Ley & foro

2008, Núm.2

Revista del Colegio de Abogad
de Puerto Rico

Función judicial

Jason Mena,
I know it had something to do with going up and down the stairs but I just don't remember what,
2007

Ley & foro
2008, Núm.2

Contenido

Función Judicial

Ley y foro es una publicación trimestral del Colegio de Abogados de Puerto Rico. El Colegio no se solidariza necesariamente con las opiniones vertidas en los artículos aquí publicados. Toda correspondencia relacionada con esta revista debe ser dirigida al colegio: pres.capr@capr.org o al editor: Cond. El Centro II, 500 Muñoz Rivera Suite 1002, San Juan, PR 00918 o a la dirección electrónica carlosgil@prtc.net

Diseño Gráfico: Sofía Sáez Matos
sofiasaez@coqui.net
Fotografías: Jason Mena
Anuncios: Irlanda Ruiz Aguirre
leyyforo@gmail.com

Jason Mena,
I am less confused I begin to see but many problems remain,
2006

How to Defend a Prosecutor at the Federal Forum In A Civil Rights Complaint?

José Enrico Valenzuela-Alvarado

Director de Asuntos Legales de la Oficina de Litigación del Departamento de Justicia de Puerto Rico.

> *"The [prosecutor's] immunity is absolute, and is grounded on principles of public policy. The public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the government should speak and act freely and fearlessly in the discharge of their important official functions. They should be no more liable to private suits for what they say and do in the discharge of their duties than are the judges and jurors, to say nothing of the witnesses who testify in a case".*
>
> *Yaselli v. Goff*, 12 F.2d 396, 406 (2d Cir. 1926) *aff'd* 275 U.S. 503, 48 S.Ct. 155, 72 L.Ed. 395 (U.S.N.Y. Dec 05, 1927).

I. Introduction

Imagine you at your office at 6:30pm a Friday, right next to the Christmas Holidays. You receive several party invitations and you confirmed them all. In one of them, a friend that never make parties apparently got a jackpot and opted to incur in "expenses" for the party, buying for example, good wine, beers and champagne. Then, for you to go with your clean conscious, you decided to look upon the mailbox, and you acknowledged a new case has been assigned to you. The file does not include a regular "civil rights complaint". There are no "police brutality allegations" and neither the boilerplate "political discrimination pleadings" filed just because an elephant (republican) looked above his shoulder to the donkey (democrat) or vice versa. The case is serious, and you read about it already through the press, when the Plaintiff was accused and surprisingly acquitted a couple of years ago. The attorney has two options, leave the file there and go to party just like any other normal person would do, or simply take a "little look" to the complaint that has about 145 pleadings or "averments". The never satisfied lawyer opted to review the complaint briefly, but it was long as the night hours the journey that commenced right there. This journey includes several emotions in contradiction. Primarily, the position of the prosecutors of doing their job the best they can, but by some inexplicable reason, they did not succeed. The second one, plaintiff's position of being prosecuted without cause, as has been decided by one single judge, not the jury, through a judgment of acquittal. These two positions certainly provoke the following questions: what went wrong with the criminal case? Why did they proceed against this individual? Isn't it correct that prosecutors are immune? Is that immunity completely absolute? Should this case would never go to trial since there are plethora of defenses any federal judge can understand? Well, these questions need answers, but in a legal understandable way. Precisely, this article intends to be a useful tool for prosecutors from our local jurisdiction, in order for them to know their rights before a civil rights case at the federal forum. As appears to be, several prosecutors lifted red flags with serious concerns of being penalized by doing their job. The author intends to provide answers to any prosecutor that might be facing a civil rights lawsuit at the federal forum, beginning with the legal framework that provides the duties and responsibilities of any local prosecutor, the Special Independent Prosecutor's Office structure, the defenses and the procedural devices to use since the beginning of the civil case until the possible end. We now begin our journey.

II. The Department of Justice Organic Law and the duties of a prosecutor

The Department of Justice was created pursuant to the provisions of Article IV, Section 6 of the Constitution of the Commonwealth of Puerto Rico. It also includes the programs and bodies integrated by virtue of Law No. 205 of Aug. 9, 2004, which created the Organic Law of the Department of Justice, codified in P.R. Laws Ann. Tit. 3, Sections 291-- 295u, and those who are made a part of the Department in the future. The Statement of Motives of Law No. 205 recognizes the new social reality in high delinquency and crime, which requires a dynamic and coordinated effort with other government entities in order to respond effectively to this situation. Based on this social reality, the Puerto Rico Legislative Assembly enacted Law No. 205, or the "Department of Justice Organic Law" with the Governor's approval in 2004. Law No. 205 defines prosecutor as an official appointed by the Governor, pursuant to the provisions of Sections 291--295u, P.R. Laws Ann. Tit. 3, who carries out his/her functions as a member of the Public Ministry, be it in his/her capacity as General Prosecutor of Puerto Rico, General Special Prosecutor, Assistant Prose-

cutor III, Assistant Prosecutor II, Assistant Prosecutor I or District Attorney. It also includes the Special Prosecutors designated by the Secretary of Justice. Prosecutors assigned to the criminal division have the duty of investigating and prosecuting all those persons accused of offenses which they may try under the authority of the Commonwealth and on behalf of the People of Puerto Rico, except in those cases when §§ 99h--99z of Title 3, P.R. Laws Ann., known as "Independent Special Prosecutor Act," applies.[1] Said Law No. 205, in its Section 293(x) of Title 3, Laws of P.R. Ann., also contemplates the General Prosecutor of Puerto Rico, who is also appointed by the Governor of Puerto Rico pursuant to the provisions of Sections 291--295u[2].

