taken following misconduct committee investiga-

tions should also make clear any policies on providing legal counsel to plaintiffs and respondents. This approach would eliminate confusion among committee members about their potential liability. The framework also indicates that the greatest liability risk is for the institutions as a whole rather than individual committee members because of state doctrines of respondeat superior or indemnity provisions that often indemnify their faculty.

VI. CONCLUSION

Committee members who participate in good faith in misconduct hearings should be exempt from defamation liability. Generally, committee members will be protected by a qualified privilege so long as they avoid conflicts of interest and do not act outside the scope of the privilege. Unfortunately, the scope of the common law qualified privileges in defamation actions is unclear in many jurisdictions. In spite of the low ultimate likelihood of liability, and because of increased publicity, some scientists may still be deterred from serving on investigation committees.

The ideal protection for committee members is to promulgate state and federal statutes that grant absolute immunity to misconduct in science committee members. At the very least, committee members should be protected by federal or state statutes granting unequivocal qualified immunity for their good faith participation in misconduct committee investigations.

Until such statutory protection is available, it is up to institutions to protect their faculty. Institutions should set clear guidelines detailing the participation of employees in misconduct in science committee investigations, monitor the investigations to ensure compliance with the institutions' guidelines, and provide indemnification for those employees who comply in good faith with the institutions' procedures.

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tions could be perceived as a retaliation against whistleblowers, for example if the subject of the investigation claims they are being retaliated against for a previous action.