LETTER OPINION
2002-L-46

July 24, 2002

Mr. Fritz Fremgen
Stutsman County State's Attorney
511 2nd Ave NE
Jamestown, ND 58401

Dear Mr. Fremgen:

Thank you for your letter regarding the issuance of subpoenas and the public official's immunity when participating in that process. I will respond separately to each of your questions.

First, you asked whether a state's attorney may assist in an investigation by issuing a subpoena for records of a telephone company under the provisions of Rule 17 of the North Dakota Rules of Criminal Procedure (N.D.R. Crim. P.) when no criminal charge has been drafted in the matter and none is expected unless the records are obtained. In other words, you ask whether a state's attorney may issue an "investigatory" subpoena pursuant to N.D.R. Crim. P. 17.

The North Dakota Rules of Criminal Procedure govern criminal proceedings in all state and municipal courts and prosecutions for contempt when punitive sanctions are sought in a nonsummary proceeding. N.D.R. Crim. P. 1. Rule 17, N.D.R. Crim. P., permits magistrates, clerks of court, and attorneys for a party to a proceeding to issue a subpoena. When issued by a magistrate or clerk of court, the subpoena must state the name of the court and the title of the action. A subpoena issued by an attorney for a party to the proceeding must be issued in the name of the court in the same manner and has the same effect as if issued by the clerk or magistrate. N.D.R. Crim. P. 17(a)(2).

This rule specifically provides that a subpoena may be issued for the presence of witnesses or the production of documentary evidence or objects in an "action," N.D.R. Crim. P. 17(a)(1), or a "proceeding," N.D.R. Crim. P. 17(a)(2). The court may, when a subpoena is issued, rule on motions to quash or modify the subpoena if compliance would be unreasonable or oppressive, N.D.R. Crim. P. 17(c), and may punish a person for contempt of the court for unexcused failure to obey a subpoena. N.D.R. Crim. P. 17(g).

Rule 17 does not authorize the issuance of investigatory subpoenas when there is no action or proceeding. Rule 17(a)(1), N.D. R. Crim. P., requires that the magistrate or clerk of court state the name of the court and the title of the action in the subpoena. An attorney issuing a subpoena must do so in the name of the court, in a "like" manner. N.D.R. Crim. P. 17(a)(2). The requirement to state the name of the court and the title of the action would be impossible to meet when there is no action filed or commenced in a court of this state. It would also be impossible for an attorney to issue a subpoena pursuant to N.D.R. Crim. P. 17(a)(2). Because there is no proceeding, the attorney would not be acting for a "party to any proceeding." Similarly, it would be difficult to argue that a court could punish a person for unexcused failure to obey a subpoena for contempt of court since there is no action or proceeding upon which to provide a jurisdictional basis for invoking the contempt powers of the court.

The authority to issue investigatory subpoenas before a charge is filed is derived from specific legislative acts. The Legislative Assembly has not, except in the limited circumstances described in this paragraph, authorized criminal prosecutors to issue investigatory subpoenas.[1] Documentary evidence or other evidentiary materials may be obtained by use of a search warrant or pursuant to search warrant exceptions authorized by law and the constitutions of this state and of the United States. In addition, North Dakota law authorizes the issuance of subpoenas to secure the presence of individuals or the production of documentary evidence or other objects at certain inquiries prior to the filing of a criminal complaint, information, or indictment. N.D.C.C. § 11-16-15 and 29-10.1-19. Section 29-10.1-19, N.D.C.C., permits a grand jury, the state's attorney, or a prosecutor to issue subpoenas in the manner provided in the statutes or rules of criminal procedure. In addition, a state's attorney may issue a subpoena after court approval of an inquiry regarding a death or felony conducted under N.D.C.C. § 11-16-15. These two sections authorize the state's attorney to issue a subpoena to obtain records of a telephone company prior to charging a defendant with a criminal offense. In each of these instances, however, actions or proceedings have been commenced by the court-ordered convening of a grand jury or state's attorney's inquiry.

After a defendant has been charged, a subpoena may be issued to a telephone company by the state's attorney pursuant to N.D.R. Crim. P. 17 to require the presence of persons or production of evidence for use in the criminal court proceedings. It is my opinion, however, that Rule 17, standing alone, does not permit the state's attorney to issue an investigative subpoena for the production of telephone records when no criminal action or

[1] During the 1999 North Dakota Legislative Session, Senate Bill 2399 was introduced to permit state's attorneys and the Attorney General to issue criminal investigative subpoenas to obtain specific records including records of telephone companies, cellular phone companies, paging companies, subscribers of private computer networks, utilities companies, transportation companies, storage facilities, and financial institutions. This bill was defeated by a wide margin. 1999 Senate Journal 425 (January 15, 1999).

proceeding has been commenced charging a defendant with an offense and the subpoena is not issued in conjunction with a court approved grand jury or state's attorney inquiry.