Everyone can agree that being appointed as a prosecutor is not an easy task to begin with. Their work is harder and the responsibility endless. Thus, having a summary of the legal structure of the duties and responsibilities of any prosecutor within our jurisdiction, we now proceed to explain the faculties and responsibilities of the Special Prosecutor's Office and its members.

III. The Special Independent Prosecutor Office (or "SIP")

The investigation process upon a public official goes through various phases before being assigned to a SIP. This method seeks to guarantee independence of judgment in the determination to file and prosecute the action. According to Law Number 2 of February 23, 1988, the Secretary of Justice carries out the preliminary investigation and shall determine, based on the information available and the alleged facts, whether there is sufficient cause to believe that a felony and misdemeanor included in the same transaction or event and offenses against civil rights, public duties and the public treasury have been committed. A report is then submitted to the Panel with recommendations as to whether the designation of a Special Prosecutor is appropriate or not.[3] Whenever the Secretary of Justice makes the determination as to whether he recommends the appointment of a Special Prosecutor or not, he shall notify the complainant who requested the appointment of a Special Prosecutor and the official who is to be investigated.[4] Once the determination is reached by the Secretary of Justice, the panel independently determines the convenience of appointing a Special Prosecutor to carry out the investigation and prosecution needed for the disposition of said complaint, subject to the provisions of § 99p. P.R. Laws Ann. Tit. 3, § 99o. The members of the Panel each make an individual determination after studying and reviewing the file, the evidence at hand and the applicable law, they come together to vote on the final determination. The determination is made by majority and in most instances, a unanimous decision is made. The minimum elements of the violation have to be present to make the determination to assign a SIP. This means that a Panel of ex-judges composed of experimented and knowledgeable professionals makes individual and independent determinations of whether it is necessary to appoint a Special Independent Prosecutor before making the final determination as a Panel.

As can be precisely appreciated from the above, the SIP has investigative and prosecutorial powers bestowed to it by Law No. 2 of February 23, 1988, which intended to guarantee an unbiased and objective investigation upon the potential criminal actions of public officials. It is also evident that the whole process safeguards independence of judgment as to whether further investigation is in place by having independent phases and entities corroborate the evidence and determine if such investigation should continue. Thus, when a SIP is assigned to a case, already two independent bodies, *vis a vis*, the Department of Justice and the Independent Prosecutor Panel have independently analyzed the evidence and determined that there were enough elements in it to merit further investigation into the probability of a criminal act to have taken place.

IV. Are the Prosecutors really immune to civil lawsuits at the federal forum?

One of the main questions asked by several state prosecutors is if whether or not they are immune from civil rights lawsuits. In general terms, yes, a state prosecutor has absolute immunity from suit under civil rights laws for the initiation and pursuit of a criminal prosecution, as well as for his actions during judicial proceedings.[5]

A. A little "bite" of the history regarding prosecutorial immunity

The common law has historically recognized the need to protect judges and others closely identified with the judicial process from the threat of damage suits for actions taken within the scope of their judicial or quasi-judicial functions[6].This immunity has been applied in non-Civil Rights Act damage suits against federal prosecutors.

In 1926, the Court of Appeals for the Second Circuit in *Yaselli v. Goff*, 12 F.2d 396, 397-398 (2d Cir. 1926) was confronted with a suit for damages against a special assistant to the Attorney General, named Goff, who was specially appointed to prosecute a single case against Mr.

1 *See* P.R. Laws Ann. Tit. 3, § 294y.

2 The General Prosecutor shall direct the office and shall be responsible for supervising District Attorney Offices and all specialized divisions, work units and programs under his/her direction, as provided for in Sections 291--295u, P.R. Laws Ann. Tit. 3., as well as those commissioned by the Secretary of Justice. The General Prosecutor shall designate a General Deputy Prosecutor in consultation with the Secretary from among the Prosecuting Attorneys appointed by the Governor and confirmed by the Senate of Puerto Rico, to assist him/her in his/her functions.

3 *See* P.R. Laws Ann. Tit. 3, at § 99k(2).

4 *Id.*, at § 99k(3).

5 *See Suboh v. City of Revere*, 141 F. Supp. 2d 124, 137 (D. Mass. 2001)(*citing Buckley v. Fitzsimons*, 509 U.S. 256, 269 (1993), and *Imbler v. Patchman*, 424 U.S. 409, 430, (1976), *rev'd on other grounds*, 298 F.3d 81 (1st Cir. 2002).

6 *See Scheuer v. Rhodes*, 40 L.Ed.2d 90, 98 n. 4 (1974).

Yaselli before a federal grand jury. Goff was charged with: (1) maliciously obtaining the appointment in order to carry out his scheme against Mr. Yaselli; (2) maliciously and without probable cause charging Yaselli with a crime; and (3) "*... maliciously, willfully, and corruptly caus [ing] to be introduced and used before the aforesaid grand jury a great mass of false, misleading ... irrelevant ... testimony, and evidence.*" The Second Circuit Court did "historical research" of judicial and quasi-judicial immunity back to the time of the old England courts and noted the parallel absolute immunity for defamation.[7] Said Court discussed the policies behind the rule of absolute judicial immunity and concluded that they apply equally to a prosecutor. The U.S. Supreme Court summarily affirmed the decision in *Yaselli v. Goff,* 275 U.S. 503, 48 S.Ct. 155, 72 L.Ed. 395 (U.S.N.Y. Dec 05, 1927), and thereafter said doctrine was followed in *Barr v. Matteo,* 360 U.S. 564, 569-570; 79 S.Ct. 1335; 3 L.Ed.2d 1434,1440 (1959).

