The Intersection of the First Amendment
and
Professional Ethics for Government Attorneys

Christopher B. McLaughlin
Assistant Professor, UNC School of Government
mclaughlin@sog.unc.edu 919.843.9167

I. Scope Note

This article answers two questions:

1. What First Amendment rights do government employees possess?
2. How do the North Carolina Rules of Professional Conduct governing attorneys interact with government attorney-employees' First Amendment rights?

First Amendment protection exists for government employees, but not to the same extent as it does for everyone else. The ability of government employees to exercise their First Amendment rights are limited by their employers' interest in providing services to the public in an efficient and effective manner. Recent caselaw from the Supreme Court of the United States has further limited the ability of government employees' to exercise their First Amendment rights by excluding from constitutional protection speech that is within their scope of employment. As a result, the First Amendment no longer protects government employees who complain to their supervisors about misconduct or waste relating to matters that are within their job responsibilities and later suffer negative consequences as a result of those complaints.

Government employees who are also attorneys face additional limitations on their speech due to their professional responsibility obligations under state bar rules. Speech that might otherwise be protected by the First Amendment may be prohibited by an attorney's duty of confidentiality. Other speech that is required by an attorney's professional responsibility obligations may fall outside of the First Amendment's protection. This imperfect overlap between the First Amendment and attorneys' ethical duties raise two interesting constitutional conundrums that are analyzed at the end of this article.

II. What First Amendment rights do government employees possess?

Until the mid-20th century, public employees possessed minimal First Amendment free speech rights. Governments were free to condition public employment on the near complete waiver of First Amendment rights, a view neatly summarized by Oliver Wendell Holmes when sitting on the Supreme Judicial Court of Massachusetts. "A policeman may have the constitutional right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892).

Beginning in the 1950s, the Supreme Court began to expand First Amendment protection for government employees. The court first struck down loyalty oaths banning membership in particular political parties and later invalidated statutes that prohibited the hiring of past or

present members of "subversive" organizations. See Wiemann v. Updegraff, 344 U.S. 183 (1952)(striking down loyalty oaths); Keyishian v. Board of Regents, 385 U.S. 589 (1967)(striking down "subversive" organization statutes).

In 1968, the Supreme Court moved to protect speech other than traditional political activities when it ruled unconstitutional the firing of a public school teacher for publicly criticizing the local board of education's spending decisions.

> [T]he question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive. On such a question free and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

Pickering v. Board of Education, 391 U.S. 563, 571 (1968).

Pickering provided the first express statement of the Court's current approach to this issue: public employees do not relinquish their First Amendment rights to comment on matters of public concern simply because they are employed by the government. "A State may not condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." Connick v. Myers, 461 U.S. 138, 142 (1983).

However, the government's authority to limit the free expression of its employees remains far greater than its ability to limit the free expression of common citizens.

> When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provisions of public services. Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.

Garcetti v. Ceballos, 547 U.S. 410, 418-19 (2006)(internal citations omitted).

Writing for the majority in Garcetti, Justice Kennedy summarized the delicate balancing act currently mandated by the Supreme Court: "to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the

needs of government employers attempting to perform their important government functions." 547 U.S. at 420.

A. Two Foundational Cases: Connick and Garcetti

Two of the Supreme Court cases cited above deserve extended analysis because of their foundational roles in the evolving government employee First Amendment jurisprudence: Connick v. Myers, 461 U.S. 138 (1983), and Garcetti v. Ceballos, 547 U.S. 410 (2006). Connick firmly established the current test for whether the speech in question touches on a matter of public concern, while Garcetti added a new requirement that the speech be outside of the employee's job duties to receive First Amendment protection. Both cases involve government attorneys as plaintiffs, making them even more relevant for the purposes of this article.

i. Connick v. Myers

Harry Connick, Sr.—the father of the famous jazz singer and actor—served as the New Orleans district attorney for thirty years. In 1980, he unintentionally laid the groundwork for a seminal Supreme Court decision when he terminated for insubordination one of his assistant district attorneys, Sheila Myers.

Connick had ordered that Myers be transferred to prosecute cases in a different section of criminal court, a move that Myers strongly opposed. After expressing her opinion about the transfer to her supervising attorneys, Myers decided to distribute a questionnaire to her colleagues to learn if they shared her concerns. Early one morning, Myers typed up a questionnaire and distributed it to 15 of her fellow assistant district attorneys. The questionnaire asked for her colleagues' views on five issues:

- office transfer policy;
- office morale;
- the need for a grievance committee;
- the level of confidence in their supervisors; and,
- whether employees felt pressured to work on political campaigns.

When Connick was informed that Myers was distributing the questionnaire at the office, he immediately fired her. Myers sued under 42 U.S.C. §1983 claiming she was terminated for exercising her First Amendment right to free speech. She prevailed at trial and at the United States Court of Appeals for the Fifth Circuit. The Supreme Court agreed to hear the case and used it to explore the constitutional question at issue in more depth than it had since Pickering 15 years earlier.

In the Court's view, the key issue to be resolved was whether Myers' questionnaire constituted speech on a matter of public concern.

