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## **Kalish v. Illinois Education Association: Absolute Privileges in Quasi - Judicial Proceedings, 22 J. Marshall L. Rev. 737 (1989)**

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## KALISH v. ILLINOIS EDUCATION ASSOCIATION:\* ABSOLUTE PRIVILEGES IN QUASI—JUDICIAL PROCEEDINGS

Ordinarily, the law of defamation protects an individual's reputation from the damage of calumnious communication.<sup>1</sup> Courts sometimes limit this protection,<sup>2</sup> by holding that defamatory statements made during judicial, legislative, or quasi-judicial administrative hearings are absolutely privileged.<sup>3</sup> Most courts, however, are

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\* 157 Ill. App. 3d 969, 510 N.E.2d 1103 (1987).

1. The law of defamation consists of the torts of libel and slander. W. KEETON, PROSSER & KEETON ON TORTS, § 111 at 771 (5th ed. 1984). Its purpose is to protect a person's interest in reputation and good name. *Id.* A defamatory communication impeaches a person's character and lowers a person's stature in the eyes of the community or causes people not to keep company or do business with that person. BLACK'S LAW DICTIONARY 375 (5th ed. 1979). Statements portraying a person as immoral, a fornicator, a coward or a perjurer are examples of defamation. W. KEETON, *supra*, at 775. For a discussion of the law of defamation in Illinois see M. POLELLE & B. OTTLEY, ILLINOIS TORT LAW 101-76 (1985).

2. Courts limit a remedy for defamation if they find that the communication is privileged. RESTATEMENT (SECOND) OF TORTS, §§ 242-44 (1977). This privilege may be absolute or qualified. *Id.* Which type of privilege a court extends to defamatory statements is a question of law for the court. *Spencer v. Community Hosp. of Evanston*, 87 Ill. App. 3d 214, 408 N.E.2d 981 (1980). If a defamatory statement is absolutely privileged, the law affords no civil remedy for any resulting injury. L. ELDRIDGE, THE LAW OF DEFAMATION § 72, at 340 (1978). If a defamatory statement is qualifiedly privileged, it is actionable if a plaintiff proves that a defendant made it with actual malice. *Judge v. Rockford Memorial Hosp.*, 17 Ill. App. 2d 365, 150 N.E.2d 202 (1958). In Illinois, a plaintiff must prove that a defendant acted from ill-will with intent to injure or with wanton disregard of the plaintiff's rights to meet the burden of actual malice. Comment, *Privilege as a Defense to Defamation*, 1977 U. ILL. L.F. 523, 533-34 (1977). The United States Supreme Court requires a plaintiff to prove that the defendant knew of the falsity of his statements or recklessly disregarded the truth to meet the burden of actual malice. *Id.* at 534 n.35.

3. Comment, *Privilege in Defamation*, 45 BROOKLYN L. REV. 131, 139-40 (1978). See *infra* notes 82-84 and accompanying text for a discussion of the reasons why courts originally granted absolute privilege to these bodies. The privilege extends only to remarks which are relevant to the proceeding in which a person makes them. Comment, *Immunity From Liability for Defamatory Statements*, 33 S.C. L. REV. 343, 351-52 (1981) [hereinafter *Defamatory Statements*]. Courts apply this relevance requirement more liberally than the evidentiary relevance requirement. *Id.* Illinois courts have held that if a statement is irrelevant it is therefore not privileged. Comment, *Libel and Slander in Illinois: Absolute Privilege*, 43 CHI[-]KENT L. REV. 55, 59 (1966). A body must also have jurisdiction or color of jurisdiction over the subject matter for the privilege to apply. *Parker v. Kirkland*, 298 Ill. App. 340, 18 N.E.2d 709 (1939). But see *Range v. Franklin*, 72 Tex. 585, 10 S.W. 721 (1889) (jurisdiction not necessary for privilege to apply). Courts grant absolute privilege to communication during the proceedings of certain bodies so that people will feel free to come forward with information which the bodies need to perform their function. Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 COLUM. L. REV. 463, 469 (1909). Courts fear that the risk of being sued for defamation would deter people from offer-

usually reluctant to extend an absolute privilege to libelous or slanderous remarks.<sup>4</sup> In *Kalish v. Illinois Education Association*,<sup>5</sup> an applicant to the Illinois Bar sued the Illinois Education Association ("IEA"),<sup>6</sup> his former employer, for defamation based on the IEA's false statement to the Character and Fitness Committee ("CFC")<sup>7</sup> which accused the applicant of engaging in crimes of a very serious nature.<sup>8</sup> The court held that this otherwise actionable remark was

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ing information. *Id.* Courts have held that a qualified privilege is inadequate because people would be forced to defend the charge that they acted with actual malice. *Id.* at 469-70. *But see* *Kintz v. Harriger*, 99 Ohio St. 240, 124 N.E. 168 (1919) (court granted a qualified privilege to grand jury proceeding).

4. Most courts hesitate to deny a cause of action to a defamed person for two reasons. First, the court's extension of an absolute privilege to defamatory communications conflicts with the fundamental principle that all wrongs should have a remedy. *Veeder, supra* note 3, at 465. Second, the courts recognize the intrinsic value of a person's reputation. *Kintz*, 99 Ohio St. at 240, 124 N.E. at 169-70 (citing the Bible, Shakespeare and Lincoln to emphasize the court's high regard for reputation).

5. 157 Ill. App. 3d 969, 510 N.E.2d 1103 (1987).

6. Other defendants were the National Education Association and four corporate officers of the IEA. Brief and Argument for Plaintiff/Appellant at 4, *Kalish v. Illinois Education Association* 157 Ill. App. 3d 969, 510 N.E.2d 1103 (1987) (No. 84 L 18503) [hereinafter Plaintiff's Brief]. IEA is an Illinois not-for-profit corporation and former employer of Kalish. *Id.* Kalish had been employed by IEA for several years beginning in 1971. *Id.* During this time, he filed three grievance arbitrations against the IEA, and his relationship with the IEA was strained. *Id.* In January 1982, he and the IEA entered into a contract which provided for termination of his employment, payments, and insurance coverage. *Id.* In addition, the IEA expressly recognized that his health had been adversely affected by job-related stress. *Id.* In November 1983, he filed a federal lawsuit against IEA for breach of contract, breach of fiduciary duty, tortious interference with contract and conspiracy, seeking damages in excess of \$200,000. *Id.*

7. Each November, the Illinois Supreme Court appoints the Character and Fitness Committee ("CFC") for each judicial district of the state, consisting of three or more members of the bar. ILL. REV. STAT. ch. 110A ¶ 708 (a) (1987); Ill. Sup. Ct. R. 708(a). Members of the Board of Law Examiners are *ex-officio* members of these committees. *Id.* The purpose of each committee is to review each bar applicant to determine if he has the requisite moral character and fitness to practice law. *Id.* at ¶ 708(b). If the CFC determines that the applicant is fit, it then certifies the applicant to the Board of Law Examiners and the applicant then "shall be admitted to the bar unless the court orders otherwise." *Id.*, at ¶ 708(c). An applicant who the CFC does not certify may petition the Supreme Court for relief. *Id.* at ¶ 708(d).

