
NATIONAL REPORT OF THE STATE LAW ON PROSECUTOR IMMUNITY

The Accountable Prosecutor Project

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Wake Forest University School of Law



WAKE FOREST
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**Foundation for
Prosecutorial
Accountability**

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About the Accountable Prosecutor Project

The Accountable Prosecutor Project is a research initiative funded by the Foundation for Prosecutorial Accountability and operated out of Wake Forest School of Law. It was founded in 2021 with an aim to generate a better understanding of the current landscape of prosecutor accountability mechanisms and ways to improve prosecutor transparency and connection to their communities. The project seeks to explore both external methods of accountability (such as civil lawsuits) and internal methods of accountability (such as data collection within a prosecutor office).

For more information about the Foundation for Prosecutorial Accountability and the Accountable Prosecutor Project research initiative, please visit accountableprosecutors.org.

Questions about this report should be directed to the Project Director, Eileen Prescott (prescoe@wfu.edu).



Executive Summary

Prosecutors in the United States are entrusted with significant discretion in choosing which cases to pursue and which charges to bring in those cases. As a society, we generally prioritize the prosecutorial freedom to make those choices over individuals who might be hurt by malicious or negligent uses of that discretion. Elections, bar discipline, and criminal charges are all preferred to civil lawsuits as methods of reaching problematic prosecutor behavior. But prosecutors cannot be immune from civil liability for everything they do—courts must draw a line somewhere.

This report compiles for the first time every state’s common law on when prosecutors are absolutely immune from civil liability and when they may be sued. Absolute immunity applies regardless of possible malice or bad faith by the prosecutor, such as filing retaliatory charges against a political opponent. Lesser immunity standards such as qualified immunity involve narrow sets of circumstances where a prosecutor could be liable in a civil lawsuit for their bad faith actions.

Most states have adopted some version of the federal approach set forth in *Imbler v. Pachtman*, 424 U.S. 409 (1976) and its progeny³: prosecutors may never be the subject of civil lawsuits for the actions they take as quasi-judicial advocates. This protects quintessential prosecutorial conduct such as charging decisions, evidence used at trial, and statements during sentencing. Actions that are not closely tied to a judicial proceeding, such as purely investigative or administrative actions, are not protected any more than they would be for typical investigators and administrators. The exact boundaries of “non-judicial” actions are difficult to draw, resulting in some variation between states that apply the same framework.

³ See *Burns v. Reed*, 500 U.S. 478 (1991) (advice to police in investigation phase is not absolutely immune); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) (physical investigation of footprint and false statements during public announcement of charges are not absolutely immune); *Kalina v. Fletcher*, 522 U.S. 118 (1997) (personally attesting to the facts supporting probable cause is the role of a witness, not prosecutor, so no absolute immunity).

The majority rule articulated by *Imbler* and its progeny is predicated on an understanding that absolute immunity will prevent civil redress for meritorious claims. Courts recognize that this harms individuals who may genuinely be victims of malicious prosecutor conduct. But if prosecutors could be sued for malicious official actions, courts fear that an unmanageable flood of allegations would come from unhappy defendants, and the office would have no time to do anything but compile materials for litigation in their hundreds of frivolous lawsuits. In order to protect the office's ability to prosecute criminal cases, which is an important social duty, courts sacrifice relief for the few meritorious plaintiffs, and maintain that elections, bar discipline, and criminal charges will suffice to address prosecutorial misconduct.

Some states have even more protective absolute immunity laws than the federal framework. These states insulate prosecutors for their investigative actions, like advising law enforcement about the proper method of conducting a search, or their administrative actions like delivering a press conference. Three states (New Jersey, Nebraska, and Hawai'i) do not recognize absolute immunity for prosecutors at all in state claims. They rely instead on some variation of qualified immunity, which is the same immunity that protects law enforcement, mayors, and other government actors.

The broad categories of conduct that are most often reachable despite absolute immunity protections are pre-indictment investigation (such as personally overseeing illegal lineups before a suspect has been identified) and false public statements (such as the Oregon case where a prosecutor publicly, falsely claimed a gay defendant had AIDS).

States had a median of 5 cases dealing with prosecutorial immunity in their state common law history. A few outliers (California, Louisiana, and New York) had more than 20, and nineteen states had 3 or fewer. In states where the issue of prosecutor immunity is so sparsely litigated, it is difficult to determine how a modern case would play out—we hope that further study or litigation will make those lines clearer, and that this can be a useful tool for researchers and attorneys seeking clarity in the state law governing prosecutor immunity.

About the Study

The Accountable Prosecutor Project set out to gather existing case law regarding state lawsuits against prosecutors. In order to gather as many relevant cases as possible while maintaining consistency between researchers, all researchers used a Westlaw keynote search to generate a universe of cases involving prosecutor liability for official acts, negligence, or misconduct. Within those cases, researchers followed any citation to other relevant state cases and added those to the list. This method may possibly have left some relevant cases behind, but it generated 353 total and we believe they are complete enough to provide a useful picture of the national landscape for state civil lawsuits against prosecutors.

Specifically, researchers selected Westlaw headnote 131, which compiles cases involving district and prosecuting attorneys. Researchers then filtered for keynote 10, entitled “Liabilities for official acts, negligence, or misconduct.” With those categories selected, we selected one state jurisdiction at a time and read each case that was included in this category.

When included cases referred to other state cases not flagged by the Westlaw keynote category but involving prosecutor immunity, we added those cases to our list and similarly explored those opinions in turn for references to other relevant cases. Although federal law on prosecutors is obviously a consideration for many state courts—especially where a state civil suit includes a federal 42 U.S.C. § 1983 claim—we noted federal references but do not include summaries of federal cases in this report.

We found that the initial Westlaw keynote filter typically generated many more numeric entries than were relevant to this project. For example, some cases registered as 4 or 5 entries but were different court opinions of the same case at different stages, or were simply duplicate opinions showing up in the search query more than once. When confronted with duplicates of either type, we only included one case in our data, using the highest authority/most recent opinion in that case.

Additionally, we found that the definition of “prosecutor” was not as clear-cut as we imagined at the outset of research. There were essentially two varieties.

First, while many local jurisdictions employ dedicated, full-time criminal prosecutors, some utilize an office of a county or city attorney for both criminal and civil functions. The line between these functions is not always clear. A county attorney might be responsible for notifying businesses of zoning violations, and send a letter informing a business that it must come into compliance with the zoning ordinance or face an enforcement action. This does not seem like a prosecutorial duty, since the enforcement of the zoning ordinance will not include prison time. However, if the same attorney has the authority to bring criminal charges for a crime like trespassing where the conditions of one property affects a neighboring property, and local citizens sue the attorney for failing to bring those criminal charges, it appears that prosecutorial immunity should protect the attorney. Thus, where an attorney was not necessarily acting as a prosecutor in a given case, student researchers flagged it and attorney researchers reviewed it to determine whether the conduct in question in the suit was “prosecutor” conduct. Where it was not, cases were omitted from this report.

Second, other actors who are clearly not prosecutors may be vested with certain responsibilities that can lead to criminal cases. In particular, social services agents tasked with investigating child welfare and domestic situations can write reports and, in some jurisdictions, initiate criminal proceedings. Courts typically treat these duties as investigative up until the point that a criminal case is initiated. After that point, social services workers can be draped in prosecutorial immunity for their involvement in the judicial criminal proceeding. We have excluded from this report cases where a non-prosecutor was sued for their participation in a non-criminal proceeding, such as a child custody matter. We have included cases involving a prosecutor who is vested with certain civil matters like child support enforcement.

Additionally, some listed cases involved actions against prosecutors that were not civil lawsuits, such as judicial removal actions or contempt penalties. Prosecutors sometimes raised absolute immunity as a defense to these proceedings. Because these miscellaneous state court actions have bearing on the legal landscape of prosecutor immunity, they are included in this report. State court actions that do not implicate prosecutor liability, such as the Pennsylvania cause of action for private institution of criminal charges despite a prosecutor’s declination to move forward, are referred to in summary at times but not included in the case report.

Underlying spreadsheets of this research data are available on request from the Project Director, Eileen Prescott, at prescoe@wfu.edu.

State Reports

The following state reports have five sections. First, we list the number of cases examined in each state, the year range of those cases, and the causes of action brought in that state. Second, for the ease of the reader, we have summarized scenarios from the cases in that state in a table that shows whether that scenario was treated with absolute immunity for the prosecutor.

The third section describes the immunity law of that state, starting with an overview of the background the state court incorporates in structuring its absolute immunity analysis. Most states rely on the Supreme Court decision in *Imbler v. Pachtman*, 424 U.S. 409 (1976), but many also have their own legislative and cultural frameworks for understanding prosecutor immunity. This section summarizes the current law as established by that state's cases.

The fourth section is a detailed examination of any prosecutor behavior that was treated in that state with something less than absolute immunity. In some situations, judicial opinions list hypothetical behaviors that would *not* fall within the boundaries of absolute immunity even if the matter before them specifically is protected. We have included both these hypothetical behaviors and any actual fact scenarios that fell outside the protections of absolute immunity.

Lastly, the fifth section is a complete list of the cases touching on prosecutor immunity in that state, in chronological order with short parenthetical summaries beside each.

ALABAMA

Number of Cases: 5

Year Range: 1979–2016

Causes of Action: malicious prosecution, false imprisonment, deprivation of civil rights, conspiracy, negligence, libel, defamation, wrongful death, § 1983, state and federal constitutional violations

| Absolute Immunity | Not Absolute Immunity |
|---|---|
| <ul style="list-style-type: none">• misappropriating funds• charging decisions, including malicious charging and• failure to perform duties during campaign for another office• ethical misconduct• criminal activity | <ul style="list-style-type: none">• investigative or administrative actions |

Structure of State Law

The Alabama Supreme Court follows the prosecutor immunity law set out by *Imbler v. Pachtman*, 424 U.S. 409 (1976), drawing a line between actions taken as a prosecutor and actions taken as an investigator or administrator. Several cases have raised the question of financial misconduct by prosecutors in Alabama, and the Court has repeatedly held that lawsuits against the prosecutor are not an appropriate remedy—instead, voters must rely on safeguards like elections, impeachment proceedings, bar discipline, and criminal prosecutions to address prosecutor misconduct. A showing of malice by the prosecutor is not sufficient to overcome absolute immunity.

There is separate sovereign immunity for lawsuits that seek money from the state treasury; a suit seeking money damages from a prosecutor would be barred by state immunity unless an exception applies. One exception is a demonstration of malice by the state official. Even if state sovereign immunity would bar money damages, people can sue for prospective injunctive relief only if they can show a reasonable probability that they will face the issue again.

Both state sovereign immunity and absolute prosecutorial immunity can be raised for the first time on appeal. The state bears the burden of showing that it applies, and courts have denied motions to dismiss where the prosecutor has not yet explained how their conduct was prosecutorial rather than investigative or administrative.

Behavior Not Absolutely Immune

Alabama has held that prosecutors may receive qualified immunity or less for actions performed in administrative or investigative capacities, but there is no case where a prosecutor was found to be acting outside their prosecutorial function.

Full List of Cases

Jones v. Benton, 373 So.2d 307 (Ala. 1979) (prosecutor allegedly chose not to charge known burglars, ceased to work while he ran for attorney general, and misappropriated funds) (absolute immunity)

Honeycutt v. Simpson, 388 So.2d 990 (Ala. 1980) (prosecutor allegedly used his position for private benefits, converted public money for personal use, and engaged in criminal activity) (absolute immunity)

Bogle v. Galanos, 503 So.2d 1217 (Ala. 1987) (prosecutor allegedly pursued baseless opioid prosecution out of malice for the defendant) (absolute immunity)

Poiroux v. Rich, 150 So.3d 1027 (Ala. 2014) (DAs participated in allegedly unconstitutional bond fee scheme) (absolute immunity)

McConico v. Patterson, 204 So.3d 409 (Ala. Civ. App. 2016) (prosecutor allegedly brought retaliatory charges when magistrate brought wrongful termination suit) (absolute immunity)

ALASKA

Number of Cases: 2

Year Range: 1978–2019

Causes of Action: appeal from judicial sanction, § 1983, malicious prosecution, malicious abuse of process, conspiracy, intentional infliction of emotional distress, negligent infliction of emotional distress, negligence

| Absolute Immunity | Not Absolute Immunity |
|--|--|
| <ul style="list-style-type: none">• eliciting false testimony• illegally obtaining warrants to threaten witnesses• strategizing with police department regarding an individual prosecution• misrepresenting evidence in closing arguments | <ul style="list-style-type: none">• investigative or administrative actions fines from judge• investigative or administrative actions |

Structure of State Law

The Alaska Supreme Court very recently considered whether it would apply the federal law from *Imbler*, 424 U.S. 409 (1976), which pertained to federal 42 U.S.C. § 1983 claims, to state tort claims against prosecutors. In 2019 it decided to join “the majority of other states” in applying absolute immunity for prosecutors across state law contexts, acknowledging that this may mean that victims of malicious prosecution have no meaningful avenue for relief. The Court held that it would be too burdensome to determine a prosecutor’s motives in tort claims like malicious prosecution, and protracted litigation could make it impossible for prosecutor offices to operate effectively.

In applying *Imbler’s* absolute immunity structure to state claims, Alaska evaluates whether a prosecutor acted in their capacity as an advocate. The Alaska Supreme Court found that supervision of a case, pretrial calendar calls, and defending a conviction on appeal are all part of the prosecutor’s advocate role, rather than the administrator role.

Behavior Not Absolutely Immune

Alaska holds that prosecutors may not receive absolute immunity for acts taken as investigators or administrators, but provides no example of conduct that would qualify. In one case, a prosecutor challenged a judge's authority to sanction prosecutors for lack of preparation, and the Supreme Court upheld trial court authority to discipline attorneys.

Full List of Cases

Davis v. Superior Court, 580 P.2d 1176 (Alaska 1978) (prosecutor fined by judge as sanction for lack of preparation)

Jackson v. Borough of Haines, 441 P.3d 925 (Alaska 2019) (prosecutor allegedly suborned perjury, illegally threatened witnesses, and misrepresented the evidence to the jury in pursuit of a conviction)

ARIZONA

Number of Cases: 5

Year Range: 1983–2009

Causes of Action: § 1983, wrongful seizure of property, negligence, intentional infliction of emotional distress, breach of contract, malicious prosecution, false arrest, false imprisonment, civil rights violations, abuse of process, defamation

| Absolute Immunity | Not Absolute Immunity |
|---|---|
| <ul style="list-style-type: none">• seizing property pursuant to court judgment• withholding exculpatory evidence• charging decisions, including pursuit of baseless charges• use of problematic evidence• Attorney General civil enforcement actions | <ul style="list-style-type: none">• personally conducting a problematic lineup• statements to the press• possibly: failure to bring case to trial in time |

Structure of State Law

Arizona’s Supreme Court has not discussed absolute immunity for prosecutors, but the appeals courts have applied *Imbler*, 424 U.S. 409 (1976), to both state and federal actions against prosecutors. In deciding whether a prosecutor’s action is investigative or administrative, courts analyze whether the conduct could be addressed through objection, appeal, or post-verdict motions in the criminal case. If so, the conduct is considered judicial; if not, the conduct is considered investigative or administrative. Courts explicitly choose not to inquire into the motives of the prosecutor.

Arizona courts have extended prosecutor immunity to other entities, such as Child Protective Services and the Department of Health Services, where employees of those agencies serve “quasi-prosecutorial” functions connected with certain enforcement actions. Generally, absolute immunity attaches to these employees as soon as an enforcement action is initiated. Before the action is initiated, their actions are considered investigative, and only protected by qualified immunity. This application of absolute immunity is justified by the same reasoning as prosecutors: the enforcing actors must be able to exercise independent judgment without fear of litigation.

Behavior Not Absolutely Immune

Arizona has applied merely qualified immunity to situations where the prosecutor participates in creating and gathering evidence. A prosecutor actually conducting an in-person lineup rather than relying on police was found to be an investigative action. Additionally, defamatory statements given to the press are not protected by absolute immunity, since such statements are disconnected from the judicial process. In an unreported case, the court also could not determine from the pleadings whether a negligent delay in bringing already-filed charges to trial would be protected by absolute immunity.

Full List of Cases

Mulligan v. Grace, 666 P.2d 1092 (Ariz. Ct. App. 1983) (prosecutor enforced judgment seizing defendant's property to pay his fees after conviction of arson and fraud) (absolute immunity)

Knutson v. County of Maricopa ex rel. Romley, 857 P.2d 1299 (Ariz. Ct. App. 1993) (prosecutor failed to notify victim of defendant's plea change or hearing) (rule requiring notification did not create a private right of action)

City of Phoenix v. Superior Court for County of Maricopa, 885 P.2d 160 (Ariz. Ct. App. 1994) (prosecutor continued pursuing charges despite new suspect and advice of police to dismiss; did not disclose evidence of new suspect, conducted problematic live lineup, then dismissed charges after plaintiff had been jailed for over nine months) (absolute immunity for charging case and using problematic evidence, qualified immunity for conducting lineup)

State v. Superior Court for County of Maricopa, 921 P.2d 697 (Ariz. Ct. App. 1996) (DHS and Attorney General brought civil enforcement action alleging abuse and negligence that they could not prove, and Assistant Attorney General gave television interviews about the case) (absolute immunity for civil action, qualified immunity for media statements)

Yuma County Attorney's Office v. Miller, 2009 WL 296079 (Ariz. Ct. App. 2009) (unreported) (prosecutors delayed more than 120 days in bringing civil commitment action against allegedly sexually violent person) (survives motion to dismiss to develop facts on whether failure to request trial is administrative or judicial)

ARKANSAS

Number of Cases: 3

Year Range: 1990–2015

Causes of Action: malicious prosecution, abuse of process, civil conspiracy, § 1983, false imprisonment, slander, outrage, wrongful asset forfeiture

| Absolute Immunity | Not Absolute Immunity |
|--|--|
| <ul style="list-style-type: none">• charging decisions, including baseless charges• defective condemnation or forfeiture actions connected to a criminal case | <ul style="list-style-type: none">• statements to the press• inviting press to planned arrest for maximum reputational harm• knowingly supervising false testimony to secure an arrest warrant• conspiring to secure false arrest outside prosecutor’s jurisdiction |

Structure of State Law

Arkansas applies the *Imbler*, 424 U.S. 409 (1976) functional analysis to both federal and state causes of action against prosecutors. Actions taken within the prosecutor’s role as an advocate, such as initiating charges, are protected by absolute immunity regardless of the prosecutor’s personal motive. The Arkansas Supreme Court has noted that absolute immunity does not protect prosecutors from disciplinary action from the state bar if they have committed misconduct such as bringing malicious, unsupported charges.

Behavior Not Absolutely Immune

Arkansas has decided that statements to the press are not protected by absolute immunity, since they are not connected to the judicial process. Likewise, a prosecutor may face civil liability for the decision to invite press to a public arrest intended to embarrass the person arrested. Generally, advising police is also considered “investigative” and not protected by absolute immunity.

Suits for malicious prosecution are usually foreclosed by absolute immunity. But the court found that a prosecutor working with police to effect an arrest outside the prosecutor's jurisdiction (thus unconnected to a case the prosecutor could bring) may be subject to liability, especially since the prosecutor allegedly helped procure a false affidavit in support of the arrest warrant. Providing false information to secure an arrest is considered "investigative" behavior in Arkansas, outside the scope of absolute immunity, based on *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993).

Full List of Cases

Culpepper v. Smith, 792 S.W.2d 293 (Ark. 1990) (prosecutor initiated charges based on false report by witness who had dispute with defendant) (absolute immunity)

Newton v. Etoch, 965 S.W.2d 96 (Ark. 1998) (prosecutor allegedly conspired with police to harass and embarrass an attorney by publicly arresting him, making damaging media statements, and never actually filing charges) (no absolute immunity; beyond jurisdiction and advocacy role)

Hall v. Jones, 453 S.W.3d 674 (Ark. 2015) (prosecutor filed an untimely and defective forfeiture action and did not notify defendant, resulting in defendant's default of \$5,000) (absolute immunity)

CALIFORNIA

Number of Cases: 29

Year Range: 1908–2016

Causes of Action: malicious prosecution, conspiracy, habeas, false arrest, false imprisonment, fraud, deceit, assault, city tax recovery suit, defamation, abuse of process, negligence, § 1983, injunctive relief, intentional infliction of emotional distress, negligent infliction of emotional distress, invasion of privacy, professional negligence, wrongful death, Brown Act (open meetings) violation, negligent supervision, RICO, intentional interference with prospective economic advantage, breach of involuntary bailment, battery

| Absolute Immunity | Not Absolute Immunity |
|--|--|
| <ul style="list-style-type: none">• charging decisions, including negligent or malicious charges• statements regarding official action• withholding exculpatory evidence• errors or negligence in child support enforcement cases• reassuring witnesses they are safe to testify• maliciously prolonging wrongful confinement• in state cases, investigative actions | <ul style="list-style-type: none">• negligent hiring• statements beyond reporting official action• possibly: false imprisonment or false arrest arising from investigative or administrative actions |

Structure of State Law

California is one of the states with the most litigation on prosecutorial immunity, and its legal regime is somewhat unique. State claims are generally resolved on the basis of a statutory grant of immunity, which courts have characterized as “absolute” even though it has a few exceptions. The statutory grant is California’s Government Code § 821.6, which holds public officials immune from liability for harms arising from institution or prosecution of any judicial or administrative proceeding within the scope of their employment, even if the action was malicious or lacked probable cause. The California courts have interpreted this statute to apply to any prosecutorial action, including investigations by prosecutor staff and warrants executed

personally by prosecutors. The statute applies to malicious prosecution claims, but specifies that it does *not* apply to false arrest or false imprisonment claims. Additionally, California has a statutory protection for statements made by public officials in the discharge of their official duties: California Civil Code § 42. Together, these statutes insulate prosecutors from liability even for actions that would be reachable under federal law, such as press conferences and pure investigation.

When addressing federal claims, California courts apply federal precedent. This would theoretically mean that someone who could not recover for defamation under state law might be able to prevail a federal civil rights suit. However, the most commonly used federal civil rights statute, 42 U.S.C. § 1983, only applies to local officials, not state officials. Federal courts evaluate whether county DAs are subject to the statute based on state-specific evaluations of their duties and policymaking powers. In California, that evaluation shows county prosecutors act as state officials: they cannot be sued under § 1983. Federal immunity law is thus generally irrelevant in lawsuits against California prosecutors.

In light of this, virtually all prosecutorial actions (taken within the scope of a prosecutor's employment, even in excess of jurisdiction) are immune from suit under California law. But the legislature chose to single out false imprisonment and false arrest to withhold from the immunity statute. In 2015, a plaintiff raised a viable false imprisonment claim in a lawsuit against a prosecutor. The court of appeals held that the claim thus stepped beyond § 821.6 immunity protections, but stated for the first time that the immunity statute coexists with the common law immunity protecting prosecutors—they are still absolutely immune for their acts taken as judicial advocates. Therefore, even though false arrest and false imprisonment are exceptions to the general immunity rule, they will only give rise to prosecutor liability where the prosecutor's actions were part of an investigative or administrative function not intimately connected with a judicial process.

Lastly, one judge attempted to impose financial sanctions on an attorney who persisted in bringing a weak case over the advice of the judge and defense counsel. The appellate court held that monetary penalties are not meant to apply in criminal cases, even where the action brought is distinctly frivolous.

Behavior Not Absolutely Immune

As stated above, prosecutors may not be immune from suit where they are accused of false arrest or false imprisonment due to actions taken in their investigative or administrative capacity. This is a fairly narrow class of cases. Other than that, there are essentially two categories of conduct reachable through the structure of California's absolute immunity law: employment actions by district attorneys and statements that are not reports of official action (such as decisions to bring charges or justifications for office policies). Where prosecutors are sued for their employment

decisions, courts generally hold them immune from suit as long as there is no allegation of bad faith. Courts have also suggested that statements given as personal knowledge rather than reports of official prosecutor actions would not be immune from suit, but no defamation claim has been successful under this theory.

In a unique wrongful death case, the appellate court chose to evaluate the claim on its merits (whether there was a duty to protect) rather than on immunity grounds. A teenage witness had spoken to police under condition of anonymity, expressing fear that he would be targeted if his gang learned he'd cooperated with law enforcement against one of their own. The prosecutor called him to the stand, where he refused to testify, so the prosecutor read his statement to police into the record. The teenager was killed by his gang one week later. The same prosecutor had been involved in a previous case that same year where he assured a 14-year-old boy it was safe to testify, then the boy was killed in retaliation. In a concurrence, an appellate judge noted that prosecutor immunity is meant to allow prosecutors to make effective and independent decisions, but taking it this far chills witnesses from voluntarily coming forward to police at all—the Fourteenth Amendment “must surely . . . deny to the State . . . the carte blanche power to place to place a sixteen-year-old’s life in jeopardy.” *Hernandez v. City of Pomona*, 57 Cal.Rptr. 2d 406, 414 (Cal. Ct. App. 1996) (J. Aranda, concurring). Although the act of calling witnesses and presenting evidence seems the classic definition of judicial prosecutorial behavior giving rise to absolute immunity, this case leaves something of an open question whether competing constitutional principles would abrogate immunity for a prosecutor who forces witnesses to testify despite known mortal danger, if a plaintiff could show there was in fact a duty to protect.