Years after, the Third Circuit Court of Appeals in *Bethea v. Reid* 445 F.2d 1163, 1166, (3rd Cir. 1971) *cert. den.* 404 U.S. 1061 supported the common law immunity for federal prosecutors by analogizing their position to that of state prosecutors under the Civil Rights Act and noting that there is no reason to distinguish between prosecutorial immunity under the Civil Rights Act and under the common law. In sum, it can be concluded that the interests supporting prosecutorial immunity apply equally to state as to federal prosecutors. As analyzed by the U.S. Supreme Court from the point of the common law, state as well as federal prosecutors are entitled to absolute, quasi-judicial immunity for their prosecutorial acts.

B. The contemporaneous prosecutorial immunity doctrine

During the seventies, the U.S. Supreme Court resolved the most cited case regarding the prosecutorial immunity doctrine, which is *Imbler v. Patchman,* 424 U.S. 409, 430, (1976). In said case, the U.S. Supreme Court made clear that the reasoning behind the doctrine of absolute prosecutorial immunity: "[is] intended to protect the prosecutor's independence as he makes difficult determinations regarding matters within his discretion." "When a prosecutor is enshrouded in absolute immunity the protection is not eroded no matter how erroneous the act may have been, how injurious its consequences, or how malicious the motive."[8]

During the nineties, in *Buckley v. Fitzsimons,* 509 U.S. 256, 275 (1993), the United States Supreme Court determined that prosecutors were not absolutely immune from 42 U.S.C. §1983 damages claims were there was fabrication of evidence during the preliminary investigation and false statements were made during a press conference. To construct this conclusion, the Court applied a functional approach to the prosecutor's actions, which looks to the nature of the function performed, and not at the identity of the actor who performed it[9]. Under the functional approach, it is immaterial that the defendants were prosecutors *ex officio.* Absolute immunity protects the prosecutor's "'role as advocate for the State,'" and not his or her role as an "'administrator or investigative officer.'"[10] Prosecutorial conduct is absolutely immune *only* if it is "intimately associated with the judicial phase of the criminal process . . . ." *See Burns v. Reed,* 500 U.S. 478, 491, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991).[11]

V. In the alternative, a public official is qualified immune from a civil rights lawsuits, in a case-by-case basis.

In the Federal Jurisdiction, what might cover any regular public official is what is called the "qualified immunity". In sum, as explained in *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982), the qualified immunity doctrine protects state officials from civil liability under § 1983 as long as their conduct does not violate a clearly established constitutional right of which a reasonable official would have knowledge. In analyzing the qualified immunity defense, the court must take three steps: First, determine whether, as a matter of law, the plaintiff has alleged a deprivation of a constitutional right at all[12]. Second, the Court must determine whether the constitutional right in question was clearly established at the time of the alleged violation[13]. Tersely speaking, qualified immunity is a question of law for the courts to decide and should be resolved in advance of trial.[14] Therefore, any prosecutor must use the qualified immunity defense since the beginning of litigation through a motion to dismiss, and if denied by the Court, then should submit evidence together with a motion for summary judgment, as will be explained below.

VI. How to proceed effectively?

A. The motion to dismiss device

As it is known, the Civil Rights Act, specifically Section 1983 of Title 42, "is not itself a source of substanti-

7 *See Yaselli v. Goff,* 12 F.2d 396, 399 and 403 (2d Cir. 1926).

8 *See Imbler v. Patchman,* 424 U.S. 409, 430, (1976) (*citing Cleavinger v. Saxner,* 474 U.S. 193, 199-200, (1985), and *Cok v. Cosentino* 876 F. 2d 1, 2 (1st Cir. 1989) (*per curiam*)), *rev'd on other grounds,* 298 F.3d at 81. *See also, Reid v. New Hampshire,* 56 F.3d 332, 337 (1st Cir. 1995)(noting that even an allegation that "prosecutors repeatedly misled the trial court in order to conceal their alleged misconduct does not defeat absolute immunity") (*citing Burns v. Reed,* 500 U.S. 478, 489-90, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991)).

9 *See also, Burns,* 500 U.S. at 486.

10 *Id.,* at 491, (*quoting Imbler,* 424 U.S. at 430-31).

11 *Id.,* (holding that state prosecutor had absolute immunity for the initiation and pursuit of a criminal prosecution, including presentation of the state's case at trial). *See also Buckley,* 509 U.S. at 269 ; *Celia v. O'Malley,* 918 F.2d 1017, 1019 (1st Cir. 1990) ("a prosecutor enjoys absolute immunity from suit based on actions taken pursuant to his quasi-judicial function"). *Héctor Guzman Rivera v. Héctor Rivera Cruz,* 55 F.3d 26, 29(1st Cir. 1995).

12 *See County of Sacramento v. Lewis,* 118 S. Ct. 1708, 1714, n.5 (1998); *Siegert v. Gilley,* 500 U.S. 226, 232 (1991).

13 *See St. Hilaire v. City of Laconia,* 71 F.3d 20, 24 (1st Cir. 1995).