Your second question asks whether a state's attorney who properly issues a subpoena under either N.D.R. Crim. P. 17 or seeks to have one issued by a court under N.D.C.C. § 11-16-15 has performed an investigatory function that reduces the state's attorney's level of immunity from absolute to qualified.

To answer this question, it is necessary to review the interplay between a public official's exposure to liability and the application of absolute or qualified immunity to an official's actions. Which type of immunity applies and, in some cases, whether immunity exists at all, depends upon the specific function performed by the public official and the manner in which the official engaged in the conduct in question.

Most public officials are entitled only to qualified immunity. Government officials are not subject to damages and liability for the performance of their discretionary functions when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Buckley v. Fitzsimmons, 509 U.S. 259 (1993); Harlow v. Fitzgerald, 457 U.S. 800 (1982). Some officials, however, may perform special functions that provide absolute immunity from suit. An official who seeks absolute immunity from personal liability bears the burden of showing that public policy requires an exception to the general rule that the official is entitled only to qualified immunity. Malley v. Briggs, 475 U.S. 335 (1986).

In Imbler v. Pachtman, 424 U.S. 409 (1976), the Supreme Court reviewed the immunity of a state prosecuting attorney from a civil suit for damages under 42 U.S.C. § 1983. The initial inquiry was whether an official claiming immunity can point to a common law counterpart to the privilege asserted by the official. Malley at 339-40. The Court found a close connection between the common law immunity of a prosecutor and the considerations that underlay the common law immunities of judges and jurors acting within the scope of their duties. Imbler at 422-23. These considerations include a concern that harassment by unfounded litigation would deflect the prosecutor's energies from public duties and the possibility the prosecutor would shade his or her decisions instead of exercising the independent judgment required of the prosecutor's public trust. Id. Finding the common law of immunity well settled, the Court concluded that the considerations of public policy underlying the common law rule also support absolute immunity in a 42 U.S.C. § 1983 lawsuit. Id. at 424-27. Providing a prosecutor with only qualified immunity would not meet the important interests of public policy and the proper functioning of the criminal justice system. Id. at 427.

Application of absolute immunity to the conduct of a state prosecutor, however, is not without limits. In Imbler, a claim was made that the prosecutor violated the defendant's constitutional rights by initiating and pursuing a criminal prosecution. The Court concluded

this conduct was "intimately associated with the judicial phase of the criminal process" and were functions to which the reasons for absolute immunity apply with full force. Id. at 430. The Court did not, however, further delineate the boundaries of the prosecutor's absolute immunity especially when it related to a prosecutor's role as an administrator or an investigative officer rather than that of an advocate. Later cases began to provide those boundaries.

Applying absolute immunity to claims of public official misconduct since Imbler has placed emphasis upon a functional analysis of the actions performed by the public official. The scope of the common law immunity principles applicable to the judicial process appears to be a key inquiry.

This functional analysis examines the nature of functions with which a particular official or class of officials has been lawfully entrusted. A court will evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions. Forrester v. White, 484 U.S. 219, 224 (1988). Absolute immunity flows not from rank, title, or location within the government but from the nature of the responsibilities of the individual official. Cleavinger v. Saxner, 474 U.S. 193, 201 (1985). In other words the functional analysis approach examines the function which is sought to be absolutely immunized and not to the status or title of the person seeking immunity. In addition, the functional analysis approach focuses on the conduct for which the immunity is claimed and not on the harm that the conduct may have caused or the question of whether it was lawful. Buckley, 509 U.S. at 271 (1993). Application of this functional analysis to the question of immunity of governmental officials may also exclude some individuals from the protection of absolute immunity from suit.[2]

After Imbler, the same functional analysis applied to other governmental officials has been applied to prosecutors. The actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor. When a prosecutor functions as an administrator or an investigator, rather than as an officer of the court or advocate, the prosecutor is entitled only to qualified immunity. Buckley, 509 U.S. at 273 (1993).[3] A

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[2] The following decisions provided government officials with qualified, rather than absolute, immunity for the performance of administrative, legislative, or executive functions. Malley v. Briggs, 475 U.S. 335 (1986), police officer seeking an arrest warrant; Forrester v. White, 484 U.S. 219 (1988), demotion and discharge of a probation officer by a state court judge acting in an administrative capacity; Antoine v. Byers & Anderson, Inc., 508 U.S. 429 (1993), court reporter; Cleavinger v. Saxner, 474 U.S. 193 (1985), members of a prison's disciplinary committee not performing an adjudicatory function closely related to the judicial process.

