

## PROSECUTORIAL IMMUNITY IN THE SECOND CIRCUIT

### **Prosecutorial immunity generally.**

Under the plain text 42 U.S.C. §1983, any state actor who causes a citizen to suffer a constitutional or federal rights violation can be sued. But in *Tenney v. Brandhove*, 341 U.S. 367 (1951) (holding that legislatures acting in legislative capacity are absolutely immune from suit under Section 1983), Justice Frankfurter wrote: “We cannot believe that Congress ... would impinge on [traditional immunities] so well grounded in history and reason by covert inclusion in the general language” of Section 1983. In *Monroe v. Pape*, 365 U.S. 167 (1961), the opinion which gave birth to modern civil rights litigation, Justice Douglas wrote for the Court that Section 1983 “should be read against the background of tort liability [.]” *Id.* at 188.

The “background of tort liability,” *id.* at 188, the Court noted in *Pierson v. Ray*, 386 U.S. 547 (1967) includes common law defenses. *Id.* at 554-55 (holding that some immunities were so “well established” at common law that Congress “would have specifically so provided had it wished to abolish” them.) Thus, if “an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871 [he will be entitled to immunity unless Section] 1983's history or purposes nonetheless counsel against recognizing the same immunity in 1983 actions.” *Malley v. Briggs*, 475 U.S. 335, 339-40 (1986) (quoting *Tower v. Glover*, 467 U.S. 914, 920 (1984)). In *Imbler v. Pachtman*, 424 U. S. 409 (1976), the Court held that prosecutors performing core prosecutorial functions are entitled to absolute immunity.

Prosecutorial immunity does not apply to all prosecutorial conduct. Rather, the reviewing court looks to “the nature of the function performed, not the identity of the actor who performed it.” *Forrester v. White*, 484 U. S. 219, 229 (1988). This is called the “functional test” to immunities. When a prosecutor performs “advocative” conduct, that is, he “act[s] within the scope of his duties in initiating and pursuing a criminal prosecution,” *Imbler v. Pachtman*, 424 U. S. 409, 410 (1976), he is absolutely immune from suit.

### **The functional approach.**

It's a matter of first principle that a prosecutor is not entitled to absolute immunity unless he is performing an “advocative” function. In *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976), the Court noted the significant difference between “those aspects of the prosecutor’s responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate [.]” Thus, in *Burns v. Reed*, 500 U.S. 478 (1991) the Court held that prosecutors were absolutely immune for conduct associated with presenting evidence before a grand jury, but not for rights violations flowing from legal advice they gave to police officers. Giving legal advice to police officers (in this case, telling them that hypnotizing a witness was constitutional), was not advocative conduct. *Id.* at 492-96.

Then, in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), the Court held that a prosecutor was not absolutely immune for false statements made in a press conference, and for other pre-trial investigative conduct. The *Fitzsimmons* court noted that “[t]he conduct of a press conference does not involve the initiation of a prosecution, the presentation of the state's case in court, or actions preparatory for these functions.” *Id.* at 278. Thus, even though “[s]tatements to the press may be

an integral part of a prosecutor's job," *id.* at 278 and "may serve a vital public function ... a prosecutor is in no different position than other executive officials who deal with the press, and, as noted above, qualified immunity is the norm for them." *Id.* (citations omitted).

Recently, in *Kalina v. Fletcher*, 522 U.S. 118 (1997), a unanimous Supreme Court held that a prosecutor who perjured herself when certifying certain facts necessary to obtain an arrest warrant was not absolutely immune from suit. Applying the functional approach to immunities, i.e., looking to "the nature of the function performed, not the identity of the actor who performed it," *Forrester v. White*, 484 U. S. 219, 229 (1988), the Court asked "whether the prosecutor was acting as a complaining witness rather than a lawyer when she executed the certification [ ]." *Id.* at 129. The Court rejected the prosecutor's argument "that the execution of the certificate was just one incident in a presentation that, viewed as a whole, was the work of an advocate and was integral to the initiation of the prosecution." *Id.* at 130. Because "[t]estifying about facts is the function of the witness, not of the lawyer," the prosecutor was not entitled to absolute immunity.

Supreme Court precedent thus clearly establishes that a prosecutor is not entitled to absolute immunity unless he is performing advocative conduct. The challenge is distinguishing between "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate[ ]." *Imbler v. Pachtman*, 424 U.S. at 430-31 (1976).