14 *See Swaine v. Spinney,* 117 F.3d 1, 10 (1st Cir. 1997).

ve rights," but merely provides "a method for vindicating federal rights elsewhere conferred." "The first step in any such claim is to identify the specific constitutional right allegedly infringed". *See e.g., Albright v. Oliver,* 510 U.S. 266, 271, (1994). Before the filing of a motion to dismiss by the prosecutor, he or she must do the analysis on the specific claims the plaintiff is making. The most common claim in a federal civil rights complaint involving prosecutors is malicious prosecution.

The Court of Appeals of the First Circuit in *Nieves v. McSweeney,* 241 F.3d 46, 53 (1st Cir. 2001)[15] has recognized four elements in a malicious prosecution action. These are: "(1) the commencement or continuation of a criminal proceeding against the eventual Plaintiff at the behest of the eventual defendant; (2) the termination of the proceeding in favor of the accused; (3) an absence of probable cause for the charges; and (4) actual malice". Yet, in order to claim malicious prosecution into a §1983 claim it is necessary to prove a state action and a depravation of a federally protected right.[16] Further, the First Circuit in *Meehan v. Town of Plymouth, 167 F.3d 85, 88 (1st Cir.1999) held that* a claim for malicious prosecution under § 1983 as a deprivation of procedural due process is barred where the state's tort law recognizes a malicious prosecution cause of action. Thus, the Due Process Clause cannot be used to claim a malicious prosecution rise under §1983 when the state provides adequate remedy.

The District Court for the District of Puerto Rico in *Segarra Jímenez v. Banco Popular,* 421 F.Supp.2d 452, 459 (D.P.R. 2006)(Casellas, J.)[17], citing the Puerto Rico Supreme Court case of *García Gómez v. Estado, 2005 T.S.P.R. 14, 2005 WL 536113 at * 3 (2005), streamlined the* malicious prosecution doctrine by stating that any individual must be prosecuted without probable cause in order to at least have a valid "cause of action" in a civil rights complaint. In short, malicious prosecution is the unjustified use of legal proceedings; there is malicious prosecution when a criminal action is filed maliciously and without probable cause, and such an action provokes damages. A malicious prosecution claim is brought under the auspices of Article 1802 of the Puerto Rico Civil Code and requires that the plaintiff avers and proves: (1) that he or she has been the subject of a criminal complaint filed by the defendant, (2) that the criminal case ended favorably for Plaintiff, (3) that the case was instigated maliciously and without probable cause, and (4) that Plaintiff suffered damages as a result.[18] Generally speaking, malicious prosecution suits are not favored by the courts because they run counter to the goal of having citizens cooperate with the state in fighting crime[19]. A defendant does not "instigate a criminal case" as required to succeed in a malicious prosecution claim merely because he or she provides information to a police officer or a district attorney about a certain set of facts.[20]. Nor does a statement to such an officer based on a reasonable belief provide the basis for imposing liability. Malice, in cases of malicious prosecution, is not presumed; it is up to the plaintiff to prove that the defendant acted maliciously and without probable cause. In sum, where a defendant files a criminal complaint and it is taken to a district attorney, who decides to file charges, and later to a judge, who finds probable cause, the complainant is not liable for malicious prosecution.[21]. In such a case, the decision to prosecute or file charges is attributed to the authorities based on their own evaluation of the facts. In most cases, probable cause is determined against an accused individual. *Ergo, it would be a win-win situation if the prosecutor files a motion to dismiss under Fed. R. Civ. P. 12 (b)(6), by failure to state a claim upon a relief could be granted, in the situation in which probable cause was found by a state court. The reasoning is very simple, the filing of charges needs to be analyzed by an impartial judge, who if decides that probable cause for arrest or for trial exists, then the prosecutor is shielded or protected and a civil rights complaint at the federal forum should be dismissed as sure as the law of gravity.*

B. The discovery proceedings and what should be discovered?

If the motion to dismiss is denied, the prosecutor should move to an intense discovery process, which shall include interrogatories, request for production of documents, depositions and request for admissions. In most cases, the evidence is at the prosecutor's possession, since is part of the criminal case file. Nevertheless, the prosecutor defense lawyer must be very careful with the evidence he or she produces, since there are several privileges and confidentiality matters that impede the production of evidence. For example, Rule 95 of Puerto Rico's Rules of Criminal Procedure, PR ST T. 34 Ap. II, provides the mechanisms for the discovery of evidence after an accusation is formally presented against a defendant. Before the accusation is presented, the prosecutor's protocol and the criminal investigation file are considered secret and confidential. The Supreme Court of P.R. in *Pueblo v. Navarro Alicea,* 138 D.P.R. 511, 520 (1995) has clearly determined that: "[b]efore a criminal accusation takes place, the prosecutor's protocol, this is, the State's file that contains the sworn statements and the evidence of the prosecutor, is private and secret". (Our translation). Moreover, even after a criminal accusation has been filed, the discovery of the prosecutor's protocol is not unlimited. In *Silva Iglecia v. F.E.I.* 137 D.P.R. 821, 834 (1995), the Puer-

15 *See also, Correllas v. Viveiros, 410 Mass. 314, 572 N.E.2d 7, 10 (1991).*

16 *ee Meehan v. Town of Plymouth, 167 F.3d 85, 88 (1st Cir.1999) citing Roche v. John Hancock Mutual Life Ins. Co., 81 F.3d 249, 253-254 (1st Cir.1996).*

17 *Affirmed by Segarra-Jimenez v. Banco Popular de Puerto Rico,* 235 Fed.Appx. 2 (1st Cir. May 25, 2007) (Not selected for publication in the Federal Reporter, NO. 06-1816).