Full List of Cases

Carpenter v. Sibley, 94 P. 879 (Cal. 1908) (prosecutors allegedly used false evidence, perjured testimony, a faulty indictment, and intimidated the jury to imprison plaintiff for 261 days until he won his appeal) (dismissal reversed)

Ex parte Hayter, 116 P. 370 (Cal. Ct. App. 1911) (without court order, prosecutor immediately re-arrested and re-charged plaintiff whose indictment had just been dismissed) (plaintiff released from custody)

Pearson v. Reed, 44 P.2d 592 (Cal. Ct. App. 1935) (prosecutor brought case for theft against landlady who took nonpaying tenants’ property) (absolute immunity)

White v. Brinkman, 73 P.2d 254 (Cal. Ct. App. 1937) (prosecutor brought charges based on false reports by malicious witnesses, then dismissed them ten days later) (absolute immunity)

Downey v. Allen, 97 P.2d 515 (Cal. Ct. App. 1937) (prosecutor brought bribery charges based on false report) (absolute immunity)

Norton v. Hoffman, 93 P.2d 250 (Cal. Ct. App. 1939) (prosecutor allegedly brought false unlicensed-practice charges to punish attorney who was suing prosecutor's brother and sister-in-law) (absolute immunity)

Galli v. Brown, 243 P.2d 920 (Cal. Ct. App. 1952) (prosecutor allegedly hired two employees without requisite residency and experience requirements) (qualified immunity)

Wilson v. Sharp, 268 P.2d 1062 (Cal. 1954) (prosecutor failed to bring enforcement action despite report that political appointee was receiving illegal payments) (absolute immunity)

Lipman v. Brisbane Elem. School Dist., 359 P.2d 465 (Cal. 1961) (prosecutor and others allegedly harassed and defamed teacher to force her out of her job) (absolute immunity for investigation and official reports, qualified immunity for statements of personal knowledge)

Taylor v. Jones, 121 Cal. App. 3d 885 (Cal. Ct. App. 1981) (prosecutor allegedly pursued probation revocation out of racial prejudice and personal malice) (absolute immunity)

Kilgore v. Younger, 30 Cal. 3d 770 (Cal. 1982) (attorney general distributed a report at a press conference with 92 named individuals suspected of crimes, which was published in newspapers) (absolute immunity)

Bach v. County of Butte, 147 Cal. App. 3d 554 (Cal. Ct. App. 1983) (prosecutor brought unauthorized criminal charges against attorney who routinely sues the county after negligent investigation) (absolute immunity)

Randle v. City and County of San Francisco, 186 Cal. App. 3d 449 (Cal. Ct. App. 1986) (prosecutors allegedly withheld exculpatory evidence discrediting their main witness) (absolute immunity)

People v. Cook, 209 Cal. App. 3d 404 (Cal. Ct. App. 1989) (judge attempted to fine prosecutor as a sanction for pursuing clearly unsupported case) (immunity not discussed; sanctions of this type not permissible in criminal proceedings)

Harmston v. Kirk, 216 Cal. App. 3d 1410 (Cal. Ct. App. 1989) (assistant attorney general told sheriff he could refuse to answer questions in grand jury, then advised grand jury to charge him with misconduct for refusing to answer questions) (absolute immunity)

Jager v. County of Alameda, 8 Cal. App. 4th 294 (Cal. Ct. App. 1992) (prosecutor recorded the wrong amount of child support in enforcement action and did not correct it when notified) (absolute governmental immunity)

Falls v. Superior Court, 42 Cal. App. 4th 1031 (Cal. Ct. App. 1996) (prosecutors assured family of 14-year-old witness that he did not need to relocate to testify, but witness was killed by gang members for cooperating) (absolute immunity)

Hernandez v. City of Pomona, 49 Cal. App. 4th 1492 (Cal. Ct. App. 1996) (16-year-old witness agreed to speak with police as long as his cooperation was never made public. One of the same

prosecutors from *Falls* brought in his police statement at trial, and witness was killed by gang members for cooperating.) (absolute immunity)

Kaplan v. LaBarbera, 58 Cal. App. 4th 175 (Cal. Ct. App. 1997) (prosecutors allegedly miscalculated child support and used illegal means to collect it) (absolute immunity)

Pitts v. County of Kern, 949 P.2d 920 (Cal. 1998) (prosecutors allegedly intimidated children into falsely accusing plaintiffs of molestation) (absolute immunity)

Ingram v. Flippo, 74 Cal. App. 4th 1280 (Cal. Ct. App. 1999) (prosecutor made statement that he would not bring charges under open meetings act but that there were minor violations and he may bring future charges if they continued) (absolute immunity)

Reed v. County of Santa Barbara, 2002 WL 14382 (Cal. Ct. App. 2002) (unpublished) (prosecutor allegedly violated woman's civil rights in the pursuit of termination of parental rights in child dependency case) (absolute immunity)

Chatman v. County of Santa Clara, 2002 WL 220342 (Cal. Ct. App. 2002) (unpublished) (prosecutor allegedly fabricated excuses to continue cases and hold plaintiff in jail for 16 months) (absolute immunity)

Roberts v. Los Angeles City Fire Dept., 2002 WL 265888 (Cal. Ct. App. 2002) (unpublished) (prosecutor allegedly routinely relied on perjured search warrant affidavits and did so here to interfere with attorney's career) (absolute immunity)

Sonnier v. County of Los Angeles, 2002 WL 31217252 (Cal. Ct. App. 2002) (unpublished) (prosecutor listed man on unpaid child support list preventing him from getting driver's license, until granting request to remove his name and inform DMV of the change) (absolute immunity)

Sokolsky v. Madrid, 2002 WL 31358808 (Cal. Ct. App. 2002) (unpublished) (man claimed wrongful death because his incarceration during prosecutor's sexually dangerous person petition prevented him from donating his kidney to mother) (absolute immunity)

Miller v. Filter, 150 Cal. App. 4th 652 (Cal. Ct. App. 2007) (temporarily deputized prosecutors allegedly fabricated evidence and misled grand jury to secure an indictment against mine director/operator that was promptly dismissed) (absolute immunity)

County of Los Angeles v. Superior Ct., 181 Cal. App. 4th 218 (Cal. Ct. App. 2009) (investigator in prosecutor's public corruption unit allegedly prepared and executed a faulty search warrant, took property beyond the warrant, held it too long, and returned it damaged) (absolute immunity)

Bocanegra v. Jakubowski, 241 Cal. App. 4th 848 (Cal. Ct. App. 2015) (prosecutor persisted in pursuing case against man whose ID, SSN, fingerprints, and photograph did not match warrant, who was held for 9 days and sexually assaulted by another person in the jail) (absolute immunity)

COLORADO

Number of Cases: 5

Year Range: 1969–2020

Causes of Action: malicious prosecution, libel, slander, negligence, attorney’s fees for improper guardianship action, § 1983, replevin, due process violation

| Absolute Immunity | Not Absolute Immunity |
|---|---|
| <ul style="list-style-type: none">• charging decisions, including pursuing meritless charges• initiating baseless guardianship proceedings | <ul style="list-style-type: none">• personally overseeing illegal lineups• drafting misleading affidavits in support of search and arrest warrants• possibly: defamatory press statements |

Structure of State Law

Like other states, Colorado applies *Imbler*, 424 U.S. 409 (1976) to both state and federal actions. In deciding whether a particular action is advocacy (protected by absolute immunity) as opposed to investigation or administration (protected by qualified immunity), the Colorado Supreme Court developed a three-part test:

1. Did the conduct occur before or after formal charges were filed?
2. Are there safeguards/methods of redress besides a civil action?
3. Does the conduct look more like police conduct than prosecutor conduct?

If the prosecutor’s actions took place before formal charges, courts will be more likely to consider them investigative or administrative. If the prosecutor’s actions can be corrected by a motion to suppress or other non-civil remedies, courts are more likely to apply absolute immunity in a civil case. If the conduct resembles police behavior more than prosecutor behavior, it will be more likely to be treated as investigative.

Colorado has repeatedly found that absolute immunity protects prosecutor decisions to file charges—there is a societal interest in avoiding litigation about whether a prosecutor should have believed certain witnesses or evidence before initiating a case. This principle applies to state employees who are not criminal prosecutors, when they step into a quasi-judicial role to initiate proceedings like guardianship petitions and license suspensions. The same exceptions apply for investigative or administrative conduct, which trigger only qualified immunity. Unless

legislation says otherwise, absolute immunity prevents wronged parties in these actions from collecting attorney’s fees, even if the case is resolved in their favor. It does not shield attorneys from Rule 11 sanctions if they initiate a frivolous case.

Behavior Not Absolutely Immune

Colorado has held that prosecutors who participate in investigatory behavior, such as drafting requests for identification evidence, are subject to the same immunity protections as law enforcement officers who would normally perform those duties. This is distinctly in contrast to jurisdictions that consider any conduct “necessary to deciding whether to initiate a prosecution” as advocacy rather than investigation. Colorado notes that the Third Circuit and Fifth Circuit have adopted this rule, but it goes too far—this “rule of necessity” essentially immunizes prosecutors from lawsuits that police would be subject to, for identical conduct. Taken to an extreme, it would incentivize prosecutors to commit misconduct on behalf of law enforcement.

In *McDonald*, the court implied that at least some statements to the press fall outside a prosecutor’s official duties and should not be protected by absolute immunity, but was not in a procedural position to decide whether it applied to the specific statements in question.

Full List of Cases

McDonald v. Lakewood Country Club, 461 P.2d 437 (Colo. 1969) (prosecutor brought larceny charges based only on account of malicious accuser and made statements to the press about the defendant’s guilt) (absolute immunity for charging and official capacity communications; possibly no absolute immunity for statements to press outside official duties)

Higgs v. District Court for Douglas County, 713 P.2d 840 (Colo. 1985) (prosecutors approved illegal lineup and drafted affidavits in support of search/arrest warrants that omitted exculpatory evidence) (no absolute immunity)

Stepanek v. Delta County, 940 P.2d 364 (Colo. 1997) (en banc) (county attorney initiated guardianship proceedings based on unreliable and later-disproved communication method with incapacitated person) (absolute immunity)

State Board of Chiropractic Examiners v. Stjernholm, 935 P.2d 959 (Colo. 1997) (assistant attorney general improperly pursued chiropractor’s license suspension without emergency hearing) (absolute immunity for actions taken once Board referred adjudicatory action to her)

Woo v. El Paso County Sheriff’s Office, 490 P.3d 884 (Colo. App. 2020) (the government allegedly kept certain seized property unrelated to a crime and refused an untimely request to return it) (no authorized cause of action; immunity not discussed)

CONNECTICUT

Number of Cases: 4

Year Range: 1991–2014

Causes of Action: malicious prosecution, § 1983, intentional infliction of emotional distress, negligent infliction of emotional distress, vexatious litigation, fraud, breach of privacy, wanton and malicious conduct

| Absolute Immunity | Not Absolute Immunity |
|---|---|
| <ul style="list-style-type: none">• statements made in charging or sentencing• charging decisions• decision whether to pursue arrest warrant• requesting higher bond amounts | <ul style="list-style-type: none">• removal charges by mayor• possibly: failure to investigate law enforcement for misconduct• possibly: permitting assaults by law enforcement |

Structure of State Law

Connecticut appellate courts have applied the *Imbler*, 424 U.S. 409 (1976) structure in evaluating prosecutor immunity from state tort suits, since *Imbler* refers to a tradition of absolute immunity that springs from historical common law and applies to state and federal actions alike. The most significant inquiry is whether the prosecutor acted in close connection with the judicial process of a criminal case. A prosecutor's decision not to charge someone despite a private citizen's request is clearly protected by absolute immunity, as are statements made during court proceedings such as sentencing (even if those statements would be defamatory in other contexts). When a prosecutor is fulfilling their duties as an advocate, courts will not inquire into the state of mind or possible malice of the prosecutor.

In an unpublished opinion, a Connecticut trial court applied the three-factor test from the Second Circuit to determine whether absolute immunity attaches to a particular function by a prosecutor:

1. Is there existing historical or common law immunity from suits arising out of this function?
2. Does performing the function obviously create risks of vexatious litigation against the official?
3. Are there other ways to redress wrongful conduct in this function besides suits for damages?

Based on this test, the trial court found that a prosecutor had absolute immunity from claims that he signed a baseless arrest warrant and failed to pursue an alternative suspect. The prosecutor did not necessarily have absolute immunity from allegations that he failed to adequately investigate law enforcement misconduct, since investigatory functions are not within the scope of *Imbler*. He also did not have absolute immunity for allegedly permitting the plaintiff to be assaulted by the sheriff, since that is not a traditional prosecutor function and professional discipline would not be a sufficient remedy if the allegation were true.

Behavior Not Absolutely Immune

The only binding precedents in Connecticut regarding a prosecutor (rather than a mayor) have dealt with clear applications of absolute immunity: charging decisions and statements at sentencing. Investigatory and administrative actions should generally fall outside absolute immunity protections, but the courts have noted that some investigatory actions will be considered closely connected to the judicial process and therefore absolutely immune from suit. Because published cases have not explored that boundary, there is little state common law guidance on which investigatory actions would be covered by absolute immunity.

Full List of Cases

DeLaurentis v. City of New Haven, 597 A.2d 807 (Conn. 1991) (mayor initiated removal action of parking authority employee for allegedly political reasons when employee threatened to expose internal corruption) (no absolute immunity for action, but “absolute privilege” for text of summons)

Barese v. Clark, 773 A.2d 946 (Conn. App. Ct. 2001) (prosecutor disclosed defendant’s HIV status at sentencing despite prior assurances he would not mention it) (absolute immunity)

Damato v. Thomas, 50 Conn. L. Rptr. 112 (Conn. Super. 2010) (unpublished) (prosecutor allegedly signed baseless arrest warrant, did not pursue a better suspect, failed to investigate misconduct by police, and allowed defendant to be assaulted by the state sheriff) (absolute immunity for warrant, no absolute immunity for failure to investigate police and permitting assault)

Morneau v. State, 90 A.3d 1003 (Conn. App. Ct. 2014) (prosecutor did not pursue charges against state marshals after plaintiff accused them of various crimes) (absolute immunity)

DELAWARE

Number of Cases: 2

Year Range: 1986–1995

Causes of Action: malicious prosecution, § 1983

| Absolute Immunity | Not Absolute Immunity |
|---|---|
| <ul style="list-style-type: none">• eliciting false testimony• charging decisions• discovery violations | <ul style="list-style-type: none">• possibly: state claims grounded in bad faith actions• federal claims regarding investigative or administrative actions |

Structure of State Law

Prosecutorial absolute immunity has only come up in two Delaware court opinions. In the first, the court found the prosecutor had official immunity from state law claims under 10 Del. C. § 4001, since he acted within his official capacity and no bad faith or gross negligence were alleged. The court further found that the prosecutor had absolute immunity from federal law claims pursuant to *Imbler*, 424 U.S. 409 (1976), because all allegations dealt with actions taken in pursuit of an active criminal prosecution. In the second, the state law claims were dismissed because they were foreclosed by the plaintiff's guilty plea to the underlying charges, and the federal law claims were dismissed on absolute immunity grounds. Both cases suggest that state courts apply the federal absolute immunity law for federal claims but evaluate state law claims under a more relaxed qualified immunity analysis, although neither explicitly lays out that analytical framework.

Behavior Not Absolutely Immune

To the extent that one can rely on the two trial court opinions dealing with this issue, they suggest that state law claims against prosecutors are evaluated through the lens of official immunity (which can be overcome by a showing of bad faith and/or gross or wanton negligence) while federal claims against prosecutors are evaluated according to *Imbler*, which provides absolute immunity for prosecutorial advocacy actions and not for investigative or administrative actions. However, without an opinion from the state Supreme Court, it is unclear whether this dual

structure would survive—other states such as Idaho and Louisiana have altered their approach upon learning that the majority of states apply absolute immunity to prosecutors.

Full List of Cases

Vick v. Haller, 512 A.2d 249 (Del. Super. 1986) (prosecutor allegedly used perjured testimony, did not permit pro se defendant to review discovery such as police reports, and did not provide him access to potential witnesses) (state official immunity for state claims, and absolute immunity for federal claims)

Lee v. Fowler, 1995 WL 270140 (Del. Super. 1995) (unpublished) (prosecutors allegedly brought charges based on perjury) (guilty plea ruled out cause of action for malicious prosecution, and absolute immunity for federal civil rights claim)

FLORIDA

Number of Cases: 9

Year Range: 1979–2020

Causes of Action: negligence, gross negligence, false arrest, false imprisonment, malicious prosecution, § 1983, conspiracy

| Absolute Immunity | Not Absolute Immunity |
|---|---|
| <ul style="list-style-type: none">• charging decisions, including baseless charges and decisions not to charge• failure to file restraining order• use of falsified evidence• eliciting false testimony• meritless asset forfeiture actions• issuing false material witness warrants | <ul style="list-style-type: none">• personally-motivated investigation prior to existence of probable cause |

Structure of State Law

Florida courts apply the rationale from *Imbler*, 424 U.S. 409 (1976) to state torts: when prosecutors act in their quasi-judicial capacity with respect to initiating and maintaining prosecutions, they are immune from any lawsuits arising from that conduct. Any malice or corruption on behalf of a prosecutor is irrelevant to the absolute immunity protection, so long as the category of their action (e.g. charging decisions) falls within the function of a prosecutorial advocate.

Like other states, Florida has a sovereign immunity protection which the legislature has waived in certain circumstances. The Florida Supreme Court has emphasized that the absolute immunity framework springs from the necessity for an independent judiciary, and thus cannot be waived by the legislature.

Behavior Not Absolutely Immune

Florida courts draw a line between a prosecutor's duty to evaluate evidence and witnesses for use at trial as opposed to a police officer's duty to search for evidence and corroboration that could lead to an arrest. If a prosecutor investigates someone before there is reason to believe they have

committed a crime or any connection to an ongoing case, then the prosecutor does not have absolute immunity for torts such as false arrest arising from that investigation. If a prosecutor investigates someone connected to an already-existing case, such as a witness whose credibility they must determine, then the prosecutor will have absolute immunity.

Full List of Cases

Weston v. State, 373 So.2d 701 (Fla. Dist. Ct. App. 1979) (prosecutor informed grand jury they could indict a county commission employee under a particular statute that did not permit such charges) (decided on sovereign immunity grounds)

Berry v. State, 400 So.2d 80 (Fla. Dist. Ct. App. 1981) (person committed future crimes after prosecutor chose not to charge him as multiple offender) (absolute immunity)

Lloyd v. Hines, 474 So.2d 376 (Fla. Dist. Ct. App. 1985) (prosecutor allegedly brought baseless charges and maliciously used falsified evidence and perjured testimony) (absolute immunity)

Hansen v. State, 503 So.2d 1324 (Fla. Dist. Ct. App. 1987) (prosecutor allegedly withheld exculpatory evidence and continued pursuing case against plaintiff) (absolute immunity)

State v. Kowalski, 617 So.2d 1099 (Fla. Dist. Ct. App. 1993) (staff investigator for prosecutor allegedly conducted a negligent investigation that led to false charges) (decided on sovereign immunity grounds)

Office of State Attorney v. Parrotino, 628 So.2d 1097 (Fla. 1993) (prosecutor misplaced restraining order paperwork and abusive boyfriend subsequently killed complainant) (absolute immunity)

Amos v. State, 666 So.2d 933 (Fla. Dist. Ct. App. 1995) (prosecutors pursued allegedly unconstitutional civil and criminal RICO forfeiture actions) (absolute immunity)

Swope v. Krischer, 783 So.2d 1164 (Fla. Dist. Ct. App. 2001) (prosecutors combed through educational records of expert witness and prosecuted him for perjury arising from date discrepancy in diploma issuance) (survives motion to dismiss; no absolute immunity for investigation prior to existence of probable cause)

Qadri v. Rivera-Mercado, 303 So.3d 250 (Fla. Dist. Ct. App. 2020) (prosecutor allegedly harassed witness, threatened her, and finally issued baseless material witness warrant, causing her to be arrested, strip searched, and held until a hearing) (absolute immunity)

GEORGIA

Number of Cases: 8

Year Range: 1979–2012

Causes of Action: improper conduct, lost income, wrongful imprisonment, wrongful arrest, malicious prosecution, defamation, § 1983

| Absolute Immunity | Not Absolute Immunity |
|---|---|
| <ul style="list-style-type: none">• charging decisions, including failure to charge and baseless charges• failure to investigate• eliciting false testimony• failure to notify jail or defendant that charges have been dropped• statements to Parole Board | <ul style="list-style-type: none">• investigative or administrative actions |

Structure of State Law

Georgia’s constitution contains a provision that holds district attorneys immune from any private suit arising from actions they take in the performance of their duties. Ga. Const. of 1983, Art. VI, § 8, Para. 1(e). Legislation extends the state constitutional immunity to state solicitors general. Ga. Code Ann., § 15-18-74(c). These state protections follow the same application as the common law regarding prosecutor immunity as described in *Imbler*, 424 U.S. 409 (1976)—as long as the prosecutor’s action is intimately connected with the advocate’s role in the judicial process, they are immune from suit based on that action regardless of its wrongfulness or their subjective motives.

Behavior Not Absolutely Immune

The common law in Georgia suggests that judicial immunity of any type, including prosecutorial quasi-judicial immunity, does not apply if the judicial agent is acting outside the scope of their jurisdiction. Additionally, absolute immunity only protects actions taken as a quasi-judicial advocate; prosecutors are not absolutely immune from suit for investigative actions or

administrative actions like firing an employee. While courts have discussed these exceptions to the absolute immunity rule, none have found that specific conduct before them was administrative or investigative, even when confronted with examples like making press statements about a case or failing to notify the jail/defense that charges had been dropped and a defendant could be released.

Full List of Cases

Smith v. Hancock, 256 S.E.2d 627 (Ga. Ct. App. 1979) (prosecutor allegedly hid evidence and blocked indictment of someone plaintiff wanted prosecuted) (absolute immunity)

Williams v. Dykes, 317 S.E.2d 661 (Ga. Ct. App. 1984) (prosecutor allegedly elicited false testimony from law enforcement witness) (absolute immunity)

Holsey v. Hind, 377 S.E.2d 200 (Ga. Ct. App. 1988) (prosecutor did not notify defendant, defense attorney, or jail that charges were dropped, resulting in 40 unnecessary days of incarceration) (absolute immunity)

Robbins v. Lanier, 402 S.E.2d 342 (Ga. Ct. App. 1991) (prosecutor allegedly revived eight-month-old police report, intimidated witnesses, and induced witnesses to testify by dropping charges against them in order to pursue a baseless and retaliatory criminal case against plaintiff) (absolute immunity)

Battle v. Sparks, 438 S.E.2d 185 (Ga. Ct. App. 1993) (prosecutor allegedly obtained illegal indictment without evidence, elicited false testimony at the trial, and made unfounded post-conviction statements to the newspaper) (absolute immunity)

Mosier v. State Bd. of Pardons & Paroles, 445 S.E.2d 535 (Ga. Ct. App. 1994) (prosecutors wrote to Parole Board describing plaintiff's crime, giving opinions about his personality, and attaching an allegedly autobiographical manuscript he wrote that describes a murder) (absolute immunity)

Bartlett v. Caldwell, 452 S.E.2d 744 (Ga. 1995) (man sought mandamus to compel prosecutor to arrest and charge his ex-wife for perjury in divorce action) (absolute immunity)

McSmith v. Brown, 732 S.E.2d 839 (Ga. Ct. App. 2012) (prosecutor enhanced charges from traffic citations to a marijuana DUI without any evidence, and plaintiff was acquitted) (absolute immunity)

HAWAI'I

Number of Cases: 4

Year Range: 1916–2012

Causes of Action: false arrest, false imprisonment, malicious prosecution, § 1983, abuse of process, violation of privacy

| Absolute Immunity | Not Absolute Immunity |
|---|--|
| <ul style="list-style-type: none">• delay in dropping charges (for federal claim) | <ul style="list-style-type: none">• state causes of action• in federal cases, investigative or administrative actions |

Structure of State Law

Before the U.S. Supreme Court released its opinion in *Imbler*, 424 U.S. 409 (1976), Hawai'i held that prosecutors are nonjudicial, executive officers. At the time, they were appointed by the mayor and removable for cause, although Maui is the only remaining county with appointed, rather than elected, chief prosecutors. The Hawai'i Supreme Court held that executive officers like prosecutors could be liable for torts arising from official misconduct on a showing of clear and convincing evidence that they were motivated by malice.

This treatment of prosecutors in state actions was never overruled after *Imbler*. Instead, Hawai'i applies federal principles of absolute prosecutorial immunity as set out in *Imbler* only to federal causes of action against prosecutors. When a plaintiff raises a state claim against a prosecutor, the courts have evaluated such claims according to the prior structure, without applying an absolute immunity analysis.

Behavior Not Absolutely Immune

As explained above, prosecutors do not have absolute immunity from any state law claims in Hawai'i. Instead, the plaintiff must show clear and convincing evidence that the prosecutor acted maliciously, together with any other elements of the claim. Malicious prosecution, false arrest, and false imprisonment claims require a showing that the proceedings were initiated without probable cause, so prosecutors may avoid liability on such claims if a judge found probable cause at a preliminary hearing.