[3] See also Burns v. Reed, 500 U.S. 478 (1991), qualified immunity to a state prosecutor for providing legal advice to the police in the investigative phase of a criminal case; Buckley v. Fitzsimmons, 509 U.S. 259 (1993), fabricating evidence during an

prosecutor performs the duty or function as an advocate for the state in preparing for the initiation of judicial proceedings or for trial which includes professional evaluation of the evidence assembled by law enforcement officials and appropriate preparation for presentation of that evidence at trial or before a grand jury after a decision to seek a criminal charge has been made. This function may include the advocate's role in evaluating evidence and interviewing witnesses in preparation for trial. Id. at 273.[4] As discussed in the footnote, the conduct sought to be immunized must be functionally close and connected to the judicial process. If it is not so connected, the public official will be entitled to qualified, and not absolute, immunity for the claimed injury.

If a subpoena is issued in accordance with the provisions of N.D.R. Crim. P. 17(a)(2), the state prosecutor will be acting as an attorney for the party to a proceeding or action which has been commenced in court. Since the action has commenced and the subpoena is issued pursuant to court rule to compel attendance of witnesses in a court proceeding, the prosecutor is acting as an advocate and performing an act intimately associated with the judicial phase of the criminal process. It is my opinion that this conduct falls within the absolute immunity umbrella of Imbler, 424 U.S. 409.

Application of Imbler to a N.D.C.C. § 11-16-15 inquiry presents somewhat different issues. Section 11-16-15, N.D.C.C., permits the state's attorney to conduct an inquiry when the state's attorney is aware of a violation or criminal act causing death or has reason to believe a felony has been committed. Prior to charging the crime, the state's attorney may conduct the inquiry and, with the approval of the district judge, may issue subpoenas requiring persons to appear and testify concerning those matters. Witnesses will be sworn to testify under oath by the state's attorney, testimony must be reduced to writing, and the state's attorney may ask the district court to punish any witness for contempt for disobeying a subpoena, for refusing to be sworn, or for refusing to sign the testimony of the witness. N.D.C.C. § 11-16-15.

Applying the functional approach, it is necessary to examine the nature of the function performed by the state's attorney when conducting an N.D.C.C. § 11-16-15 inquiry. If a prosecutor's function is judicial or quasi-judicial, the prosecutor is entitled to absolute

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investigation and making false statements during a press conference after a criminal case had commenced entitled to qualified immunity; Kalina v. Fletcher, 522 U.S. 118 (1997), prosecutor who executed a probable cause affidavit or certification perform the function of a complaining witness rather than as a lawyer and was entitled only to qualified immunity.

[4] See also Burns v. Reed, 500 U.S. 478 (1991), prosecutor entitled to absolute immunity for participating in a probable cause hearing where evidence was presented in support of a motion for a search warrant; Kalina v. Fletcher, 522 U.S. 118 (1997), prosecutor protected by absolute immunity for the action of preparing and filing charging documents which involve the prosecutor's role as an advocate.

immunity from suit. Anderson v. Simon, 217 F.3d 472, 475 (7th Cir. 2000) cert. denied, 531 U.S. 1073 (2001). When prosecutors perform purely investigative functions, only qualified immunity may apply. There is an investigatory purpose for the statutory state's attorney inquiry procedure. At first glance, the statement made by the Court in Buckley, 509 U.S. at 273 that a prosecutor would not be entitled to assert absolute immunity when that prosecutor performs the investigative functions "normally performed by a detective or police officer" is problematic. Examination of the function performed by the state's attorney in issuing subpoenas under N.D.C.C. § 11-16-15 leads to the conclusion that the actions are an integral part or closely associated with the judicial process and intimately associated with the judicial phase of the criminal process in accordance with the requirements imposed by Imbler, Briscoe, and Cleavinger, and therefore entitled to absolute immunity.

In 1927, the North Dakota Supreme Court recognized that the law was "well settled" that the state's attorney is a quasi-judicial officer. Kittler v. Kelsch, 56 N.D. 227, 216 N.W. 898, 900 (1927). Finding a state's attorney immune from suit for the initiation of a criminal charge, the court concluded that the burden of investigation had been made the duty of the state's attorney and, when the state's attorney passes judgment on the sufficiency of the evidence before approving the issuance of a warrant, such judgment is a "judicial act." Id. at 905. Our court recognized the public policy considerations supporting immunity of a state prosecutor in such instances in the same manner as the United States Supreme Court in Imbler.