18 *See Segarra Jímenez v. Banco Popular,* 421 F.Supp.2d 452, 459-460 (D.P.R. 2006)(Casellas, J.). *See also, Ayala v. San Juan Racing Corp., 112 D.P.R. 804, 811-12 (1982); González Rucci v. U.S. I.N.S., 405 F.3d 45, 49 (1st Cir.2005).*

19 *See Segarra Jímenez,* 421 F.Supp.2d at 460. *Parrilla Báez v. Airport Catering Serv., 133 D.P.R. 263, 273, 1993 WL 839985 (1993).*

20 *See Raldiris v. Levitt, 103 D.P.R. 778, 782, 1975 WL 38787 (1975)*

21 *Id.,. at 782. See also, Parrilla Báez, 133 D.P.R. at p. 276.*

to Rico Supreme Court concluded that: "the discovery of evidence in favor of the defendant does not include that part of the prosecutor's protocol that constitutes the State's work product". (Our translation).

Rule 95(a) states that "[o]n motion of the defendant at any time after the filing of the information or charges and within the term prescribed to submit it, the court shall order the prosecution to allow the defendant to inspect, copy or photocopy the following material or information in the possession, custody or control of the prosecution: "[...](6) [a]ny report prepared by police agents related to the cases filed against the defendant that is relevant to the adequate preparation of the defense of the defendant". Even then, the discovery of such evidence is limited and subjected to various requirements, such as the specificity of the discovery asked for, sufficient anticipation of the request and "that it does not affect the security of the Commonwealth nor the investigative work of its police agents". (*Our translation).* Now, the question is, a prosecutor can argue this confidentiality defense at the Federal Court? The answer is yes.
The standard provided by Fed. R. Evid. 501 has to be made "in light of reason and experience". The first of these is the state law proviso. As defined by WRIGHT & MILLER, *Federal Practice and Procedure, § 5432, p. 846 (1980), citing Jaffee v. Redmond,* 518 U.S. 1, 116 S.Ct. 1923, 1929-1930, (1996); it applies (1) when the issue arises in a civil action or proceeding; (2) when it concerns an element of a claim or defense; and (3) when the claim or defense is one as to which state law supplies the substantive law. When these conditions are satisfied, the Court must apply the state law of privilege.[22] Therefore, we must conclude that as to any privilege or confidential matter requested by any plaintiff throughout discovery in these cases, the prosecutor must raise the above-explained arguments using as venue Fed. R. Evid. 501, and as substantive law the doctrines developed by the Puerto Rico Supreme Court.

C. The motion for summary judgment device[23]

Once we have all the evidence after the discovery process transpired, the prosecutor must file a motion for summary judgment. The petition for a summary judgment is covered explicitly and primarily in Rule 56 of the Federal Rules of Civil Procedure. Rule 56 (c) states that it "shall be rendered... if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The underlying statement done by the moving party, then, is that there is no sufficient legal basis to the claim of the non-moving party. Thus, the moving party, if that is true, must prevail "as a matter of law". As described by *Mahuet* in his book *Pre Trial,* at p. 331, (6th Ed. Aspen, 2005), summary judgment is a fact-driven motion, so how you organize and present your facts is critical. Any statement of facts must show that there is no material fact over which there is a genuine dispute. The statement of facts will contain the material facts that are necessary to the motion and will be annotated to the factual sources that support it. A good method is to use the elements provided by the jury instructions to determine what facts are material, then organize and state those material facts in paragraphs much like the factual allegations in a complaint. Each material fact stated must then be cross-referenced to the sources that prove that fact. Therefore, the courts must view Rule 56 with extreme care as to not deny jury trial to a deserving party. It must be granted only in cases that are in line with the main purposes of Rule 56. Only after the requirements set forth in the text of Rule 56 (c) are met, the granting of summary judgment should be viewed favorably. This was firmly restated in *Celotex Corp. v. Catrett*[24], *Anderson v. Liberty Lobby, Inc.*[25], *and Matsushita Elec. Indus. Co. v. Zenith Radio Corp*[26]

The Supreme Court has said that in a motion for summary judgment, the burden of proving that there does not exist any genuine issue of material fact lies on the movant. Any inference that is drawn from the evidence supporting the motion will be viewed in the most favorable way to the non-movant, who opposes the motion. Thus, the prosecutor must be organized with his/her arguments and with the evidence submitted to the court. Each defense must be discussed separately, making reference to the evidence, with the specific description of the document, the date, who produced it, the specific page, paragraph and line. This is what is called the "anti-ferret rule". Federal Courts do not allow any party to file a document that needs to be ferreted, since it has tunnels and sewers within its content. Conversely, Federal Courts demand crystal clear and pristine documents with reference to each piece of evidence, or otherwise would not consider the summary judgment petition and such will be stricken from the record. Loc. Civ. R. 56(c) requires a party opposing a motion for summary judgment to submit with its opposition "a separate, short, and concise statement of material facts". Said Rule also mandates that "[t]he opposing statement shall admit, deny or qualify the facts by reference to each numbered paragraph of the moving party's statement of material facts and unless a fact is admitted, shall support each denial or qualification by a record citation as required by this rule." In sum, Federal

22 *See also,* CHIESA, *Tratado de Derecho Probatorio, Vol. I, Section 4.2, pp. 203-205 (2001).*

23 For more information regarding the summary judgment analysis, please refer to VALENZUELA-ALVARADO, JOSÉ ENRICO, *"The Summary Judgment at the Federal Forum, the best intent to dismiss a case",* Seminar at the Institute for the Training and Development of Juridical Thought (February 28 and 29, 2008)(presentation available in the Department of Justice's Institute for the Training and Development of Juridical Thought).