When state courts in Hawai'i hear cases involving federal claims against prosecutors, they apply the absolute immunity law set out by *Imbler*, which encompasses acts by prosecutors in their role as advocates. Accordingly, administrative or investigative acts such as collecting evidence to identify a suspect would not be protected by absolute immunity in a 42 U.S.C. § 1983 action.

Full List of Cases

Yau v. Carden, 23 Haw. 362 (Haw. 1916) (prosecutor allegedly caused plaintiff to be arrested and charged with baseless usury charges) (survives motion to dismiss, establishes only qualified immunity for prosecutors)

Orso v. Honolulu, 534 P.2d 489 (Haw. 1975) (prosecutor gave multiple damaging, untrue statements about defendant in newspaper interviews and needlessly delayed dropping charges) (overruled on other grounds by *Kahale v. Honolulu*, 90 P.3d 233 (Haw. 2004)) (jury verdict for damages affirmed)

Reed v. Honolulu, 873 P.2d 98 (Haw. 1994) (prosecutor delayed dropping charges after learning sole witness had left the state and could not be located) (absolute immunity for federal claims, summary judgment for prosecutor on state claims affirmed on the merits)

Thomas v. County of Hawai'i, 2012 WL 5289306 (Haw. Ct. App. 2012) (unpublished) (prosecutor brought charges for violating a restraining order that was already dissolved, and published defendant's social security number) (summary judgment for prosecutor affirmed on the merits)

IDAHO

Number of Cases: 1

Year Range: 2007

Causes of Action: § 1983, negligence, intentional infliction of emotional distress, negligent infliction of emotional distress, invasion of privacy, retaliation

| Absolute Immunity | Not Absolute Immunity |
|---|---|
| <ul style="list-style-type: none">• turning over private information during discovery | <ul style="list-style-type: none">• investigative or administrative actions |

Structure of State Law

Until 2007, Idaho had never affirmatively recognized absolute prosecutorial immunity. However, the Idaho Supreme Court considered the *Imbler*, 424 U.S. 409 (1976) immunity structure to be an articulation of established common law, supported by public policy considerations, and harmonious with existing constitutional and state law. As such, Idaho now recognizes absolute immunity for prosecutors acting in their quasi-judicial functions with respect to both federal and state lawsuits.

Behavior Not Absolutely Immune

Idaho has adopted the *Imbler* approach to absolute immunity, which does not apply when prosecutors act in an administrative or investigative capacity. The courts have not yet addressed any prosecutorial actions outside of the discovery process.

Full List of Cases

Nation v. State Dep't of Correction, 158 P.3d 953 (Idaho 2007) (prosecutor passed along prison staff's unredacted personal information to defense team, which ended up distributed among prison inmates) (absolute immunity)

ILLINOIS

Number of Cases: 12

Year Range: 1975–2016

Causes of Action: deprivation without legal authority, § 1983, false imprisonment, malicious prosecution, wrongful death, false arrest, conspiracy, defamation, invasion of privacy, breach of duty, willful and wanton misconduct, intentional infliction of emotional distress

| Absolute Immunity | Not Absolute Immunity |
|--|--|
| <ul style="list-style-type: none">• judicial functions such as charging and evaluating strength of case• helping to draft arrest warrant and attending probable cause hearing• failure to pursue prompt charges• interviewing witnesses after the existence of probable cause• eliciting false testimony | <ul style="list-style-type: none">• acts outside the scope of prosecutorial authority• fabricating evidence before probable cause exists• possibly: withholding exculpatory evidence discovered after conviction |

Structure of State Law

Illinois law on absolute immunity for prosecutors has shifted several times in the last few decades, possibly in part because the issue has never reached the Illinois Supreme Court. Illinois appellate courts apply federal law (*Imbler*, 424 U.S. 409 (1976) and its progeny) to federal claims such as § 1983, and slightly different state law to state claims such as malicious prosecution.

While federal law is primarily concerned with the nature of the prosecutor's action (judicial advocacy is absolutely immune, while investigation and administrative receive only qualified immunity), Illinois state law is concerned with the scope of a prosecutor's authority and the timing of the action. If the action was part of a prosecutor's employment, such as giving a press conference, then it will generally be immune from suit. If the action occurred after the existence of probable cause, it will be treated as part of the prosecution even if it looks investigative.

Illinois abolished sovereign immunity in its 1970 constitution and established that tort claims against the state must be brought in the Court of Claims pursuant to certain rules. Suits may be brought against state employees (which includes county prosecutors) in the traditional

trial courts only if the employee acted in excess of their authority or contrary to a statutory or constitutional law. Furthermore, in the district courts, public official immunity also shields prosecutors acting within the scope of their prosecutorial duties. A 1999 decision held that public official immunity had an exception for malicious motives, but a 2013 decision clarified that because it is a “judicial” immunity, it must be absolute regardless of motive. The scope of prosecutorial duties is a more permissive standard than the federal structure, which only immunizes those prosecutorial duties which are intimately connected to the judicial process—press statements, witness interviews, and advice to police in their investigation have all been held absolutely immune by this public official standard, even recognizing that the same actions would not necessarily be covered by the federal law. Press statements are also covered by an absolute executive privilege for comments made on issues within the scope of the official’s employment or arising from the performance of their duties.

Additionally, a state statute holds that no public employee is liable for injury caused by releasing a person from custody or failing to arrest a person or prevent crime. Ill.Rev.Stat. 1985, ch. 85, par.s 4-102, 4-107. This insulated a prosecutor’s office from a wrongful death suit brought based on allegations that the prosecutor failed to act on a woman’s reports that a man whose probation was ending had threatened to kill her.

Behavior Not Absolutely Immune

Administrative or investigative actions, such as advising the police on how to investigate before probable cause exists, are not absolutely immune under federal law. In evaluating federal claims, Illinois courts apply the federal case law.

For state claims, the only case where a court found that immunity did not apply was in a circumstance where the prosecutor allegedly committed deliberate investigative fraud by directing investigators to fabricate evidence targeting a political opponent. This allegation was sufficient for a malicious prosecution claim and an intentional infliction of emotional distress claim to survive a motion to dismiss. *Bianchi v. McQueen*, 58 N.E.3d 680 (Ill. App. Ct. 2016). The court drew a distinction between how a prosecutor handles a case after it’s in motion (failing to disclose exculpatory evidence or eliciting false testimony), which is absolutely immune, and the act of creating a case from nothing by knowingly manufacturing false evidence, which is not a prosecutorial duty at all.

There has been some implication that prosecutorial absolute immunity is waivable by the prosecutor. In several cases where the prosecutor did not raise absolute immunity (such as *Aboufariss*, where the prosecutor only argued a qualified immunity for good faith with regard to the state law claims), the court resolved the matter on a lesser immunity standard or the merits of the pleadings. This may suggest that prosecutors who seek more accountability than the law requires could choose to raise only qualified immunity or less.

Full List of Cases

Rosenbaum v. State, 34 Ill.Ct.Cl. 38 (Ill. Ct. Cl. 1975) (prosecutors did not permit woman to use domestic relations court because she was not sufficiently destitute) (public official immunity)

Coleson v. Spomer, 334 N.E.2d 344 (Ill. App. Ct. 1975) (prosecutor participated in erroneous bond setting) (absolute immunity)

Ware v. Carey, 394 N.E.2d 690 (Ill. App. Ct. 1979) (prosecutor allegedly made false statements about police corruption) (absolute executive privilege for statements arising from prosecutor's duties)

People v. Patrick J. Gorman Consultants, 444 N.E.2d 776 (Ill. App. Ct. 1982) (prosecutors allegedly violated civil rights in course of prosecution and made false statements to newspapers about it) (absolute immunity for all but press statements, and press statements insufficiently alleged)

Weimann v. Kane County, 502 N.E.2d 373 (Ill. App. Ct. 1986) (prosecutor continued pursuing case against plaintiff despite lack of probable cause and five line-ups where no witness identified him) (absolute immunity)

In re Estate of Vasconcelles, 524 N.E.2d 720 (Ill. App. Ct. 1988) (prosecutor did not act on information suggesting man whose probation was ending could be a threat to the now-deceased) (public official immunity)

Aboufariss v. DeKalb, 713 N.E.2d 804 (Ill. App. Ct. 1999) (prosecutor participated in preparation of arrest warrant for child abduction despite lack of probable cause against co-parent) (absolute immunity)

Sneed v. Howell, 716 N.E.2d 336 (Ill. App. Ct. 1999) (prosecutor who was friends with a man under order of protection sent case to another county prosecutor, who failed to intervene before the man killed his ex-wife) (no jurisdiction over tort claim against state employee in scope of duties)

Price v. State, 820 N.E.2d 104 (Ill. App. Ct. 2004) (prosecutor misrepresented felony class at sentencing, producing improperly high sentence) (no jurisdiction over tort claim against state employee in scope of duties)

White v. City of Chicago, 861 N.E.2d 1083 (Ill. App. Ct. 2006) (prosecutors allegedly learned of plaintiffs' innocence, then hid exculpatory evidence and paid a witness to testify falsely. Plaintiffs were acquitted after five years in jail with no bail possible because prosecutors sought the death penalty.) (absolute immunity and no jurisdiction over tort claim against state employee in scope of duties)

Frank v. Garnati, 989 N.E.2d 319 (Ill. App. Ct. 2013) (prosecutor allegedly brought baseless kidnapping charge against woman to retaliate for prior conflicts) (absolute immunity)

Bianchi v. McQueen, 58 N.E.3d 680 (Ill. App. Ct. 2016) (defendant special prosecutor allegedly fabricated evidence to support malicious charges in an attempt to stop the reform efforts of plaintiff, an elected prosecutor) (no absolute immunity; survives motion to dismiss for malicious prosecution and intentional infliction of emotional distress, but insufficient facts alleged for defamation)

INDIANA

Number of Cases: 9

Year Range: 1890–2019

Causes of Action: § 1983, invasion of privacy, negligent hiring, libel, false arrest, false imprisonment, civil rights violations, intentional infliction of emotional distress

| Absolute Immunity | Not Absolute Immunity |
|---|---|
| <ul style="list-style-type: none">• charging decisions, including false charges• reading false charges in public• defamatory press statements• securing known invalid warrant• overseeing execution of wrongful search warrant• wrongful child support enforcement actions | <ul style="list-style-type: none">• defamatory press statements made after leaving office |

Structure of State Law

Indiana applied absolute immunity to prosecutors long before *Imbler*, 424 U.S. 409 (1976); in 1896, the Indiana Supreme Court held that prosecutors are judicial officers protected from lawsuits arising from their official duties.

Indiana’s application of absolute immunity is even more expansive than the federal law. Federal absolute immunity only applies to prosecutorial acts taken as an advocate, rather than an investigator or administrator. In Indiana, absolute immunity applies to all acts “reasonably within the general scope of authority granted to prosecuting attorneys.” This highly protective absolute immunity structure is justified partly upon the availability of professional discipline to address serious misconduct.

While federal courts have found that press statements are generally not “intimately connected with the judicial process,” Indiana holds that prosecutors have a duty to inform the public about pending cases, and press statements by prosecutors cannot thus give rise to state lawsuits (although they can form the basis for federal lawsuits). Likewise, while federal courts have found that prosecutors do not have absolute immunity when they advise or participate in law enforcement searches, Indiana says prosecutors are absolutely immune from claims arising from

a law enforcement search that they instigated and accompanied. The Indiana Supreme Court also refers to immunity established by the Indiana Tort Claims Act (revised in 2022) that shields government officials from torts arising from their discretionary functions.

Behavior Not Absolutely Immune

Actions outside the scope of a prosecutor's authority would not be protected by the immunity, but Indiana has only found one example of this: statements made to the press by a person who is no longer a prosecutor.

Full List of Cases

State ex rel. Michener v. Egbert, 24 N.E. 256 (Ind. 1890) (the state cannot sue prosecutors for failing to request default and forfeiture judgments when defendants do not show up) (resolved on merits; no duty to request default judgment)

Griffith v. Slinkard, 44 N.E. 1001 (Ind. 1896) (prosecutor allegedly inserted plaintiff's name in indictment even though grand jury had voted not to indict him, then had him arrested and reporting to court for nine months before dropping the charge) (absolute immunity, and widely considered the first state case in the U.S. on prosecutor immunity)

Brune v. Marshall, 350 N.E.2d 661 (Ind. Ct. App. 1976) (prosecutor kept defendant's \$20 fee for a diversion program that was held unconstitutional) (absolute immunity)

Foster v. Percy, 387 N.E.2d 446 (Ind. 1979) (prosecutor's deputy made detailed defamatory press statements about defendant's involvement in a massive heroin distribution scheme, despite grand jury returning no indictment) (absolute immunity)

Foster v. New, 407 N.E.2d 271 (Ind. Ct. App. 1980) (prosecutor continued making defamatory press statements after leaving employment at prosecutor office) (no absolute immunity for statements made after leaving office)

Hupp v. Hill, 576 N.E.2d 1320 (Ind. Ct. App. 1991) (prosecutor brought search warrant to judge hours after his term expired and accompanied police to execute the warrant, where police allegedly threatened and assaulted plaintiff) (absolute immunity)

Clifford v. Marion Cnty. Prosecuting Att'y, 654 N.E.2d 805 (Ind. Ct. App. 1995) (prosecutor pursued income withholding for child support that person was paying directly to ex-wife, and held on to \$1,500 even when debt was satisfied) (absolute immunity)

Sims v. Barnes, 689 N.E.2d 734 (Ind. Ct. App. 1997) (prosecutor told press that defendant was making death threats against him, allegedly without any basis) (absolute immunity)

Buchanan v. State, 122 N.E.3d 969 (Ind. Ct. App. 2019) (prosecutor allegedly drew up and executed baseless warrant and baseless charges, which were dropped after plaintiff had been in jail for 42 days) (absolute immunity)

IOWA

Number of Cases: 8

Year Range: 1977–2019

Causes of Action: malicious prosecution, abuse of process, conspiracy, obstruction of justice, § 1983, negligence, fraud, defamation, contract interference, state constitutional claims

| Absolute Immunity | Not Absolute Immunity |
|---|---|
| <ul style="list-style-type: none">• charging decisions, including offering to drop charges for private benefit, bringing charges despite conflict of interest, and dropping charges involving a specific police officer• eliciting false testimony• personally attesting to facts supporting charges• child support actions• failure to train or supervise lower-ranked prosecutors on matters where they would have immunity | <ul style="list-style-type: none">• failure to train or supervise lower-ranked prosecutors on matters outside the scope of absolute immunity• advising local law enforcement authorities of officer's prior dishonesty• advisory, investigative, and administrative functions• filing retaliatory ethical complaint against defense attorney |

Structure of State Law

Iowa recognizes longstanding common law that prosecutors are quasi-judicial officers who are absolutely immune from suit for their judicial duties in filing and prosecuting criminal matters. Courts apply the *Imbler*, 424 U.S. 409 (1976) framework to federal claims, state common law torts, and state constitutional torts. The only apparent deviation from the federal framework is that Iowa holds that prosecutors who “exceed” their jurisdiction maintain their immunity, only losing absolute protection if they act “wholly without” jurisdiction. Bringing charges in contravention of rules governing conflicts of interest or altering the complaint in violation of criminal procedure rules were both considered actions that exceeded the prosecutor’s jurisdiction but had enough connection to matters under the prosecutor’s authority to remain cloaked in absolute immunity.

Behavior Not Absolutely Immune

Iowa applies *Imbler's* principle that administrative and investigative functions not closely tied to the judicial process are outside of the protection of absolute immunity. Negligent hiring, training, and supervision of lower-ranked prosecutors is considered administrative only where the problematic behavior of the lower-ranked prosecutor would not itself be protected by absolute immunity. Where a prosecutor learned that a police officer was likely involved in his wife's death and lied to authorities about it, the Iowa Supreme Court held that the prosecutor had absolute immunity for his decision not to prosecute further cases involving that officer (since charging decisions are part of an essential judicial function) but informing the department and mayor of this decision and its basis was administrative (since advising law enforcement agencies is typically an administrative function).

Full List of Cases

Blanton v. Barrick, 258 N.W.2d 306 (Iowa 1977) (part-time prosecutor who was also a private attorney filed criminal charges against private client's ex-husband who absconded with the client's children) (absolute immunity)

Gartin v. Jefferson County, 281 N.W.2d 25 (Iowa Ct. App. 1979) (prosecutor allegedly brought indictment action and trial on false testimony) (absolute immunity)

Burr v. City of Cedar Rapids, 286 N.W.2d 393 (Iowa 1979) (prosecutor signed and filed complaint where prosecutor personally attested to certain facts) (absolute immunity)

Moser v. Black Hawk County, 300 N.W.2d 150 (Iowa 1980) (prosecutor stated under oath that he had made a full and careful investigation of facts in the charging document, which plaintiff alleged was false) (absolute immunity)

Hike v. Hall, 427 N.W.2d 158 (Iowa 1988) (prosecutor offered to drop criminal charges if defendant would pay his private client \$1,000 and testify in a related civil matter, and allegedly trained line prosecutors to violate the law) (absolute immunity for charging and for training regarding prosecutorial functions, no absolute immunity for training or supervision regarding investigative or administrative matters)

Hanson v. Flores, 486 N.W.2d 294 (Iowa 1992) (county attorney sued by woman who claims prosecutor handled the child support action negligently) (absolute immunity)

Beck v. Phillips, 685 N.W.2d 637 (Iowa 2004) (prosecutor, having learned of police officer's false statements to authorities investigating the death of his wife, chose not to prosecute cases involving that officer and informed police officer's other employers about the issue) (absolute immunity for no longer charging cases involving the officer, no absolute immunity for disclosing dishonesty to law enforcement)

Venckus v. City of Iowa City, 930 N.W.2d 792 (Iowa 2019) (prosecutors charged a sexual assault case and brought it to trial despite substantial evidence of the defendant's innocence) (absolute immunity)

KANSAS

Number of Cases: 6

Year Range: 1977–2005

Causes of Action: libel, slander, conspiracy, abuse of process, invasion of privacy, malicious prosecution, negligence, § 1983

| Absolute Immunity | Not Absolute Immunity |
|---|---|
| <ul style="list-style-type: none">• statements made during trial• charging decisions• impaneling grand jury• use of falsified evidence | <ul style="list-style-type: none">• personally attesting to warrant affidavit• investigative actions |

Structure of State Law

Kansas has historically relied on federal absolute immunity law for federal claims and state discretionary immunity law for state claims. When evaluating federal claims, Kansas courts apply *Imbler*, 424 U.S. 409 (1976) and its progeny to assess whether a prosecutor was acting in their role as an advocate. When evaluating state claims, Kansas courts typically start with the Kansas Tort Claims Act, which provides that no suit may proceed against a government official for discretionary actions within the scope of their employment. In one unpublished opinion, the Kansas Court of Appeals evaluated state claims according to *Imbler*, finding that impaneling a grand jury and introducing false evidence were protected by absolute immunity, while a prosecutor’s investigation was immune from suit only due to state discretionary immunity. This is consistent with the idea that *Imbler* merely codified the application of common law absolute immunity principles to federal civil rights law; state courts may apply the common law absolute immunity framework to state claims without announcing that federal law controls. This is also consistent with *Smith*, one of the earliest prosecutor immunity cases in the country, where in 1917 the Kansas Supreme Court acknowledged that judicial immunity applies to prosecutors carrying out their duties. Should a prosecutor’s action fall outside the scope of absolute immunity laid out by common law, it may nonetheless be protected as a discretionary function under the Kansas Tort Claims Act.

Kansas courts have previously ruled that investigations by a prosecutor’s staff investigators, including the Kansas Bureau of Investigation (which is a subset of the Attorney General’s office), are absolutely immune from suit for the same policy reasons as judicial proceedings. No court

has explicitly overruled those cases, but starting in 2001, courts began treating law enforcement actions by prosecutors, such as signing warrant affidavits, as only protected by the qualified immunity that law enforcement would receive for doing the same things. In state tort cases, such actions may also be protected by the KTCA discretionary function immunity.

Behavior Not Absolutely Immune

The Kansas Supreme Court has found that personally attesting to facts in an affidavit supporting a warrant application is traditionally a law enforcement function, and thus outside the scope of absolute prosecutorial immunity. Similarly, in an unpublished appellate case, the court found that actions taken in connection with a law enforcement investigation (illegally searching and confiscating property) are not subject to absolute immunity. In both situations, the courts found that the prosecutors were still immune from suit due to discretionary function immunity under the Kansas Tort Claims Act.

Full List of Cases

Smith v. Parman, 165 P. 663 (Kan. 1917) (prosecutor brought malicious charges without probable cause) (absolute immunity)

Sampson v. Rumsey, 563 P.2d 506 (Kan. Ct. App. 1977) (prosecutor called plaintiff vulgar names during closing argument and harassed him with criminal investigations) (absolute immunity)

Knight v. Neodesha Kansas Police Department, 620 P.2d 837 (Kan. Ct. App. 1980) (prosecutors allegedly brought harassing charges regarding man's dog, failed to investigate threats he received and law enforcement assaults on his son) (absolute immunity)

McCormick v. Board of County Commissioners of Shawnee County, 24 P.3d 815 (Kan. 2001) (prosecutor signed complaint affidavit under oath that plaintiff claimed was false and led to his wrongful detention) (no absolute immunity)

Schmeidler v. Drees, 2003 WL 21948155 (Kan. Ct. App. 2003) (unpublished) (county attorneys brought Child in Need of Care petition after doctor notified them he believed child was being abused) (absolute and Tort Claims Act immunity)

Garner v. Wahl, 2005 WL 3098727 (Kan. Ct. App. 2005) (unpublished) (prosecutor allegedly participated in illegal investigation, illegally impaneled a grand jury despite, and used fabricated evidence at trial) (no absolute immunity for illegal search and confiscation, but Tort Claims Act immunity for those actions)

KENTUCKY

Number of Cases: 8

Year Range: 1941–2020

Causes of Action: false imprisonment, wrongful death, wrongful arrest, malicious prosecution, negligence, defamation

| Absolute Immunity | Not Absolute Immunity |
|---|--|
| <ul style="list-style-type: none">• withholding exculpatory evidence• charging decisions and other acts as judicial advocate | <ul style="list-style-type: none">• physical violence• acts outside scope of prosecutorial authority• investigative (pre-charging) or administrative actions• statements to press |

Structure of State Law

Kentucky treats the federal law regarding absolute immunity as consistent with the state law: prosecutors are free from lawsuits based on their actions as prosecutors, but only have qualified immunity or less for actions taken as investigators or administrators. While the federal courts define this difference as a functional test, the Kentucky courts essentially inquire whether a prosecutor was acting within the scope of the legally required duties of a prosecutor. This suggests that the Kentucky state law might be more protective, as the law might require certain duties from a prosecutor beyond judicial advocacy functions, but in the particular factual situations that have reached the court, the analysis seems indistinguishable—charging and bringing cases to trial is absolutely immune, while investigation and press statements are not.

Kentucky courts also maintain a distinction between official and individual capacity suits against prosecutors—official capacity suits trigger sovereign immunity, while individual capacity suits trigger the above inquiry into the nature of the action (absolute for advocacy, qualified for investigative/administrative, and possibly no immunity for actions like physical violence).

Behavior Not Absolutely Immune

Before *Imbler*, 424 U.S. 409 (1976) and its progeny, Kentucky courts had not discussed absolute immunity for prosecutors. However, in 1885, the appellate court found no liability for a prosecutor who brought weak charges because he acted in good faith within his official capacity—essentially applying qualified immunity. Since the federal law on absolute immunity was established, Kentucky courts have found that actions beyond the scope of a prosecutor’s authority (such as forging a judge’s signature on an arrest warrant) or taken in an investigative or administrative capacity (such as questioning witnesses before a charge exists or making disparaging statements in public) are not protected by absolute immunity.

