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Kyle C. Bisceglie on *Rosenberg v. Metlife, Inc.*

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

Absolute Immunity Applied to Brokers' Statements on NASD Form U-5

In *Rosenberg v. Metlife, Inc.*, [8 N.Y.3d 359](#), 866 N.E.2d 439, 834 N.Y.S. 2d 494 (2007), a divided 4-2 Court of Appeals (in which Chief Justice Kaye did not participate) determined that a brokerage firm's statements on a National Association of Securities Dealers ("NASD") Uniform Termination Notice for Securities Industry Registration ("Form U-5") are entitled to absolute immunity from a libel claim even if made maliciously. In so doing, the Court gave greater weight to the need of securities firms and NASD's regulatory scheme to provide full and complete disclosure on the Form U-5 as to all circumstances surrounding employees' terminations than to potential damage to the defamed employees' future career prospects. Because NASD requires that a Form U-5 be filed when a registered representative is terminated and be reviewed before a representative is hired, and investigates terminations based on misconduct, this decision has far-reaching implications.

Public Policy Basis for Privilege. Public policy mandates that certain otherwise defamatory communications be given immunity from libel suit based on either a qualified or an absolute privilege. A qualified privilege extends to a statement made in good faith discharge of a private or public duty. Examples include the following:

- "qualified media privilege" (known in New York as "fair report privilege," *NY Times Co. v. Sullivan*, [376 U.S. 254](#) (1964); *Curtis v. Butts*, [388 U.S. 130](#) (1967); *Gertz v. Robert Welch, Inc.*, [418 U.S. 323](#) (1974); *Edwards v. National Audobon Society*, [556 F.2d 113](#) (2d Cir. 1977));
- the "common interest doctrine," protecting communications made by one person on a subject in which he or she "has an interest or a legal, moral or societal duty to speak" to another person having a "corresponding legal duty or interest", (*Brockman v. Frank*, [149 Misc. 2d 399](#), 565 N.Y.S. 2d 426 (S.D.N.Y. 1991); see also *Huggins v. Moore*, [94 N.Y.2d 296](#), 704 N.Y.S.2d 904, 726 N.E.2d 456 (1999); *Ferguson v. Sherman Square Realty Corp.*, [30 A.D.3d 288](#), 817 N.Y.S.2d 272 (1st Dep't 2006));

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- communications by employers relating to employees or prospective employees, (*Browne v. Prudden-Winslow Co.*, [195 A.D. 419, N.Y.S. 350](#) (1st Dep't 1921); *Levine v. Board of Educ.*, [186 A.D.2d 743](#), 589 N.Y.S.2d 181 (2d Dep't 1992);
- the “labor dispute privilege,” *McGovern v. Hays*, [135 A.D.2d 125](#), 524 N.Y.S.2d 558, *app. denied* [72 N.Y.2d. 803](#), 532 N.Y.S.2d 368, 528 N.E.2d 520 (3d Dep't 1988));
- qualified immunity to professional and fiduciary communications, *McQuil-lan v. Kenyon & Kenyon*, [705 N.Y.S.2d 671](#) (2d Dep't 2000); and
- immunity for physicians and health care providers, *Farooq v. Coffey*, [206 A.D.2d 879](#), 616 N.Y.S.2d 112 (4th Dep't 1994).

For a statement subject to a qualified privilege to be actionable, the plaintiff must show that the declarant acted with malice.

An absolute privilege, on the other hand, immunizes a declarant from liability regardless of malice and is generally reserved for statements “material and pertinent” to “the public function” including executive, legislative, judicial or quasi-judicial proceedings. *Rosenberg*, [8 N.Y.3d at 365](#), 866 N.E.2d at 442-43, 834 N.Y.S. 2d at 494.

Importance of Form U-5 in NASD’s Quasi-judicial Function. In providing absolute immunity to employers’ statements on a Form U-5, the *Rosenberg* Court built on its decision in *Wiener v. Weintraub*, [22 N.Y.2d 330, 331](#) (1968) where the Court provided absolute immunity for the statements in a complaint letter to the grievance committee of the bar association accusing an attorney of misconduct. Noting in *Rosenberg* that NASD is the largest self-regulatory organization (“SRO”) subject to SEC oversight, oversees the conduct of over 5,000 brokerage firms and more than 660,000 registered securities representatives, is subject to U.S. Securities and Exchange Commission regulation and is the only “national securities association” registered under 15A of the Securities Exchange Act of 1934, the Court found that the Form U-5 plays a “significant role” in discharging one of NASD’s central responsibilities in the investigation and adjudication of securities violations.