24 *Celotex Corp. v. Catrett,* 477 U.S. 317, 331 (1986). *See also, Associated Press v. U.S.,* 326 U.S. 1, 5, n. 1(1945).

25 *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

26 *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587-588 (1986). *See also,* LOUIS, *Federal Summary Judgment Doctrine: A Critical Analysis,* 83 Yale L.J. 745, 752 (1974); CURRIE, *Thoughts on Directed Verdicts and Summary Judgments,* 45 U. Chi. L. Rev. 72, 79 (1977).

Courts are not required to ferret through the record lurking for facts that may favor plaintiff when those facts were not proffered under a counter designation of facts as required by Loc. Civ. R. 56(c), the successor of Local Rule 311.12[27]. In sum, the summary judgment motion is the best device to dismiss a case against a prosecutor. If the evidence shows that all the criminal process was duly followed, and if the movant complies with the applicable local and federal rules of civil procedure, there would be no obstacle for the Federal Court to decide in favor of the prosecutor.

VII. The interlocutory appeal and its consequences

If the motion for summary judgment is denied, the defendant-prosecutor should review in detail the opinion and order issued by the Court to determine if whether or not will file an interlocutory appeal. As explained above, the qualified immunity or the absolute immunity defenses are the most basic arguments that must be included in a motion for summary judgment together with the evidence submitted forthwith. If such arguments are included by the prosecutor and rejected by the court, then we should analyze the filing of an interlocutory appeal. The author explains.

In *Scott v. Harris,* 127 S.Ct. 1769, 1773, n. 2 (2007) *citing Mitchell v. Forsyth,* 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) the Supreme Court defines qualified immunity as "an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." Thus, the U.S. Supreme Court has held that an order denying qualified immunity is immediately appealable even though it is interlocutory; otherwise, it would be "effectively unreviewable."[28] Further, the U.S. Supreme Court has emphatically said that "we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation."[29] In sum, Court of Appeals will hear interlocutory appeals of denials of motions for summary judgment on grounds of absolute or qualified immunity.[30] The appeal on the grounds of absolute immunity provides a complete bar to civil liability for damages, regardless of the culpability of the actor. On the other hand, the doctrine of qualified immunity provides a bar to liability for damages, only where the immune actor can show that his actions were reasonable.[31]

As we can note, if the opinion and order is unencumbered in its analysis, there are viable probabilities of arguing at the First Circuit Court of Appeals that there are not issues of fact that precludes summary judgment. Throughout the author's research, explained in Section IV of the instant article, it was noticed that the majority of cases regarding absolute immunity, (not qualified immunity) have been dismissed via summary judgment, and if the District Court denies the same, the interlocutory appeal succeeded and the Appeals Court dismissed the case. Within this district, the story should be the same.

VIII. Should the notice of appeal automatically stay the case at the District level?

The issuance of a stay pending appeal lies within the discretion of the court.[32] In *Hilton v. Braunskill,* 481 U.S. 770, 776, 107 S.Ct. 2113, 2119, 95 L.Ed.2d 724 (1987)[33] it was established that pursuant to Fed. R. Civ. 62(c) the court must assess the propriety of a stay in view of the following four factors: (1) whether the stay applicant will suffer irreparable injury absent a stay; (2) whether a party will suffer substantial injury if a stay is issued; (3) whether the stay applicant has demonstrated a substantial possibility of success on appeal; and (4) where the public interest lies. In ruling on a motion pursuant Rule 62(c), the district court's objective is to preserve the *status quo* during the pendency of an appeal.[34] To justify the granting of a stay, the movant need not always establish a high or mathematical probability of success on the merits.[35] In fact, it is unlikely that a district court will find that there is a certainty that the appeal will be successful, since such a finding implies that the district court erred. Consequently, some courts have held that a movant may also have a motion granted upon a lesser showing of a "substantial case on the merits" when the balance of the equities of factors (2)–(4) weighs heavily in favor of granting the stay.[36] Other courts have held that the showing of probability of success on the merits is inversely proportional to the degree of irreparable injury evidenced and that a stay may be granted with either a high probability of success and some injury, or *vice versa.* Simply stated, more of one excuses less of the other. However, the movant is always required to demonstrate more than

27 *See, Morales v. Orssleff's EFTF,* 246 F. 3d. 32, 33 (1st Cir. 2001); *Rivas v. Federación de Asociaciones Pecuarias,* 929 F. 2d. 814, 816 n.2 (1st Cir. 1991). "When a party opposing a motion for summary judgment fails to comply with the "anti-ferret rule" the statement of material facts filed by the party seeking summary judgment shall be deemed admitted." *See Lugo Rodríguez, et al. v. Puerto Rico Institute of Culture, et al.,* 221 F. Supp. 2d. 229, 236 (D.P.R. 2002) *citing Méndez Marrero v. Toledo,* 968 F. Supp. 27, 34 (D.P.R. 1997); *Tavárez v. Champion Prods., Inc.,* 903 F. Supp. 268, 270 (D.P.R. 1995).

28 *See Scott v. Harris,* 127 S.Ct. 1769, 1773, n. 2(2007).

29 *See Scott,* 127 S.Ct. at 1773, n. 2, citing *Hunter v. Bryant,* 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) *(per curiam).*

30 *See Topp v. Wolkowski, 994 F.2d 45, 48 (1st Cir. 1993) citing Floyd v. Farrell,* 765 F.2d 1, 2-3 (1st Cir.1985)

31 *See, e.g., Acevedo-Cordero v. Cordero-Santiago,* 958 F.2d 20, 22 (1st Cir. 1992).