Full List of Cases

Mitchell v. Ripy, 82 Ky. 516 (Ky. Ct. App. 1885) (prosecutor acted on allegedly false report in advising law enforcement to initiate charges that were later dropped for lack of evidence) (immunity not discussed, but no liability found because prosecutor acted in good faith in official capacity)

Reynolds v. Coburn, 148 S.W.2d 705 (Ky. Ct. App. 1941) (prosecutor took club from police officer and hit plaintiff’s head with it several times, leading to his eventual death) (no immunity asserted or granted)

Dugger v. Off 2nd, Inc., 612 S.W.2d 756 (Ky. Ct. App. 1980) (prosecutor drafted arrest warrant with the wrong person’s name, signed it as if he were the judge, and police executed it to arrest the wrong person) (no immunity; outside scope of prosecutorial duties and authority)

McCollum v. Garrett, 880 S.W.2d 530 (Ky. 1994) (prosecutor near scene of crime questioned witnesses, held suspects, and allegedly initiated knowingly false charges to force witness to cooperate) (absolute immunity once charges filed, qualified immunity before)

Franklin County v. Malone, 957 S.W.2d 195 (Ky. 1997) (prosecutor allegedly failed to advise jail officials of their responsibility for the safety of a suicidal prisoner) (governmental immunity granted)

Jefferson County Com. Attorney’s Office v. Kaplan, 65 S.W.3d 916 (Ky. 2001) (prosecutors failed to disclose evidence showing no match between accelerants at arson and accelerant on plaintiff’s clothes) (absolute immunity)

Edwards v. Van De Rostyne, 245 S.W.3d 797 (Ky. Ct. App. 2008) (prosecutors allegedly fabricated evidence against plaintiff in ongoing criminal case) (sovereign and absolute immunity)

O’Connell v. Thieneman, 616 S.W.3d 704 (Ky. Ct. App. 2020) (prosecutor giving a speech about the First Amendment brought up plaintiff’s conviction for domestic violence and called him a sexual predator) (only qualified immunity)

LOUISIANA

Number of Cases: 30

Year Range: 1879–2018

Causes of Action: malicious prosecution, false arrest, false imprisonment, § 1983, gross negligence, negligent prosecution, sanctions, negligent infliction of emotional distress, intentional infliction of emotional distress, defamation, misconduct

| Absolute Immunity | Not Absolute Immunity |
|--|---|
| <ul style="list-style-type: none">• charging decisions• withholding exculpatory evidence• statements to clemency and parole boards• negligent charging paperwork• negligent scheduling of judicial matters | <ul style="list-style-type: none">• actions that are purely administrative, investigative, or ministerial• all pre-1996 lawsuits against prosecutors |

Structure of State Law

Until 1996, Louisiana maintained separate state common law, applying *Imbler*, 424 U.S. 409 (1976) for federal causes of action only. The Louisiana common law did not provide an absolute immunity for prosecutors—they were subject to qualified immunity, which could be overcome with proof of malice. Some appellate courts began deviating from that practice in the years leading up to 1996, when the Louisiana Supreme Court formally adopted *Imbler*. Since then, only administrative, investigative, or ministerial acts (not discretionary judicial advocacy acts) could be a basis for liability in a lawsuit against a prosecutor. Louisiana courts have found that observing a law enforcement search, failing to send charging paperwork to the sheriff, statements to clemency and parole boards, and delay in scheduling judicial matters all fall within the “judicial advocacy” function. Courts may rule on absolute immunity grounds even where the prosecutor has not raised it as a defense.

Louisiana also has a governmental immunity statute that protects government employees acting within the scope of their employment, which may be pierced by a showing of malice, fraud, criminal conduct, or intentional misconduct. La.R.S. § 2798.1.

Behavior Not Absolutely Immune

Since the Louisiana Supreme Court's holding that prosecutors have absolute immunity for their judicial functions, very little prosecutor conduct has been considered administrative or investigative. The court in *Hayes v. Parish of Orleans*, 737 So.2d 959 (La. Ct. App. 1999) suggested that pre-indictment misconduct by a prosecutor might give rise to liability, but declined to address it in that case. Later, in *Suarez v. DeRosier*, 241 So.3d 1086 (La. Ct. App. 2018), the court found that further discovery was necessary to determine whether adding a "Sex Offender" tag to certain charges was administrative or judicial. Otherwise, even seemingly administrative acts like forwarding charge dispositions to the local sheriff have been considered judicial actions.

Full List of Cases

Farrar v. Steele, 31 La. Ann. 640 (La. 1879) (attorney general declined to intervene where one man claimed the other had usurped his position as district attorney) (no obligation to intervene: discretion to bring charges is a judicial act "over which the courts have no control")

Cerna v. Rhodes, 341 So.2d 1157 (La. Ct. App. 1976) (prosecutor did not drop charges after learning plaintiff had prescription for otherwise illegal drugs) (no discussion of immunity, but dismissal affirmed on the merits)

Crier v. City of New Orleans, 365 So.2d 35 (La. Ct. App. 1978) (prosecutor allegedly participated in malicious arrest and charging) (no absolute immunity despite *Imbler*: state common law permits piercing judicial immunity if malice is shown)

Hall v. City of New Orleans, 385 So.2d 1253 (La. Ct. App. 1980) (prosecutor told police he wouldn't bring kidnapping charge and police released ex-spouse, who wrongfully took child to California) (avoids resolving federal-state immunity tension; no cause of action for failure to charge)

Foster v. Powdrill, 463 So.2d 891 (La. Ct. App. 1985) (prosecutors negligently failed to check if ticket had been paid before court date, resulting in issuance of wrongful arrest warrant for nonappearance) (no absolute immunity declared, but dismissal affirmed because no malice alleged)

Johnson v. Foti, 537 So.2d 232 (La. Ct. App. 1988) (prosecutor allegedly failed to dismiss charges when Ohio declined to extradite person on fugitive warrant) (no distinction between administrative and judicial functions, and no malice alleged, so no cause of action)

Dean v. Nunez, 541 So.2d 260 (La. Ct. App. 1989) (prosecutor continued pursuing case against supporter of his political opponent after judge found no probable cause) (no immunity if malice shown, but defendants demonstrated probable cause to jury at trial; no liability)

Dickerson v. Kemp, 540 So.2d 467 (La. Ct. App. 1989) (prosecutor waited three years between arrest warrant and indictment while waiting for plaintiff to be released from federal custody before bringing state charges) (absolute immunity from federal claim, state claim resolved on failure to show criminal proceeding terminated in his favor)

Navarre v. Foti, 562 So.2d 1113 (La. Ct. App. 1990) (prosecutor secured custody of material witness on \$100,000 bond, then due to clerical error, judge was never alerted and witness remained incarcerated five months after underlying case was resolved) (liability finding reversed because no malice shown)

Connor v. Reeves, 649 So.2d 803 (La. Ct. App. 1995) (prosecutor brought allegedly political, baseless charges of malfeasance) (absolute immunity)

West v. Foti, 654 So.2d 834 (La. Ct. App. 1995) (prosecutor charged problematic fee and failed to clear arrest warrant after case resolved) (no malice shown)

Hill on Behalf of Hill v. Joseph, 655 So.2d 486 (La. Ct. App. 1995) (prosecutor allegedly failed to protect deceased woman from parolee who had previously threatened her) (absolute immunity)

Walls v. State, 670 So.2d 382 (La. Ct. App. 1996) (prosecutor allegedly continued pursuing charges for a year after learning of 15-witness alibi) (absolute immunity even in light of malice allegation)

Knapper v. Connick, 681 So.2d 944 (La. 1996) (prosecutor failed to turn over exculpatory evidence) (*Imbler* adopted for the first time by the Louisiana Supreme Court; absolute immunity)

Fine v. Senette, 714 So.2d 1263 (La. Ct. App. 1998) (prosecutor made allegedly false statements to clemency board) (absolute immunity)

Keller v. McElveen, 744 So.2d 643 (La. Ct. App. 1999) (prosecutors failed to notify sheriff that charges were dropped, resulting in enforcement of defunct warrant) (absolute immunity)

Hayes v. Parish of Orleans, 737 So.2d 959 (La. Ct. App. 1999) (prosecutor impermissibly delayed trial, failed to subpoena a key witness resulting in further delays, and re-indicted plaintiff in spite of alleged lack of probable cause) (absolute immunity)

McCoy v. City of Monroe, 747 So.2d 1234 (La. Ct. App. 1999) (prosecutor allegedly excluded women and black men from jury) (not within statute of limitations, and absolute immunity even though prosecutor did not raise it)

Sinclair v. State ex rel. Dep't of Public Safety and Corrections, 769 So.2d 1270 (La. Ct. App. 2000) (prosecutor made allegedly false statements about plaintiff's criminal history to parole board) (absolute immunity)

Lewis v. 38th Judicial Dist. Court, 795 So.2d 347 (La. Ct. App. 2000) (prosecutor continued pursuing domestic violence case after victim reconciled with plaintiff) (absolute immunity and government official immunity)

Colquitt v. Claiborne Parish, 823 So.2d 1103 (La. Ct. App. 2002) (prosecutor allegedly filed information after limitations period and delayed trial) (absolute immunity)

Corley v. Village of Florien, 889 So.2d 364 (La. Ct. App. 2004) (mayor acted as both prosecutor and judge in matter regarding stolen picnic table) (absolute immunity because mayor was authorized by law to try municipal cases)

Briede v. Orleans Parish District Attorney's Office, 907 So.2d 790 (La. Ct. App. 2005) (prosecutors did not bring timely charges against men who went on to kill plaintiff's husband) (immunity not addressed because there is no cause of action for negligent failure to prosecute)

State v. Balka, 925 So.2d 679 (La. Ct. App. 2006) (prosecutor allegedly subpoenaed judge as witness in order to force him to recuse in another case) (action for sanctions dismissed, though civil action against individual prosecutor might survive)

Ballard v. Waitz, 951 So.2d 335 (La. Ct. App. 2006) (prosecutor failed to set arraignment within statutory timeframe) (absolute immunity)

Louisiana State Board of Nursing v. Gautreaux, 39 So.3d 806 (La. Ct. App. 2010) (nursing board cannot compel district attorney to share pre-indictment criminal files for use in a disciplinary hearing)

Godfrey v. Reggie, 94 So.3d 82 (La. Ct. App. 2011) (prosecutor allegedly pursued malicious, false charges of intimidating a public official for incident in courthouse) (absolute immunity and no favorable termination of proceedings alleged)

Miller v. Desoto Regional Health System, 128 So.3d 649 (La. Ct. App. 2013) (prosecutor allegedly observed a wrongful search and initiated false charges) (absolute immunity)

Suarez v. DeRosier, 241 So.3d 1086 (La. Ct. App. 2018) (prosecutor allegedly defamed and maliciously prosecuted plaintiff by adding "Sex Offender" stamp to his charges) (survives dismissal action, requires discovery to determine whether stamp was administrative or judicial)

Tickle v. Ballay, 259 So.3d 435 (La. Ct. App. 2018) (prosecutor pursued case despite problematic search and inconsistent police reports) (absolute immunity)

MAINE

Number of Cases: 1

Year Range: 1982

Causes of Action: conspiracy, harassment

| Absolute Immunity | Not Absolute Immunity |
|--|---|
| <ul style="list-style-type: none">• charging decisions | <ul style="list-style-type: none">• investigative or administrative actions |

Structure of State Law

Maine applies *Imbler*, 424 U.S. 409 (1976) to both state and federal causes of action—prosecutors are immune from lawsuits arising from actions they took in the scope of their advocacy duties. Prosecutors act within that scope when they institute and maintain criminal charges.

Behavior Not Absolutely Immune

Maine’s adoption of the *Imbler* absolute immunity structure suggests that prosecutors are not absolutely immune from lawsuits arising from their investigative or administrative actions, but no state courts have ruled on the boundaries of those categories of conduct.

Full List of Cases

Ingraham v. University of Maine at Orono, 441 A.2d 691 (Me. 1982) (prosecutor enforced repeated trespassing charges against former student who was banned from campus) (absolute immunity)

MARYLAND

Number of Cases: 4

Year Range: 1981–2021

Causes of Action: defamation, malicious prosecution, negligence, § 1983, intentional infliction of emotional distress, false arrest, false imprisonment, violation of state constitution, invasion of privacy

| Absolute Immunity | Not Absolute Immunity |
|--|---|
| <ul style="list-style-type: none">• charging decisions, including unsupported charges or dropped charges• grand jury matters seeking indictment• advising police about whether to commence a criminal charge | <ul style="list-style-type: none">• advising police about how to conduct investigation• participation in investigation, including falsifying evidence pre-indictment• investigative grand jury matters• statements at public meeting |

Structure of State Law

Maryland recognizes absolute immunity for prosecutors as springing from common law judicial immunity—Maryland courts rely on federal cases about prosecutor immunity, such as *Imbler*, 424 U.S. 409 (1976), as highly persuasive authority. Prosecutorial actions that are closely connected to the judicial process of criminal cases are considered absolutely immune, while prosecutor actions that are investigative or administrative may only be protected by qualified immunity or the state tort claims act.

Maryland has laid out categories of conduct that are clearly encompassed by absolute immunity protections, including charging decisions, preparing the State’s case, and presenting the evidence in court. Where prosecutor activity is clearly connected to the judicial process, subjective motives or malice are irrelevant to the immunity protection. Some categories of conduct that are not absolutely immune have not directly come before Maryland courts, but have been mentioned in dicta, such as giving statements at press conferences.

Maryland has had occasion to draw distinctions for the purposes of absolute immunity in two relatively specific areas: grand juries and advice to police. When prosecutors prepare and present evidence to a grand jury, their conduct is absolutely immune when the purpose of the grand jury

is to reach an indictment—if the grand jury is only investigative in nature, then any prosecutorial action connected with it will only be protected by qualified immunity or other state protections. Likewise, when prosecutors advise police, their conduct is absolutely immune if the purpose of the advice is to commence a criminal action. Where a police officer inquires whether the evidence is sufficient to support charges, prosecutors answer in their role as a judicial advocate. On the other hand, where a prosecutor advises law enforcement regarding proper evidence collection, suggested suspects to target, or other investigative matters, they are only protected by the same immunity that shields law enforcement.

The Maryland Tort Claims Act also shields government officials from lawsuits arising from the fulfillment of their official duties, which is defined more broadly than the prosecutor’s advocate role. However, this statutory immunity can be pierced with a showing of malice or gross negligence.

Behavior Not Absolutely Immune

Where prosecutors act as investigators or administrators, especially where probable cause does not yet exist, they are protected only by immunities that would protect law enforcement or government officials fulfilling those responsibilities. Maryland courts have found that absolute immunity does not apply when prosecutors tell law enforcement who to target and falsify evidence during that investigation.

Full List of Cases

Gersh v. Ambrose, 434 A.2d 547 (Md. 1981) (prosecutor made defamatory criminal accusations against City Community Relations Commission member at public hearing) (no absolute immunity)

Simms v. Constantine, 688 A.2d 1 (Md. Ct. Spec. App. 1997) (prosecutors allegedly conspired to falsify evidence in a politically motivated investigation seeking prosecution and firing of police) (survives motion to dismiss; no absolute immunity)

Gill v. Ripley, 724 A.2d 88 (Md. 1999) (prosecutor dropped child support action allegedly due to malice and laziness) (absolute immunity)

State v. Rovin, 246 A.3d 1190 (Md. 2021) (prosecutor pursued unsupported charges of juror intimidation and assault) (absolute immunity)

MASSACHUSETTS

Number of Cases: 4

Year Range: 1939–2016

Causes of Action: abuse of process, state constitutional violations under M.G.L.A. 12 § 11, invasion of privacy, § 1983, negligence

| Absolute Immunity | Not Absolute Immunity |
|---|---|
| <ul style="list-style-type: none">• charging decisions• maliciously threatening improper law enforcement action• investigative actions related to a specific, identified suspect• statements made in court | <ul style="list-style-type: none">• administration or general investigation• improper dissemination of criminal record |

Structure of State Law

Before *Imbler*, 424 U.S. 409 (1976) was decided, Massachusetts recognized the common law application of judicial immunity to prosecutors who are fulfilling their duties as advocates. When evaluating state claims, Massachusetts courts note that the scope of absolute immunity is at least as broad as it is under federal law, if not more so. For example, having noted differences across federal circuits in how exactly to define “investigative” acts that are outside a prosecutor’s function, Massachusetts set out a unique rule: once a particular suspect has been identified, prosecutorial investigation is considered preparation for trial against that suspect.

The Massachusetts Tort Claims Act also provides that government officials are immune from suit under various circumstances, including the exercise of their discretionary functions within the scope of their employment, any malicious prosecution claim, and any claim based on failure to enforce laws.

Behavior Not Absolutely Immune

Massachusetts has recognized roughly the same limits to absolute immunity that other courts interpreting federal law have: administrative acts and investigative acts not in preparation for a case against a specific person are not considered absolutely immune.

Furthermore, the state Criminal Offender Record Information Act (G.L. c.6, §§ 167–78) created a private cause of action for unlawful dissemination of criminal record information and explicitly abrogated any privilege, including absolute immunity, if the violation is willful. When a prosecutor was sued under this law, the court found that she had not violated it—disclosing criminal history in a bail hearing is permissible—but did dismiss the claim on its merits rather than on absolute immunity grounds. Presumably, any other law explicitly abrogating the common law absolute immunity protection would apply to prosecutors with equal force.

Full List of Cases

Andersen v. Bishop, 23 N.E.2d 1003 (Mass. 1939) (prosecutor dropped charges “maliciously and corruptly”) (absolute immunity)

Chicopee Lions Club v. District Attorney for Hampden District, 485 N.E.2d 673 (Mass. 1985) (prosecutor angrily broke up nonprofit Monte Carlo night, threatening to send state troopers to arrest attendees including local chief of police) (absolute immunity)

Whirly v. Lynch, 539 N.E.2d 1064 (Mass. App. Ct. 1989) (prosecutor described defendant’s criminal history in court, and two newspapers printed what she said) (absolute immunity for invasion of privacy tort, no absolute immunity for CORI act but no violation on merits)

Brum v. Town of Dartmouth, 704 N.E.2d 1147 (Mass. 1999) (prosecutor recommended defendant be released pending trial, and while released, defendant killed police officer) (absolute immunity and on merits; prosecutor does not ultimately control pre-trial release)

MICHIGAN

Number of Cases: 7

Year Range: 1883–1996

Causes of Action: malicious prosecution, false arrest, false imprisonment, slander, libel, intentional interference with contractual and prospective contractual rights, public disclosure of private facts, slander per se, defamation, § 1983, warrantless arrest, unlawful seizure of property

| Absolute Immunity | Not Absolute Immunity |
|--|--|
| <ul style="list-style-type: none">• directing nearby police to seize someone with probable cause• charging decisions• press statements about ongoing cases• statements made in grand jury proceedings | <ul style="list-style-type: none">• directing police to conduct massive arrest operation without probable cause• possibly: forwarding misconduct information to police officer's employer |

Structure of State Law

Michigan relies on common law principles that where prosecutor actions are within the scope of prosecutorial functions and duties, those acts are quasi-judicial in nature, generating absolute immunity. Michigan incorporates federal law on absolute immunity into its analysis of state claims, but considers the federal law too vague to determine which acts are quasi-judicial. Michigan uses the following factors to make such a determination:

1. the physical and temporal relationship of the activity to the judicial process,
2. the degree to which the acts depend on legal opinions or discretionary judgments, and
3. the extent to which the acts are primarily concerned with the prosecutor's role as an advocate.

There is a separate statutory governmental immunity in Michigan that precludes suits against governmental officials who act within the scope of their authority to perform a government function without gross negligence. 1986 P.A. 175, § 1. In a case where the court was uncertain about the application of absolute immunity to a prosecutor's choice to forward damaging information about an officer to his employer, the court ruled on governmental immunity grounds rather than absolute immunity.

Behavior Not Absolutely Immune

In *Schneider*, 158 N.W. 182 (Mich. 1916), a prosecutor hired two private investigators to seek out houses of prostitution and compile evidence for him. The private investigators gave him a list of fifty addresses, which he forwarded to police, directing police to raid those addresses, arrest their residents, and search them. The Michigan Supreme Court held that instigating investigative acts like this fall well outside the scope of quasi-judicial immunity; the prosecutor essentially stepped into the shoes of a private informant.

Additionally, in *Payton*, 357 N.W.2d 700 (Mich. App. 1984), the appellate court found that press statements about cases were absolutely immune from suit because they relay prosecutorial decisions to the public. Nine years later, the U.S. Supreme Court held that press statements do not receive absolute immunity under federal law because they have no functional tie to the judicial process—they are a vital public function performed by executive officials and many other non-judicial government actors who receive only qualified immunity. *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993). No Michigan case has addressed prosecutor statements to the media since then, but if courts apply the same cautious analysis as *Bischoff*, they will rely on Michigan's governmental immunity rather than absolute immunity.

Full List of Cases

People v. Bemis, 16 N.W. 794 (Mich. 1883) (prosecutor presented personal, irrelevant evidence at trial) (prosecutors established as quasi-judicial, affirmed)

Schneider v. Shepherd, 158 N.W. 182 (Mich. 1916) (prosecutor gave police 50 addresses and directed 100 police officers to raid them for suspected sex work operations; a resident recovered \$500 for his wrongful arrest) (no absolute immunity)

Bloss v. Williams, 166 N.W.2d 520 (Mich. App. 1968) (sheriff acting under the direction of prosecutor seized property and made an arrest without a warrant) (absolute immunity)

Davis v. Eddie, 343 N.W.2d 11 (Mich. App. 1983) (prosecutor continued pursuing robbery case even after the complaining witness found his money) (absolute immunity)

Payton v. Wayne County, 357 N.W.2d 700 (Mich. App. 1984) (prosecutor continued to publicly pursue the prosecution of plaintiff after more viable suspect confessed and judge dismissed case) (absolute immunity)

Bischoff v. Calhoun County Prosecutor, 434 N.W.2d 249 (Mich. App. 1988) (prosecutor forwarded damaging police report to plaintiff's new employer) (governmental immunity)

Baldori v. Smith, 558 N.W.2d 9 (Mich. App. 1996) (prosecutors brought in extraneous evidence in grand jury proceeding) (absolute immunity)

MINNESOTA

Number of Cases: 5

Year Range: 1981–1996

Causes of Action: malicious prosecution, false arrest, false imprisonment, misrepresentation, defamation, negligent supervision, vicarious liability, violation of Government Data Practices Act, § 1983

| Absolute Immunity | Not Absolute Immunity |
|---|--|
| <ul style="list-style-type: none">• charging decisions, including wrongful charges• failure to investigate• maliciously convening grand jury for personal gain• complying with illegal order from judge• discovery violations | <ul style="list-style-type: none">• press statements about grand jury proceeding |

Structure of State Law

Minnesota state courts apply the *Imbler*, 424 U.S. 409 (1976) functional analysis to both federal and state causes of action. The prosecutorial function “intimately associated with the judicial phase of the criminal process” includes inherent prosecutorial powers such as charging decisions, but not investigative or administrative tasks. Specifically, Minnesota courts have found that charging decisions, grand jury proceedings, discovery processes, and other matters dealing directly with the judicial process of a criminal case cannot give rise to civil lawsuits, even if they are conducted with wrongfully or with malice.

Behavior Not Absolutely Immune

In *Erickson v. County of Clay*, the Minnesota appellate court found that a prosecutor is not absolutely immune from suit for statements made to the media about an allegedly politically-motivated grand jury proceeding. Three years later, the U.S. Supreme Court also held that press statements are outside the ambit of absolute immunity protections. *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993).

In 1988, an appellate court found that even advising police on whether probable cause exists to arrest was part of the prosecutorial function and thus shielded by absolute immunity. In 2015, the Minnesota Supreme Court noted in *dicta* that subsequent U.S. Supreme Court law clarified that pre-charging investigative behavior is generally not protected by absolute immunity. *Stresemann v. Jesson*, 868 N.W.2d 32, 35 (Minn. 2015) (prosecutorial immunity not extended to Medicaid investigator).

There was also some suggestion in *Brotzler* that a prosecutor might not necessarily have absolute immunity if a plaintiff could show more than bare allegations of malice, but no subsequent case has tested that limit with an allegation like intentional destruction of evidence.

Full List of Cases

Brown v. Dayton Hudson Corp., 314 N.W.2d 210 (Minn. 1981) (prosecutor did not drop case when defendant showed mistaken identity) (absolute immunity)

Brotzler v. Scott County, 427 N.W.2d 685 (Minn. App. 1988) (prosecutor brought case relying on one witness who did not appear at trial) (absolute immunity)

Erickson v. County of Clay, 451 N.W.2d 666 (Minn. App. 1990) (prosecutor convened grand jury to indict political rival and discussed proceedings with media) (no absolute immunity, likely qualified immunity)

Kipp v. Saetre, 454 N.W.2d 639 (Minn. App. 1990) (prosecutor did not intervene when judge ordered probation revoked without a hearing) (absolute immunity)

S.J.S. by L.S. v. Faribault County, 556 N.W.2d 563 (Minn. App. 1996) (prosecutor disclosed unredacted evidence to defendant, who illegally circulated it) (absolute immunity)

MISSISSIPPI

Number of Cases: 2

Year Range: 1919–2005

Causes of Action: malicious prosecution, false arrest, unreasonable seizure, violation of due process

| Absolute Immunity | Not Absolute Immunity |
|----------------------|-------------------------------|
| • malicious charging | • seemingly all else, for now |

Structure of State Law

Prosecutors have almost never been sued in Mississippi state courts for official misconduct. Once, in 1919, an appeals court appeared to hold that prosecutors were immune from suit for official acts regardless of motive. The only other time the matter was raised, in 2005, the court referenced federal absolute immunity law, but simply resolved the case by ruling that the prosecutors would prevail even under qualified immunity.

Mississippi's Tort Claims Act protects government employees from liability for claims based on their actions in performing a discretionary function, so long as those actions are within the scope of their employment. This is regardless of whether they abused their discretion, although the qualified immunity analysis involves some consideration of whether their actions were objectively unreasonable.

Behavior Not Absolutely Immune

In the only recent case on this subject, the court of appeals did not explore the subject of absolute immunity, relying instead on governmental immunity under the Tort Claims Act and a qualified immunity analysis. As it stands, the only indication that Mississippi applies absolute immunity protections to prosecutors in state cases comes from a 1919 case where the attorney general was not liable for initiating an enforcement action for personal reasons. It is possible that future state cases will only address absolute immunity if the prosecutor does not clearly prevail on the lesser qualified immunity standard.