> The doctrine of exemption of judicial and quasi judicial officers is founded upon a sound public policy, not for the protection of the officers, but for the protection of the public, and to insure the active and independent action of the officers charged with the prosecution of crime, for the protection of life and property. It applies to the office of the state's attorney in this state.

Kittler at 905.

As noted previously, the Court in Cleavinger refused to extend absolute immunity to a prison discipline committee, concluding that the committee members did not perform an adjudicatory function. However, our court in Loran v. Iszler, 373 N.W.2d 870, 876 (N.D. 1985) did provide absolute judicial immunity to a North Dakota State Highway Department administrative hearing officer, concluding that the hearing officer was engaged in a function that was quasi-judicial in nature. The court found that the state administrative proceedings were sufficiently comparable to judicial proceedings to warrant the extension of immunity to that officer. Id. at 876. The court in Perry Center Inc. v. Heitkamp, 1998 ND 78, ¶ 45, 576 N.W.2d 505, 515, also recognized that absolute immunity covered prosecutorial functions such as the initiation and pursuit of a criminal prosecution, the presentation of the state's case at trial, and "other conduct intimately associated with the judicial process." Qualified immunity would be provided when the prosecutors were

functioning in the role of an administrator or investigative officer rather than the role of an advocate. Id.

Applying the Imbler functional analysis approach, the question then becomes whether an N.D.C.C. § 11-16-15 inquiry involves judicial or quasi-judicial activities or conduct by the state's attorney. There is no question that the state's attorney is a "quasi judicial officer." Kittler v. Kelsch, 216 N.W. at 900. In addition, the North Dakota Supreme Court has concluded that an N.D.C.C. § 11-16-15 inquiry is a "quasi-judicial" proceeding. In KFGO Radio Inc. v. Rothe, 298 N.W.2d 505, 510 (N.D. 1980), overruled on other grounds by Dickinson Newspapers, Inc. v. Johnson, 338 N.W.2d 72 (N.D. 1983), media companies sought access to a state's attorney's inquiry held pursuant to N.D.C.C. § 11-16-15. Initially, the court required the media to establish that a state's attorney inquiry can be equated to the function of a court in order for it to be open to the public.

The court concluded that when a state's attorney conducts an N.D.C.C. § 11-16-15 inquiry, the state's attorney is acting in a quasi-judicial capacity. Id. The quasi-judicial nature of the state's attorney's inquiry is evidenced by the ancillary authority which a state's attorney can exercise in administering oaths, compelling the attendance of witnesses, and applying to the district court for the punishment of witnesses for contempt. Id. The court also advised that the district court exercised a fundamental role in a state's attorney inquiry because only the district court may exercise its contempt power. Id.

Based upon our court's conclusion that a N.D.C.C. § 11-16-15 state's attorney inquiry is "clearly connected with the functions of a court," the actions of a state's attorney in conducting an inquiry under court approval, including issuing subpoenas, is, in my opinion, an integral part and closely associated with the judicial process and is intimately associated with the judicial phase of the criminal process. Therefore, a state's attorney when acting within the authority granted by N.D.C.C. § 11-16-15, is entitled to absolute immunity.

Your third question is whether a peace officer who properly obtains a search warrant for records of a telephone company has absolute or qualified immunity for the officer's investigatory act.

Courts have not extended absolute immunity to the conduct of public officials when they are performing administrative or investigatory functions. Cases previously cited and discussed in this letter make it clear that qualified immunity represents the norm. As the qualified immunity defense has evolved, it has provided ample protection to all but the plainly incompetent or those who knowingly violate the law. Malley v. Briggs, 475 U.S. at 341. In Malley, the Court refused to extend absolute immunity to the actions of a law enforcement officer when seeking an arrest warrant. It is also recognized that state law enforcement officers sued under 42 U.S.C. § 1983 for false arrest have qualified immunity from suit. Wishnatsky v. Bergquist, 550 N.W.2d 394, 400 (1996), cert. denied, 519 U.S.

895 (1996). Qualified immunity is sufficient to protect government officials in the exercise of their administrative or investigatory duties. Burns v. Reed, 500 U.S. at 486-87.

In my opinion, a peace officer performing an investigatory function and act is entitled to qualified, and not absolute, immunity from suit.

Sincerely,

Wayne Stenehjem
Attorney General

rpb/vkk