The CFC has the power to make, adopt and alter rules to enable it to perform its function, subject to the approval of the Supreme Court. *Id.* at ¶ 709(a). The CFC can receive complaints and make inquiries and investigations to help in its determination of an applicant's fitness and moral character. *Id.* at 709(b). The CFC can make procedural rules to govern such investigations and can take the testimony of witnesses. *Id.* Hearings before the CFC are private unless the applicant requests that they be public. *Id.* Commissioners of the CFC can apply to the Supreme Court for issuance of *subpoenas ad testificandum*, *subpoenas duces tecum*, or *dedimus potestatem to take depositions*. *Id.* The CFC must swear all witnesses and take all testimony under oath. *Id.* It must transcribe and transmit the proceedings if the court requests. *Id.* Also, the CFC must report the failure or refusal of persons to respond to a subpoena to the Supreme Court. *Id.*

8. Plaintiff's Brief at 7. This casenote will follow the example of the appellate court, and other published accounts of the case, and not reveal the exact conduct that the defendant falsely accused the plaintiff of engaging in. *See*, "Lawyer's Defamation Suit Barred," *Chicago Daily L. Bull.*, June 30, 1987, p. 3, col. 2. However, such behav-

absolutely privileged, which not only freed the IEA from civil liability, but left the applicant with no remedy for his damaged reputation.<sup>9</sup>

Edward Kalish graduated from law school in January, 1984, and successfully completed the February bar examination.<sup>10</sup> As part of the bar admission process, he executed a document<sup>11</sup> which authorized the CFC to investigate him.<sup>12</sup> In the course of the investigation, Kalish attended an interview before a three member section of the CFC.<sup>13</sup> During the interview,<sup>14</sup> one member, while reading from a document bearing the IEA letterhead, asked Kalish if he had ever engaged in crimes involving moral turpitude.<sup>15</sup> Kalish responded negatively and demanded to know the basis for the question.<sup>16</sup> The CFC refused,<sup>17</sup> explaining that it was not engaged in a hearing regarding the matter, but merely gathering information.<sup>18</sup>

Kalish brought an action against the IEA,<sup>19</sup> to recover damages for defamation resulting from the defendant's false statement to the CFC.<sup>20</sup> On defendant's motion, the Circuit Court of Cook County dismissed the amended complaint with prejudice.<sup>21</sup> It found that communications to the CFC were absolutely privileged because the CFC is a quasi-judicial body.<sup>22</sup> On appeal, the Appellate Court of Illinois for the First District addressed the issue of whether the CFC

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ior is considered a class X felony in Illinois. It should be noted that the plaintiff has never been charged or convicted of any such crime and in fact has never engaged in such activity. Plaintiff's Brief at 8.

9. *Kalish*, 157 Ill. App. 3d at 977, 510 N.E.2d at 1110.

10. *Id.* at 971, 510 N.E.2d at 1105.

11. All applicants for admission to the Illinois bar must sign an "Authorization and Release" in order to be admitted to the bar. *Id.* This document enables the CFC to obtain from any person, company, corporation, association or institution, information and documents pertaining to an applicant. *Id.*

12. The CFC makes an investigation as to an applicant's "moral character, reputation and fitness for the practice of law." *Id.*

13. Initially, a section of one to three members of the CFC reviews each applicant. COMMITTEE ON CHARACTER AND FITNESS FOR THE FIRST JUDICIAL DISTRICT RULES OF PROCEDURE, R. 4 (1979) [hereinafter CFC R. P.]. Any member of a section may request that an applicant appear personally before it. *Id.* A unanimous vote of a section is required to recommend an applicant to the CFC. *Id.* at R. 6.

14. This interview was not mandatory. The CFC section asked Kalish to attend an interview and he complied. Plaintiff's Brief at 8. The interview was informal. The CFC did not swear Kalish or place him under oath. *Id.*

15. *Id.*

16. *Kalish*, 157 Ill. App. 3d at 972, 510 N.E.2d at 1105.

17. The CFC has never told Kalish the basis for the question, nor revealed its source. *Id.*

18. The CFC never conducted any formal hearing regarding Kalish's admission to the bar. *Id.* Kalish did undergo a psychiatric examination, however, at the CFC section's request. *Id.*

19. For a list of other defendants, see *supra* note 6.

20. *Kalish*, 157 Ill. App. 3d at 972, 510 N.E.2d at 1105.

21. *Id.*

22. *Id.*

is a quasi-judicial body rather than merely an administrative body.<sup>23</sup> In the court's opinion, if the CFC was a quasi-judicial body, communications to the CFC were absolutely privileged.<sup>24</sup> If the CFC was administrative in nature, communications to it were not absolutely privileged.<sup>25</sup> In resolving the issue, the court examined the CFC's powers and duties.<sup>26</sup> The court concluded that the CFC possessed

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23. *Id.* at 973, 510 N.E.2d at 1105.

24. The parties agreed that statements are absolutely privileged if made during quasi-judicial proceedings. *Id.* The court, however, only considered the character of the CFC, and not the nature of the section proceeding. *Id.* at 973-76, 510 N.E.2d at 1105-07.

25. The court did not expressly say this, but definitely alluded to it. Commentators agree that courts should not extend an absolute privilege to statements made to administrative bodies not exercising a quasi-judicial function. Veeder, *supra* note 3, at 483-84 (it is material to consider the nature of the proceeding); Note, *Defamation - Absolute Privilege in Administrative Proceedings*, 97 U. PA. L. REV. 877, 878 (1949) (absolute privilege appropriate for quasi-judicial but not merely administrative proceedings); Comment, *Libel and Slander: Absolute Privilege Before Administrative Agencies*, 5 VILL. L. REV. 121, 126-27 (1959) (courts may extend absolute privilege to administrative proceedings if they are conducted in a manner and with safeguards similar to those found in judicial proceedings); 53 C.J.S. *Libel and Slander* § 71(b) (1987) (privilege does not extend unless proceeding is quasi-judicial); Annotation, *Libel and Slander: Privilege Applicable to Judicial Proceedings as Extending to Administrative Proceedings*, 45 A.L.R. 2d 1296, 1298 (1987) (absolute privilege will be extended to communicators in administrative proceeding only where agency is exercising a quasi-judicial function). In light of *Starnes v. International Harvester Co.*, 141 Ill. App. 3d 652, 490 N.E.2d 1062 (1986), however, it is likely that the trial court would have granted an absolute privilege to the IEA communication even if it had held that the CFC was not quasi-judicial. The trial judge expressed this view in his opinion. Appendix to Plaintiff's Brief at C-188 (transcript of judge's oral opinion). In *Starnes*, the court held that the Judicial Inquiry Board ("JIB") was not quasi-judicial, but still granted an absolute privilege to communications with that body. *Starnes*, 141 Ill. App. 3d at 656, 490 N.E.2d at 1065-66. This was because the court considered the JIB's functions important enough to deserve the privilege. *Id.* The *Kalish* court noted that the function of the CFC in determining the fitness of bar applicants to practice law was important. *Kalish*, 157 Ill. App. 3d at 977, 510 N.E.2d at 1109.

