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An Overview of the New Federal Rules On Electronic Discovery

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Introduction

Electronic information is changing the complexion of litigation and the discovery process. Ninety-three percent of all commercial documents produced in the United States are originated in electronic form.[1] Billions of e-mails are sent through the internet, and stored in electronic format, on a daily basis. Computer systems often retain documents that would otherwise be destroyed, modified or difficult to obtain. For these reasons, and more, electronic data is a critical source of evidence in a variety of cases.

In recognition of this reality, new amendments to the Federal Rules of Civil Procedure on electronic discovery went into effect on December 1, 2006. These rules address a number of related issues, including the preservation of electronic data, the "accessibility" of historic computer information, issues surrounding the inadvertent waiver of privileges and the importance of early planning regarding electronic discovery issues.

This article will provide a brief overview of the duty to preserve electronic data and the new amendments to the Federal Rules of Civil Procedure regarding electronic discovery. These amendments provide guidance and structure in the discovery process along with critical protection for those who participate in that process in good faith.

The Duty to Preserve Electronic Data

It is now well-settled that an attorney must take reasonable steps to locate and preserve electronic data once litigation is reasonably foreseeable. Courts have imposed harsh sanctions on attorneys who fail to preserve or, even worse, destroy electronic data. This trend is certain to continue in light of the new amendments to the Federal Rules.

The attorney's duty to preserve electronic data, while widely recognized in prior decisions, was recently defined by Judge Shira Scheindlin in Zubulake v. UBS Warburg, LLC,.[2] Zubulake involved a gender discrimination claim by Laura Zubulake against her former employer, UBS. After the lawsuit was filed, Zubulake discovered that UBS had deleted and failed to produce a number of potentially relevant e-mails. Following a motion for sanctions, the court outlined the attorney's duty to preserve electronic data in very clear terms. First, the court explained that counsel must "suspend routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents."[3] In addition, counsel "must become familiar with the . . . client's document retention policies, as well as [the] client's data retention architecture."[4] Counsel must speak with the client's IT personnel and interview all "key players" in the litigation to understand how information is stored.[5] Counsel must insure that all "back up media which a party is required to retain is identified and stored in a safe place."[6] The court concluded with the following admonition: ". . . it is not sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched." [7]

(See Discovery on page 3)

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From the President

By
Jennifer Sloan Lattis
President
Western District of Wisconsin Bar Association

February 2007

Allow me to introduce myself. I am Jennifer Sloan Lattis, and I am the 2006-2007 President of the Western District Bar Association. I work for the Wisconsin Department of Justice, specializing in employment law. Please feel free to contact me with any questions you may have about the WDBA.

When I was asked to provide some thoughts for the "President's Column," I thought I could do no better than to acknowledge what a terrific federal district court community we have here in the Western District of Wisconsin. I am continually amazed by the efficiency and speed at which our court delivers its services. Similarly, every year at our annual roundtable, Judges Crabb and Shabaz, and Magistrate Judges Crocker and Owens, tell the WDBA that the members of the Western District Bar are a skilled and conscientious group of attorneys.

As such, the WDBA does not face any major challenges for this year (keep your fingers crossed). We will continue to try and improve our services to members. We will shortly have our own web site, and we are making some much needed upgrades to our financial matters. As always, we will have our annual meeting in spring combining socializing with continuing legal education. The court, too, will become more accessible to members when it moves to electronic filing for all or nearly all cases in the fall.

I wish everyone a Happy New Year, and I hope to see you in spring at the annual meeting.

DISCOVERY - Continued from Page 1

Zubulake provides two valuable lessons. At the onset, counsel who wishes to discovery electronic data should immediately notify the other party of this intention by specifically identifying the categories of information that should be preserved. Even without such notice, responding counsel must take reasonable steps to preserve electronic data that is likely to be the subject of discovery when litigation is reasonably foreseeable. In this respect, a mere "litigation hold" is insufficient. Counsel must take a proactive role in the preservation process, which may include the suspension of routine document destruction policies and the implementation of affirmative measures to ensure that all sources of discoverable data are preserved. Counsel's failure to comply with this duty can expose the client to a spoilation of evidence claim and a wide spectrum of sanctions, including cost-shifting measures and adverse inference jury instructions.[8]

The New Amendments to the Federal Rules of Civil Procedure

Over the past several years, the Civil Rules Advisory Committee has struggled with a number of problems pertaining to the discovery of electronic information. In its study, the Committee focused on a number of issues, including the need for early discussion and disclosure in the electronic discovery process (the duty to "meet and confer"), the burden of retrieving and preserving data that is not "reasonably accessible," the inadvertent waiver of privileges through the production of electronic data and a controversial "safe-harbor" provision that limits sanctions when certain documents are destroyed.[9] The Committee's resolution of these issues has been codified in the new amendments, which went into effect on December 1, 2006.

1. The Duty to "Meet and Confer": Rule 16(b) and Rule 26(f), Fed. R. Civ. P.

The new rules place a premium on the early preservation of data and advance planning regarding electronic discovery issues. Rule 26(f) now requires the parties " . . . to develop a discovery plan that addresses . . . any issues regarding discovery of electronically stored information and the forms in which it should be produced."[10] Upon receipt of the Rule 26(f) report, the Court is required to include ". . . provisions for disclosure or discovery of electronically submitted information . . . " in its Rule 16(b) Scheduling Order.[11] The comments to the amendments confirm Zubulake V, which imposes an affirmative duty on the parties to plan their discovery plans by preserving and requesting responsive data before the litigation is commenced.[12] Such advance planning will be especially critical in complex litigation where complicated electronic data is a principal source of evidence.