> When employee expression cannot fairly be considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices without intrusive oversight by the judiciary

> in the name of the First Amendment. . . . [W]hen a public employee speaks out not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest . . . a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

461 U.S. at 146, 147.

Justice Kennedy, writing for the five-justice majority, viewed Myers' questions as aimed not at helping the public evaluate the performance of a government agency but rather at "gathering ammunition" for a battle with Myers' supervisors over the transfer. The majority concluded that the general public might have a legitimate interest in only one of the five questions, that dealing with forced participation in political campaigns. But for that question, Myers' speech was not related to a matter of public concern and therefore was not deserving of First Amendment retaliation protection.

Although the majority conceded that the question involving forced participation in political campaigns might touch upon a matter of concern, they believed that question did so "only in a most limited sense; her survey, in our view, is most accurately characterized as an employee grievance concerning internal office policy." 461 U.S. at 154.

Myers' limited First Amendment interest in that one question was outweighed by Connick's interest maintaining an effective and successful office, in large part because of the manner, time and place of Myers' speech. The court accepted Connick's characterization of Myers' conduct as causing a "mini-insurrection." When, like Myers' questionnaire, the speech at issue occurs in the office during work hours and affects other employees' ability to conduct their work, the speech is more likely to justify retaliatory action by the employer under the First Amendment.

In the end, the majority rejected Myers' attempt to "constitutionalize [her] employee grievance" and found that her termination did not violate the First Amendment.

ii. Garcetti v. Ceballos

The Supreme Court did not examine this issue in depth again for nearly 25 years, until it confronted in 2006 a similar case involving another fired district attorney, Richard Ceballos. He worked in Los Angeles for District Attorney Gil Garcetti, the same district attorney who oversaw the prosecution of O.J. Simpson in the mid-nineties.

In 2000, a defense attorney contacted Ceballos about alleged inaccuracies in an affidavit used to obtain a critical search warrant. In accordance with standard office practice, Ceballos investigated the issue and determined that there were serious misrepresentations in the affidavit. He then informed his superiors of his concerns and drafted a memorandum recommending dismissal of the criminal case. After several meetings, Ceballos' boss decided to proceed with the prosecution. The defense later called Ceballos to testify in an unsuccessful challenge to the search warrant that resulted from the allegedly inaccurate affidavit.

Ceballos claimed that he was transferred and denied a promotion because of his speech about the affidavit. He sued under 42 U.S.C. § 1983 but lost in federal district court on summary judgment when the court concluded that Ceballos' speech was not protected by the First Amendment because he wrote his memorandum pursuant to his job duties. The Court of Appeals for the Ninth Circuit reversed, finding that the memorandum was worthy of First Amendment protection because it touched upon a matter of public concern—potential government misconduct—and because it did not cause undue disruption of inefficiency in the office of the district attorney.

Again writing for a five-justice majority, Justice Kennedy believed that the controlling factor in the case was the fact Ceballos' speech was made pursuant to his duties as an assistant district attorney.

> Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe upon any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created. . . . [T]he First Amendment does not prohibit managerial discipline based on employee's expressions made pursuant to official responsibilities.

547 U.S. at 421-422, 424. To hold otherwise, wrote Justice Stevens, would be to commit the courts to an overly intrusive role of monitoring all business-related communications throughout local, state and federal government.

Because the majority concluded that Ceballos' speech did not merit First Amendment protection, the Supreme Court reversed the lower court and found in favor of Garcetti. Interestingly, the Court appeared to base its analysis exclusively on Ceballos' internal speech to his superiors and co-workers, not on his external speech while testifying in court. Most lower courts that have addressed this issue have determined that testimony in deposition or at trial is deserving of First Amendment protection. See section B(ii) below.

B. Current Five-Part Test

Since Garcetti, lower courts have applied a five-part test to First Amendment free speech claims raised by government employees. Although the order of the first two inquiries sometimes changes, these five questions now control claims similar to those brought by Myers and Ceballos:

1. Did the employee's speech touch upon a matter of public concern?
2. Was the speech made as part of the employee's job duties?
3. Did the government take adverse employment action that was substantially motivated by the employee's speech?
4. Did the government's legitimate administrative interest in providing efficient and effective services to the public outweigh the employee's First Amendment rights?

5. Would the government have taken the adverse employment action even in the absence of the protected speech?

If plaintiff produces enough evidence to answer the first three questions affirmatively, then the burden of persuasion shifts to the government for the remaining two questions. If the government fails to satisfy its burden on both questions, then the employee should prevail. See Eng v. Cooley, 552 F.3d 1062 (9th Cir. 2009).

i. Did the employee's speech touch upon a matter of public concern?

Connick makes clear that the speech in question must concern something more than an individual employee's complaint about his or her job to warrant First Amendment protection. As the Fourth Circuit observed, "A government employee's right to gripe about the conditions of his or her job is protected to the same degree as that of private employees, as only under such condition is efficient government service possible." Arvinger v. Mayor and City Council of Baltimore**,** 862 F.2d 75 (4th Cir. 1988)(holding that testimony at grievance hearing concerned only the employees involved in the hearing and not the general public and therefore was not protected by the First Amendment).

Simply put, the First Amendment does not guarantee that all government employees will be treated nicely by their supervisors: "A generalized public interest in the fair or proper treatment of public employees is not enough" to trigger First Amendment protection. Ruotolo v. City of New York, 514 F.3d 184, 190 (2nd Cir. 2008). See also Bell v. City of Philadelphia, 275 F. Appx. 157, 2008 WL 1813163 (3rd Cir. 2008)(an assistant district attorney's complaints about "abuse" and mistreatment by his colleagues and supervisors did not qualify as a matter of public concern). The mere fact that the public may be interested in hearing about a subject does not automatically make that subject a matter of public concern. Haddon v. Executive Residence at the White House, 313 F.3d 1352, 1360 (Fed. Cir. 2002)(holding that former White House chef's public comments about First Family's food preferences, President's tardiness for dinner, and poor service given to First Family by staff were not matters of public concern).