26. *Kalish*, 157 Ill. App. 3d at 973-75, 510 N.E.2d at 1106-07. The court considered several CFC rules pertinent. *Id.* Each applicant must file a questionnaire and reference list with the secretary of the CFC. CFC R. P., R. 2. The secretary then sends questionnaires to these references seeking information about the character and fitness of the applicant. *Id.* After receiving answers to these, the secretary assigns the application to a section of the CFC, which then evaluates the application. *Id.* If the section determines that an applicant does not have the requisite qualifications, the applicant is referred to the CFC. *Id.* at R. 7. Prior to this, a section may continue its investigation of an applicant and the CFC may assist it by calling on members of the bar and outside investigative personnel. *Id.* If the section determines that an applicant is qualified, it then refers the applicant to the CFC, which then may or may not certify the applicant. *Id.* at R. 9. The CFC may hold a hearing and call the applicant before it. *Id.* at R. 10. The applicant must be notified of the matters adverse to his certification and the names of those persons who made statements upon which the adverse matters are based. *Id.* The applicant has a right to counsel, to examine and cross-examine witnesses, to adduce evidence and make use of the CFC's subpoena power. *Id.* All testimonial evidence must be taken under oath. *Id.* All information acquired by the CFC is confidential. *Id.* at R. 13. See *supra* notes 7 and 13 for a further explanation of CFC and section powers.

powers which qualify it as quasi-judicial,<sup>27</sup> thereby distinguishing it

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27. The court concluded the CFC was a quasi-judicial body by asserting six powers which are distinctly quasi-judicial. It then examined the powers of the CFC and found that the CFC possessed five of the six. *Kalish*, 157 Ill. App. 3d at 973, 510 N.E.2d at 1106. These powers were:

- (1) the power to exercise judgment and discretion; (2) the power to hear and determine or to ascertain facts and decide; (3) the power to make binding orders and judgments; (4) the power to affect the personal or property rights of private persons; (5) the power to examine witnesses, to compel the attendance of witnesses, and to hear the litigation of issues on a hearing; and (6) the power to enforce decisions or impose penalties.

*Id.* (citing *Thomas v. Petrusis*, 125 Ill. App. 3d 415, 465 N.E.2d 1059 (1984); *Parker v. Holbrook*, 647 S.W.2d 692 (Tex. Civ. App. 1982); 1 AM. JUR.2D *Administrative Law* §§ 167-73). Although these powers can be classified as "quasi-judicial", formalities and safeguards characteristic of the judiciary must accompany the exercise of these powers in order for the body which possesses them to be quasi-judicial. 1 AM. JUR. 2D *Administrative Law* § 161. The *Holbrook* court addressed the formalities and safeguards issues and held that because these were lacking, communications with the Houston-Galveston Area Council were not entitled to an absolute privilege. 647 S.W.2d at 696-97. The *Petrulis* court, however, neglected to address the formalities and safeguards issue, as did the *Kalish* court. As such, these courts made their decisions while considering only one aspect of the "quasi-judicial powers" test. See *infra* note 71 for a discussion of the safeguards characteristic of the judicial process.

It should be noted that the *Kalish* court did not accurately apply the prong of the "quasi-judicial powers" test that it addressed. The court attributed powers to the CFC which the CFC does not possess. This court's opinion is additionally confused by the fact that the court did not indicate which CFC power satisfied which of the six quasi-judicial powers, with one exception. The court stated that the CFC exercised the power to make binding orders when it certifies applicants for admissions to the bar. *Kalish*, 157 Ill. App. 3d at 976, 510 N.E.2d at 1108. Other than this, the court simply held that the CFC possessed the first five of the six powers listed above. *Id.*

In light of *In re Edward A. Loss, III*, 119 Ill. 2d 186, 518 N.E.2d 981 (1987), the CFC does not have the power to make binding orders and judgments. In *Loss*, the CFC voted to certify *Loss*, a recent law school graduate, to the Board of Law Examiners for admission to the bar. *Id.* at 188, 518 N.E.2d at 983. Subsequently, the Board recommended that the Illinois Supreme Court admit *Loss* to the bar. *Id.* On further review, however, the court held that it alone determines who is admitted to the bar, and due to the circumstances of the case, it could not admit *Loss* to the bar. *Id.* at 190, 518 N.E.2d at 984. The court based its holding on its decision that *Loss*, who had an extensive criminal record and had been a drug addict, had not been adequately rehabilitated. *Id.* Since the court can choose to review a bar applicant on its own, a CFC decision to certify an applicant does not necessarily result in admission to the bar, and thus, the CFC cannot make a binding order or judgment concerning a candidate for the bar.

Also, it is not apparent how the CFC can affect the personal and property rights of private persons. An examination of the CFC powers listed *supra* at notes 7, 13 and 26, does not reveal any power which realizes this. Perhaps the court considered the fact that persons could be subpoenaed to appear before a CFC hearing as affecting their personal rights. To accomplish this, however, the CFC must petition the Illinois Supreme Court to issue the subpoena. ILL. REV. STAT. ch. 110A, ¶ 709(b) (1987). Therefore, it is the court and not the CFC which actually exercises the power to affect the personal rights of private persons.

The CFC can exercise judgment and discretion in a limited sense. It does decide whether to certify an applicant for admission to the bar. *Id.* at 708(c). It can decide who to ask the court to subpoena. *Id.* at 709(b). It can ask an applicant to appear before it. CFC R. P., R. 10. Any administrative agency, however, has the power to exercise judgment and discretion to some extent. The mere fact that an agency exercises judgment and discretion does not make it quasi-judicial. 1 AM. JUR. 2D *Administrative Law* § 167. It is the body's exercise of this power after considering evidence

from an administrative body.<sup>28</sup> Accordingly, the court affirmed the judgment of the lower court dismissing the plaintiff's amended complaint with prejudice.<sup>29</sup> The Illinois Supreme Court denied plaintiff petition for leave to appeal.<sup>30</sup>

The appellate court began its analysis by stating that the powers and duties of a body conducting a proceeding, together with the nature of the proceeding itself determine, whether a body is quasi-judicial.<sup>31</sup> Next, it indicated that the Illinois Supreme Court had delegated the task of determining a bar applicant's fitness to practice law to the CFC.<sup>32</sup> The court then listed the powers with which the Illinois Supreme Court had empowered the CFC to accomplish this task.<sup>33</sup> Also, it itemized the CFC's rules of procedure.<sup>34</sup> The court then simply concluded that it was apparent from a review of these powers that the CFC was quasi-judicial.<sup>35</sup> To substantiate its position, the court cited several Illinois Appellate Court decisions<sup>36</sup> as well as decisions of other jurisdictions<sup>37</sup> which held that bodies

and then applying the law to the discovered facts which may make it quasi-judicial rather than administrative. *Id.* The CFC did not act in this manner as to Kalish.