The practitioner should note that, with the July, 2007, consolidation of NASD and the regulatory and enforcement functions of the New York Stock Exchange into Financial

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Institution Regulatory Authority (“FINRA”), NASD’s role as a SRO and the role played by the Form U-5 has become even more important.

Subject to risks of penalty to the employer member firm, NASD requires that a Form U-5 be filed within 30 days of termination of a registered representative, that a member firm review a Form U-5 in the hiring process, and, of greatest significance, routinely investigates terminations for cause that involve misconduct and frequently initiates disciplinary action as a result. This was critical to the *Rosenberg* majority’s decision to view “the compulsory Form U-5 as a preliminary or first step in the NASD’s quasi-judicial process,” which entitles the statements to absolute immunity. [Rosenberg, 8. N.Y.3d at 367.](#)

Unlike the statements in the attorney complaint in *Weiner*, the statements on the Form U-5 are, generally speaking, “public.” Specifically, they are maintained on NASD’s Central Registration Depository (“CRD”) and must be reviewed by future member employers. Through the interplay between Form U-5 and the Uniform Application for Securities Industry Registration or Transfer (“Form U-4”), the public has access to certain information about the termination of a member employee via NASD’s BrokerCheck program. The *Rosenberg* majority valued protection of the investing public and the integrity of the financial markets by encouraging “[a]ccurate and forthright responses” at the expense of potential abuse of the Form U-5.

Significance of *Rosenberg*. *Rosenberg* represents a marked extension by the Court of Appeals of absolute immunity to non-adjudicated public statements and puts New York out of step with how the majority of jurisdictions treat broker-dealers, see e.g., *Galarneau v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 2007 U.S. App. Lex. 23919 (1st Cir. October 12, 2007) (Maine law); *Dawson v. New York Life Insurance Co.*, [135 F.3d 1158](#) (7th Cir. 1998) (Illinois law); *Glenmore v. Dean Witter Reynolds, Inc.*, [83 F.3d 132](#) (6th Cir. 1996) (Tennessee law); *Andrews v. Prudential Securities*, [1997 U.S. Dist. LEXIS 23694 *1](#) (E.D. Mich. 1997); *Eaton Vance Distributors, Inc. v. Ulrich*, [692 So.2d 915](#) (Fla. Dist. Ct. App. 2d Dist. 1997); *Prudential Securities, Inc. v. Dalton*, [929 F.Supp. 1411](#) (D. Okl. 1996); *Harburjak v. Prudential Securities, Inc.*, [759 F. Supp. 293](#) (W.D.N.C. 1991), and NASD’s original proposal for qualified immunity. See 2-UA Blue Sky Regulation § 507, n.2 (2006) (citing Securities Exchange Act Release 39,892,66 SEC Dock. 2473) (1998)).

Earlier Decisions Muddled. Prior to *Rosenberg*, there were two lines of cases in New York. A number of reported decisions flatly held that statements on a Form U-5 were absolutely privileged. *Cicconi v. McGinn, Smith & Co.*, [2005 Slip Op. 0050](#), 27 A.D.3d

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59, 808 N.Y.S.2d 604 (1st Dep't 2005); *Herzfeld & Stern, Inc. v. Beck*, [175 A.D. 689](#), 572 N.Y.S.2d 683 (1st Dep't 1991); *Culver v. Merrill Lynch & Co.*, [1995 U.S. Dist. LEXIS 10017, *16](#) (S.D.N.Y. 1995); *Hessel v. Goldman Sachs & Co.*, [281 A.D.2d 247](#), 722 N.Y.S.2d 21 (1st Dep't 2001); *Dunn v. Ladenburg Thalmann & Co.*, [259 A.D.2d 544](#), 686 N.Y.S.2d 471 (2d Dep't 1999).