That said, speech that involves public health and safety, corruption, or unconstitutional discrimination is generally considered to be a matter of public concern even if it is raised in the context of an individual employee's complaints about his or her working conditions. Consider Jones v. Quintana, ___ F.Supp.2d ___, 2009 WL 3126544 (D.D.C. 2009), in which the court concluded that a 911 dispatcher's complaints about a new system for routing 911 calls were aimed at protecting public safety and not simply at protecting the dispatcher's workload. See also Eng v. Cooley, 552 F.3d 1062 (9th Cir. 2009)(complaints by assistant district attorney about supervisor misconduct that negatively affected public finances was matter of public concern); Cromer v. Brown, 88 F.3d 1315 (4th Cir. 1996)(allegations of racial discrimination in a public agency always a matter of public concern).

ii. Was the speech made as part of the employee's job duties?

Garcetti held that speech within the scope of a government employee's official responsibilities does not warrant First Amendment protection. How should courts make this

determination? Responding to criticism from a dissenting justice in Garcetti, Justice Kennedy stated that formal job descriptions should not control this determination.

> The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.

Garcetti, 547 U.S. at 424-425.

The Garcetti inquiry concerns not only the content of the speech but also the medium, venue, and intended audience of the speech. The fact that that the content of an employee's speech concerned the subject matter of the employee's duties is "nondispositive." Garcetti, 547 U.S. at 421. Lower courts applying the Garcetti framework appear to have developed two general rules, one for *internal* speech and one for *external* speech:

1. Internal speech generally is not protected, unless the speech concerns matters clearly outside the scope of the employee's job duties. Internal speech includes complaints directed up the employee's chain of supervisors, even to the agency's most senior officials, as well as comments made in response to an internal agency investigation.

2. External speech, such as comments to the media, generally is protected regardless of content, unless the employee's job duties include the type of external speech at issue. Most courts agree that testimony in a civil or criminal judicial proceeding is considered protected external speech, even if the content of that speech is directly related to an employee's job duties.

Numerous court opinions illustrate these rules in practice:

- Complaints directed to the employee's chain of supervisors about subject *within* the scope of the employee's job duties held *unprotected*:
    - Davis v. McKinney, 518 F.3d 304 (5th Cir. 2008)(complaints made to both the employee's immediate supervisor and the president of her university division were not protected because the complaints concerned matters within employee's job responsibilities)
    - Vila v. Padron, 484 F.3d 1334 (11th Cir. 2007)(complaints about legal improprieties made by university vice-president/general counsel to university president and board of trustees not protected)
    - Hill v. Kutztown, 455 F.3d 225 (3rd Cir. 2006)(town manager's complaints to town council about alleged harassment by town's mayor not protected because manager's official duties included reporting to the council)

- Complaints directed to the employee's chain of supervisors about a subject *outside* the scope of employee's job duties held *protected*:
    - Jones v. Quintana, ___ F.Supp.2d ___, 2009 WL 3126544 (D.D.C. 2009)(911 dispatcher's complaints to her supervisors and to the mayor and council about 911 policies protected, because dispatcher's job duties did not involve policy-making)
    - Wright v. City of Salisbury, ___ F.Supp.2d ____, 2009 WL 2957918 (E.D.Mo. 2009)(police officer's letter to city council about city's drunken driving enforcement policies protected, because police officer's job duties did not include policy-making)

- Comments made in response to internal investigation held *not protected*:
    - Jackson v. Mecklenburg County, 2008 WL 2982468 (W.D.N.C. July 30, 2008)(holding that allegations made during internal investigation of discrimination not protected because all agency employee's were expected to cooperate with the investigation as part of their job duties)

- Speech directed *outside* of employee's chain of supervisors, including speech made to other government agencies or media, held *protected*:
    - Andrew v. Clark, 561 F.3d 261 (4th Cir. 2009)(indicating police officer's release of internal memo to newspaper could constitute protected speech)
    - Casey v. West Las Vegas Independent School District, 473 F.3d 1323 (10th Cir. 2007)(school superintendent's reports to supervisors and federal agency about problems in the Head Start program not protected because her job duties required such reports, but complaints to state attorney general about open meeting law violations were protected because her job duties did not involve reporting such legal problems to external agencies)
    - Snelling v. City of Claremont, 931 A.2d 1272 (N.H. 2007)(city tax assessor's comments to media about fairness and potential abuse of city tax system protected, because assessor's job duties included duty to communicate about tax assessments but not about tax policy in general)

- Speech directed to media by employees whose job duties included speaking to the media held *not protected*:
    - Nixon v. City of Houston, 511 F.3d 494 (5th Cir. 2007)(police officer's comments to media while on duty and in uniform at the scene of an accident were part of officer's job duties, despite the fact that the comments were unauthorized and against the wishes of his superiors)
    - Foley v. Town of Randolph, 601 F.Supp.2d 379 (D.Mass. 2009)(fire chief's comments at fire scene not protected, despite the fact that the comments focused on the chief's funding and staffing concerns rather than the fire itself)

- Testimony in judicial proceeding held *protected*:
    - Reilly v. Atlantic City, 532 F.3d 216 (3rd Cir. 2008)(finding that police officer's testimony in a criminal prosecution of fellow officer was protected, after reviewing caselaw and noting that Garcetti did not address the testimony made by the plaintiff in that case)

iii. Did the government take adverse employment action that was substantially motivated by the employee's speech?