The CFC does have the power to hear and determine facts and make decisions regarding those facts. CFCR P., Rs. 7 and 10. Also, it does have the power to examine witnesses and hear litigation of issues in a hearing. *Id.* at Rs. 9 and 10. The CFC, however, was not exercising these powers while investigating Kalish. The CFC section was informally gathering information and not conducting a hearing. *Kalish*, 157 Ill. App. 3d at 968, 510 N.E.2d at 1105. In fact, no formal hearing ever took place. *Id.* is the nature of the acts performed by a body during a proceeding and not the character of the body conducting the proceeding which determines whether an administrative body is quasi-judicial. 1 AM. JR. 2D *Administrative Law* § 159; see also Note, *Defamation - Absolute Privilege in Administrative Proceedings*, 97 U. PA. L. REV. 877, 880 (1949) (absolute privilege may be granted in one proceeding before an administrative agency and denied in another, because the agency may perform more than one function). The CFC was not exercising any of the powers which the court considers quasi-judicial when it interviewed Kalish. Therefore, it was not quasi-judicial for purposes of the CFC section investigation.

28. *Kalish*, 157 Ill. App. 3d at 973, 510 N.E.2d at 1107.

29. *Id.* at 978, 510 N.E.2d at 1110.

30. *Kalish*, 157 Ill. App. 3d 969, 510 N.E.2d 1103, *appeal denied*, 116 Ill. 2d 559, 515 N.E.2d 109 (1987).

31. *Id.* at 970, 510 N.E.2d at 1106. The court did not consider the nature of the proceeding in reaching its decision.

32. *Id.*

33. See *supra* note 7 for the list of these powers.

34. See *supra* notes 13 and 26 for the CFC Rules of Procedure.

35. *Kalish*, 157 Ill. App. 3d at 974, 510 N.E.2d at 1107.

36. *Id.* at 974-75, 510 N.E.2d at 1107-08. Among the cases the *Kalish* court cited were *Thomas v. Petrusis*, 125 Ill. App. 3d 415, 419-20, 465 N.E.2d 1059, 106-63 (1984) (power of the Equal Employment Opportunity Commission to affect the rights of person it investigates is an attribute of quasi-judicial bodies); *Allen v. Ali*, 105 Ill. App. 3d 887, 435 N.E.2d 167 (1982) (fact that Attorney Registration and Discipline Commission can administer attorney discipline making it quasi-judicial).

37. *Kalish*, 157 Ill. App. 3d at 974, 510 N.E.2d at 1107. Among the cases the *Kalish* court cited were *Mock v. Chicago, Rock Island & Pac. R.R. Co.*, 454 F.2d 131 (8th Cir. 1972) (power of National Railroad Adjustment Board to provide notice and conduct hearings makes it quasi-judicial); *Astro Resources Corp. v. Ionics, Inc.*, 577 F.

having powers similar to those of the CFC were quasi-judicial.<sup>38</sup>

The court then stated that public policy considerations<sup>39</sup> supported its decision to extend an absolute privilege to communications with the CFC.<sup>40</sup> Without elaborating on any specific public policy, the court pointed out that the CFC lacks sufficient resources to adequately investigate each bar applicant.<sup>41</sup> Because of this, the CFC has to rely heavily on the information which former employers of the applicants voluntarily submit.<sup>42</sup> The court reasoned that unless it bestowed an absolute privilege on communications to the CFC, it would hamper the CFC's ability to acquire information relevant to an applicant's reputation, character, and fitness to practice law.<sup>43</sup>

Finally, the court rejected the argument that the CFC was not acting as a quasi-judicial body at the time they received the defendant's defamatory statement.<sup>44</sup> The plaintiff had claimed that the CFC did not obtain the communication in response to a subpoena, under oath at a formal hearing, or through transcription, and that the statement was not subject to cross-examination.<sup>45</sup> The court noted that the plaintiff offered no authority for this contention.<sup>46</sup> In

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Supp. 446 (S.D. Tex. 1983) (because NASA contracting officer exercised quasi-judicial powers when investigating and acting upon bid protest, communications to him were absolutely privileged); *Park Knoll Assocs. v. Schmidt*, 89 A.D. 2d 164, 454 N.Y.S. 2d 901 (1982), *rev'd on other grounds*, 59 N.Y.2d 205, 464 N.Y.S. 2d 424, 451 N.E.2d 182, (1983) (proceedings of the Division of Housing and Community Renewal involving investigation and witness testimony are quasi-judicial).

38. See *supra* note 36 for a description of the powers which the courts determined were quasi-judicial.

39. The court stated that in order to protect the public, it was necessary that the CFC determine the good character of bar applicants. *Kalish*, 157 Ill. App. 3d at 976-77, 510 N.E.2d at 1108-09.

40. *Id.*

41. *Id.* at 976, 510 N.E.2d at 1109.

42. *Id.* Bar agencies often must depend on information they receive from third parties, such as former employers, in evaluating the character of bar applicants. Sprecher, *Bar Admission Agencies: Their Right to be Informed*, 51 A.B.A. J. 248, 251 (1965). This is due to manpower and funding shortages. *Id.* at 248.

43. *Kalish*, 157 Ill. App. 3d at 976, 510 N.E.2d at 1109. Court extension of an absolute privilege to communications was not intended to be based on economic foundations. See *infra* notes 82-84 and accompanying text for a discussion of the reasons why courts grant absolute privileges to communications with certain bodies.

44. *Id.*

45. *Kalish*, 157 Ill. App. 3d at 978, 510 N.E.2d at 1110.

46. *Id.* In *Andrews v. Gardiner*, 224 N.Y. 440, 121 N.E. 341 (1918), an attorney for a prisoner applying to a pardon board made defamatory statements about a man who had helped convict the prisoner. The court held that the remarks were not absolutely privileged because the hearing was highly informal. *Id.* at 447, 121 N.E. at 343. This decision was based on the fact that the hearing was without formal procedures, defined issues or competent pleadings. *Id.* The CFC section hearing was also highly informal and the members followed no formal procedure. See Plaintiff's Brief at 8. Also, in *Meyer v. Parr*, 69 Ohio App. 344, 37 N.E.2d 637 (1941), the court held that letters to the State Board of Embalmers and Funeral Directors containing defamatory statements were not absolutely privileged. The court stated that the purpose of

support of its holding, the court cited several cases in which other courts had granted an absolute privilege to informal, unsworn communications with quasi-judicial bodies.<sup>47</sup>

The *Kalish* court erroneously concluded that all communications to the CFC are absolutely privileged, adding to the existing confusion among Illinois courts concerning absolutely privileged communications. The court's decision is deficient for three reasons. First, the court misapplied the "quasi-judicial powers" test.<sup>48</sup> It misguidedly focused on the general character of the CFC, rather than on the nature of the specific proceeding in this instance, and the relevancy of the communication to the proceeding. Second, the court failed to probe deeply enough into the policy reasons which justify extension of an absolute privilege to communications with quasi-judicial bodies.<sup>49</sup> Specifically, the court neglected to consider what safeguards the CFC provides to protect an applicant's reputation. Third, in Illinois, an individual has a constitutionally protected right to reputation.<sup>50</sup> The court's grant of an absolute privilege to defamatory communications infringes upon this right.