Full List of Cases

Semmes v. Collins, 82 So. 145 (Miss. Ct. App. 1919) (attorney general allegedly brought malicious enforcement action to prevent construction work) (absolute immunity)

Stewart v. District Attorney for Eighteenth Cir. Ct. Dist. for State, 923 So.2d 1017 (Miss. Ct. App. 2005) (prosecutor sent out indictment information seeking arrest of man whose identity had been stolen by someone with an obviously different age and race, and prosecutor continued pursuing case until judge dismissed it three months later) (resolved on qualified immunity)

MISSOURI

Number of Cases: 3

Year Range: 1910–2009

Causes of Action: malicious prosecution, defamation, negligence, wrongful taking, § 1983

| Absolute Immunity | Not Absolute Immunity |
|--|---|
| <ul style="list-style-type: none">• pursuing malicious prosecution after arrest has occurred (charging, trial, appellate advocacy) | <ul style="list-style-type: none">• administrative or investigative actions |

Structure of State Law

Missouri cases have only addressed broad allegations of malicious prosecution, where the plaintiff claims there was no supporting evidence for the case pursued by the prosecutor. Missouri courts apply the Supreme Court’s *Imbler*, 424 U.S. 409 (1976) principles in holding that initiating and pursuing a criminal case is well-settled to be absolutely immune from civil suit.

Behavior Not Absolutely Immune

The courts specifically acknowledge that *Imbler* only extends to a prosecutor’s judicial acts, such as filing charges and presenting evidence. In *Shaw*, 664 S.W.2d 572 (Mo. Ct. App. 1983), the Court of Appeals mentioned that the plaintiff “would have had to allege impropriety by [the prosecutor] in his administrative or investigative functions if the claims were to fall outside the scope of *Imbler*.” Because no state cases have alleged investigative or administrative actions, Missouri has not explored the limits of those categories.

Full List of Cases

Ostmann v. Bruere, 124 S.W. 1059 (Mo. Ct. App. 1910) (prosecutor allegedly filed malicious charges, harassed defendant on cross-examination, failed to transmit her notice of appeal in time, and pursued wrongful fees) (absolute immunity)

Shaw v. City of St. Louis, 664 S.W.2d 572 (Mo. Ct. App. 1983) (prosecutor allegedly filed and pursued a baseless case maliciously) (absolute immunity)

Carden v. George, 291 S.W.3d 852 (Mo. Ct. App. 2009) (prosecutor allegedly initiated and pursued malicious criminal proceedings) (absolute immunity)

MONTANA

Number of Cases: 11

Year Range: 1973–2018

Causes of Action: malicious prosecution, destruction of property, lost profits, violation of right to public trial, false imprisonment, § 1983, wrongful discharge, age discrimination, invasion of privacy, tortious interference with contract, fraud, intentional infliction of emotional distress, negligent infliction of emotional distress

| Absolute Immunity | Not Absolute Immunity |
|---|--|
| <ul style="list-style-type: none">• charging decisions, including baseless charges• failure to intervene when judge acts improperly• state wrongful discharge tort• in-court matters handled by law student interns• signing probable cause document based on secondhand, rather than personal, knowledge | <ul style="list-style-type: none">• failure to notify jail of suicide risk• licensing investigation• federal age discrimination claim• personally attesting to facts• possibly: advising police on investigation |

Structure of State Law

Montana held that public officers were immune from civil suits within the scope of their duties before the Supreme Court's decision in *Imbler*, 424 U.S. 409 (1976), relying on historic common law. Although Montana's state constitution was amended to end sovereign immunity except in some exceptions, the courts have repeatedly held that legislation and constitutional amendments do not alter absolute prosecutorial immunity unless they explicitly say so.

Montana applies the same functional distinction as *Imbler*: a prosecutor is absolutely immune for acts related to bringing and maintaining criminal cases, and protected only by qualified immunity for investigative and administrative acts.

Behavior Not Absolutely Immune

The Montana Supreme Court has found that administrative and investigative actions are not protected by absolute immunity. For example, a prosecutor who failed to notify the jail of a medical report indicating suicide risk was acting only in an administrative capacity; the medical report was not relevant to the criminal case, nor was the notification. Additionally, an investigator from a prosecutor's office who was tasked with investigating a business for licensing approval was acting in an administrative capacity, even though he decided to report on criminal violations at the location. Likewise, an age discrimination claim by a fired secretary was treated without absolute immunity since the prosecutor would be acting in an administrative capacity in making that employment decision.

Where prosecutors sign warrant applications or probable cause affidavits for charging, the Montana court draws a distinction between personally vouching for facts (which is not protected by absolute immunity because the prosecutor steps into the role of a witness) and affirming information provided by law enforcement (which is part of a prosecutor's duty in bringing charges).

Montana law is unclear about advice to law enforcement: when confronted with a situation where a prosecutor advised a sheriff on how to investigate, the court found that the prosecutor would be immune even under the lesser protection of qualified immunity.

Full List of Cases

Wheeler v. Moe, 515 P.2d 679 (Mont. 1973) (prosecutor cooperated with police to enforce cigarette and fireworks law at Native American retail establishment) (absolute immunity)

State ex rel. Dept. of Justice v. Dist. Ct. 8th Judicial Dist., 560 P.2d 1328 (Mont. 1976) (prosecutors allegedly pursued criminal forgery cases maliciously without probable cause) (absolute immunity)

Stickney v. State, 636 P.2d 860 (Mont. 1981) (prosecutor did not intervene when judge wrongfully ordered defendant's family to leave the courtroom) (absolute immunity)

Ronek v. Gallatin County, 740 P.2d 1115 (Mont. 1987) (prosecutor allegedly brought malicious common scheme theft charges against garage contractor) (absolute immunity)

Kenyon v. Stillwater County, 835 P.2d 742 (Mont. 1992) (overruled on other grounds by *Heiat v. E. Montana College*, 912 P.2d 787 (1996)) (prosecutor allegedly fired secretary because she was too old, and replaced her with a younger woman) (absolute immunity for state wrongful discharge claim, no absolute immunity for federal age discrimination claim)

Smith v. Butte-Silver Bow County, 878 P.2d 870 (Mont. 1994) (prosecutor failed to notify jail that incoming prisoner had known suicide risk) (no absolute immunity)

Kelman v. Losleben, 894 P.2d 955 (Mont. 1995) (state DOJ investigator tasked with evaluating casino for licensing purposes instead compiled a list of recommended criminal charges) (no absolute immunity for investigative actions)

Helena Parents Comm'n v. Lewis & Clark County Comm'rs, 922 P.2d 1140 (Mont. 1996) (prosecutor chose not to prosecute county commissioners after alleged illegal investment of school funds) (absolute immunity)

Rosenthal v. County of Madison, 170 P.3d 493 (Mont. 2007) (prosecutor allegedly brought a baseless environmental misdemeanor charge, advised sheriff's office on how to proceed with an unrelated stalking case regarding the same defendant, and compiled evidence for Attorney General's stalking case) (resolved for prosecutor on qualified immunity grounds)

Spreadbury v. Wetzsteon, 264 P.3d 516 (Mont. 2011) (unpublished) (prosecution by supervised law student who did not comply with speedy trial requirements) (absolute immunity)

Renenger v. State, 426 P.3d 559 (Mont. 2018) (prosecutor signed allegedly false probable cause affidavit for juvenile charges) (absolute immunity because relied on law enforcement attestations)

NEBRASKA

Number of Cases: 4

Year Range: 1974–2001

Causes of Action: false arrest, false imprisonment, malicious prosecution, wrongful death, negligence, contract rescission

| Absolute Immunity | Not Absolute Immunity |
|---|---|
| <ul style="list-style-type: none">• N/A | <ul style="list-style-type: none">• bad faith judicial actions• providing negligent legal services unrelated to criminal cases |

Structure of State Law

While Nebraska courts have not explicitly referenced federal immunity law or its adoption by most states, they do not apply absolute immunity to prosecutors even in cases decided since *Imbler*, 424 U.S. 409 (1976). Nebraska describes prosecutor immunity under state law as “quasi-judicial” but holds that it can be pierced by a showing of bad faith or corrupt motive, since bad faith would place a wrongful prosecutorial action outside the scope of prosecutorial authority. Plaintiffs must allege malice in specific rather than broad terms in order to overcome this effectively qualified immunity.

Presumably, Nebraska would apply federal absolute immunity law to federal claims in state court, but that situation has not arisen.

Behavior Not Absolutely Immune

The Nebraska Supreme Court has specified that a prosecutor who knowingly brings a baseless charge with a malicious motive is not absolutely immune from suit, although plaintiffs must plead sufficient facts to conclude the prosecutor was not acting in good faith. Administrative actions or other actions unrelated to criminal prosecutions, such as failing to secure a promised financial benefit for a private client in *Talbot*, 544 N.W.2d 839 (Neb. 1996), are not protected by absolute immunity.

Full List of Cases

Koch v. Grimminger, 223 N.W.2d 833 (Neb. 1974) (prosecutor filed criminal child support charges based on the report of plaintiff's ex-wife without actually checking the status of the child support) (insufficient allegations of malice to survive motion to dismiss)

Koepf v. York County, 251 N.W.2d 866 (Neb. 1977) (prosecutor instituted juvenile removal action of allegedly neglected child and sent him to foster home where he was violently beaten until he died of brain swelling) (no allegation of malice)

Talbot v. Douglas County, 544 N.W.2d 839 (Neb. 1996) (prosecutor assured plaintiff that his office would garnish the inheritance of her former-spouse for child support, but it did not) (no prosecutorial immunity)

Shaul v. Brenner, 637 N.W.2d 362 (Neb. Ct. App. 2001) (prosecutor told county commissioners they could only avoid frivolous criminal charges if they each paid \$10,000 to the county through him) (dismissed because county was not a party)

NEVADA

Number of Cases: 4

Year Range: 1974–2001

Causes of Action: § 1983, negligent infliction of emotional distress, intentional infliction of emotional distress, tortious discharge, negligent misrepresentation

| Absolute Immunity | Not Absolute Immunity |
|---|--|
| <ul style="list-style-type: none">• most charging decisions, including unsupported charges• judicial advocacy actions in civil obligations such as child support | <ul style="list-style-type: none">• knowingly bringing unsupported charges with an actual conflict of interest• assisting law enforcement in preparing arrest affidavit, especially with malice• possibly: employment disputes |

Structure of State Law

Nevada recognizes absolute immunity for prosecutor actions that are judicial advocacy, such as charging and presenting a case. Courts have extended this immunity to prosecutors performing civil obligations such as child support actions. Nevada cites *Imbler*, 424 U.S. 409 (1976) approvingly and incorporates some federal law from the 9th Circuit in evaluating which prosecutorial actions are absolutely immune from suit.

Nevada also has statutory governmental immunity that protects government employees from lawsuits regarding their exercise or failure to exercise a discretionary duty on behalf of the government. If the government employee abused their discretion, they are still immune. However, acts taken in bad faith (motivated by malice, corruption, etc.) are not protected by this immunity.

Behavior Not Absolutely Immune

The Nevada Supreme Court has recognized certain exceptions to prosecutorial absolute immunity. First, acts that are administrative or investigative may not be protected. Examples include signing an affidavit in support of an arrest and terminating an employee. Second, Nevada has applied an exception to the absolute immunity rule where 1. a prosecutor has an

actual conflict of interest and 2. the prosecutor knowingly brings baseless charges for personal gain. The Supreme Court adapted this exception from a 9th Circuit case that was later overruled by *Ashelman v. Pope*, 793 F.2d 1072 (9th Cir. 1986), but the only Nevada case decided after *Ashelman* did not discuss absolute immunity, relying instead on statutory government official immunity. It is thus unclear whether the exception established in *Edgar* would stand in a similar case before the court today.

Full List of Cases

Washoe County ex rel. Office of District Attorney v. Second Jud. Dist. Ct., 652 P.2d 1175 (Nev. 1982) (prosecutor made misrepresentations in child support enforcement action) (absolute immunity)

Stevens v. McGimsey, 673 P.2d 499 (Nev. 1983) (prosecutor allegedly pursued baseless charges against plaintiff where conflict of interest existed) (no absolute immunity)

Edgar v. Wagner, 699 P.2d 110 (Nev. 1985) (prosecutor assisted Department of Wildlife in preparing erroneous arrest warrant for a misidentified man, then prosecuted case until it was dismissed) (only qualified immunity)

Wayment v. Holmes, 912 P.2d 816 (Nev. 1996) (former prosecutor alleged he was fired because he informed a supervisor of an invalid indictment and refused to defend it in post-conviction litigation) (decided on governmental immunity)

Dorsey v. City of Reno, 124 Nev. 1462 (Nev. 2008) (unpublished) (prosecutors brought allegedly baseless burglary charge) (absolute immunity)

NEW HAMPSHIRE

Number of Cases: 2

Year Range: 1992–1993

Causes of Action: negligence, malicious prosecution, conspiracy

| Absolute Immunity | Not Absolute Immunity |
|--|--|
| <ul style="list-style-type: none">• charging decisions, including unsupported charges• discovery violations• obstructing trial process• use of false evidence• failure to recuse | <ul style="list-style-type: none">• administrative functions such as press interviews• possibly: investigative functions such as participating in an illegal search |

Structure of State Law

New Hampshire applies the common law absolute immunity to prosecutors as described in *Imbler*, 424 U.S. 409 (1976); prosecutors performing their role as judicial advocates are immune from lawsuits based on that conduct. Investigative and administrative acts are not protected by absolute immunity, but the line between investigation and advocacy is very difficult to draw. The New Hampshire Supreme Court holds that investigative actions that are functionally related to the initiation and prosecution of criminal charges, such as interviewing witnesses to evaluate their credibility before grand jury proceedings, are absolutely immune. Any behavior that is closely tied to the judicial role, such as pre-trial discovery matters, is absolutely immune from suit regardless of abuse or malice by the prosecutor.

Behavior Not Absolutely Immune

Administrative and purely investigative functions are not absolutely immune under New Hampshire law. The New Hampshire Supreme Court noted that statements to the press are administrative, and approvingly cites other federal examples of non-judicial actions by

prosecutors, such as executing a search, transferring illegally seized documents, and making defamatory statements unrelated to the proceedings. Where a plaintiff alleged that a prosecutor brought charges after negligently failing to investigate them, the court held that the true action complained of (giving rise to the alleged damages) was the act of bringing charges, rather than negligent investigation

Full List of Cases

Belcher v. Paine, 612 A.2d 1318 (N.H. 1992) (prosecutor brought sexual assault charges based on poor information negligently investigated) (absolute immunity)

State v. Dexter, 621 A.2d 435 (N.H. 1993) (prosecutor did not turn over some discovery, purposely delayed expert testing, attempted to use false evidence, refused to disqualify self after participating in expert testing personally, and gave a press interview the night before trial) (absolute immunity for discovery violations, use of false evidence, and failure to recuse; no absolute immunity for press statements but affirmed no relief based on trial court finding of no bad faith)

NEW JERSEY

Number of Cases: 10

Year Range: 1887–2016

Causes of Action: assault, battery, false imprisonment, criminal nonfeasance, false arrest, libel, slander, invasion of privacy, legal malpractice, malicious abuse of process, § 1983

| Absolute Immunity | Not Absolute Immunity |
|--|--|
| <ul style="list-style-type: none">• for federal claims, any conduct as judicial advocate or intimately connected with judicial process | <ul style="list-style-type: none">• all state claims• federal claims based on investigative or administrative conduct |

Structure of State Law

New Jersey has separate immunity analyses for federal and state claims. When assessing federal claims such as 42 U.S.C. § 1983, New Jersey courts apply the federal law beginning with *Imbler*, 424 U.S. 409 (1976), which holds all actions taken in a prosecutor’s judicial advocate role absolutely immune regardless of motive. Administrative or investigative acts can be exceptions to this rule under federal law so long as they are not intimately related to the judicial process.

For state claims, New Jersey applies less strict immunity law: in 1975, building on common law developed since the 1880s, the New Jersey Supreme Court held that prosecutors are not absolutely immune from suit under state common law. Suits against prosecutors are generally evaluated under the New Jersey Tort Claims Act, which protects government officials from being sued for performing their discretionary duties unless their actions are outside the scope of their employment, a crime, actual fraud, willful misconduct, or motivated by actual malice. Additionally, the Tort Claims Act exempts false arrest and false imprisonment claims from this protection—a prosecutor sued for false arrest would need to rely on substantive defenses such as the existence of probable cause or another legal justification for the action in question. Prosecutors may also be subject to criminal malfeasance, misfeasance, and nonfeasance charges where they willfully fail to use reasonable and lawful diligence in pursuing their cases.

Behavior Not Absolutely Immune

Federal claims against prosecutors in New Jersey will only fall outside of absolute immunity protections where the action is purely investigative or administrative. As stated above, state claims against prosecutors do not carry any absolute immunity. Instead, prosecutors must rely on the government official immunity set out in the Tort Claims Act, good faith defenses, or other substantive defenses to defeat lawsuits, especially for false arrest or false imprisonment.

Although eliciting false testimony is generally considered immune from suit under the state analysis, one court held that knowingly suborning perjury in furtherance of a death penalty case crossed the line into “the ultimate peak of wickedness” that governmental immunity cannot possibly be meant to shield.

Full List of Cases

Lloyd v. Hann, 11 A. 346 (N.J. 1887) (prosecutor allegedly instructed sheriff to enforce essentially a material witness warrant, which plaintiff argued was illegal) (government immunity)

Edelman v. Dunn, 153 A. 524 (N.J. Ct. Err. & App. 1931) (prosecutor delayed approval of plaintiff’s bail bond, maliciously causing him to be held longer) (no cause of action)

State v. Winne, 96 A.2d 63 (N.J. 1953) (prosecutor properly indicted for nonfeasance where he chose not to investigate 19 cases of gambling in his county)

Earl v. Winne, 101 A.2d 535 (N.J. 1953) (same prosecutor arrested and charged man with criminal libel after man publicly accused him of malfeasance in choosing not to pursue gambling cases) (claims for malicious prosecution and malicious abuse of process survive motion to dismiss)

DeGroot v. Muccio, 277 A.2d 899 (N.J. Super. Ct. Law Div. 1971) (prosecutors allegedly threatened and bribed witnesses to fabricate and pursue death penalty case) (survives motion to dismiss)

Cashen v. Spann, 334 A.2d 8 (N.J. 1975) (prosecutor moved forward with case based on known unreliable informant and erroneous phone records) (insufficient allegations of malice to overcome government immunity)

Hayes v. Mercer County, 526 A.2d 737 (N.J. Super. Ct. App. Div. 1987) (prosecutor mistook identity of man who had the same first and last name, same age, and same profession as real suspect) (absolute immunity for federal claims, government immunity for state claims)

Fleming v. United Parcel Service, Inc., 642 A.2d 1029 (N.J. Super. Ct. App. Div. 1994) (municipal prosecutor brought weak charges on behalf of UPS, who paid him to prosecute pursuant to local fee structure) (summary judgment for prosecutor affirmed; probable cause shown)

Van Engelen v. O'Leary, 732 A.2d 540 (N.J. Super. Ct. App. Div. 1999) (prosecutor brought weak drug charges against police officers who were investigating his friend's bar) (summary judgment for prosecutor; insufficient proof of malice)

Williams v. City of Newark, 2016 WL 1396283 (N.J. Super. Ct. App. Div. 2016) (unpublished) (investigator for prosecutor's office allegedly coerced witnesses into identifying the plaintiff, who was incarcerated for 16 months until case was dismissed, during which time his wife of 25 years died) (claims survive summary judgment)

NEW MEXICO

Number of Cases: 5

Year Range: 1969–1995

Causes of Action: wrongful search, defamation, negligence, declaratory judgment, state constitutional action, § 1983

| Absolute Immunity | Not Absolute Immunity |
|---|---|
| <ul style="list-style-type: none">• issuing improper search warrant• reporting officer conduct to law enforcement agency• press statements about official actions• negligent delay in indictment• withholding exculpatory evidence• eliciting false testimony• erroneous sentencing request | <ul style="list-style-type: none">• for federal claims, investigative or administrative actions• possibly: press statements not about official actions |

Structure of State Law

New Mexico courts acknowledge federal absolute immunity law for prosecutors, especially with respect to federal claims. For state claims, rather than adopting the federal absolute immunity law structure like a majority of states or adopting qualified immunity like Hawai'i, New Mexico applies an absolute immunity to all but a very small subset of potential prosecutor conduct.

New Mexico courts primarily rely on the 1978 New Mexico Tort Claims Act in evaluating whether a state lawsuit against a prosecutor may proceed; generally, if a public employee is acting within the scope of their duties, they are not liable for torts arising from those actions. N.M.S.A. 1978 §§ 41-4-1–41-4-25. The statute waives this protection for certain types of suits, such as malicious prosecution, false arrest, and false imprisonment, if the actor was a law enforcement official acting in the scope of their duties. Courts have held that a prosecutor might conceivably be considered “law enforcement” for a particular action in context, but all of the situations yet considered (giving a press conference about a case and filing an indictment) did not rise to that level. An appellate court specified that the plaintiff would have to show that the prosecutor was engaged in the normal, commonplace activities of a law enforcement officer at the time, without providing examples of such activities.

To assess whether a prosecutor was acting in the scope of their duties for the purposes of the Tort Claims Act, courts consider the New Mexico Constitution and other statutes that set out a prosecutor's duties. These include, but may not necessarily be limited to:

- prosecuting and defending criminal convictions,
- advising law enforcement officers when requested,
- investigating whether a charge should be filed by inquiring into the facts,
- keeping the public advised of official acts and conduct, and
- acting as an advocate of the State's interest in the protection of society.

This last duty was used as a justification for holding a prosecutor immune for *unsolicited* advice to law enforcement (given that advice is only a duty when requested), and could be interpreted broadly.

In one case, a plaintiff acknowledged that absolute immunity precluded a federal suit for damages against a prosecutor, instead seeking a declaratory judgment. The court found that declaratory judgment is inappropriate where the plaintiff does not anticipate repetition of the harm, and it was barred by absolute immunity anyway because it could produce government liability for attorney's fees.

Behavior Not Absolutely Immune

For federal claims, the federal common law regarding administrative and investigative actions apply as exceptions to the general rule of absolute immunity. For state claims, courts rely on the Tort Claims Act immunity, which is not explicitly described as "absolute." The only two exceptions to the Tort Claims Act immunity for prosecutors are for actions outside the scope of their duties—which is broader than the functional analysis from federal common law—or when they act as a "law enforcement officer," which is very difficult to prove.

New Mexico courts have not been very clear about what conduct is absolutely immune under the common law applying judicial immunity to prosecutors, but the Tort Claims Act appears to be even more protective than the traditional absolute immunity. It does not inquire into the motives of the prosecutor, and it extends far past courtroom conduct into law enforcement advice and media statements. The only example of a court withholding an immunity finding was where the plaintiff did not allege sufficient detail to determine whether a press conference was about an official action—if not, it might not be within the scope of the prosecutor's duties.

Full List of Cases

Torres v. Glasgow, 456 P.2d 886 (N.M. Ct. App. 1969) (prosecutor enforced improperly issued search warrant for property in order to secure custody of a child) (public official immunity)

Candelaria v. Robinson, 606 P.2d 196 (N.M. Ct. App. 1980) (prosecutor prepared a report finding police officer had used highly improper interrogation tactics, recommended the officer be fired, and gave a press conference about the officer) (public official immunity for all but press conference, where insufficient facts to determine if statements were reporting official actions)

Abalos v. Bernalillo County District Attorney's Office, 734 P.2d 794 (N.M. Ct. App. 1987) (prosecutor filed indictment one day too late to continue holding defendant, who committed a sexual assault against plaintiff while released) (public official immunity)

Johnson v. Lally, 887 P.2d 1262 (N.M. Ct. App. 1994) (prosecutor allegedly withheld exculpatory evidence from grand jury in pursuing forged prescription case against pharmacist) (declaratory judgment inappropriate where there is no anticipated future harm)

Coyazo v. State, 897 P.2d 234 (N.M. Ct. App. 1995) (prosecutor applied erroneous habitual offender enhancement, resulting in 17 more months' detention than if the sentence had been calculated correctly) (public official immunity)

NEW YORK

Number of Cases: 42

Year Range: 1925–2017

Causes of Action: violation of constitutional rights, false arrest, false imprisonment, malicious prosecution, conspiracy, abuse of process, invasion of privacy, unlawful psychiatric detention, defamation, illegal incarceration, conversion, dissemination of false information, negligence, negligent supervision, breach of and conspiracy to breach contracts, extortion, battery, § 1983, interference with business relationships, § 1988, intentional infliction of emotional distress, unreasonably prolonged detention

| Absolute Immunity | Not Absolute Immunity |
|--|--|
| <ul style="list-style-type: none">• charging decisions, including declining to prosecute or bringing baseless charges• false attestation before judge• grand jury proceedings, including false statements• issuing grand jury subpoenas before grand jury exists, if it's impaneled by date of appearance• withholding exculpatory evidence• failure to investigate• office-wide policies regarding case priorities• statements made in conviction review reports | <ul style="list-style-type: none">• non-judicial actions like conspiracy to defraud• actions known to be outside jurisdiction and intended to injure (defective indictment)• issuing improper warrants• issuing grand jury subpoenas where no grand jury exists even when witnesses arrive• press statements• directing police to arrest someone• investigation-phase extortion• advising police chief of officer misconduct• instructing medical examiner to falsify evidence |

Structure of State Law

New York law generally comports with federal law; prosecutors have absolute immunity for their traditional judicial functions (charging, evaluating evidence, pretrial preparation, statements at trial, etc.) and only qualified immunity for investigative or administrative actions. Historically, state law protected even investigative acts, but since 1993 the scope of protected investigative acts has become more limited—rather than including all investigation conducted by a prosecutor, absolute immunity applies to post-indictment actions and the evaluation of evidence presented by police. This mirrors the federal trend of evaluating whether an investigative act is sufficiently tied to a judicial process to warrant judicial immunity. Recently, the appellate court held that conviction review processes are also protected by absolute immunity, even though they necessarily come after the conclusion of a criminal case, because they are sufficiently tied to the judicial responsibilities of a prosecutor.