The definition of "adverse employment action" varies from circuit to circuit. All federal courts generally agree that a public employer clearly violates an employee's First Amendment rights when it "discharges or 'refuses to rehire [the] employee,' or when it makes decisions relating to 'promotion, transfer, recall, and hiring based on the exercise of that employee's free speech rights.' " Ridpath v. Board of Governors Marshall Univ., 447 F.3d 292, 316 (4th Cir. 2006), quoting Suarez Corp. Indus. v. McGraw, 202 F.3d 676, 686 (4th Cir.2000).

The Fourth Circuit is one of several that conclude the First Amendment also bars less severe employment actions that "chill" public employee's free speech rights. "The employee must establish retaliation of some kind—that he was deprived of a valuable government benefit or adversely affected in a manner that, at the very least, would tend to chill his exercise of First Amendment rights." Goldstein v. Chestnut Ridge Volunteer Fire Department Co., 218 F.3d 337, 352 (4th Cir. 2000)(suspension of volunteer firefighter constituted adverse employment action). In a footnote sometimes dismissed as dicta, the Supreme Court seemingly blessed an expansive definition of "adverse employment action": "Moreover, the First Amendment, as the court below noted, already protects state employees not only from patronage dismissals but also from even an act of retaliation as trivial as failing to hold a birthday party for a public employee ... when intended to punish her for exercising her free speech rights." Rutan v. Republican Party of Illinois, 497 U.S. 62, 76 n.8 (1990)(internal citations omitted). See also Spiegla v. Hull, 371 F.3d 928 (7th Cir. 2004)(transfer to more physically demanding and less-skilled post and unfavorable change in schedule can be adverse employment action even if the employee suffers no loss in pay); Coszalter v. City of Salem, 320 F.3d 968 (9th Cir. 2003)(transfer to occasionally less-pleasant duties and unwarranted disciplinary investigations constitute adverse employment action). But see Benningfield v. City of Houston, 157 F.3d 369 (5th Cir. 1998)(reprimands and false accusation of criminal wrongdoing do not constitute adverse employment actions under First Amendment).

After producing evidence of an adverse employment action, the plaintiff must then demonstrate that the protected speech was a "substantial" or "motivating" factor behind that action. Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 287 (1977). The protected conduct need not be the *only* or the *primary* reason for the adverse employment action, but merely *one of* those reasons. See Speigla, 371 F.3d at 942 (citing unanimity among the circuits on this interpretation).

iv. Did the government's legitimate administrative interest in providing efficient and effective services to the public outweigh the employee's First Amendment rights?

This balancing test was first explicitly defined by the Supreme Court in Pickering and further refined in Connick when Justice Kennedy analyzed the competing interests in the one item on Myers' questionnaire that touched upon a matter of public concern. The government's "legitimate purpose in promoting efficiency and integrity in the discharge of official duties and to maintain property discipline in the public service" is most at risk when the speech in question occurs in the office and impedes other employees from accomplishing their job responsibilities. Connick, 461 U.S. at 151(internal citations omitted). The Court found that Myers' First Amendment interest in her intra-office questionnaire was outweighed by the district attorney's interest in preventing a "mini-insurrection" and maintaining "close working relationships" within the office.

The Fourth Circuit interprets this balancing test to require an analysis of the nature of the employee's position, the context of the employee's speech, and the extent to which it disrupts the Department's activity. McVey v. Stacy, 157 F.3d 271, 278 (4th Cir.1998). When considering these factors, the court looks at whether the speech: "(1) impairs discipline by superiors; (2) impairs harmony among co-workers; (3) has a detrimental impact on close relationships; (4) impedes the performance of the public employee's duties; (5) interferes with the operation of the agency; (6) undermines the mission of the [department]; (7) is communicated to the public or to co-workers in private; (8) conflicts with the responsibilities of the employee within the [department]; and (9) makes use of the authority and public accountability the employee's role entails." McVey, 157 F.3d at 278 (quoting Rankin v. McPherson, 438 U.S. 378, 388-91 (1987)).

Generally speaking, the more the employee's job requires "confidentiality, policy making, or public contact, the greater the state's interest in firing her for expression that offends her employer." Sheppard v. Beerman, 190 F.Supp.2d 361, 374 (E.D.N.Y. 2002)(internal citations omitted). In Sheppard, the court (perhaps not surprisingly) favored a judge's interest in maintaining an effective workplace over the First Amendment interest of the judge's clerk. Because "a law clerk is often privy to a judge's thoughts and decision-making processes," the importance of the clerk's "cooperative and confidential relationship with staff members cannot be overemphasized . . . ." Sheppard, 190 F.Supp.2d at 374.

Two cases involving sarcastic references to assassination attempts nicely demonstrate how the First Amendment balancing test can vary based on level of employment. In Rankin v. McPherson, 483 U.S. 378 (1987), a county typist told her colleague "I hope they get him next time" after learning of the 1981 assassination attempt on President Reagan. Because the typist was a low-level employee with little interaction with the public and no policy-making authority, the court found that her comments did not unduly interfere with her employer's effective and efficient delivery of public services. Compare that result to the one in Baird v. Cutler, 883 F.Supp. 591 (D. Utah 1995), in which a senior city attorney was demoted after making this snide reference on a local political commentary television show, "Perot thinks everyone is trying to assassinate him. Too bad he's still alive!" Because the attorney had substantial policy-making authority—in the area of gun control, no less—the court found that his interest in free expression were outweighed by his employer's interest in controlling its message on important policy issues.