In stating the "quasi-judicial powers" test, the *Kalish* court did not accurately set forth the requirements of the test.<sup>51</sup> The cases upon which the *Kalish* court relied, however, clearly indicate the test's requirements.<sup>52</sup> In order for a court to extend an absolute privilege to defamatory remarks, the remarks must be made during

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the board hearing in question was to gather information which would then be used to enforce the rule of a statute. *Id.* at 349, 37 N.E.2d at 640. The court decided that the board was not acting quasi-judicially, but was merely exercising "circumspection and sound discretion that should characterize the conduct of every official [body]." *Id.* The court noted that public policy did not dictate the granting of an absolute privilege to statements of "a volunteer informer who is accused of venting his malice under the guise of protecting the public." *Id.* at 350, 37 N.E.2d at 641. In addition, courts have held that the privilege does not extend to statements made in preparation for a quasi-judicial hearing. *See, e.g., Medina v. Spotnail, Inc.*, 591 F. Supp. 190, 196 (N.D. Ill. 1984).

47. *Kalish*, 157 Ill. App. 3d at 978, 510 N.E.2d at 1110. Among the cases the *Kalish* court cited were *Astro Resources Corp. v. Ionics, Inc.*, 577 F. Supp. 446 (S.D. Tex. 1983) (letter to NASA contract agent absolutely privileged); *Thomas v. Petruilis*, 125 Ill. App. 3d 415, 465 N.E.2d 1059 (1984) (charge of discrimination filed with the Equal Employment Opportunity Commission absolutely privileged); *Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 657 P.2d 101 (1983) (employer's letter to Employment Security Department absolutely privileged).

48. See *infra* notes 51-63 and accompanying text for a discussion of the "quasi-judicial powers" test.

49. See *infra* notes 66-88 and accompanying text for a discussion of the public policy reasons justifying absolute privilege for quasi-judicial bodies.

50. See *infra* notes 98-102 and accompanying text for a discussion of the right to reputation as protected under the Illinois Constitution.

51. *Kalish*, 157 Ill. App. 3d at 972, 510 N.E.2d at 1105. Although the court noted that statements must be made during a quasi-judicial hearing, it did not address the issue of whether the IEA communications were relevant to the CFC proceeding. *Id.*

52. See *supra* notes 36 and 37 for a list of these cases.

a quasi-judicial proceeding and they must be relevant to that proceeding.<sup>53</sup>

The *Kalish* court drew flawed conclusions from the cited precedents.<sup>54</sup> It incorrectly assumed that if a body possesses quasi-judicial attributes then all communications to it are absolutely privileged. The court failed to consider that a quasi-judicial body does not al-

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53. *Defend v. Lascelles* 149 Ill. App. 3d 630, 633, 500 N.E.2d 712, 714 (1986). The pertinency requirement, however, is not strictly applied. *Id.* at 634, 500 N.E.2d at 715.

54. See *supra* notes 36 and 37 for a list of the cases which the court held supported its decision. In *Thomas v. Petruilis*, 125 Ill. App. 3d 415, 465 N.E.2d 1059 (1984), the court held that certain communications to the Equal Employment Opportunity Commission ("EEOC") were absolutely privileged. *Id.* at 423, 465 N.E.2d at 1065. The communication in question, the filing of a sexual harassment charge with the EEOC, was intended to initiate a formal hearing on the matter. *Id.* at 416, 465 N.E.2d at 1061. Courts have held that the filing of a complaint with a court in contemplation of a criminal proceeding is absolutely privileged. 53 C.J.S. *Libel and Slander* § 75 (1987). The *Kalish* court merely looked to the powers of the CFC, which are similar to those of the EEOC, and not to the relationship of the communication to the CFC proceeding when it determined that *Petruilis* supported its decision. *Kalish*, 157 Ill. App. 3d at 976, 510 N.E.2d at 1108. The IEA letter to the CFC was not in contemplation of securing a hearing on the issue before the CFC. The states attorney's office would be the appropriate agency if this were the letter's purpose.

In *Allen v. Ali*, 105 Ill. App. 3d 887, 435 N.E.2d 167 (1982), the court stated that the Attorney Registration and Discipline Committee ("ARDC") was a quasi-judicial body. *Id.* at 891, 435 N.E.2d at 170. The court offered no explanation as to why the ARDC qualified as quasi-judicial. *Id.* The *Kalish* court cited *Allen* to support its decision to extend as absolute privilege to communications with the CFC. 157 Ill. App. 3d at 976, 510 N.E.2d at 1108. Reliance on another court's unsubstantiated statements is weak at best.

In *Mock v. Chicago, Rock Island and Pac. R.R. Co.*, 454 F.2d 131 (8th Cir. 1972), the court held that communications during a proceeding of the National Railroad Adjustment Board ("NRAB") were absolutely privileged. *Id.* at 133. The defendant's alleged defamatory statement was made in response to the plaintiff's pleadings on an action for reinstatement and back wages which the plaintiff had filed with the NRAB. *Id.* at 132. Once again, the *Kalish* court emphasized the quasi-judicial powers of the NRAB and not the nature of the proceeding before that body. *Kalish*, 157 Ill. App. 3d at 975, 510 N.E.2d at 1107. The NRAB was involved in a formal proceeding necessary to a full hearing on the issues. The CFC was conducting an informal, information gathering proceeding. The NRAB and CFC proceedings are therefore not comparable.

In *Astro Resources Corp. v. Ionics, Inc.*, 577 F. Supp. 446 (S.D. Tex. 1983), the court held that defendant's letter to a NASA contracting officer was absolutely privileged. *Id.* at 447. The defendant sent the letter to the officer to protest the award of a NASA contract to another company. *Id.* The filing of such a letter initiates a contracting officer's investigation to decide whether the protest was valid. *Id.* This letter initiated an investigation on that specific issue. The *Kalish* court concerned its review of *Astro* with the quasi-judicial powers of the contracting officer and not the nature of the act he was performing at the time. *Kalish*, 157 Ill. App. 3d at 975, 510 N.E.2d at 1107. The communication in *Astro* began a formal investigation of a quasi-judicial nature. The communication in *Kalish* was not part of any formal proceeding.

The court in *Park Knoll Assocs. v. Schmidt*, 59 N.Y.2d 205, 464 N.Y.S.2d 424, 451 N.E.2d 182 (1983), stated that tenant applications to the State Division of Housing and Community Renewal seeking refunds of rent overcharges and punitive damages from landlords were absolutely privileged because they initiated a quasi-judicial proceeding. *Id.* In *Kalish*, the IEA letter did not initiate a quasi-judicial proceeding. *Kalish*, 157 Ill. App. 3d at 969, 510 N.E.2d at 1103. The *Kalish* court's reliance on *Park Knoll* is therefore not appropriate.

ways act quasi-judicially.<sup>55</sup> As a result, the court incorrectly focused on whether the CFC itself was a quasi-judicial body. The court should have focused on whether the CFC was acting in a quasi-judicial capacity at the time it received the defamatory communication from the IEA.<sup>56</sup> Had the court done this, it may well have decided that Kalish's informal meeting with the three-member section of the CFC did not constitute a quasi-judicial proceeding.