32 *See Hayes v. City Univ. of New York,* 503 F.Supp. 946, 962 (S.D.N.Y.1980), *aff'd,* 648 F.2d 110 (2d Cir.1981).

33 *See Hirschfeld v. Bd. Of Elections,* 984 F.2d 35, 39 (2d Cir.1992).

34 *See Kidder, Peabody & Co., Inc. v. Maxus Energy Corp.,* 925 F.2d 556, 565 (2d Cir.), *cert. denied,* 501 U.S. 1218, 111 S.Ct. 2829, 115 L.Ed.2d 998 (1991); 7 James W. Moore et al., *Moore's Federal Practice* ¶ 62.05 (2d ed. 1993).

35 *See Michigan Coalition of Radioactive Material Users, Inc. v Griepentrog,* 945 F.2d 150, 153 (6th Cir. 1991).

36 *See Ruiz v Estelle,* 666 F.2d 854, 856-857 (5th Cir. 1982).

the mere "possibility" of success on the merits.[37] If the basis of an application for a stay of judgment pending appeal lay in events occurring after the District Court had denied a similar application, the Court of Appeals will make an independent judgment, but if the application is in effect an appeal from the District Court's denial of the stay, the Court of Appeals will treat it as such and give the district judge's action the appropriate deference.[38]

IX. If the case goes to jury trial, which jury instructions should be included?

After researching the First Circuit Court of Appeals jurisprudence, the Author noticed that the issue of whether or not a jury should be instructed that prosecutors are immune has not been decided yet by said court. Nevertheless, the Tenth Circuit shed light since it has discussed this issue. The Author strongly recommends that our jurisdiction should follow said decision.

In *Valdez v. Black*, 446 F.2d 1071(10th Cir. 1971) the plaintiffs alleged that they were deprived of their civil rights by defendants under color of state law. Specifically, the plaintiffs claim violations to their right of free speech and assembly, the right to petition their government for redress of grievances and the right to be free from unreasonable searches and seizures and arrest. Each plaintiff made claim for $3,000. The Defendants were (1) Alfonso Sánchez, the district attorney for the first judicial district of the State of New Mexico; (2) Joe Black, Chief of the New Mexico State Police; (3) fourteen named persons who are members of the New Mexico State Police; (4) Adjutant General John Jolly, Commander of the New Mexico National Guard; and (5) two named persons who are members of the New Mexico National Guard. The trial by jury culminated in verdicts for the defendants on the claims of twelve of the thirteen plaintiff. The jury returned a verdict in favor of one plaintiff, Sevedeo Martinez, and against four members of the New Mexico State Police in the amount of $3,000. Then, the non-prevailing plaintiffs appealed the judgments entered dismissing on the merits the claims. Among the other issues tried at the appeal, certain of the plaintiffs complained about the instructions given the jury concerning Alfonso Sánchez, the district attorney for the first judicial district of the State of New Mexico, relating to the immunity and the extent thereof given him by virtue of the office he held. The gist of the instruction was that the law grants immunity to a district attorney for acts done or ordered by him in the performance of his official duties as an integral part of the judicial process, but that if a district attorney abandons the performance of his official duties and commits or directs the commission of acts which are ordinary police activity instead of judicial activity and orders the arrest or detention of persons in order to prevent them from exercising their constitutional rights then he is no less liable than those who carry out his instructions. For our surprise, the Tenth Circuit perceived no error in the giving of this instruction and concluded that was within the line of several cases regarding prosecutorial immunity. Indeed, the appeals court concluded that the instruction given squared pretty much with *Robichaud v. Ronan*, 351 F.2d 533 (9th Cir. 1965), in which it was stated that when a prosecuting attorney acts in some capacity other than his quasi-judicial capacity, then the reason for his immunity (integral relationship between his acts and the judicial process) ceases to exist and if he acts in the role of a policeman, he should be liable as a policeman.

X. After Plaintiff finished with his or her case in chief, could a prosecutor can request dismissal prior to presenting his or her evidence?

The answer is very simple, yes. Federal Rule of Civil Procedure 50(a)(1) permits a party to move for judgment as a matter of law before the case has been submitted to the jury. Judgment as a matter of law may be granted when "during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue". In deciding a Rule 50 motion, a district court "must examine the evidence, and inferences to be drawn therefrom, in the light most favorable to the non-movant."[39]

XI. After the defendant-prosecutor finished with his or her case in chief, should a prosecutor request dismissal of the case prior to jury deliberations? What to do for the record before appealing?

The answer is also yes. When we refer to a "renewed" Rule 50 motion, it means that it must be argued after the defendants presented their case in chief, before the jury begins to deliberate. Furthermore, if the verdict is in favor of the plaintiff, the defendants must renew their Rule 50 motion after the verdict is reached, prior to any appeal, if filed. At the appeal level, the First Circuit in *Casillas-Diaz v. Palau,* 463 F.3d 77, 81 (1st Cir. 2006) citing *Sánchez v. P.R. Oil Co.,* 37 F.3d 712, 716 (1st Cir.1994) said that if a Rule 50 motion contests the sufficiency of the proof, "the court of appeals must examine the evidence and the inferences reasonably to be extracted therefrom in the light most hospitable to the nonmovant." In performing this tamisage, the First Circuit has said that "we may not consider the credibility of witnesses, resolve conflicts in testimony, or evaluate the weight of the evidence."[40] Judgment as a matter