The facts of Braswell v. Haywood Regional Medical Center, 234 Fed.Appx. 47, 2007 WL 1227464 (4th Cir. 2007) provide an excellent example how the Fourth Circuit applies the Pickering balancing test. Braswell, a physician with medical privileges at the local county hospital, sent a letter to a surgeon being recruited to the area ridiculing the county hospital's assertion that the community could support additional surgeons. After determining that Braswell was the equivalent of a public employee and that his speech touched upon a matter of public concern, the court concluded that Braswell's First Amendment interest in his letter was outweighed by the hospital's interest in regulating speech that affected its "core mission:"

> To meet the medical needs of Haywood County, the Hospital, like all hospitals in more sparsely populated areas, must devote extra effort to recruiting physicians. Accordingly, the Hospital has a significant interest in preventing staff doctors from interfering with the Hospital's recruiting efforts. The Hospital also has an important interest in maintaining a collegial atmosphere. As stated above, doctors must frequently consult with each other and assist in performing surgeries. Braswell's actions negatively affected his relationship with his colleagues and thus impacted his ability to provide quality care to patients at the Hospital.

Braswell, 234 Fed. Appx. 53-54.

v. Would the government have taken the adverse employment action even in the absence of the protected speech?

If the plaintiff produces evidence of an adverse employment action that was based at least in part on the plaintiff's protected speech, the government can still defeat the First Amendment claim by demonstrating that it would have made the same employment decisions even if the plaintiff had not uttered the speech in question. The court should first ask, "Was the adverse employment action based on both protected *and* unprotected activities?" If so, the court must then ask, "Would the government still have taken the adverse action if the proper reason alone had existed?" Eng v. Cooley, 552 F.3d 1062, 1072 (9th Cir. 2009).

III. How do the North Carolina Rules of Professional Conduct governing attorneys interact with government attorney-employees' First Amendment rights?

When attorneys gain admission to the bar and enter into professional relationships with clients, they implicitly agree to restrain their speech on certain issues. A state's ethical rules governing attorneys cannot trump the First Amendment, of course, but they can create additional limitations on when, where and how a government attorney may engage in certain speech. This section identifies several North Carolina Rules of Professional Conduct ("RPC") regulating attorney speech and analyzes two constitutional conundrums that could arise due to the imperfect overlap between the RPC and the First Amendment as they relate to government attorneys.

A. RPC Rule 1.6: Confidentiality

Attorneys are forbidden to disclose *any* "information acquired during the professional relationship" unless the client provides informed consent. This duty of confidentiality is far broader than the attorney-client privilege. The privilege is an evidentiary rule that covers only communications made in confidence between an attorney and client in the course of giving or seeking legal advice for a non-criminal purpose. See In re: Miller, 357 N.C. 316 (2003). In contrast, the duty of confidentiality covers *all* information the attorney learns while working for the client, regardless of source, purpose, or context. The duty of confidentiality so broad that is could forbid speech by a government attorney that would be protected by the First Amendment under the Connick/Garcetti tests. This potential conundrum is discussed in more detail below in section E.

North Carolina's version of Rule 1.6 does not *require* attorneys to breach a client's confidence under any circumstances. However, at least 13 states require disclosure by attorneys to prevent some types of criminal acts, usually those that are likely to cause injury or death. See The Law Governing Lawyers: National Rules, Standards, Statutes, and State Lawyer Codes, Susan R. Martyn, Lawrence J. Fox, W. Bradley Wendel (Wolters Kluwer, 2009-2010 ed.).

In North Carolina, attorneys are *permitted but not required* to disclose a client's confidential information in seven situations:

> (1) to comply with the Rules of Professional Conduct, the law or court order;
> (2) to prevent the commission of a crime by the client;
> (3) to prevent reasonably certain death or bodily harm;
> (4) to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used;
> (5) to secure legal advice about the lawyer's compliance with these Rules;
> (6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
> (7) to comply with the rules of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court.

The sixth exception is most commonly applied in billing and malpractice disputes between lawyers and clients. It may also permit an in-house attorney to share confidential information with his or her personal attorney to determine whether the in-house attorney has an employment law claim against the employer. See Jacobs v. Schiffer, 204 F.3d 259 (D.C. Cir. 2000)(holding that First Amendment protects and Rule 1.6 permits conversations between in-house attorney and his personal attorney that involve the in-house attorney's employer's confidential information). Whether the in-house attorney could later publicly reveal his employer's confidential information in support of an employment claim is subject on which courts disagree. See section E below.

B. RPC Rule 1.13: Organization as Client

An attorney representing an organization must put the interests of the organization above the interests of the organization's individual agents, employees, and officers. This principle applies equally to attorneys to representing private corporations and to those representing governments. For example, an attorney representing a town must disclose to the town council a meeting involving the attorney, the mayor, and other parties despite the mayor's request that the attorney keep the meeting a secret. N.C. Ethics Op. CPR 154. Similarly, if a newly elected city council member asks the city attorney to describe past conversations with the council, the attorney must get permission from the council as a whole before revealing those conversations. See R.I. Ethics Op. No. 2002-02.