Another flaw in the *Kalish* court's application of the "quasi-judicial powers" test was its failure to consider whether the IEA communication to the CFC was relevant to the CFC proceeding.<sup>57</sup> Even if the court had properly found that the proceeding was quasi-judicial, the IEA communication would not have satisfied this requirement of the test. In *McDavitt v. Boyer*,<sup>58</sup> the Illinois Supreme Court stated that a person could not maintain an action in defamation against a witness in a judicial proceeding unless that witness maliciously related false information in attacking the character of another in a matter unrelated to the inquiry.<sup>59</sup> Likewise, in *Kintz v. Harriger*,<sup>60</sup> the Ohio Supreme Court indicated that the assassination of a person's character is not relevant to any proceeding.<sup>61</sup> In *Kalish*, the plaintiff charged that the defendant falsely and maliciously assailed his character.<sup>62</sup> The defendant did this in response to the CFC's request for information concerning plaintiff's employment with defendant.<sup>63</sup> Thus, the IEA response was not related to the CFC inquiry and it impugned Kalish's character. Following *McDavitt* and *Kintz*, the statement was irrelevant to the CFC proceeding and therefore not entitled to an absolute privilege.

In attempting to determine whether defamatory communications are absolutely privileged, Illinois courts have continually at-

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55. Because an agency may perform more than one function, it may act administratively in some instances and quasi-judicially in others. Note, *Defamation - Absolute Privilege in Administrative Proceedings*, 97 U. PA. L. REV. 877, 880 (1949). The absolute privilege applies only to the quasi-judicial functions. *Id.*

56. There is no consensus as to what constitutes a quasi-judicial exercise of power. See generally, Annotation, *Libel and slander: Privilege Applicable to Judicial Proceedings as Extending to Administrative Proceedings*, 45 A.L.R. 2d 1296 (1987) (annotation notes exercises of powers which courts have held to be quasi-judicial). Many courts require a proceeding to be adversarial. Comment, *Privilege in Defamation*, 45 BROOKLYN L. REV. 131, 141 n.45 (1978). Other courts have defined quasi-judicial proceedings to be those in which a body performs a substantial public purpose and for which there are adequate safeguards against unnecessary defamation. Comment, *Defamatory Statements*, *supra* note 3, at 348-49 (1981).

57. See *supra* note 3 for the court standard as to relevance.

58. 169 Ill. 475, 48 N.E. 317 (1897).

59. *Id.* at 478, 48 N.E. at 319.

60. 99 Ohio St. 240, 124 N.E. 168 (1919).

61. *Id.* at 243-44, 124 N.E. 170-71.

62. Plaintiff's Brief at 8.

63. *Kalish*, 157 Ill. App. 3d at 970, 510 N.E.2d at 1105.

tempted to apply the "quasi-judicial powers" test.<sup>64</sup> In doing so, the courts have extended absolute privilege to communications to a wide variety of "quasi-judicial" bodies.<sup>65</sup> This contravenes the common law policy of only expanding this privilege to a limited number of bodies.<sup>66</sup>

Historically, the courts first extended absolute privilege to communications during judicial proceedings.<sup>67</sup> The courts decided that participants in judicial proceedings should be free to openly communicate without fear that they would be subjected to a civil defamation action.<sup>68</sup> This unrestricted flow of information was necessary for the courts to perform their functions in the administration of justice and the protection of the public.<sup>69</sup> The courts knew that persons would on occasion abuse this privilege and that individuals would be

64. These courts have not been consistent in their application of the test. See *supra* notes 25, 27 & 54 and accompanying text for a discussion of how the courts have applied the "quasi-judicial powers" test in granting absolute privilege to defamatory statements.

65. See *supra* notes 25 and 54 for samples of bodies which Illinois courts have held to be quasi-judicial. See also *Richardson v. Dunbar*, 95 Ill. App. 3d 254, 419 N.E.2d 1205 (1981) (Knoxville City Council Police Committee); *Parker v. Kirkland*, 298 Ill. App. 340, 18 N.E.2d 709 (1939) (Board of Appeals of Cook County). *But see Allen v. Ali*, 105 Ill. App. 3d 887, 435 N.E.2d 167 (1982) (American Bar Association and Chicago Bar Association are not quasi-judicial).

66. See *supra* note 3 and accompanying text for a discussion of the types of bodies to which courts have extended absolute privileges.

67. Courts first extended absolute privilege to judicial proceedings on the public policy grounds of ensuring freedom of speech where freedom of speech should necessarily exist. *Veeder, supra* note 3, at 469. The courts decided that it was necessary for the proper administration of justice to have people speak without fear of any possible consequences while participating in the judicial process. *Id.* Courts implemented this common law rule to protect those who were acting honestly while discharging their function in the judicial process and not to protect malicious abuse of the system. *Id.* Underlying the doctrine of absolute privilege in judicial proceedings are the concepts of alternate remedies and procedural safeguards. *Id.* at 470. For a discussion of these concepts, see *infra* notes 71-72. The purpose of these is to minimize the damage to reputation which absolutely privileged defamatory statements cause. *Id.*

Although most courts extend absolute privilege to statements made during judicial proceedings, some courts have not. *White v. Nicholls*, 44 U.S. 266 (1845). The *White* court stated that when a privilege applied to defamatory statements made during judicial proceedings, it was not absolutely privileged but only qualifiedly privileged. *Id.* at 287. That is, the usual presumption of malice was removed, and the plaintiff had to prove the statement was made with malice to prevail in a defamation action. *Id.* A recent Supreme Court decision held that the *White* discussion of privilege was only dictum and that the *White* decision cannot be considered authoritative. *Briscoe v. Lahue*, 460 U.S. 325, 332-33 n.12 (1983). The *White* decision is therefore not a reliable statement of the common law. *Id.*

In Germany, the courts make no distinction between absolute and qualified privilege. *Veeder, supra* note 3, at 464. There is no privilege for malicious defamation. *Id.* In France, defamatory statements are not actionable unless the court to which they were made authorized an action on them. *Id.* In England, courts hold all statements made during judicial proceedings absolutely privileged. *Id.* at 474-75.

68. See *supra* note 67 for a further discussion of extending absolute privilege to courts.

69. *Id.*

injured as a result.<sup>70</sup> This was not a major concern of the courts, however, because adequate safeguards<sup>71</sup> and alternate remedies<sup>72</sup> were present in the judicial system.<sup>73</sup> The safeguards would mitigate any damage to the individual's reputation.<sup>74</sup> The alternate remedies would deter those who contemplate abuse of the privilege from doing so.<sup>75</sup>

From the 1920's to the present, there has been a steady increase in the number of administrative agencies.<sup>76</sup> Many of these agencies perform important functions and exercise powers similar to those of courts. Because of this, courts extended the concept of absolute privilege to include communications to bodies which were conducting quasi-judicial proceedings.<sup>77</sup> Problems developed, however, when some courts began analyzing cases only in terms of the powers which the agency in question possessed.<sup>78</sup> As the courts centered on an agency's powers, other valid considerations received cursory review.<sup>79</sup> Also, there is no consensus on what qualifies as a quasi-judi-

70. Although this was so, the courts decided that the public good must be considered before any inconvenience to an individual. Veeder, *supra* note 3, at 478.