In contrast, the line permitting prosecution of a libel claim against broker-dealers provided only tepid support for qualified immunity. See *Fahnestock v. Waltman*, [935 F.2d 512](#) (2d Cir. 1991); *Jordan v. Metropolitan Life Ins. Co.*, [280 F. Supp. 2d 104, 109](#) (S.D.N.Y. 2003); *Acciardo v. Millenium Securities Corp.*, [83 F. Supp.2d 413, 419](#) (S.D.N.Y. 2000). Specifically, both *Fahnestock* and *Acciardo* involved confirmation of an arbitration award in which the arbitrators had already applied a qualified immunity. As a result, the *Fahnestock* and *Acciardo* courts upheld the arbitrators' ruling based on a "manifest disregard of the law" standard effectively finding that the arbitrators' application of qualified immunity had some legal basis. This is very different from holding that a standard of qualified immunity applies. However, it was sufficient authority to cause confusion. In *Jordan*, the district court denied an employee's request for an injunction to force the employer to favorably amend the Form U-5 and noted that plaintiffs' defamation claim is subject to qualified immunity. *Jordan*, [280 F. Supp. at 109-110](#). Also, it was sufficiently unclear that it led the Second Circuit in *Rosenberg* to certify the question to the Court of Appeals. *Rosenberg v. Metlife, Inc.*, [453 F.3d 122](#) (2d Cir. 2006); *Rosenberg v. Metlife, Inc.*, [7 N.Y.3d 804](#), 854 N.E.2d 1268 (2006).

Post-Rosenberg Strategies. In light of the Court's holding, there will be more venue shopping in multi-state libel cases and more arguments over applicable choice of law. New York applies the law of the state with the greatest interest/most significant relationship with the alleged conduct and the parties, which is usually determined by the plaintiff's domicile and/or the situs of the alleged tortious conduct. [Celle v. Filipino Reporter Enterprises, Inc.](#), [209 F.3d 163, 175](#) (2d Cir. 2000); [Lee v. Bankers Trust Company](#), [166 F.3d 540, 545](#) (2d Cir. 1999); [Machleder v. Diaz](#), [801 F.2d 46, 51](#) (2d Cir. 1986). Securities industry employers should follow the law of the state where the employee works and/or resides when assessing appropriate language for the Form U-5. Plaintiffs should consider emphasizing the impact of the statement outside of New York.

The Second Circuit, in applying the certified response from the Court of Appeals in *Rosenberg*, did not "decide if there are circumstances in which statements on Form U-5 are not absolutely privileged" (*Rosenberg v. MetLife, Inc.*, [493 F.3d 290, 291, n.1](#) (2nd Cir. 2007)), but suggested that those circumstances would exist where the statements

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were not “material and pertinent to the issue to be resolved in the proceeding.” Counsel should consider whether any statements were made beyond the Form U-5, such as remarks made to the media, socially, in emails outside the firm or in meetings. In-house counsel for brokers should vet the statement in the Form U-5 to tie it into the reasons for termination and purge any collateral statement not necessary to give an account of the reasons for the termination. Notwithstanding the immunity, depending on the circumstances, other employee claims, including retaliation, breach of contract and discrimination claims, are still viable.

At least one decision has held that *Rosenberg* is insufficient to obtain a stay of the arbitration and any question over the extent of the applicable immunity should be raised before the arbitral tribunal, not in a CPLR article 75 proceeding. [McKim Capital, Inc. v. Stewart, 2006 NY Slip Op 52462U LEXIS 3888, *1-2 \(N.Y. Misc. 2006\)](#).

Finally, practitioners should keep in mind that potential clients are often most concerned about their reputation and ability to find new gainful work in the same industry. While *Rosenberg* limits the availability of money damages, it does not preclude an employee from protecting his or her reputation by initiating a NASD arbitration or court action to expunge defamatory language on the Form U-5. Employment lawyers should explain this distinction to discharged employees concerned about the deleterious effect of a negative Form U-5.

For additional discussion of arbitrating and litigating statements on the Form U-5 see, [New York Civil Practice: CPLR Article 75 Arbitration](#); [Personal Injury: Actions, Defenses, Damages § 4, Defamation: Defenses and Defense Considerations](#); Anne H. Wright, Form U-5 Defamation, [52 Wash & Lee L. Rev. 1299](#) (1995) (for discussion on Form U-5 defamation and privileges); Vivek G. Bhatt, The Amended Form U-5: Two Proposals for Solving the Privilege Dilemma, [21 Whittier L. Rev. 963](#) (2000) (discussion of qualified and absolute privileges attributed to U-5 statements and possible solutions to the issue); Loretta A. Wise, Enforcing the Personal Trading Rules Under the Investment Company Act: Employment Law Considerations, [33 Rutgers L. J. 487](#) (2002) (employment law considerations in relation to defamation suits in the securities industry).

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