Unlike Rule 1.6, Rule 1.13 *requires* certain speech on behalf of organizational attorneys. It is possible that a government attorney may be required to speak on subjects and in settings that do not trigger First Amendment protection under Connick/Garcetti, a second potential constitutional conundrum analyzed below in section E.

The obligation to speak under Rule 1.13 is triggered when an attorney representing an organization knows that an employee, officer or agent has acted or will act in a matter related to the attorney's representation that is likely to cause substantial injury to the organization and is either (i) a violation of a legal obligation to the organization or (ii) a violation of law that could be imputed to the organization. RPC 1.13(b). When such a situation arises, the attorney has an obligation to report the matter up the organization's chain of command to the "highest authority that can act on behalf of the organization," unless the lawyer reasonably believes that such internal disclosure is not in the best interests of the organization.

Are the voters the "highest authority" that can act on behalf of a government? Comment 5 to Rule 1.13 appears to rule out that conclusion by observing that an organization's "highest authority" is generally its "board of directors or similar governing body." Rule 1.13, Comment 5. If a corporation's highest authority is not its shareholders, then it seems unlikely that a government's highest authority could be its voters. For an attorney representing a local government, the highest authority should be the board of county commissioners or town council. For an attorney representing a discrete unit of local government, the highest authority is likely the head of that unit. See N.C. State Bar v. Koenig, 04 DHC 41 (2005)(disciplining attorney representing sheriff's office for failing to pursue allegations of sexual harassment to a final decision by the highest authority, the sheriff). For an attorney representing the state, the highest authority could be a department secretary, the General Assembly, or the governor, depending on whom the attorney considers to be the client. Rule 1.13, Comment 9.

If the issue is not resolved by the organization's highest authority, then the attorney is permitted but not required to disclose the issue publicly if (i) it involves a clear violation of law and (ii) is likely to cause substantial injury to the organization. Rule 1.13(c). However, the rule limits this public disclosure "to the extent permitted by Rule 1.6." This clause, which does not appear in the American Bar Association's model version of the rule, means that North Carolina's version of Rule 1.13 does not create independent authority for an attorney to disclose information that would otherwise be considered confidential. Unless the issue involves one of the exceptions to the Rule 1.6 duty of confidentiality discussed above, an attorney is *not* permitted to make a public disclosure under Rule 1.13.

Comment 9 to Rule 1.13 emphasizes the different obligations facing government attorneys as compared to their counterparts who represent private clients. When public business is involved, "a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified." While this observation suggests that government attorneys have more leeway to make public disclosure under Rule 1.13 than do private attorneys, that suggestion is somewhat negated by North Carolina's requirement that any disclosure under Rule 1.13 be permitted under Rule 1.6. Comment 9 likely has more weight in jurisdictions that do not tie Rule 1.13 to the specific exceptions in Rule 1.6. But even in North Carolina, government attorneys weighing the option to publicly disclose misconduct under an exception to Rule 1.6 might consider Comment 9 to serve as a finger on the scale in favor of disclosure over confidentiality.

C. Rule 3.3: Client Perjury

Under the Rules of Professional Conduct, the sanctity of the attorney-client relationship is trumped only by the integrity of the judicial process. In North Carolina, the only situation in which an attorney may be obligated to violate the duty of client confidentiality is when the attorney knows that the client or the client's witness has or will commit perjury or a similar fraud upon the court. Rule 3.3 requires an attorney to take all "reasonable remedial measures, including, if necessary, disclosure to the tribunal" once the lawyer realizes that the client has offered or will offer false material evidence or is engaged in fraudulent activity relating to the proceeding.

Could the obligation to remedy client perjury create a situation similar to that possible under Rule 1.13 in which speech is mandated by the RPC but unprotected by the First Amendment? Probably not. The mandated disclosure of a government client's perjury to the court by a government attorney would almost certainly be protected under the Connick/Garcetti test. First, the commission of a crime—perjury—by a government official should be considered a matter of public concern. Second, disclosing misconduct to an external agency—in this case, the court—is usually viewed as speech that falls outside of the scope of a government employee's duties. If so, then the disclosure mandated by Rule 3.3 would be protected by the First Amendment.

D. Rule 8.3: Reporting Professional Misconduct

Attorneys are *required* to report misconduct by another attorney "that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer." In North Carolina, this category of misconduct includes misappropriation of client funds (89 Disciplinary Hearing Committee 5), deliberate violation of settlement conditions (N.C. Ethics Op. RPC 127), and abuse of the trial calendaring authority by the district attorney (N.C. Ethics Op. RPC 243). Other jurisdictions have found an obligation to report grossly unreasonable fees (N.M. Ethics Op. 2005-02), the use of illegal drugs (Utah Ethics Op. 98-12), and fraudulent notarizations (Ohio State Bar Ethics Op. 02-01).

However, similar to Rule 1.13, the obligation to publicly disclose another attorney's misconduct is restrained by Rule 1.6. Rule 8.3 does not require or permit the reporting attorney to violate the duty of client confidentiality. Rule 8.3, Comment 3. If reporting other attorney's

misconduct would involve disclosure of a client's confidential information, the reporting attorney should "encourage" the client to consent to the disclosure if such disclosure will not "substantially prejudice" the client's interests. If the client refuses to provide consent for the disclosure, the attorney may not report the other attorney's misconduct –and the failure to do so will not be considered a violation of Rule 8.3.