71. Procedural safeguards include the right to be represented by counsel, the opportunity to confront and cross-examine witnesses, the power to subpoena, take statements under oath, and the use of the rules of evidence. Comment, *Toker v. Polak: The Applicability of Absolute Privilege in Defamation Cases*, 8 N.Y.U. REV. L. & SOC. CHANGE 381, 391 (1978-79) [hereinafter *Applicability of Absolute Privilege*].

72. Alternate remedies include criminal prosecution for perjury and punishment for contempt. RESTATEMENT (SECOND) OF TORTS § 588 comment a (1977). Other examples include impeachment, removal, recall, defeat for re-election or disciplinary action against attorneys or judges for unethical or wrongful conduct. Comment, *Developments in the Law - Defamation*, 69 HARV. L. REV. 875, 920 (1956). Also, in a judicial proceeding, the court may expunge the defamatory statement. Veeder, *supra* note 3, at 471.

73. Veeder, *supra* note 3, at 470.

74. Proceedings which are protected by safeguards are more likely to bring out the truth as to whether a statement is accurate or not. Comment, *Libel and Slander - Absolute Privilege Before Administrative Agencies*, 5 VILL. L. REV. 121, 123 (1959). If an individual is able to show during the proceeding that the statements are false, the damage to his reputation is mitigated. *Id.* "[I]t is only the potential harm as thus mitigated which may properly be considered outweighed by the public interest in favor of broad access by suitors of the court." *Rainier's Dairies v. Raritan Valley Farms*, 19 N.J. 552, 557, 117 A.2d 889, 894 (1955).

75. Veeder, *supra* note 3, at 471.

76. See M. DIMOCK, G. DIMOCK & D. FOX, PUBLIC ADMINISTRATION (1983).

77. Several courts decided that the similarities between judicial proceedings and quasi-judicial proceedings, along with the fact that many administrative agencies perform important public functions, made extension of the absolute privilege doctrine to quasi-judicial proceedings appropriate. Note, *Defamation - Absolute Privilege in Administrative Proceedings*, 97 U. PA. L. REV. 877, 878 (1949).

78. See *infra* note 105 for a discussion of decisions based upon the character of the administrative agency, rather than on the nature of the proceeding.

79. *Kalish* is a perfect example of this. The court focused on the character of the CFC rather than the proceeding itself. *Kalish*, 157 Ill. App. 3d 969, 510 N.E.2d 1103. It did not consider the relevancy of the IEA statements to the proceeding nor whether safeguards or alternate remedies were available. *Id.*

cial power<sup>80</sup> or how many of these powers are needed to transform an administrative body into a quasi-judicial body.<sup>81</sup>

Fortunately, many courts consider the fundamental policy reasons which originally persuaded courts to extend an absolute privilege to defamatory language.<sup>82</sup> These courts first determine whether an agency is performing a function so important to the public interest that communications to it must be unobstructed.<sup>83</sup> These courts then determine whether adequate safeguards are present in the agency's proceedings, and whether there are alternate remedies available if a participant in a proceeding defames another.<sup>84</sup>

Courts which use a "function/safeguard"<sup>85</sup> analysis protect all interests involved in a proceeding. The individual is protected from the harm caused by defamatory language. Society is protected because an agency has unrestricted access to information. The Illinois courts should abandon the difficult and unreliable "quasi-judicial powers" test and analyze absolute privilege cases in terms of the "function/safeguard" test. In *Kalish*, the court noted the important public function of the CFC.<sup>86</sup> However, it did not consider whether any safeguards existed for the protection of participants in CFC proceedings.<sup>87</sup> If the court had done so, it would not have granted an absolute privilege to the IEA statement because no adequate safeguards existed.<sup>88</sup>

At least one court has stated that absolute privilege for defamatory statements should not exist in any proceeding,<sup>89</sup> including both judicial and quasi-judicial proceedings. In *Kintz v. Harriger*,<sup>90</sup> the

80. See *supra* note 56 for an example of this lack of consensus.

81. *Kalish*, 157 Ill. App. 3d at 974, 510 N.E.2d at 1107.

82. See *supra* note 62-75 and accompanying text for a discussion of these policy reasons.

83. Comment, *The Applicability of Absolute Privilege*, *supra* note 71, at 396-97.

84. *Id.*

85. See *supra* text accompanying notes 83-84 for the elements of this test. The "function/safeguard" label is taken from, *Applicability of Absolute Privilege*, *supra* note 71, at 396.

86. *Kalish*, 157 Ill. App. 3d at 976, 510 N.E.2d at 1108-09. The CFC performs an important public function in determining the bar applicant's good moral character and general fitness for the practice of law. *Id.*

87. Neither the Illinois Supreme Court Rules nor the CFC Rules of Procedure provide for any safeguards to protect a bar applicant's reputation from defamatory statements at the CFC section stage. ILL. REV. STAT. ch. 110A, §§ 701 *et seq.* (1987). Also, there are no alternate remedies available. *Id.*

88. See *supra* notes 71-72 for a discussion of these remedies and safeguards.

89. See *infra* text accompanying notes 90-97 for a discussion of this case.

90. 99 Ohio St. 240, 124 N.E. 168 (1919). The Ohio Supreme Court subsequently overruled the *Kintz* court's conclusion that grand jury testimony is not absolutely privileged in *Taplin-Rice-Clerkin Co. v. Hower*, 124 Ohio St. 123, 177 N.E. 203 (1931). The *Hower* court stated that it was forced to conclude that such testimony was absolutely privileged due to its holdings in *Erie County Farmer's Ins. Co. v. Crecelius*, 122 Ohio St. 210, 171 N.E. 97 (1930) and *Buehrer v. Provident Mutual Life*

Ohio Supreme Court held that perjured testimony before a grand jury was not absolutely privileged.<sup>91</sup> The court based its decision on two provisions of the Ohio Constitution.<sup>92</sup> One provision stated "[t]hat a frequent recurrence to the fundamental principles of civil government, is absolutely necessary to preserve the blessings of liberty."<sup>93</sup> The other provision stated that "[a]ll courts shall be open and every person, for injury done him in his . . . reputation, shall have remedy by due course of law."<sup>94</sup> From these provisions, the court reasoned that individuals had a constitutionally protected right to reputation.<sup>95</sup> As such, the court refused to grant an absolute privilege to the defendant's statement to the grand jury.<sup>96</sup> The court noted that the great weight of precedent was contrary to its position, but declared that the courts must protect constitutionally mandated rights.<sup>97</sup>

The Illinois Constitution contains provisions similar to those of the Ohio Constitution upon which the *Kintz* court based its opinion.<sup>98</sup> Thus, following the Ohio court's reasoning, an individual's reputation is also constitutionally protected in Illinois. In addition,

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Ins. Co., 123 Ohio St. 264, 175 N.E.25 (1931). However, both *Crececius* and *Buehrer* involved statements alleged in pleadings made in judicial proceedings in libel actions, whereas both *Kintz* and *Hower* involved malicious prosecution actions based on statements made during grand jury hearings. In fact, the *Crececius* court specifically distinguished *Kintz*. 122 Ohio St. 210, 171 N.E. at 98. The *Crececius* court held that different rules applied in libel actions and in malicious prosecution actions as to whether testimony was privileged, with the former requiring an absolute privilege and the latter a qualified privilege. *Id.* It is therefore odd that the *Hower* court felt compelled, without explanation, to overrule *Kintz* based on *Crececius* and *Buehrer*. Several courts have cited *Kintz* in support of not extending an absolute privilege to testimony given in judicial or quasi-judicial proceedings. See *Krumin v. Bruknes*, 255 Ill.App. 503, 513, N.E. (1930) (O'Connor, J., dissenting), *Copeland v. Anderson*, 707 P.2d 560 (Okla. App. 1985).