In situations where a county or city is sued under 42 U.S.C. § 1983 for a policy or practice that violates constitutional rights, the county does not necessarily escape liability by showing that the individual prosecutor is absolutely immune: if the plaintiff can show a policy such as non-disclosure of exculpatory evidence or failure to train prosecutors in a matter implicating constitutional rights, the county may be liable where the prosecutor individually is not.

Behavior Not Absolutely Immune

New York courts have found that prosecutors are not entitled to absolute immunity in situations where they act as law enforcement. This includes directing police to arrest a specific suspect, applying for search/arrest/wiretap/material witness warrants, and directing a party to fabricate evidence to support an indictment. This also includes misconduct at an investigation stage before charges are supported, such as pressuring a person to bribe the prosecutor by interfering with their work. While indictments usually mark the beginning of a clear judicial proceeding, an indictment knowingly secured without jurisdiction for the purpose of injuring the defendant could be the basis for liability.

Additionally, statements to the press or others are not protected by absolute immunity as long as they occur outside a judicial proceeding. Instead, a “qualified privilege” applies to statements connected to official matters such as pending criminal cases, and prosecutors may be subject to liability if plaintiffs can show that the prosecutor acted with malice.

Several cases have arisen in New York where prosecutors issued grand jury subpoenas requiring witnesses to appear either at a police station or the district attorney’s office, where a grand jury was not in fact empaneled, and the witnesses were interrogated by police or prosecutors upon arrival. In each of those cases, prosecutors were not protected by absolute immunity. However, where a grand jury is seated by the time a witness arrives, prosecutors have absolute immunity for issuing subpoenas at a time when a grand jury did not yet exist.

Lastly, actions entirely unrelated to a judicial proceeding, such as conspiring to defraud someone by deceiving them about a tenant’s identity, are not protected by absolute immunity.

Full List of Cases

Copeland v. Donovan, 124 Misc. 553 (N.Y. Erie Cnty. Ct. 1925) (prosecutor refused to prosecute charge against pastor on the ground that he was mentally ill, and pastor sued) (absolute immunity)

Chappel v. Dewey, 173 Misc. 438 (N.Y. Sup. Ct. Westchester Cnty. 1939) (prosecutors allegedly coordinated fraud by deceiving plaintiff into leasing to a co-conspirator) (no absolute immunity)

Potash v. Sacks, 123 N.Y.S.2d 913 (N.Y. Sup. Ct. Queens Cnty. 1953) (prosecutor allegedly brought false and malicious forgery charges) (absolute immunity)

Prentice v. Gulotta, 13 Misc. 2d 280 (N.Y. Sup. Ct. Nassau Cnty. 1958) (prosecutor chose not to pursue indictment against woman who had fled the state in child custody dispute) (dismissed on merits; no legal right to relief)

Manceri v. City of New York, 12 A.D.2d 895 (N.Y. App. Div. 1961) (prosecutor allegedly slandered plaintiff during arrest and interrogation) (absolute immunity)

Zimmerman v. New York, 52 Misc. 2d 797 (N.Y. Sup. Ct. New York Cnty. 1966) (plaintiff alleged that district attorney concealed evidence in the criminal prosecution against the plaintiff) (absolute immunity)

Shanbarger v. Kellogg, 35 A.D.2d 902 (N.Y. App. Div. 1970) (prosecutor pursued defective loitering case against mentally ill plaintiff) (absolute immunity)

Carpenter v. Rochester, 67 Misc. 2d 832 (N.Y. Sup. Ct. Monroe Cnty. 1971) (prosecutor pursued case against plaintiff despite defective indictment) (absolute immunity unless express knowledge of lack of jurisdiction and intent to injure plaintiff)

Muka v. Williamson, 53 A.D.2d 950 (N.Y. App. Div. 1976) (prosecutor allegedly deceitfully brought motion before a biased judge and swore to false affidavit) (absolute immunity)

Broughton v. New York, 91 Misc. 2d 543 (Civ. Ct. N.Y. Cnty. 1977) (prosecutor improperly secured arrest of out-of-state plaintiff as a material witness) (only qualified immunity; administrative duty)

Brenner v. Cnty. of Rockland, 92 Misc. 2d 833 (N.Y. Sup. Ct. Rockland Cnty. 1978) (prosecutor allegedly used false and misleading evidence to secure grand jury indictment) (absolute immunity)

Drake v. City of Rochester, 96 Misc. 2d 86 (N.Y. Sup. Ct. Monroe Cnty. 1978) (prosecutors issued grand jury subpoenas for nonexistent grand jury in order to enable police to interrogate plaintiffs) (only qualified immunity; police activity)

Cunningham v. State, 71 A.D.2d 181 (N.Y. App. Div. 1979) (prosecutor allegedly used improper evidence and procedures in grand jury proceeding and used a false affidavit to obtain a wiretap warrant) (absolute immunity for grand jury proceedings, only qualified immunity for wrongful wiretap warrant)

Rao v. State, 74 A.D.2d 964 (N.Y. App. Div. 1980) (prosecutor fabricated a robbery where a person was intentionally jailed, recorded an attorney advising the person's wife how to get his bail reduced, initiated a grand jury proceeding for judicial bribery, then prosecuted the attorney for perjury when his grand jury statements contradicted the recording) (absolute immunity)

Whitmore v. City of New York, 80 A.D.2d 638 (N.Y. App. Div. 1981) (prosecutor allegedly withheld exculpatory evidence at trial) (absolute immunity)

Ryan v. State, 435 N.E.2d 396 (N.Y. 1981) (prosecutor allegedly withheld exculpatory evidence from grand jury) (absolute immunity affirmed)

Minicozzi v. City of Glen Cove, 97 A.D.2d 815 (N.Y. App. Div. 1983) (prosecutor allegedly failed to investigate and unnecessarily prolonged baseless case) (absolute immunity)

Johnson v. Colonie, 102 A.D.2d 925 (N.Y. App. Div. 1984) (prosecutor brought charges he allegedly knew were false) (absolute immunity)

Calderon v. County of Westchester, 111 A.D.2d 208 (N.Y. App. Div. 1985) (prosecutor allegedly brought false case) (absolute immunity)

Covillion v. New Windsor, 123 A.D.2d 763 (N.Y. App. Div. 1986) (prosecutor and judge allegedly failed to advise jury of proper defenses at trial, and prosecutor allegedly committed unspecified misconduct during trial) (absolute immunity)

Chase v. Grilli, 127 A.D.2d 728 (N.Y. App. Div. 1987) (prosecutor gave press statements about plaintiff's arrest and conviction) (only qualified privilege)

Hallum v. Rothberg, 146 A.D.2d 743 (N.Y. App. Div. 1989) (prosecutor allegedly committed unspecified misconduct) (absolute immunity)

Rosen v. County of Westchester, 158 A.D.2d 679 (N.Y. App. Div. 1990) (prosecutor allegedly brought baseless, malicious charges and improperly obtained a search warrant) (absolute immunity for charging and trial, only qualified immunity for search warrant)

Rodrigues v. City of New York, 193 A.D.2d 79 (N.Y. App. Div. 1993) (prosecutors allegedly extorted and entrapped plaintiffs, used grand jury subpoenas to investigate witnesses before a grand jury was ever convened, leaked false information to the press, and directed an informant to instigate work stoppages and slowdowns if plaintiffs would not bribe them) (absolute immunity for post-indictment conduct, qualified immunity or less for investigation and extortion)

Claude H. v. County of Oneida, 214 A.D.2d 964 (N.Y. App. Div. 1995) (prosecutor allegedly directed police to arrest plaintiff before a charge or warrant existed, and before he was acquitted, plaintiff was sexually assaulted by inmate with AIDS) (survives motion to dismiss; only qualified immunity for investigative direction to arrest)

Shapiro v. Town of Clarkstown, 238 A.D.2d 498 (N.Y. App. Div. 1997) (prosecutor waited over a year to file charges against plaintiff based on an argument and arrest in a grocery store parking lot) (absolute immunity)

Moore v. Dormin, 173 Misc. 836 (N.Y. Sup. Ct. New York Cnty. 1997) (prosecutor wrote letter to police chief detailing a specific officer's demonstrably false testimony to grand jury and recommending internal discipline) (qualified immunity or less: administrative at best, and only if his job entails that conduct)

Hirschfeld v. City of New York, 253 A.D.2d 53 (N.Y. App. Div. 1999) (prosecutor issued grand jury subpoenas a few days before actually convening grand jury, conducted lengthy grand jury proceedings, scheduled arraignment for the day of plaintiff's political candidacy announcement, and shared indictment with the press) (absolute immunity for grand jury behavior, and remaining claims dismissed because they did not sufficiently allege constitutional harm)

Tucker v. City of New York, 184 Misc. 2d 491 (N.Y. Sup. Ct. New York Cnty. 2000) (prosecutors initiated charges based on allegedly false police report, which were dismissed six months later) (absolute immunity)

Akande v. City of New York, 275 A.D.2d 671 (N.Y. App. Div. 2000) (prosecutors brought charges that turned out to be false and dismissed case at the next court date after receiving exonerating lab results) (absolute immunity)

Ramos v. City of New York, 285 A.D.2d 284 (N.Y. App. Div. 2001) (prosecutor allegedly followed local policy in failing to disclose exculpatory evidence, which plaintiff nonetheless discovered after seven years in prison and successfully used to overturn conviction) (absolute immunity for prosecutor in individual capacity, but suit survives summary judgment against City due to evidence of prosecutorial custom/policy/training violating constitutional rights)

Johnson v. Kings Cnty. Dist. Attorney's Office, 308 A.D.2d 278 (N.Y. App. Div. 2001) (prosecutors delayed confirming whether person arrested was the person identified by an out-of-state warrant) (absolute immunity for prosecutors, survives summary judgment against City due to evidence of failure to train for this foreseeable situation that could violate constitutional rights)

Wyllie v. District Attorney of County of Kings, 2 A.D.3d 714 (N.Y. App. Div. 2003) (prosecutors pursued case against neighboring prosecutor for theft and spoke to the press about her arrest before grand jury failed to indict, ultimately resulting in her dismissal from the neighboring prosecutor's office) (absolute immunity for charging, qualified privilege for press statements)

Arzeno v. Mack, 39 A.D.3d 341 (N.Y. App. Div. 2007) (prosecutors allegedly brought baseless insurance fraud charges against plaintiff) (absolute immunity)

Crawford v. New York County District Attorney, 99 A.D.3d 600 (N.Y. App. Div. 2012) (prosecutor allegedly maintained gun case policy that encouraged illegal seizures by police and constitutional violations by assistant district attorneys) (absolute immunity and insufficient allegations of policy's existence)

Spinner v. County of Nassau, 103 A.D.3d 875 (N.Y. App. Div. 2013) (prosecutors failed to interview certain witnesses to incident who would have provided exculpatory evidence) (absolute immunity)

Kirchner v. County of Niagara, 107 A.D.3d 1620 (N.Y. App. Div. 2013) (prosecutor reopened closed case at the urging of plaintiff's ex-wife and allegedly advised medical examiner to fabricate evidence supporting charges) (survives motion to dismiss: no absolute immunity for investigation, and sufficient allegations of bad faith to overcome qualified immunity)

Kosmider v. Garcia, 111 A.D.3d 1134 (N.Y. App. Div. 2013) (prosecutor improperly subpoenaed bank records from another state) (no immunity discussed; plaintiffs could not allege privacy interest in another party's bank records)

Friedman v. Rice, 47 Misc. 3d 944 (N.Y. Sup. Ct. Nassau Cnty. 2015) (prosecutors reopened case for conviction integrity review, ruled the conviction sound, published an extensive report, and gave media statements about the report, which included allegations of child pornography) (absolute immunity for report, possibly only qualified privilege for press statements, but insufficient allegations of malice for those claims to proceed)

Dann v. Auburn Police Dept., 138 A.D.3d 1468 (N.Y. App. Div. 2016) (prosecutors proceeded in case with weak evidence) (absolute immunity)

Savane v. Dist. Att'y of N.Y. Cnty., 148 A.D.3d 591 (N.Y. App. Div. 2017) (prosecutor pursued allegedly false charges of child sex abuse) (absolute immunity)

Blake v. City of New York, 148 A.D.3d 1101 (N.Y. App. Div. 2017) (prosecutors proceeded in case after allegedly unreliable identification procedure) (absolute immunity)

NORTH CAROLINA

Number of Cases: 8

Year Range: 1978–2013

Causes of Action: wrongful ejection, declaratory judgment, injunctive relief, wrongful termination, § 1983, state constitutional violations, interference with contract, removal actions

| Absolute Immunity | Not Absolute Immunity |
|---|--|
| <ul style="list-style-type: none">• charging decisions, including baseless charges• failure to notify defendants of court dates and refusal to correct | <ul style="list-style-type: none">• unconstitutional abuse of trial calendaring process• statutory removal actions• wrongful termination in violation of public policy |

Structure of State Law

North Carolina has indicated that it applies roughly the same absolute immunity law set out by *Imbler*, 424 U.S. 409 (1976) and its progeny, but the courts seem to rely more on whether a prosecutor is authorized to perform the action in question rather than whether the action is judicial advocacy, investigation, or administration. For example, in *White*, prosecutors were sued for failing to correct a known clerical error in the court records that had led to his ongoing license suspension. *White v. Williams*, 433 S.E.2d 808 (N.C. Ct. App. 1993). In two sentences, the court of appeals noted that the prosecutors had absolute immunity for actions in their “official capacities” regardless of motive, and that the action was properly dismissed against them. This suggests that the state common law absolute immunity is much broader than the federal framework, despite references to it.

Behavior Not Absolutely Immune

First, prosecutors did not assert absolute immunity in several North Carolina cases, and courts proceeded on the merits. This suggests that the immunity may be waived by a prosecutor who does not raise it as a defense.

Second, given that there is no impeachment process for prosecutors, the North Carolina legislature created a statutory procedure by which chief prosecutors can be suspended or removed from office for seven possible grounds³. N.C.G.S.A. § 7A-66. Courts have found that prosecutors are obviously not immune from the application of this statute, which is neither a criminal action nor a civil lawsuit but a unique type of judicial inquiry appealable only by the district attorney.

Third, a group of plaintiffs successfully brought a suit for declaratory and injunctive relief claiming that Durham prosecutors were using their statutory power to schedule cases in an unconstitutional manner, which did not create personal liability for the prosecutors. *Simeon v. Hardin*, 451 S.E.2d 858 (N.C. 1994).

Fourth, in the specific wrongful termination situation where a prosecutor fires an at-will employee for a reason against public policy, such as her cooperation in a financial investigation against him, he is not shielded by immunity. *Caudill v. Dellinger*, 501 S.E.2d 99 (N.C. Ct. App. 1998). Again, this is somewhat at odds with the federal jurisprudence which suggests that there is no public policy justification for shielding prosecutors acting as typical state administrators from the same suits that would apply to, for example, a governor—although the court of appeals here made a small exception for unusually problematic terminations, the federal analysis would suggest that purely administrative decisions not connected to judicial proceedings should not be protected by absolute judicial immunity at all. See *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993).

³ “(1) Mental or physical incapacity interfering with the performance of his duties which is, or is likely to become, permanent; (2) Willful misconduct in office; (3) Willful and persistent failure to perform his duties; (4) Habitual intemperance; (5) Conviction of a crime involving moral turpitude; (6) Conduct prejudicial to the administration of justice which brings the office into disrepute; or (7) Knowingly authorizing or permitting an assistant district attorney to commit any act constituting grounds for removal, as defined in subdivisions (1) through (6) above.” N.C.G.S.A. § 7A-66. The court in *In re Hudson* clarified that “habitual intemperance” for the purposes of the statute meant alcoholism interfering with job duties, rather than an angry or explosive demeanor.

Full List of Cases

State ex rel. Jacobs v. Sherard, 243 S.E.2d 184 (N.C. Ct. App. 1978) (prosecutor allegedly instituted malicious ejectment action in order to humiliate plaintiffs) (absolute immunity)

White v. Williams, 433 S.E.2d 808 (N.C. Ct. App. 1993) (prosecutors failed to notify plaintiff to appear for court, dismissed with leave to refile due to failure to appear, then refused to reopen case or contact DMV when plaintiff's license was suspended for failing to appear) (absolute immunity)

Simeon v. Hardin, 451 S.E.2d 858 (N.C. 1994) (prosecutors allegedly abused trial scheduling power to unconstitutionally prolong cases, create pressure to plead guilty, harass defense attorneys they disliked, create undue expenses in transporting witnesses, and select specific judges for particular cases) (survives motion to dismiss in part because suit only for declaratory and injunctive relief)

In re Spivey, 480 S.E.2d 693 (N.C. 1997) (prosecutor used racial slurs and started a fight, and a judge removed him from office pursuant to a statute) (no immunity discussed)

Caudill v. Dellinger, 501 S.E.2d 99 (N.C. Ct. App. 1998) (prosecutor allegedly fired assistant because she cooperated in financial investigation against him) (only sovereign immunity raised and denied, survives summary judgment)

In re Hudson, 600 S.E.2d 25 (N.C. Ct. App. 2004) (prosecutor singled out three attorneys, including a former electoral opponent, to no longer be allowed to plead misdemeanor cases without their clients present, which substantially affected their business) (no discussion of immunity; insufficient basis for removal suit and no appeal permitted by statute for complainant)

Hines v. Yates, 614 S.E.2d 385 (N.C. Ct. App. 2005) (prosecutor fired investigative assistant after he made disparaging comments about prosecutor's office during unsuccessful campaign for sheriff) (no discussion of immunity, summary judgment to prosecutor on merits)

In re Cline, 749 S.E.2d 91 (N.C. Ct. App. 2013) (prosecutor accused judges of corruption and misconduct, and a lawyer successfully sought her removal under statute) (no immunity because suit for removal, not damages)

NORTH DAKOTA

Number of Cases: 4

Year Range: 1927–2020

Causes of Action: malicious prosecution, false arrest, abuse of process, perjury, defamation, conversion of property, conspiracy, § 1983

| Absolute Immunity | Not Absolute Immunity |
|---|---|
| <ul style="list-style-type: none">• charging decisions• behavior during trial• decisions on whether to call witnesses | <ul style="list-style-type: none">• statements made as an administrator outside of legal proceedings• other administrative or investigative acts |

Structure of State Law

Under both federal and state law, prosecuting attorneys are considered “quasi-judicial officers” entitled to the same absolute immunity judges have when their activities are closely connected with criminal adjudication. Courts have extended absolute immunity to the conduct of a prosecutor in some civil proceedings, concluding that a prosecutor’s duties are often functionally analogous in civil and criminal proceedings. North Dakota acknowledges the same exceptions to absolute immunity laid out in *Imbler*, 424 U.S. 409 (1976) and its progeny: investigative and administrative acts may fall outside the protection of absolute immunity. However, North Dakota has a statute that creates an absolute privilege for statements made in judicial proceedings, other proceedings authorized by law, and in the proper discharge of an official duty. N.D.C.C. § 14-02-05. The same statute provides a qualified immunity for good faith reports of public official proceedings.

Behavior Not Absolutely Immune

When functioning in the role of an administrator or investigative officer rather than in the role of an advocate, prosecutors are only subject to qualified immunity. The courts have found that while the decision not to use testimony from a certain officer is part of a prosecutor’s judicial role, notifying the police chief of this decision is an administrative act entitled to only qualified

immunity. Disclosing the officer's record of dishonesty to the Department of Labor pursuant to their investigation into the wrongful termination case is absolutely privileged because it occurs in a "proceeding authorized by law," but disclosing that record when asked by the officer's prospective employer is not. *Krile v. Lawyer*, 947 N.W.2d 366 (N.D. 2020).

Full List of Cases

Kittler v. Kelsch, 216 N.W. 898 (N.D. 1927) (prosecutor brought charges based on forged confession letter) (absolute immunity)

Perry Center, Inc. v. Heitkamp, 576 N.W.2d 505 (N.D. 1998) (attorney general instituted consumer protection action that removed plaintiff from control of business) (absolute immunity for bringing action; decided on other grounds for personal capacity conspiracy claim, asset seizure, and statements about board of directors)

Witzke v. City of Bismarck, 718 N.W.2d 586 (N.D. 2006) (prosecutor allegedly lied to city officials, committed perjury, abused process, and made defamatory statements in the course of a successful prosecution for attempted criminal mischief) (absolute immunity)

Krile v. Lawyer, 947 N.W.2d 366 (N.D. 2020) (prosecutor notified police chief that they would no longer use an officer as a witness due to her false statements. Officer was fired, and, when prompted, prosecutor disclosed the same information to the Department of Labor and another police chief who was considering hiring plaintiff) (absolute immunity for decision not to call police officer and disclosing to Department of Labor, qualified immunity or less for disclosing officer's dishonesty to police chiefs)

OHIO

Number of Cases: 22

Year Range: 1894–2018

Causes of Action: removal action, contempt appeal, false arrest, false imprisonment, malicious prosecution, intentional infliction of emotional distress, § 1983, negligent infliction of emotional distress, prisoner confinement statute violation, coercion, trespass, invasion of privacy, § 1985, fraud, harassment, libel, conversion, wrongful taking

| Absolute Immunity | Not Absolute Immunity |
|---|---|
| <ul style="list-style-type: none">• planning and observing police raid• plea negotiations• eliciting false testimony• press statements directly related to judicial proceedings• charging decisions, including selective charging | <ul style="list-style-type: none">• statutory removal actions• press statements not closely connected to judicial proceedings• post-trial disposition of property |

Structure of State Law

Ohio follows *Imbler*, 424 U.S. 409 (1976) and its progeny in holding that prosecutors are absolutely immune from lawsuits based on their judicial acts, but not for investigative or administrative acts. Prosecutors are absolutely immune from suits based on their charging decisions, their behavior in plea negotiations, their use of witness testimony, and their statements to the press that are closely related to judicial proceedings (such as sending a copy of the publicly-available criminal complaint to a newspaper). In 1974, pursuant to federal guidance from the Northern District of Ohio, the appellate court also held that prosecutors maintain absolute immunity while they act as observers or advisors to police officers, even when they accompany officers to a crime scene. *Bertram v. Richards*, 358 N.E.2d 1372 (Ohio Ct. App. 1974) (citing *Boyd v. Huffman*, 342 F.Supp. 787 (N.D. Ohio 1972)). While this holding has not been explicitly overruled, it seems in tension with subsequent federal cases such as *Burns v. Reed*, 500 U.S. 478 (1991) which suggest that advice to police during the investigative phase of a case is not protected by absolute immunity.

Two unpublished opinions applied a slightly modified version of the functional test from federal common law; in deciding whether a given action was absolutely immune, the courts inquired whether a layperson would have the authority to perform that action. If the action was only available due to the prosecutorial powers vested in the actor, then they are absolutely immune from suit. Other courts have not adopted this test, and it has not been used since 1993.

In addition to common law absolute immunity for prosecutors, Ohio courts sometimes apply other statutory immunity grounds. For example, the statute creating a cause of action for coercion explicitly immunizes prosecutors conducting good faith plea negotiations or offering immunity from prosecution. Ohio R.C. § 2905.12(B). There is also a governmental immunity statute that protects government employees from being sued for actions performed in their governmental functions unless they acted manifestly outside the scope of their employment or in bad faith, or if civil liability is expressly imposed by another law. Ohio R.C. § 2744.03(6). This immunity is more limited, since it can be pierced with a showing of malice, but some prosecutors nonetheless rely on it in moving to dismiss lawsuits against them.

Relatedly, in two unpublished opinions, Ohio appellate courts ruled on absolute immunity grounds even where the prosecutor had not raised that defense. This suggests that Ohio courts do not consider the defense waived if a prosecutor fails to mention it in the pleadings. No court has decided whether absolute immunity may be waived, and the Ohio Supreme Court does not appear to have ever issued an opinion regarding prosecutor immunity.

Behavior Not Absolutely Immune

Ohio follows the federal framework that prosecutors are not absolutely immune from suit for administrative or investigative acts. As such, an appellate court noted in 1995 that press statements not closely connected to a judicial proceeding could give rise to liability. Additionally, where statutes explicitly authorize actions against prosecutors (such as the removal statute in effect in 1894), there is no absolute immunity. Most recently, the appellate court found that post-trial disposition of seized property is a “quintessentially administrative matter” that only gives rise to qualified immunity. *Kennedy v. Specht*, 119 N.E.3d 792, 795 (Ohio Ct. App. 2018).