The obligation to report professional misconduct raises the possibility of an attorney being forced by the RPC to speak without assurance that the First Amendment will protect the attorney from retaliation from his or her government employer. This constitutional conundrum, similar to that which can arise under Rule 1.13, is analyzed below.

E. Two Constitutional Conundrums

Unfortunately for government attorneys, the First Amendment and the RPC are not perfectly aligned. Some speech may be protected by the First Amendment but still lead to adverse consequences under the RPC. Other speech may be permitted or even required by an attorney's ethical obligations but unprotected by the First Amendment. These two conundrums and their possible ramifications are analyzed below.

i. Speech protected by the First Amendment but prohibited by the RPC

The broad scope of Rule 1.6 means that a government attorney is prohibited by ethical considerations from speaking about many topics that would be protected by the First Amendment. Consider this scenario:

> Attorney Smith is the recently hired county attorney for Carolina County, whose board of commissioners consists of four Tar Heel Political Party members, including the chair, and three Blue Devil Political Party members. Six months after joining the county, Smith learns that the four Tar Heels on the board routinely meet in private to discuss county business. Smith believes this practice violates state open-meetings law and informs the chair of this view. Despite Smith's admonitions, the Tar Heels continue to meet secretly. The chair instructs Smith not to reveal these meetings to anyone. Nevertheless, Smith informs the Blue Devils on the board of these meetings and, when that does not stop the practice, Smith discloses these meetings to the local newspaper. Two days after the newspaper calls the chair to ask about these secret meetings, the board votes 4-3 to terminate Smith's employment.

It seems likely that Smith's speech to the newspaper would be protected by the First Amendment under the Connick/Garcetti analysis. The commissioner's willful violation of state open-meetings law is clearly a matter of public concern, and Smith's speech to the newspaper does not appear to be within the scope of employment for a county attorney. Even if an employee is expected to respond to media inquiries on certain topics, self-initiated comments to

the media about topics that the employer has demanded the employee keep confidential probably would be considered outside of the scope of that employee's job duties. See Snelling v. City of Claremont, 931 A.2d 1272 (N.H. 2007)(fact that tax assessor's job duties included talking to the media on certain tax issues did not mean that all comments to the media by the assessor were within his scope of employment).

However, it seems equally likely that Smith's speech to the newspaper violates Smith's duties under the RPC. Public disclosure of a violation of open-meeting laws does not appear to satisfy any of the exceptions to client confidentiality under Rule 1.6. The remedies for a violation of the open meetings are civil in nature, not criminal, meaning the most likely exception, preventing the commission of a crime by the client, would not apply. See N.C.G.S. § 143-318.16 (authorizing injunctive relief for violation of open-meetings laws) and N.C.G.S. § 143-318.16A (authorizing the invalidation of acts by public body in violation of open-meetings laws).

Rule 1.13 offers no help to Attorney Smith either. The county commissioners are the highest authority that can act on behalf of the county, meaning there is no opportunity for Smith to report the matter up the internal chain of command. The rule's option of reporting the misconduct externally is limited by the attorney's obligations under Rule 1.6; because no exceptions to the duty of client confidentiality apply, Rule 1.13 does not authorize external disclosure.

Can the county fire Smith for conduct protected by the First Amendment but prohibited by the RPC? The answer must be yes: it is almost unimaginable that a client would have the ability to seek ethical sanctions against an in-house attorney for violating the RPC but would not have the ability to terminate its employment relationship with that attorney.

The most relevant case law on this specific issue appears to be Douglas v. DynMcDermott Petroleum Operations Co., 144 F.3d 364 (5th Cir. 1998), which involved the anti-retaliation provisions of Title VII of the federal Civil Rights Act of 1964. The court held that public disclosure of client confidences by an in-house attorney that violated state bar rules justified the termination of the attorney, despite the fact that the disclosures would have been considered "protected activity" under Title VII had they been made by a non-attorney employee. In the court's view,

> [The attorney] took no precautions to preserve the attorney-client relationship and instead acted with thoughtless indiscretion, demonstrating little regard for the ethical obligations inherent in the legal profession. This dereliction of professional duties meant that . . . the trust undergirding the attorney-client relationship was broken and [the attorney] could no longer function in her role as in-house counsel. . . .The ethical precepts of confidentiality and loyalty serve to assure that trust is not misplaced and to shield the employer-client from an abuse of the power that the attorney has acquired as a result of her unique position of confidence. The employer-client's reasonable expectation that its attorney will abide by the profession's ethical edicts is thus entitled to great

> weight. . . . To forgive a breach [of the duty of confidentiality] by allowing the legal protections sought in this case obviously would have repercussions beyond this one case because such a ruling would carve out a class of individual rights that that trump professional ethical considerations and, by extrapolation, could lead to further tolerances with unanticipated consequences to the profession . . . .

Douglas, 144 F.3d at 375. See also Washington v. Davis, 2001 WL 1287125 (E.D.La. 2001)(indicating that principles espoused in Douglas could bar a First Amendment retaliation claim based on speech that violated an attorney-employee's ethical obligations).

ii. Speech required by the RPC but not protected by the First Amendment

The RPC mandates speech by attorneys in at least three instances:

1. To report serious wrongdoing up the internal chain of command (Rule 1.13);
2. To remedy client perjury or fraud upon the court (Rule 3.3); and,
3. To report another attorney's serious misconduct if the misconduct can be reported without violating the duty of confidentiality (Rule 8.3).