In addition, many courts have cited *Kintz* with approval as to its holding that the weight of precedent should not prevent a court from finding a remedy for wrongs protected by constitutions and statutes. See *State ex re The Repository, Div. of Thompson Newspapers, Inc. v. Unger*, 28 Ohio St. 3d 418, 504 N.E.2d 37, 41 (1986), *Hardy v. Ver Meulen*, 32 Ohio St. 3d 45, 512 N.E.2d 626, 628 (1987).

91. *Kintz*, 99 Ohio St. at 241, 124 N.E. at 170-171.

92. The two provisions were OHIO CONST. art. 8, § 18 and OHIO CONST. art. I § 16. See *Kintz*, 99 Ohio St. at 244, 124 N.E. at 169.

93. *Kintz*, 99 Ohio St. at 244, 124 N.E. at 169; OHIO CONST. art. 8, § 18.

94. *Id.* (construing art. I); OHIO CONST. bill of rights § 16 (1851).

95. *Kintz*, 99 Ohio St. at 244, 124 N.E. at 169. To support its position, the court cited the Bible, Shakespeare and Lincoln as to the importance of reputation. *Id.*

96. *Id.* at 253, 124 N.E. at 171-72.

97. *Id.* at 243, 124 N.E. at 169.

98. Section 12 of article I provides: "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly." ILL. CONST. art. I, § 12. Section 23 of article I provides: "A frequent recurrence to the fundamental principles of civil government is necessary to preserve the blessings of liberty. These blessings cannot endure unless the people recognize their corresponding individual obligations and responsibilities." ILL. CONST. art. I, § 12.

the Illinois Constitution provides that "[a]ll persons may speak, write and publish freely, being responsible for the abuse of that liberty."<sup>99</sup> These constitutional provisions signify that Illinois courts should not protect individuals when they abuse the right to free speech and injure the reputations of others.<sup>100</sup>

Court statements that defamatory communication should at times be absolutely privileged are specious. An important purpose of the judiciary is to protect the rights of individuals.<sup>101</sup> In Illinois, the state constitution specifically points to reputation as an individual right which the citizenry highly values.<sup>102</sup> Illinois courts should not ignore their duty to protect the reputation of the individual. In *Kalish*, the court infringed upon Kalish's constitutional right to a remedy for injury to his reputation when it granted an absolute privilege to the IEA statements to the CFC. The court therefore erred in extending such a privilege.

The proper administration of justice is the most important function of the judiciary.<sup>103</sup> Judicial decisions should reflect this so as to maintain the people's confidence in the judiciary.<sup>104</sup> This confidence is weakened when courts deny individuals a civil remedy when others maliciously defame them. A court grant of absolute privilege to defamatory statements denies individuals a civil remedy, and, therefore, should be extended in only the narrowest of circumstances.

Illinois courts' use of a formalistic "quasi-judicial powers" test allows extension of absolute privilege to nearly every administrative agency.<sup>105</sup> These courts have continually misapplied this test and

99. ILL. CONST. art. I, § 4.

100. Article I, section 4 of the Illinois Constitution states that people will be responsible for their abuses of the right of free speech. *Id.* Malicious defamation of an individual is such an abuse. Article I, section 12 provides that each person shall have a remedy for injuries to his reputation. Thus, Illinois extends a constitutional protection to an individual's reputation. ILL. CONST. art. I, § 12. Although the drafters of the Illinois Constitution did not intend to do away with any common law defenses, they did not address the issue of absolute privilege for communications injurious to an individual's reputation. ILLINOIS CONSTITUTIONAL CONVENTION, VERBATIM TRANSCRIPT OF MAY 29, 1970 at 1410. In light of the fact that article I, section 12 extends a constitutional protection to reputation, an absolute privilege would infringe on this right. When the common law addressed the issue of privilege, the courts had made a choice between an absolute or a qualified privilege. Veeder, *supra* note 3, at 781. Because of Illinois' constitutional right to reputation, the court must only extend a qualified privilege to defamatory language which injures reputation. In doing so, the court's extension of common law privilege as a defense to defamation is not eliminated, and an individual's constitutional right of reputation is not diminished.

101. THE FEDERALIST No. 78, at 469 (A. Hamilton) (C. Rossiter ed. 1961).

102. ILL. CONST. art. I, § 12.

103. THE FEDERALIST No. 17, at 120 (A. Hamilton) (C. Rossiter ed. 1961) (administration of justice is the "great cement of society").

104. *Id.*

105. Note, *Defamation - Absolute Privilege in Administrative Proceedings*, 97

have freely bestowed absolute privilege to communications with administrative bodies. They have failed to consider safeguards to the individual. Also, their liberal accord of this privilege in cases where persons are maliciously defamed violates the Illinois Constitution.<sup>106</sup>

The *Kalish* decision extends the doctrine of absolute privilege beyond its acceptable parameters. The holding not only affects communications to the CFC, but the reputations of bar applicants will continue to be injured as a result. The Illinois Supreme Court had an opportunity to elucidate the absolute privilege doctrine for Illinois courts when *Kalish* appealed to that court. It denied rehearing of the case,<sup>107</sup> and, therefore, unfortunately passed on an excellent opportunity to clarify how Illinois courts should apply absolute privilege in cases involving quasi-judicial bodies.

Michael Fahey

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U. PA. L. REV. 877, 878 (1949). When courts have strictly looked at the character of the body and not the proceeding before it, there have been some absurd decisions. As an example, in *Meyer v. Parr*, 69 Ohio App. 344, 37 N.E.2d 637 (1941), the court denied an absolute privilege to a letter written to a licensing board. The court noted that the state constitution provides that judge's must be elected. *Id.*, at 346-47, 37 N.E.2d at 639. The court then reasoned that because the board members were appointees, the board was not quasi-judicial. *Id.*

106. On the federal level, the Supreme Court has held that reputation alone is not a constitutionally protected interest. *Paul v. Davis*, 424 U.S. 693, 701 (1976).

107. *Kalish*, 157 Ill. App. 3d 969, 510 N.E.2d 1103, *appeal denied*, 116 Ill. 2d 559, 515 N.E.2d 109 (1987).