Full List of Cases

Graham v. Stein, 18 Ohio C.C. 770 (Ohio Cir. Ct. 1894) (prosecutor allegedly committed several types of fraud, including taking unauthorized 10% commissions of legal fees, keeping money from prisoner accounts, and accepting money in exchange for non-prosecution) (no immunity from statutory removal action)

Ex parte Morris, 28 Ohio C.C. 611 (Ohio Cir. Ct. 1906) (line prosecutor refused to drop charges when court directed him to, since he lacked authorization, and was held in contempt) (no immunity discussed, decided on merits; court could not hold prosecutor in contempt for legal, discretionary decision without written charges and a hearing)

Bertram v. Richards, 358 N.E.2d 1372 (Ohio Ct. App. 1974) (prosecutors helped law enforcement plan a drug raid, which they attended, where plaintiff was arrested and jailed for three days for possessing ordinary cold medicine) (absolute immunity)

Jarvis v. Slaby, 1985 WL 3638 (Ohio Ct. App. 1985) (unpublished) (prosecutor allegedly offered to withdraw arrest warrant if plaintiff would consent to child support wage garnishment, then did not) (absolute immunity)

Hunter v. City of Middletown, 509 N.E.2d 93 (Ohio Ct. App. 1986) (prosecutor allegedly offered to drop baseless charge only if plaintiff would release the prosecutors and city from civil liability, then did not drop charges) (absolute immunity)

Bender v. Diemert, 1993 WL 127091 (Ohio Ct. App. 1993) (unpublished) (prosecutor allegedly collected affidavits from witnesses and intimidated one witness into signing a statement that inculpated plaintiff) (absolute immunity)

Richard v. Rice, 632 N.E.2d 525 (Ohio Ct. App. 1993) (prosecutor allegedly elicited perjury from two witnesses) (absolute immunity)

Carlton v. Davisson, 662 N.E. 2d 1112 (Ohio Ct. App. 1995) (prosecutor allegedly brought baseless charges and made defamatory statements to the press about the case) (absolute immunity)

Tomko v. McFaul, 729 N.E.2d 832 (Ohio Ct. App. 1999) (county prisoner claimed he was wrongfully transferred to municipal jail with overcrowded conditions) (only government immunity discussed, which shielded prosecutors, sheriff, and county)

State v. Williams, 728 N.E.2d 50 (Ohio Municipal Ct. 1999) (prosecutor told plaintiff that if he went to trial on misdemeanor, she would drop that case and bring it as a felony in county court) (statutory immunity; exception to coercion claims for prosecutors conducting plea negotiations)

Reno v. Centerville, 2004 WL 316512 (Ohio Ct. App. 2004) (unpublished) (prosecutor allegedly solicited false information, instructed complaining witness how to wrongfully collect private information, then destroyed file when case was complete) (only governmental immunity discussed, no demonstration of malice)

Hawk v. American Electric Power Co., 2004 WL 1488847 (Ohio Ct. App. 2004) (unpublished) (prosecutor allegedly selectively chose one employee to prosecute and not other equally culpable employees) (absolute immunity)

Barstow v. Waller, 2004 WL 2427396 (Ohio Ct. App. 2004) (unpublished) (prosecutor continued pursuing sexual assault case despite exculpatory DNA evidence) (absolute immunity)

McClellan v. Franklin County Board of Comm'rs, 2009 WL 2438059 (Ohio Ct. App. 2009) (unpublished) (prosecutor met with doctor and police officer to discuss medical record discrepancy and did not disclose it to plaintiff, who was charged and ultimately acquitted for causing her child's injuries) (absolute immunity)

Jopek v. Cleveland, 2010 WL 2136468 (Ohio Ct. App. 2010) (unpublished) (prosecutor visited scene, talked to witnesses, and took measurements before charging police officer who had already been cleared by the police Internal Affairs Division) (absolute immunity)

Bykova v. Cuyahoga County Dept. of Child & Family Services, 2011 WL 917743 (Ohio Ct. App. 2011) (unpublished) (prosecutors pursued complaint and allegedly made false statements against homeschooling mother who complied with education laws) (only governmental immunity discussed, and prosecutors within scope of employment)

Transky v. Ohio Civil Rights Commission, 951 N.E.2d 1106 (Ohio Ct. App. 2011) (assistant attorney general offered to drop housing discrimination complaint if plaintiff landlords would amend their policies, attend training, and pay a fine) (absolute immunity) (overruled on other grounds by *Grybosky v. Ohio Civil Rights Commission*, 2012 WL 3264096 (Ohio Ct. App. 2012) (*en banc*) (unpublished)).

Grybosky v. Ohio Civil Rights Commission, 2011 WL 6938434 (Ohio Ct. App. 2011) (unpublished) (assistant attorney general offered to drop administrative action if landlords complied with conciliation agreement) (absolute immunity)

Rieger v. Marsh, 2011 WL 6930159 (Ohio Ct. App. 2011) (prosecutor allegedly coerced plea bargain by hiding exculpatory information about the timing of events in the police reports) (absolute immunity even though prosecutor did not raise it)

Dehlendorf v. Gahanna, 2015 WL 5310204 (Ohio Ct. App. 2015) (prosecutor allegedly brought baseless, malicious charges for harassment) (absolute immunity even though prosecutor did not raise it)

Field v. Summit County Child Support Agency, 72 N.E.3d 165 (Ohio Ct. App. 2016) (prosecutor who was also head of child support agency allegedly failed to correct false child support debt) (only governmental immunity discussed and granted)

Kennedy v. Specht, 119 N.E.3d 792 (Ohio Ct. App. 2018) (prosecutor destroyed firearms without notice before defendant could move to transfer them to his wife, who had an ownership interest in them) (motion to dismiss reversed; only qualified immunity)

OKLAHOMA

Number of Cases: 3

Year Range: 1926–2005

Causes of Action: malicious prosecution, false arrest, false imprisonment, negligence, civil rights violations, § 1983, professional misconduct

| Absolute Immunity | Not Absolute Immunity |
|---|---|
| <ul style="list-style-type: none">• false arrest• investigative acts, including threats of false charges | <ul style="list-style-type: none">• N/A |

Structure of State Law

Oklahoma has applied absolute immunity for prosecutors facing state lawsuits since 1924. In contrast to *Imbler*, 424 U.S. 409 (1976), the state common law protecting prosecutors includes investigative actions by the prosecutor or even prosecutorial staff. The Oklahoma Government Tort Claims Act, which waives sovereign immunity in many instances, provides that judicial, quasi-judicial, and prosecutorial functions cannot be the basis for a claim under the act.

Behavior Not Absolutely Immune

Oklahoma courts have not addressed prosecutorial behavior that would not be considered absolutely immune.

Full List of Cases

Price v. Cook, 250 P. 519 (Okla. 1926) (prosecutors had plaintiff arrested and then dropped the matter after preliminary review of charges) (absolute immunity)

Powell v. Seay, 560 P.2d 555 (Okla. 1976) (investigator in prosecutor's office allegedly pressured plaintiff to testify and take a lie detector test by threatening false charges against him) (absolute immunity)

White v. State ex rel. Harris, 122 P.3d 484 (Okla. Civ. App. 2005) (prosecutor prepared an arrest warrant without physical description, resulting in the wrong person getting arrested) (absolute and statutory immunity)

OREGON

Number of Cases: 5

Year Range: 1924–2020

Causes of Action: declaratory relief, malicious prosecution, infliction of severe emotional distress, invasion of privacy, § 1983, false imprisonment, negligence

| Absolute Immunity | Not Absolute Immunity |
|--|--|
| <ul style="list-style-type: none">• charging decisions, including malicious charging• initiating false arrest | <ul style="list-style-type: none">• press statements not closely related to judicial proceedings• investigative actions before anticipated litigation |

Structure of State Law

Oregon generally follows *Imbler*, 424 U.S. 409 (1976) and its progeny in assessing whether a prosecutor acted as a judicial advocate or an investigator or administrator—only those actions taken as an advocate are absolutely immune from suit. When confronted with press statements made by prosecutors, the Oregon Court of Appeals chose not to decide whether the state law analysis differed from the federal analysis, merely holding that press statements will only be protected by absolute immunity if the defendants can show that the statements had a sufficient relationship to judicial proceedings. For other traditional prosecutorial functions such as charging and filing arrest warrants, courts hold prosecutors immune regardless of their motive.

Behavior Not Absolutely Immune

In *Meyer*, the assistant attorney general conceded that investigative actions taken without anticipation of litigation (in this case, taken for the purposes of administrative remedies such as placing a government employee on leave) are not protected by absolute immunity. *Meyer v. Sugahara*, 466 P.3d 90 (Or. Ct. App. 2020). As addressed above, the Oregon Court of Appeals has also declined to define the exact limits of immunity for press statements; defamation cases may proceed against prosecutors who make false statements that are not sufficiently tied to a judicial proceeding.

Full List of Cases

Watts v. Gerking, 228 P. 135 (Or. 1924) (prosecutor allegedly brought charges based on known perjury by police officer) (absolute immunity)

Jackson v. Multnomah County, 709 P.2d 1153 (Or. Ct. App. 1985) (prosecutor filed warrant against woman with several aliases, and an unrelated woman with one of those names was wrongly arrested) (absolute immunity)

Beason v. Harcleroad, 805 P.2d 700 (Or. Ct. App. 1991) (when prosecutors learned plaintiff was gay, they secured a baseless indictment and made false statements to the media that he had AIDS and was spreading it to unknowing partners) (absolute immunity for indictment, survives motion for judgment on the pleadings for press statements)

Heusel v. Multnomah County District Attorney's Office, 989 P.2d 465 (Or. Ct. App. 1999) (law student intern for prosecutor filed arrest warrant based on restraining order that had expired) (absolute immunity)

Meyer v. Sugahara, 466 P.3d 90 (Or. Ct. App. 2020) (assistant attorney general pursued investigation of lottery employees and placed them on administrative leave) (defendant concedes no absolute immunity for investigative conduct not anticipating litigation)

PENNSYLVANIA

Number of Cases: 14

Year Range: 1952–2017

Causes of Action: libel, slander, false arrest, malicious prosecution, illegal detention, invasion of privacy, appeal from contempt order, denial of civil rights, violation of constitutional rights, willful and gross negligence, intentional infliction of emotional distress, § 1983, § 1985

| Absolute Immunity | Not Absolute Immunity |
|---|---|
| <ul style="list-style-type: none">• eliciting false testimony• press statements• charging decisions | <ul style="list-style-type: none">• violations of section 603 of Mental Health Act• misdemeanor misconduct actions against district attorney |

Structure of State Law

Pennsylvania maintains state immunity law that is independent of *Imbler*, 424 U.S. 409 (1976) and more protective of prosecutors. *Imbler* and its progeny hold that prosecutors are absolutely immune for their actions as judicial advocates, but not as investigators or administrators—press conferences fall outside this protection, for example. *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993). Pennsylvania courts, on the other hand, consider prosecutors “high public officials” who are protected by an absolute official immunity for actions taken in the course of their official duties, including investigative and administrative actions like giving press statements or recommending personnel changes. Some Pennsylvania judges have objected to this practice in concurrences and dissents, suggesting that *Imbler* and common law require a narrower absolute immunity, but they remain a minority. See *Schroeck v. Pennsylvania State Police*, 362 A.2d 486 (1976) (J. Crumlish, concurring in part) (“I do not feel that the recent U.S. Supreme Court case of *Imbler v. Pachtman* [] grants the blanket immunity contemplated by the majority.”) An “absolute privilege” also extends to any statements made by a high public official that are closely related to their official duties, even for a statement by an attorney general that an assistant prosecutor was a dangerous communist who should be fired.

Because Pennsylvania permits private citizens to file criminal complaints, which are then reviewed by the district attorney and either pursued or dropped, there is a category of cases where people have sued to move the charges they filed forward. A prosecutor’s decision not to act on a private complaint is only reversible if the complainant shows either (1) that the prosecutor

refused to move forward based on a legal evaluation that the complaint was insufficient despite a *prima facie* cause of action, or (2) that the prosecutor abused their discretion in refusing to move forward for policy reasons, insofar as the failure to bring charges was patently discriminatory, arbitrary, or pretextual. *See, e.g., Com. v. McGinley*, 673 A.2d 343 (Pa. Super. Ct. 1996); *Com. v. Cooper*, 710 A.2d 76 (Pa. Super. Ct. 1998); *In re Wilson*, 879 A.2d 199, 215 (Pa. Super. Ct. 2005). Those cases are not included here because they are concerned with the revival of a criminal complaint rather than any prosecutorial liability.

Behavior Not Absolutely Immune

Legislation overrides absolute immunity in at least two instances in Pennsylvania. First, the Mental Health and Mental Retardation Act of 1966 explicitly provided that “no person” would receive more than limited immunity for good faith and reasonable cause for violations of Section 603, and that even those immunities would not apply for claims based on gross negligence or incompetence. *Freach v. Commonwealth*, 370 A.2d 1163 (Pa. 1977). Second, a Pennsylvania statute makes certain misconduct by a district attorney (corrupt payment or willful and gross negligence in executing duties) a misdemeanor punishable by jail or fine, and provides that “the party aggrieved” by the misconduct may initiate such an action against the district attorney. 16 P.S. § 1405. Courts have held that this only applies to harm personally caused by the district attorney, rather than negligent supervision of police or subordinates. Courts have not decided whether it would apply to an assistant district attorney, although a provision in the statute to declare the office vacant upon a finding of guilt suggests that it only applies to the elected district attorney.

Full List of Cases

Matson v. Margiotti, 88 A.2d 892 (Pa. 1952) (attorney general publicly accused assistant district attorney of being a communist and directed district attorney to fire her) (absolute “high public official” privilege for statements made to both press and DA)

McCormick v. Specter, 275 A.2d 688 (Pa. Super. Ct. 1971) (prosecutor gave public statements about ongoing investigation of potentially criminal business dealings) (absolute “high public official” privilege for statements)

Schroeck v. Pennsylvania State Police, 362 A.2d 486 (Pa. Commw. Ct. 1976) (prosecutors allegedly violated civil rights) (dismissed on jurisdictional grounds but reiterates “high public official” absolute immunity)

Freach v. Commonwealth, 370 A.2d 1163 (Pa. 1977) (prosecutors negligently permitted release of mentally ill man with history of violence against children from hospitalization. The man then

got a job as a police officer and used his authority to kill two children.) (legislation trumps “high public official” immunity, so suit survives motion to dismiss)

In re Ranck, 457 A.2d 556 (Pa. Super. Ct. 1983) (prosecutors allegedly violated speedy trial rule and deprived creditors/police of anticipated money by settling with defendants) (decided on standing; did not reach immunity)

Lynch v. Johnston, 463 A.2d 87 (Pa. Commw. Ct. 1983) (prosecutor was present when forgery charges were dismissed, then dropped subsequent forgery charge initiated by state trooper) (official immunity, no discussion of absolute)

Mosley v. Observer Pub. Co., 619 A.2d 343 (Pa. Super. Ct. 1993) (prosecutor allegedly made false statements in search warrant application and to press) (absolute privilege for statements made by high public officials if closely related to their duties)

Pickering v. Sacavage, 642 A.2d 555 (Pa. Commw. Ct. 1994) (prosecutor told the press that plaintiff and media had withheld evidence from coroner’s inquest, delaying finding that death was suicide rather than homicide) (absolute privilege for statements by high public officials within the scope of their duties)

Miller v. Nelson, 768 A.2d 858 (Pa. Super. Ct. 2001) (prosecutor declined to prosecute tenant for bad check in a landlord-tenant dispute despite landlord’s requests) (absolute immunity)

Durham v. McElynn, 772 A.2d 68 (Pa. 2001) (plaintiff alleged that prosecutor elicited perjury at trial and prevented him from calling a necessary witness) (absolute “high public official” immunity)

Leventry ex rel. Com. v. Tulowitzki, 804 A.2d 1281 (Pa. Commw. Ct. 2002) (prosecutor allegedly failed to stop police from conducting illegal electronic surveillance) (insufficient to survive motion to dismiss; must allege personal causation by DA, not supervisory negligence)

Wilkins v. Marsico, 903 A.2d 1281 (Pa. Super. Ct. 2006) (prosecutor allegedly elicited perjury and refused to turn over transcripts necessary for appeal) (insufficient facts alleged against chief DA to survive motion to dismiss)

Szarewicz v. Zappala, 2014 WL 10988480 (Pa. Super. Ct. 2014) (unpublished) (prosecutor allegedly conspired to hide habeas petition and keep it from being docketed for 4 years) (insufficient facts alleged to show willful or gross negligence by prosecutor)

Rouse v. Williams, 2017 WL 3687749 (Pa. Commw. Ct. Aug. 28, 2017) (unpublished) (prosecutors allegedly were aware of illegally seized property not being returned to plaintiff) (official immunity, no discussion of absolute)

RHODE ISLAND

Number of Cases: 5

Year Range: 1964–2020

Causes of Action: negligence, false arrest, false imprisonment, malicious prosecution, abuse of process, private nuisance, trespass, intentional infliction of emotional distress

| Absolute Immunity | Not Absolute Immunity |
|---|--|
| <ul style="list-style-type: none">• failure to act• charging decisions, including wrongful charges• negligent record-keeping• failure to comply with victim's rights statute | <ul style="list-style-type: none">• acts that are not judicial or quasi-judicial |

Structure of State Law

Rhode Island formally adopted the common law of prosecutorial absolute immunity in 1964, when it declared that judicial officers are immune from suit for their official acts regardless of their subjective motive, and that attorneys general are judicial officers insofar as they enforce the criminal laws. The legislature waived sovereign immunity for tort suits that seek less than a certain amount of damages or are based on bad faith actions by public officials, but the courts have found that this law does not abridge the common law judicial immunity for prosecutors. R.I. G.L. 1956 § 9-31-1. Likewise, the legislature created a Victims Bill of Rights and a victim's rights amendment to the constitution, neither of which created a cause of action or stated that they override judicial immunity. R.I. G.L. 1956 § 12-28-1 et seq.; R.I. Const. Art. I § 23. The Rhode Island Supreme Court held that unless the legislature specifies a law is meant to supersede the well-established common law of judicial immunity, it will interpret laws in the context of absolute immunity for judicial acts by public officials like prosecutors. This protection extends to non-prosecutors who have quasi-judicial responsibilities, such as a town solicitor vested with the responsibility to enforce zoning and building codes by prosecuting violations in the trial court.

Behavior Not Absolutely Immune

Rhode Island adopts a version of the functional analysis from *Imbler*, 424 U.S. 409 (1976): a prosecutor is only absolutely immune from suit for actions taken within the scope of their quasi-judicial duties. Acts that are not considered judicial would not be protected. However, Rhode Island courts have not found any prosecutor to be liable for official acts that would be considered non-judicial, such as the administrative or investigative acts the federal common law conceives of as beyond the scope of immunity.

Full List of Cases

Suitor v. Nugent, 199 A.2d 722 (R.I. 1964) (attorney general allegedly secured a baseless indictment motivated by malice) (absolute immunity)

Calhoun v. City of Providence, 390 A.2d 350 (R.I. 1978) (man erroneously arrested for unpaid fines he in fact paid months before) (absolute immunity for prosecutor and judge, but suit permitted to proceed against state based on possible clerk actions)

Beaudoin v. Levesque, 697 A.2d 1065 (R.I. 1997) (prosecutor allegedly pursued wrongful restraining order enforcement case while representing the defendant's wife in the divorce proceedings) (absolute immunity)

Bandoni v. State, 715 A.2d 580 (R.I. 1998) (prosecutor failed to keep victims apprised of court dates and resolved case without giving them an opportunity to speak or request restitution) (absolute immunity, unless legislature rewrites victims' rights legislation to create cause of action)

Diorio v. Hines Road, LLC, 226 A.3d 138 (R.I. 2020) (town solicitor failed to bring enforcement action against man with problematic retaining wall) (absolute immunity)

SOUTH CAROLINA

Number of Cases: 1

Year Range: 2001

Causes of Action: § 1983, false arrest, malicious prosecution, negligence

| Absolute Immunity | Not Absolute Immunity |
|--|--|
| <ul style="list-style-type: none">• charging decisions, including unsupported charges• judicial and quasi-judicial acts | <ul style="list-style-type: none">• investigative or administrative acts such as advising police on investigations |

Structure of State Law

For federal claims, South Carolina applies the federal law regarding prosecutor immunity as set out in *Imbler*, 424 U.S. 409 (1976) and its progeny. In the only case to address this issue, the South Carolina Court of Appeals held that suits against prosecutors in their individual capacities are barred by the common law absolute immunity for prosecutors, regardless of the prosecutor's motive. Suits against prosecutors in their official capacities under the South Carolina Tort Claims Act are addressed by sovereign immunity, which a prosecutor must affirmatively assert, and covers "judicial" and "quasi-judicial" acts.

Behavior Not Absolutely Immune

South Carolina recognizes the *Imbler* rule that prosecutors performing non-judicial functions may not be entitled to absolute immunity. Examples of non-judicial functions include prosecutors providing legal advice to police regarding proper investigative tactics, prosecutors presenting cases to grand juries, and prosecutors participating in press conferences.

Full List of Cases

Williams v. Condon, 553 S.E.2d 496 (S.C. Ct. App. 2001) (prosecutors brought unsupported charges against employee who encouraged other employees to sue for back pay) (absolute immunity)

SOUTH DAKOTA

Number of Cases: 0

Year Range: N/A

Causes of Action: N/A

| Absolute Immunity | Not Absolute Immunity |
|---|---|
| <ul style="list-style-type: none">• N/A | <ul style="list-style-type: none">• N/A |

Structure of State Law

No cases in South Dakota have raised the issue of absolute prosecutorial immunity.

Behavior Not Absolutely Immune

No cases in South Dakota have discussed conduct outside the bounds of absolute prosecutorial immunity.

Full List of Cases

N/A

TENNESSEE

Number of Cases: 5

Year Range: 1979–2019

Causes of Action: malicious prosecution, conspiracy to obstruct justice, negligent misrepresentation, prosecutorial misconduct, defamation, false arrest and imprisonment, abuse of process, slander, libel, intentional infliction of emotional distress, outrageous and extreme conduct

| Absolute Immunity | Not Absolute Immunity |
|---|---|
| <ul style="list-style-type: none">• unnecessary delays in prosecution• withholding exculpatory evidence• charging decisions, including retaliatory charging• misrepresenting facts in court• eliciting false testimony• false arrest• issuing erroneous warrant | <ul style="list-style-type: none">• potentially: defamatory statements made to press about ongoing cases• investigative or administrative acts |

Structure of State Law

Since 1979, Tennessee has applied the immunity principles from *Imbler*, 424 U.S. 409 (1976) to both state and federal actions, meaning that prosecutors are immune from lawsuits based on their conduct as advocates. Investigative and administrative actions fall outside the *Imbler* absolute immunity protections. The appeals court has held that any suits arising from the initiation or pursuit of a prosecution, or in presenting the state's case, are barred by absolute immunity regardless of the prosecutor's motives.

Behavior Not Absolutely Immune

Tennessee has state sovereign immunity that may also prohibit lawsuits seeking monetary damages against prosecutors, with exceptions for malicious torts. Absolute prosecutorial immunity extends past that, prohibiting relief even for malicious torts. The courts have not decided whether prosecutorial absolute immunity extends to press statements about future or ongoing cases.

Full List of Cases

Willett v. Ford, 603 S.W.2d 143 (Tenn. Ct. App. 1979) (prosecutor initiated unusual extortion charges against an attorney who threatened to sue his friend) (absolute immunity)

Shell v. State, 893 S.W.2d 416 (Tenn. 1995) (prosecutors allegedly pressured children into reporting sexual abuse, withheld exculpatory evidence from grand jury, destroyed records of interviews with children, and distributed children's names to private attorneys) (decided on statute of limitations grounds)

Storey v. Nichols, 49 S.W.3d 288 (Tenn. Ct. App. 2000) (prosecutors allegedly delayed the case for years, elicited false testimony, misrepresented facts to the court, and withheld exculpatory evidence) (absolute immunity)

Simmons v. Gath Baptist Church, 109 S.W.3d 370 (Tenn. Ct. App. 2003) (prosecutor allegedly conspired to charge church employee in retaliation for his reports of sexual abuse by church leaders) (absolute immunity and statute of limitations)

Burns v. State, 601 S.W.3d 601 (Tenn. Ct. App. 2019) (executive official privilege did not apply to prosecutor's press statements about alleged perjury by a police officer, but court did not rule on whether absolute prosecutorial immunity barred the claim)

TEXAS

Number of Cases: 18

Year Range: 1981–2019

Causes of Action: tortious interference with business relations, invasion of privacy, libel, slander, abuse of process, alienation of right, § 1983, violations of Texas Tort Claims Act, violations of Texas Constitution, malicious prosecution, defamation, intentional infliction of emotional distress, conspiracy, breach of contract, fraud, § 1985

| Absolute Immunity | Not Absolute Immunity |
|--|--|
| <ul style="list-style-type: none">• charging decisions• initiating an arrest or search• presenting a case• failure to act• eliciting false testimony• plea bargaining• withholding exculpatory evidence• grand jury proceedings | <ul style="list-style-type: none">• giving legal advice to public officials• press statements after case is concluded |

Structure of State Law

Texas had developed a state common law of immunity for prosecutors before the Supreme Court's decision in *Imbler*, 424 U.S. 409 (1976), but once federal courts started addressing prosecutorial immunity, Texas explicitly relied on the federal law, which is more protective. Texas common law had defined "quasi-judicial" immunity to require good faith and an action in the scope of one's authority. Now, prosecutors have absolute immunity for actions that are closely tied to their judicial functions, regardless of alleged malice. Prosecutors only have qualified immunity for administrative or investigative actions like press statements. In 2012, the first time someone sued over failure to disclose exculpatory evidence, the Texas appellate court applied federal law in finding that decisions about evidence disclosure are closely tied to the judicial process and thus absolutely immune from suit.