Will any or all of this mandated speech be protected by the First Amendment? As discussed above, speech mandated by Rule 3.3 would almost certainly be protected by the First Amendment because it will be on a matter of public concern and would likely be outside the scope of the attorney-employee's duties. The same is not always true of speech mandated by Rule 1.13 or Rule 8.3. Consider this example:

> Attorney Jones is the assistant city attorney in charge of preparing the city's discovery production in a sexual harassment case brought by a former city employee. Halfway through the process, Jones' boss, the city attorney, orders Jones not to produce several emails sent by the plaintiff's former supervisor that describe the plaintiff in crude and unflattering sexual terms. Jones objects based on the emails' obvious relevance to the plaintiff's claims. The city attorney insists that the emails not be produced and, further, deletes all of the emails from the city's computer system. After much thought, Jones calls the city manager to raise concerns about the discovery issue. The manager promises to "look into it." The city attorney fires Jones immediately after learning of Jones' call to the manager. Two weeks later, Jones sends a letter to the judge assigned to the case disclosing the alleged destruction of evidence by the city attorney.

Does Jones have a viable First Amendment retaliation claim against the city? Probably not. Jones' reporting to the city manager of the city attorney's misconduct was likely required under Rule 1.13, but that does not mean that such speech is automatically protected by the First Amendment under Connick/Garcetti. It is true that destruction of evidence by the government in

a harassment suit should constitute a matter of public concern. But reporting legal misconduct by a supervisor up the internal chain of command could be considered part of the expected duties of an assistant city attorney. If so, then Jones' speech to the city manager would not protected by the First Amendment, despite the fact that it was required by the RPC.

Note that Jones was fired before disclosing the city attorney's to the judge. If the termination had occurred *after* this public disclosure, the First Amendment would be more likely to offer protection because that reporting could be considered outside of the Jones' job duties.

Even if the First Amendment offers no protection, Jones still might be able to attack the city's decision to terminate Jones' employment through a wrongful discharge claim. Most jurisdictions that have addressed the issue recognize these tort claims by in-house attorneys, even if such claims involve information protected by Rule 1.6. See Crews v. Buckman Laboratories International, Inc., 78 S.W.3d 852 (Tenn. 2002)(permitting wrongful discharge claim by in-house counsel who alleged she was terminated after satisfying state bar ethics obligation of reporting her supervisor's practice of law without a license); ABA Formal Ethics Op. 01-424 (Model Rules do not prohibit former in-house counsel from suing former employer for wrongful termination and from revealing confidential information necessary to establish claim). However, several jurisdictions have approved these claims with the large caveat that the claims may proceed only if the terminated attorney can prove his or her allegations without violating the duty of client confidentiality. GTE Products Corp. v. Stewart, 653 N.E.2d 161 (Mass. 1995)(allowing wrongful discharge claim only if the attorney-employee can prove allegations without violating duty of confidentiality); General Dynamics Corp. v. Superior Court, 876 P.2d 487 (Cal. 1994)(permitting a tort claim for wrongful discharge but warning that attorneys face possible disciplinary action if they breach the attorney-client privilege while pursuing their claims). At least one jurisdiction has effectively barred in-house attorneys from pursuing such claims entirely. Balla v. Gambro, 584 N.E.2d 104 (Ill. 1991)(prohibiting wrongful discharge suit by former in-house counsel because of the potential chilling effect on attorney-client communications).

North Carolina caselaw demonstrates that requiring an attorney-plaintiff to honor the client's confidentiality while pursuing a wrongful discharge claim may present an insurmountable obstacle to such claims. See Considine v. Compass Group USA, Inc., 145 N.C.App. 314 (2001)(dismissing attorney-employee's wrongful discharge action for failing to state a claim and, in the view of the dissent, "deny[ing] in-house attorney-employees the ability to allege with particularity their wrongful termination of employment claims" because of fear that they will violate confidentiality duties under Rule 1.6). The ruling in Considine appears to ignore a 2000 ethics opinion from the North Carolina State Bar that concluded an attorney-employee should be able to pursue a wrongful discharge claim by alleging just enough to put the employer on notice of the claim and then obtaining permission of the court to reveal confidential client information in further support of the attorney's claim. N.C. Ethics Op. 2000-11.

In addition to a wrongful discharge claim, could a North Carolina government attorney bring a statutory whistle-blower claim as a result of a termination based on the attorney's compliance with state bar rules? Local government attorneys like Jones have no statutory whistle-blower protection in North Carolina. But *state* government attorneys are protected by N.C.G.S. §126-84 and §126-85 from employer retaliation for the attorneys' disclosure of

government misconduct. Importantly, the statute protects only reports to the employee's "supervisor, department head, or other appropriate authority," not disclosure to the media or public generally. Internal reporting required by Rule 1.13 seems to be well within the scope of these statutes. Presumably they would also protect a state government attorney's decision to report a colleague's misconduct to the state bar, which is the "appropriate authority" to deal with that issue.

State employees are also protected by civil service laws that permit their discharge, suspension or demotion only when "just cause" exists. N.C. G.S. §126-35. But many state employees are excluded from this provision via N.C.G.S. §126-5. And employees that are covered must serve two years in their positions before the "just cause" protection applies. N.C.G.S. §126-1.1.