37 *See Michigan Coalition,* 945 F.2d at p. 153.
38 *See Lightfoot v. Walker,* 797 F.2d 505, 506 (7th Cir. 1986).
39 *See Mangla v. Brown Univ.,* 135 F.3d 80, 82 (1st Cir.1998) (*citing Rolón-Alvarado v. Municipality of San Juan,* 1 F.3d 74, 76 (1st Cir.1993)).
40 *See Casillas-Diaz v. Palau,* 463 F.3d 77, 81-82 (1st Cir. 2006); *citing Wagenmann v. Adams,* 829 F.2d 196, 200 (1st Cir.1987).

of law should be approved, or the denial of such a judgment reversed, "only when the evidence, viewed from this perspective, is such that reasonable persons could reach but one conclusion."[41] It follows that the appeals court "may reverse the denial of such a motion only if reasonable persons could not have reached the conclusion that the jury embraced."[42] In *Casillas-Diaz,* 463 F.3d at 82; *citing Correa,* 69 F.3d at 1196, the First Circuit held that the premise on which this contention rests is impeccable: a renewed motion for judgment as a matter of law under Rule 50(b) cannot assert new grounds but, rather, is "bounded by the movant's earlier Rule 50(a) motion.". In other words, a party cannot use a Rule 50 motion as an instrument for introducing a neoteric legal theory-one not distinctly articulated in his end-of-the-evidence motion for judgment as a matter of law-into the case.[43]

XII. SHOULD THE PROSECUTOR ASK FOR A NEW TRIAL AND ALSO FOR A REMITTITUR AFTER THE VERDICT IS REACHED AGAINST HIM/HER?

In addition to any Rule 50 motion, the prosecutor must file a motion to set aside the jury verdict requesting a new trial pursuant to Fed. R. Civ. P. 59(a), only if verdict is against the demonstrable weight of the credible evidence or results in blatant miscarriage of justice. As stated in *Sánchez v. Puerto Rico Oil Co.,* 37 F.3d 712, 717 (1st Cir. 1994)[44], a trial judge's refusal to disturb a jury verdict is further insulated because it can be reversed by the First Circuit solely for abuse of discretion. Despite of the remedies already explained provided by the Federal Rules of Procedure before and after the jury verdict is reached, the prosecutor can ask, in the alternative and without waiving the other arguments for appeal, a *remittitur* or a reduction on the amount awarded by the jury in damages. *Remittitur* is defined by the *Black's Law Dictionary,* as the process by which a court reduces the damages in a jury verdict; is simply a court's order reducing an award of damages. For example, "the defendant sought a remittitur of the $100 million judgment"[45].

In *Valentin-Almeyda v. Municipality Of Aguadilla,* 447 F.3d 85 (1st Cir. 2006), citing *O'Rourke v. City of Providence,* 235 F.3d 713, 733 (1st Cir. 2001), the First Circuit reiterated the rule of thumb that any award will not be overturned unless it is grossly excessive or so high as to shock the conscience of the court. Further, the appeals court has said in *Brown v. Freedman Baking Co.,* 810 F.2d 6, 11 (1st Cir.1987) that "[w]e accord broad discretion to the trial court's decision to affirm the jury's award of damages because of that court's greater familiarity with local community standards and with the witnesses' demeanor at the trial." Definitely, this *remittitur* device must be also used by the prosecutor as an alternative prior to appeal, and to have the record straight. Sometimes juries are extremely generous with compensation or they simply misunderstood the evidence or the jury instructions, and this device certainly helps a reasonable judge to reduce the amount in compensation to what really should be given.

Having the pressure of prosecuting a case and not obtaining a verdict in favor of the People of the Commonwealth of Puerto Rico is enough for a prosecutor. This means that any prosecutor must not be suffering the pain of having a civil rights federal case on the back if does not prevail in the criminal case.

XIII. CONCLUSION

Having the pressure of prosecuting a case and not obtaining a verdict in favor of the People of the Commonwealth of Puerto Rico is enough for a prosecutor. This means that any prosecutor must not be suffering the pain of having a civil rights federal case on the back if does not prevail in the criminal case. Certainly, this is not a "free will" or an "empty check" for a prosecutor to act maliciously or with reckless disregard of the duties imposed by the Law and the jurisprudence detailed above. The current legal standards provide equity and balance in federal civil cases against prosecutors. The Author only informs, analyzes and recommends new interpretations for these cases, since the entity of the Department of Justice, its prosecutors, the Special Independent Prosecutor's Office and its members should know the most recent defenses available in favor of them. As the U.S. Constitution and our Constitution say, everyone is equal under the law, and there should be no fear in prosecuting anyone regardless who is the accused. And precisely, the author can conclude that the discussion made herewith will help others to believe most in the evidence to prosecute, and to simply believe in their assigned cases. ⁂

41 *Id.*

42 *See Correa v. Hosp. San Francisco,* 69 F.3d 1184, 1191 (1st Cir.1995).

43 *See also* JAMES W. MOORE, 5A *Moore's Federal Practice* ¶ 50.08 (2d ed.1994) (explaining that "any argument omitted from the motion made at the close of the evidence is waived as a ground for judgment under Rule 50(b)").

44 *See also, Freeman v. Package Mach. Co.,* 865 F.2d 1331, 1334 (1st Cir.1988); *Milone v. Moceri Family, Inc.,* 847 F.2d 35, 37 (1st Cir.1988).

45 *See Black's Law Dictionary Pocket Edition,* at page 537, 6th ed., West Group (1996).