Behavior Not Absolutely Immune

Texas courts have found that absolute immunity does not apply for administrative or investigative acts. Administrative acts include giving legal advice to public officials and, in some circumstances, giving press statements. Some press statements may be considered closely tied to the judicial function, but a false statement given over a week after the case had concluded only triggered qualified immunity in *Oden v. Reader*, 935 S.W.2d 470 (Tex. App. 1996).

Full List of Cases

Miller v. Curry, 625 S.W.2d 84 (Tex. App. 1981) (prosecutor did not act when women came to office in fear from husbands, and children brought wrongful death suit when they were each killed by their husbands) (absolute immunity)

Wyse v. Dep't of Public Safety, 733 S.W.2d 224 (Tex. App. 1986) (prosecutor requested investigation into police officers that resulted in their firing) (immune because acting in good faith in scope of quasi-judicial authority)

Kimmell v. Leoffler, 791 S.W.2d 648 (Tex. App. 1990) (prosecutor allegedly brought case without jurisdiction, failed to show up for some hearings, and made disparaging statements in court) (absolute immunity)

Font v. Carr, 867 S.W.2d 873 (Tex. App. 1993) (prosecutor advised sheriff to stop accepting bonds from bail bondsman who was insolvent) (only qualified immunity would apply, and no showing of good faith so prosecutor does not prevail on summary judgment)

Bradt v. West, 892 S.W.2d 56 (Tex. App. 1994) (prosecutor allegedly brought baseless contempt charge when judge should have recused) (absolute immunity)

Oden v. Reader, 935 S.W.2d 470 (Tex. App. 1996) (prosecutor falsely stated convicted insurance vendor had lost license) (only qualified immunity, and prosecutor wins summary judgment on good faith mistake)

Clawson v. Wharton County, 941 S.W.2d 267 (Tex. App. 1996) (families of drunk driving victims sued prosecutor for allegedly taking bribes not to prosecute the specific drunk drivers, who had been arrested before) (absolute immunity)

Hawkins v. Walvoord, 25 S.W.3d 882 (Tex. App. 2000) (prosecutors brought contempt charges against attorney who objected to indigent defense plan and did not appear) (absolute immunity)

Johnson v. Elliot, 2002 WL 54118 (Tex. App. 2002) (unpublished) (prosecutor allegedly elicited known perjury from a police officer) (absolute immunity)

Grable v. Buess, 2002 WL 31662573 (Tex. App. 2002) (unpublished) (prosecutor allegedly threatened to arrest man's wife and bring unsupported charges if he did not plead guilty) (absolute immunity)

Gidvani v. Aldrich, 99 S.W.3d 760 (Tex. App. 2003) (prosecutor delayed Hindu religious tradition regarding cremation for autopsy given suspicious circumstances of death) (prosecutor only asserted official immunity, won summary judgment)

Brown v. Lubbock County Comm. Court, 185 S.W.3d 499 (Tex. App. 2005) (prosecutors did not provide access to an attorney before the indictment issued) (absolute immunity)

Charleston v. Pate, 194 S.W.3d 89 (Tex. App. 2006) (prosecutor was not properly appointed and did not take oath of office, but tried cases) (absolute immunity)

Esparza v. Safety Nat'l Casualty Corp., 247 S.W.3d 288 (Tex. App. 2007) (District Attorney's office gave County Attorney's office authority over bond forfeiture actions) (only sovereign immunity addressed, dismissed with prejudice)

Martinez v. State, 2011 WL 861059 (Tex. App. 2011) (unpublished) (prosecutor allegedly reneged on plea bargain arrangement by opposing credit for time served) (absolute immunity)

Charleston v. Allen, 420 S.W.3d 134 (Tex. App. 2012) (prosecutor allegedly maliciously withheld the recording of an exculpatory 911 call) (absolute immunity)

Leshner v. Coyel, 435 S.W.3d 423 (Tex. App. 2014) (prosecutor allegedly presented false and improper information to grand jury) (absolute immunity)

Robbins v. Lostracco, 578 S.W.3d 130 (Tex. App. 2019) (district attorney failed to pay contracted civil forfeiture attorney according to their contract) (only sovereign immunity addressed, dismissed without prejudice³)

³ The court specified that the plaintiff could cure the sovereign immunity problem by obtaining a legislative resolution granting him permission to sue the District Attorney's office (thus functionally the county) for money damages.

UTAH

Number of Cases: 0

Year Range: N/A

Causes of Action: N/A

| Absolute Immunity | Not Absolute Immunity |
|---|---|
| <ul style="list-style-type: none">• N/A | <ul style="list-style-type: none">• N/A |

Structure of State Law

The only case that might have involved absolute prosecutorial immunity centered around a DCFS investigator who allegedly brought multiple harassing investigations despite no findings of child abuse. The court granted only qualified immunity to the investigator, with absolute immunity for testimony at hearings about the investigation. The court noted that the Utah Supreme Court has not provided guidance on prosecutorial immunity. *Cline v. State D.C.F.S.*, 142 P.3d 127 (Utah Ct. App. 2005).

Behavior Not Absolutely Immune

No cases in Utah have involved a finding that pierced absolute prosecutor immunity.

Full List of Cases

N/A

VERMONT

Number of Cases: 6

Year Range: 1972–2019

Causes of Action: false arrest, malicious prosecution, abuse of process, conspiracy, conversion, interference with contractual relations, defamation, intentional infliction of emotional distress, intentional interference with employment, and negligent hiring, training, and retention

| Absolute Immunity | Not Absolute Immunity |
|--|---|
| <ul style="list-style-type: none">• charging decisions, including malicious charging• statements in court• negligent failure to dismiss• plea bargaining• administrative responses to police dishonesty• other acts in scope of authority | <ul style="list-style-type: none">• out-of-court statements outside scope of authority• administrative and investigative actions, potentially including negligent hiring |

Structure of State Law

Vermont applies slightly different immunity standards for federal claims and state claims. For federal claims, state courts rely on federal law that primarily considers whether the prosecutor's action was functionally judicial as opposed to administrative or investigative. For state claims, the courts evaluate whether the action taken was within the scope of authority as the chief law enforcement officer—this includes some conduct that would not be protected under federal law, such as publicly disclosing nonprivileged information about a police officer's job performance. It also encompasses behavior that clearly would be protected under federal law, such as malicious charging or presenting false evidence in court. In both the federal and state analyses, the motive of the prosecutor is irrelevant in determining whether absolute immunity applies.

Behavior Not Absolutely Immune

Under federal law, prosecutors are not absolutely immune from suit for actions taken in their capacity as administrators or investigators. Under Vermont law, prosecutors are not absolutely immune from suit for actions taken outside the scope of their authority as prosecutors—this potentially includes out-of-court statements unrelated to law enforcement, negligent hiring, and interference with contract, if the plaintiff can show that the actions taken were not related to the prosecutor’s duties, or were beyond their authority.

Levinsky, 442 A.2d 1277 (Vt. 1982), suggests that absolute immunity could potentially be waived. In that case, the defendants did not assert it in their answer to the complaint, and immediately moved to dismiss for failure to state a claim based on absolute immunity. The court found that defendants needed to raise the defense in their answer and move for judgment on the pleadings or summary judgment.

Full List of Cases

Polidor v. Mahady, 287 A.2d 841 (Vt. 1972) (prosecutor charged man who was held for seven months on statutorily defective facts) (absolute immunity)

Levinsky v. Diamond, 442 A.2d 1277 (Vt. 1982) (prosecutor allegedly fabricated charges and falsely accused plaintiff both in court and in a press conference of being a fugitive from justice) (absolute immunity)

Muzzy v. State by & through Rutland County State’s Attorney, 583 A.2d 82 (Vt. 1990) (overruled by *O’Connor v. Donovan*, 48 A.3d 584 (Vt. 2012) to the extent it distinguished attorneys general and state’s attorneys) (prosecutor agreed to drop a charge in connection with a plea agreement, then neglected to dismiss it and plaintiff was arrested pursuant to the active charge) (absolute immunity)

Huminski v. Lavoie, 787 A.2d 489 (Vt. 2001) (dismissal reversed where lower court did not consider whether defamation, interference with contract, and negligent hiring were based on investigative or administrative functions)

O’Connor v. Donovan, 48 A.3d 584 (Vt. 2012) (prosecutor who had previously worked as criminal defense attorney criticized police officer, reported him to superiors, declined to seek charges based on his warrants, spoke poorly of him to State Police who were considering hiring him, and told other prosecutors and defense attorneys that he was dishonest) (absolute immunity determined at summary judgment after discovery)

Cornelius v. Barrett-Hatch, 2019 WL 3761430 (Vt. 2019) (unpublished) (prosecutor brought unsupported charges of aiding an escaped prisoner, allegedly out of malice) (absolute immunity)

VIRGINIA

Number of Cases: 3

Year Range: 1997–2017

Causes of Action: § 1983, defamation, intentional infliction of emotional distress

| Absolute Immunity | Not Absolute Immunity |
|---|---|
| <ul style="list-style-type: none">• charging decisions, including malicious charging• any other acts intimately associated with the judicial phase of the criminal process | <ul style="list-style-type: none">• defamatory statements about former employee unrelated to criminal cases• acts taken in clear absence of all jurisdiction |

Structure of State Law

Virginia assesses federal claims against prosecutors under federal absolute immunity law, and state claims under Virginia’s common law. The federal law is based on *Imbler*, 424 U.S. 409 (1976) and its progeny, stating that prosecutors are absolutely immune from suit for actions taken in their roles as judicial advocates, regardless of motive, but not for administrative or investigative actions. The state common law appears slightly more restrictive. Non-judges may receive quasi-judicial immunity where they:

1. performed judicial functions,
2. acted within their jurisdiction, and
3. acted in good faith.

In the few cases applying this standard, courts found prosecutors immune where they acted within the scope of their prosecutorial duties to perform an action intimately associated with the judicial phase of the criminal process. There appears to be tension between the characterization of the immunity as “quasi-judicial” or “absolute” and the consideration of good faith, which the Virginia Supreme Court has not resolved—within opinions, it refers to “quasi-judicial” immunity as requiring good faith or as absolute. In *Andrews*, 585 S.E.2d 780 (Va. 2003), the application of quasi-judicial immunity precluded a suit based on malicious charging, so we presume the Court holds the immunity is absolute when applied to prosecutors performing judicial functions. Charging decisions are considered judicial, while defamatory statements unrelated to criminal cases are not.

Behavior Not Absolutely Immune

For federal claims, Virginia courts apply the federal law, which suggests that prosecutors are not absolutely immune from suit for actions that are purely investigative or administrative, rather than judicial.

For state claims, prosecutors are not immune from suit if they act in the clear absence of all jurisdiction. They also may not assert quasi-judicial immunity for acts that are non-judicial in nature, such as defamatory statements about a former employee unrelated to any criminal case. There is a suggestion that quasi-judicial immunity also requires acting in good faith, but in *Andrews*, where charging was held to be intimately connected to judicial proceedings, an allegation of malice was immaterial.

Full List of Cases

Lux v. Commonwealth, 484 S.E.2d 145 (Va. Ct. App. 1997) (prosecutor did not need to be disqualified for a conflict of interest in criminal case because absolute immunity barred recovery in the federal civil rights case)

Andrews v. Ring, 585 S.E.2d 780 (Va. 2003) (prosecutor allegedly brought malicious charges regarding storage tank construction at school) (quasi-judicial immunity)

Viers v. Baker, 841 S.E.2d 857 (Va. 2020) (newly elected prosecutor allegedly told administrative assistant her job was safe, fired her for failing to keep his office clean, then lied in public claiming she'd deleted files from his computer) (facts alleged for intentional infliction of emotional distress claim, survives motion to dismiss on defamation claim)

WASHINGTON

Number of Cases: 13

Year Range: 1935–2017

Causes of Action: negligence, § 1983, malicious prosecution, outrage, wrongful death, emotional distress, personal injury, false arrest, false imprisonment

| Absolute Immunity | Not Absolute Immunity |
|---|---|
| <ul style="list-style-type: none">• charging decisions, including malicious charges and negligent errors• using threat of charges to force hospitalization, then negligently failing to act• threatening retaliatory charges for refusal to waive certain rights• negligent investigation• failure to initiate license revocation• failure to send recommendations to parole board• statements made while conferring with witness in case preparation• instructing witness to gather evidence and report no-contact violations | <ul style="list-style-type: none">• prosecutorial actions manifestly beyond the authority of the office• investigative or administrative actions |

Structure of State Law

Washington follows the principles of absolute immunity set out in federal common law without drawing distinctions for state law. Actions considered prosecutorial (in the capacity of a judicial advocate) are absolutely immune from suit regardless of motive, while actions that look more like law enforcement investigation or administration are not.

Washington courts have found that the scope of prosecutorial duties includes charging decisions, plea bargaining, and certain investigative actions in preparation for trial. In one case,

the court held that advising police about whether to arrest was absolutely immune, but that case was decided before the Supreme Court's decision in *Burns v. Reed*, 500 U.S. 478 (1991). In an unpublished opinion since *Burns*, the court held that advice to law enforcement on how to approach an arrest was not absolutely immune, suggesting that the rule regarding police advice changed when *Burns* was issued.

The absolute immunity protection for prosecutors extends both upwards and downwards: counties and states cannot be liable for actions that are immunized for the prosecutors themselves, and prosecutorial employees are not liable for actions which would receive absolute immunity if performed by a prosecutor.

Behavior Not Absolutely Immune

Actions beyond the scope of prosecutorial duties are not protected by absolute immunity. This includes traditional law enforcement functions, such as physically arresting someone, as well as investigative and administrative functions that are not intimately connected to the judicial process. The only example where a court found this exception met was in an unpublished case where a prosecutor advised police about how to arrest a mentally ill woman with a young child.

Full List of Cases

Anderson v. Manley, 43 P.2d 39 (Wash. 1935) (prosecutor brought charges against plaintiff for unlawful game hunting based on one informant) (absolute immunity)

Mitchelle v. Steele, 236 P.2d 349 (Wash. 1951) (prosecutor threatened he wouldn't set hearing for four months unless defendant agreed to be evaluated at a hospital, and offered to drop charges if he was free from mental illness. Man was held at hospital for a month, then evaluated, released, and charges dropped.) (absolute immunity)

Creelman v. Svenning, 410 P.2d 606 (Wash. 1966) (county and state immune to same extent as prosecutor, who is absolutely immune for negligent investigation and bringing charges without probable cause)

Loveridge v. Schillberg, 561 P.2d 1107 (Wash. Ct. App. 1977) (prosecutors did not send recommendations to parole board, who could not make any decisions in the absence of the prosecutor recommendations) (absolute immunity)

Kuchenreuther v. Whatcom County, 604 P.2d 499 (Wash. Ct. App. 1979) (prosecutors allegedly brought baseless, harassing theft charges) (absolute immunity)

Filan v. Martin, 684 P.2d 769 (Wash. Ct. App. 1984) (prosecutors allegedly conspired with judge to “keep the constitution from the jury”) (absolute immunity)

Hartley v. State, 698 P.2d 77 (Wash. 1985) (*en banc*) (prosecutors failed to initiate license revocation for drunk driver who later killed someone driving drunk) (absolute immunity)

Coffel v. Clallam County, 735 P.2d 686 (Wash. Ct. App. 1987) (prosecutors advised sheriffs that man demolishing a building over another man’s objection was a civil matter, not a criminal one) (absolute immunity)

Collins v. King County, 742 P.2d 185 (Wash. Ct. App. 1987) (prosecutor assured domestic violence victim her husband would be arrested, but police did not act, woman and one child were killed, and remaining children were hurt) (absolute immunity)

Tanner v. City of Fed. Way, 997 P.2d 932 (Wash. Ct. App. 2000) (prosecutor erroneously filed indictment for never-returned video rental in adult court when defendant was 17) (absolute immunity)

Musso-Escude v. Edwards, 4 P.3d 151 (Wash. Ct. App. 2000) (prosecutor offered to drop charges if plaintiff waived civil lawsuits against officers, then added charges when she refused) (absolute immunity)

McCarthy v. County of Clark, 376 P.3d 1127 (Wash. Ct. App. 2016) (prosecutor allegedly threatened domestic violence witness with false report charges if she recanted and instructed her to gather supporting evidence such as her husband’s fitness club records) (absolute immunity)

Monte v. Clark County, 197 Wash. App. 1037 (Wash. Ct. App. 2017) (unpublished) (prosecutor told law enforcement he wanted to charge woman for harming her child during psychotic episode 4 years earlier; police asked how they should go about arrest, and prosecutor advised) (no absolute immunity, survives motion to dismiss)

WEST VIRGINIA

Number of Cases: 1

Year Range: 2011

Causes of Action: retaliatory discharge, due process violations, intentional infliction of emotional distress

| Absolute Immunity | Not Absolute Immunity |
|--|---|
| <ul style="list-style-type: none">• charging decisions | <ul style="list-style-type: none">• investigative or administrative actions |

Structure of State Law

West Virginia relies on *Imbler*, 424 U.S. 409 (1976) and *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) for the premise that prosecutors are absolutely immune from suit for actions performed in their role as advocates for the state, and not absolutely immune from suit for actions that are investigatory or administrative. The court also refers to the Litigation Handbook on West Virginia Rules of Civil Procedure, which specifies that prosecutors are “entitled only to qualified immunity when performing actions in an investigatory or administrative capacity.” In a case about whether appointed defense counsel can be sued for malpractice, the court noted that the common law absolute immunity protection for prosecutors is extended to appointed counsel under West Virginia Code § 29–21–20. *Mooney v. Frazier*, 693 S.E.2d 333, fn.12 (W.Va. 2010).

In the only application of these principles to a West Virginia suit against a prosecutor, the appellate court upheld a finding of absolute immunity from a retaliatory discharge claim, where a legal secretary claimed she was fired for not taking special cautions with the files of members of a football team. The legal secretary claimed the prosecutor was wrongly “protecting” members of the team when they should be charged. The court held that because charging decisions are prosecutorial, the prosecutor was entitled to absolute immunity on that claim. The remaining causes of action failed on their merits, without an immunity analysis.

Behavior Not Absolutely Immune

We identified no examples where a West Virginia court explicitly found that a prosecutor action was not absolutely immune from suit. Citing *Imbler* and *Buckley*, West Virginia state courts have indicated that investigative or administrative functions are potentially reachable by civil suits. However, an arguably administrative function (alleged retaliatory discharge) was treated as prosecutorial.

Full List of Cases

Wilcox v. Conley, 2011 WL 8192211 (W.Va. 2011) (unpublished) (legal secretary brought several actions against prosecutor after being fired)(absolute immunity)

WISCONSIN

Number of Cases: 2

Year Range: 1978–1991

Causes of Action: § 1983, negligence

| Absolute Immunity | Not Absolute Immunity |
|---|---|
| <ul style="list-style-type: none">• judicial actions• negligent enforcement of erroneous bench warrant | <ul style="list-style-type: none">• investigative actions like seeking school closing |

Structure of State Law

The Wisconsin Supreme Court primarily relies on *Imbler*, 424 U.S. 409 (1976) for the holding that prosecutors perform judicial functions and thus are entitled to absolute immunity for conduct that falls under that definition. This protection does not extend to administrative or investigatory functions.

Behavior Not Absolutely Immune

In *Riedy*, 265 N.W.2d 475 (Wisc. 1978), the Wisconsin Supreme Court found that a city attorney who entered a local business and demanded that it close due to supposed permit problems, then initiated a DHS proceeding, was not entitled to absolute immunity. The court justified its decision by noting that the attorney was performing an investigatory, and not a judicial, function—investigating permit compliance is a police function

Full List of Cases

Riedy v. Sperry, 265 N.W.2d 475 (Wisc. 1978) (city attorney repeatedly tried to shut down a local business due to potential licensing issues) (no absolute immunity; survives motion to dismiss)

Ford v. Kenosha, 466 N.W.2d 646 (Wisc. 1991) (judge’s clerk erroneously issued bench warrant, prosecutor proceeded as if it was valid) (absolute immunity)

WYOMING

Number of Cases: 3

Year Range: 1982–1996

Causes of Action: tortious conduct in connection with the investigation and prosecution of a criminal perjury charge, civil rights violations, malicious prosecution

| Absolute Immunity | Not Absolute Immunity |
|--|--|
| <ul style="list-style-type: none">• behavior during trial• charging decisions, including baseless charges• statements regarding official actions | <ul style="list-style-type: none">• directing officials to prepare and enforce knowingly false probation revocation petition |

Structure of State Law

The Wyoming Supreme Court relies on *Imbler*, 424 U.S. 409 (1976) for the proposition that a prosecutor acting within the scope of her prosecutorial duty is entitled to absolute immunity. The court also references § 656 of the Restatement 2d of Torts for the rule that “[a] public prosecutor acting in his official capacity is absolutely privileged to initiate, institute, or continue criminal proceedings,” as well as the comments to that section, which note that privilege is absolute.

The court notes that initiating a prosecution falls within quasi-judicial function and thus provides absolute immunity. While press releases could conceivably cross the line past absolute immunity, the Wyoming Supreme Court held that a press release merely announcing the name and charges against a defendant (publicly available in court records) was fully immune from suit.

Behavior Not Absolutely Immune

Wyoming holds that prosecutors performing administrative or investigative functions are only entitled to qualified immunity. In the only case piercing absolute immunity for a prosecutor, the prosecutor allegedly instructed city and probation officials to falsify materials supporting a probation revocation. Because the criminal case had concluded already and these actions were only in support of a new, wrongful enforcement proceeding, the court found no absolute immunity for the prosecutor.

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Full List of Cases

Blake v. Rupe, 651 P.2d 1096 (Wyo. 1982) (prosecutor allegedly directed subordinate to pursue a perjury charge based on questionable facts, announced charges in press release, and notified plaintiff's employer of the charges) (absolute immunity)

Cooney v. White, 845 P.2d 353 (Wyo. 1992) (prosecutor instructed mayor and probation officials to make false statements in pursuit of wrongful revocation proceeding) (on remand after *Burns v. Reed*, 500 U.S. 478 (1991) was decided, no absolute immunity for directing officials to make false statements and institute wrongful enforcement action. No decision on immunity for continued incarceration.)

Johnson v. Griffin, 922 P.2d 860 (Wyo. 1996) (prosecutor allegedly conspired with expert witness to maliciously prosecute plaintiff in criminal trial for aggravated burglary and first degree sexual assault) (absolute immunity)

DISTRICT OF COLUMBIA

Number of Cases: 1

Year Range: 1985

Causes of Action: malicious prosecution

| Absolute Immunity | Not Absolute Immunity |
|--|--|
| <ul style="list-style-type: none">• charging decisions | <ul style="list-style-type: none">• administrative actions |

Structure of State Law

Only one case in a D.C. local court (either Superior Court or the D.C. Court of Appeals) addresses prosecutor immunity: in that case, the Court of Appeals applied federal law in determining that prosecutors who bring allegedly malicious charges without probable cause are acting as advocates, and are thus absolutely immune from suit.

There are also approximately 45 cases addressing prosecutor immunity in D.C. federal court, which are better addressed in a report on federal immunity law rather than this survey of state-level immunity law. Obviously, those cases apply the federal analysis drawn from *Imbler*, 424 U.S. 409 (1976) and its progeny.

Behavior Not Absolutely Immune

The court noted that administrative actions, as opposed to advocacy actions, would not be subject to absolute immunity.

Full List of Cases

Stebbins v. Washington Metropolitan Area Transit Authority, 495 A.2d 741 (D.C. 1985) (prosecutors acted on allegedly fraudulent police reports in filing charges) (absolute immunity)

TRIBAL COURTS

Number of Cases: 2

Year Range: 1979–2016

Causes of Action: § 1983

| Absolute Immunity | Not Absolute Immunity |
|---|--|
| <ul style="list-style-type: none">• N/A | <ul style="list-style-type: none">• judicial sanctions |

Structure of Tribal Law

Tribal courts have not addressed prosecutorial immunity as such. A tribal court overseeing a suit against a federal prosecutor declined to determine whether prosecutor immunity would apply because sovereign immunity clearly did

Behavior Not Absolutely Immune

In a case that did not raise the issue of prosecutor immunity, the court imposed monetary sanctions on a prosecutor for her negligence in several cases, suggesting that at least this method of imposing costs on prosecutors is not prohibited by absolute immunity.

Full List of Cases

NAFCO Inc. v. U.S., 2006 WL 6357123 (Tulalip Tribal Court of Appeals 2006) (unreported) (federal prosecutors allegedly violated treaty by prosecuting cigarette sales) (sovereign immunity)

Gallaher v. Colville Confederated Tribes, 5 CCAR 31 (Colville Tribal Court of Appeals 2000) (unreported) (tribal prosecutor allegedly displayed pattern of repeated negligence in job duties) (immunity not discussed, monetary sanction imposed)

U.S. TERRITORIES

Number of Cases: 0

Year Range: N/A

Causes of Action: N/A

| Absolute Immunity | Not Absolute Immunity |
|---|---|
| <ul style="list-style-type: none">• N/A | <ul style="list-style-type: none">• N/A |

Structure of Territorial Law

All cases regarding prosecutor immunity in U.S. territories (American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands) have occurred in federal court, either in the District of Puerto Rico or in the First Circuit Court of Appeals. As such, an assessment of the federal law is more appropriate for a report on federal immunity law, rather than state immunity law.

Behavior Not Absolutely Immune

N/A

Full List of Cases

N/A

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