#### **The "advocative" function.**

"Advocative" conduct includes that which is "intimately associated with the judicial phase of the criminal process. *Imbler v. Pachtman*, 424 U.S. at 430-31. In *Bernard v. County of Suffolk*, 356 F.3d 495, 503 (2d Cir. 2004) a unanimous three-judge panel wrote that advocative conduct is that which "lie[s] at the very core of a prosecutor's role as an advocate engaged in the judicial phase of the criminal process." These "core" functions include:

- filing criminal charges, *Imbler v. Pachtman*, 424 U. S. 409 (1976); *Pinaud v. County of Suffolk*, 52 F.3d 1139 (2d Cir. 1995), even when done in bad faith. *Shmueli v. New York*, No. 03-0287 (2d Cir. Sept. 15, 2005);
- presenting evidence before a grand jury, *Hill v. City of New York*, 45 F.3d 653 (2d Cir. 1995);
- advocacy at a preliminary hearing, *Burns v. Reed*, 500 U.S. 478 (1991);
- accepting a plea bargain, *Taylor v. Kavanagh*, 640 F.2d 450 (2d Cir. 1981);
- retaining evidence pending a direct appeal, *Parkinson v. Cozzolino*, 238 F.3d 148 (2d Cir. 2001);
- advocating increased bail at a bail hearing, *Pinuad v. County of Suffolk*, 52 F.3d 1139 (2d Cir. 1995).

#### **The "impermissibly intertwined" and lack of jurisdiction exceptions.**

Even if a prosecutor is performing an advocative function, he will nonetheless be denied absolute immunity if he intertwines the exercise of his advocacy function with impermissible conduct; or if he acts in excess of his statutorily-conferred jurisdiction.

Thus, absolute immunity will not shield him if he "has intertwined his exercise of

prosecutorial discretion with other, unauthorized conduct.” *Bernard v. County of Suffolk*, 356 F.3d 495, 504. A prosecutor also does not have absolute immunity “for acts that are manifestly or palpably beyond his authority” or are “performed in the clear absence of all jurisdiction.” *Schloss v. Bouse*, 876 F.2d 287, 291 (2d Cir. 1989). To determine whether a prosecutor has authority to take some act, “a court will begin by considering whether relevant statutes authorize prosecution for the charged conduct.” *Bernard v. County of Suffolk*, 356 F.3d 495 (2d Cir. 2004) (holding that prosecutor engaging in an allegedly politically-motivated prosecution was nonetheless entitled to absolute immunity, since the decision to file charges was a prosecutorial function).

“For example, where a prosecutor has linked his authorized discretion ... to an unauthorized demand for a bribe, sexual favors, or the defendant’s performance of a religious act, absolute immunity will be denied.” *Id.* at 504 (citing *Doe v. Phillips*, 81 F.3d 1204 (2d Cir. 1996)). The most prominent (and perhaps one of the only published Second Circuit opinions applying the impermissibly intertwined doctrine) is *Doe v. Phillips*, 81 F.3d 1204 (2d Cir. 1996)

In *Doe*, a state prosecutor, Gerald D’Amelia filed felony charges against a mother for allegedly molesting her 14-year old son. *Id.* at 1206. After beginning to doubt the boy’s accusations, the prosecutor agreed to dismiss the charges. But only on one condition. Doe, a Roman Catholic, was required to swear on the Bible that the son’s accusations were false. *Id.* at 1207 (“D’Amelia testified that he told counsel that [unless Doe swore on the Bible] criminal charges would not be dismissed against her [ ].”)

The panel held that even though accepting and demand a plea bargain is an advocative function, *Taylor v. Kavanagh*, 640 F.2d 450 (2d Cir. 1981), the prosecutor was not absolutely immune since he lacked authority to demand that Doe swear on the Bible. Because he lacked authority to demand this “intertwined conduct,” D’Amelia was not absolutely immune from suit. *Id.* at 1211. (“D’Amelia’s conduct was not protected by absolute immunity because his demand that Doe swear to her innocence on a bible in church was manifestly beyond his authority.”)

### **Summary.**

Prosecutorial immunity, an atextual and judicially-created doctrine, shields advocative conduct from suit. Whether or not the prosecutor acted with bad faith or ill will matters not. The challenge, then, is differentiating between “advocative,” “administrative,” and “investigatory” functions. It is also worth noting that even if a prosecutor is denied absolute immunity, she might still be entitled to qualified immunity.