2. Electronic Documents Containing Privileged Information: Rule 26(f) and Rule 26(b)(5), Fed. R. Civ. P.

The new amendments anticipate that privileged documents may be inadvertently disclosed due to the significant amount of data that is ultimately produced during electronic discovery. Accordingly, Rule 26(f) requires the parties to develop a proposed discovery plan that addresses "any issues relating to claims of privilege or of protection as trial-preparation material, including– if the parties agree on a procedure such claims after production– whether to include their agreement in an order."[13] The comments to Rule 26(f) illustrate the agreements that can cure an inadvertent disclosure of privileged material, such as a "clawback" agreement in which the parties stipulate that the inadvertent production of a privileged document will not constitute a waiver if the responding party promptly identifies the documents that were mistakenly produced.[14] Absent such an agreement, the production of electronic data that inadvertently includes privileged material may constitute an irretrievable waiver of the applicable privilege, and with irreversible consequences for the client.

Rule 26(b) also provides a procedure for the retrieval of inadvertently produced privileged information until the court rules on the waiver issue. To invoke this procedure, the party who inadvertently produces the privileged material must notify the recipient of the privilege claim, which triggers an obligation by the recipient to "promptly return, sequester, or destroy the specified information and any copies it has" and to refrain from using or disclosing the information until the claim is resolved.[15] Again, this amendment does not change the substantive waiver rules, which may still apply even if privileged material is inadvertently produced. Thus, it is critical to negotiate a procedure, in advance, that protects the inadvertent production of privileged electronic documentation from a subsequent waiver argument.

(See Discovery on page 4)

DISCOVERY - Continued from Page 3

3. Cost-Shifting Mechanisms for Electronic Data That is not "Reasonably Accessible:" Rule 26(b)(1), (2), Fed. R. Civ. P.

The new amendments also recognize that certain electronic information is expensive to produce when it is not reasonably accessible. Rule 26(b)(1) creates a two-tiered structure for addressing this problem. As a preliminary matter, the responding party is required to produce reasonably accessible electronic information without a court order. If the responding party can demonstrate that the information is not reasonably accessible, the court will then balance the burden or expense of the proposed discovery against its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation and the overall importance of the information in question.[16] These factors are commonly addressed in assessing costs in connection with the recovery of electronic data that is not reasonably accessible.[17]

4. How Should the Data be Produced?: Rule 34(b), Fed. R. Civ. P.

The new rules provide guidance regarding the form in which electronic data must be produced. Under Rule 34(b), a party is permitted to produce electronic data in a particular form, but if the responding party objects to the requested form, it must produce the data in the form in which it is ordinary maintained or in a format that is "reasonably usable."[18] The purpose of this amendment is to prohibit "data dumping" in which the responding party produces massive volumes of disorganized documents in response to a routine discovery request.[19] This problem can also be avoided through careful planning at the Rule 26(f) conference, which requires the party to address the form in which electronic data will be produced during the litigation.

5. The "Safe Harbor" Provision: Rule 37, Fed. R. Civ. P.

Given the duty to preserve electronic data and the potential for spoilation of evidence claims when that duty is violated, the rules recognize that some electronic information will be destroyed as a result of the ". . . routine, good faith operation of an electronic information system."[20] Accordingly, the new amendments provide a safe harbor that protects a party from sanctions when electronic data is lost or unrecoverable due to its good faith reliance on regular business practices. To qualify for the safe harbor, the requesting party must demonstrate that the destruction was made in good faith and as a result of routine business operations.[21] While the safe harbor provision does not override the duty to preserve and "quarantine" potentially discoverable electronic data, it does provide significant protection for parties who destroy documentation pursuant to regularly established business practices before a litigation hold is imposed.

Conclusion

Discovery is changing in response to the pervasive use of computers and other mediums that store electronic data. Most of the costs associated with computer-based discovery can be avoided through the advance planning and careful management of the discovery process. The new rules encourage the early preservation of electronic data and they place a premium on advance planning that is necessary for the execution of an orderly electronic discovery plan. Finally, the amendments set the stage for the resolution of a number of related issues, including the recapture of inadvertently produced privileged material, the allocation of costs when electronic data is not reasonably accessible and, finally, the provision of a safe harbor for parties who destroy documents pursuant to regularly established business practices. As the parameters of these rules are defined by the courts, it is certain that effective advocacy will require a working understanding of electronic data and the new obligations imposed by the Federal Rules.

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Endnotes for this Article Appear on Following Page

Endnotes for "An Overview of the New Federal Rules On Electronic Discovery

1. Richard E. Best, Why Discovery Electronic Data?, available at http://californiadiscovery.findlaw.com/why_electronic_discovery.htm (last visited December 19, 2006).

2. Zubulake v. UBS Warburg, LLC, 229 F.R.D. 422 (S.D. N.Y. 2004)

3. Id. at 229 F.R.D. at 432-434

4. Id.

5. Id.

6. Id.

7. Id.

8. In imposing sanctions, courts typically examine the "state of mind" of the offending party and impose sanctions on a spectrum. See, e.g., Zubulake, infra at 229 F.R.D. at 436, n. 96 (stressing distinction between negligent destruction and willful destruction of e-mails in imposting sanctions); Anderson v. Crossroads Capital Partners, LLC, 2004 WL 256512 (D. Minn. 2004)(awarding adverse inference instruction based on intentional destruction of evidence).

9. 2006 US ORDER 20, Committee on Rules of Practice and Procedure (Sept., 2005).

10. Rule 26(f), Fed. R. Civ. P.

11. Rule 16(b), Fed. R. Civ. P.

12. Official Comment, Rule 16(b), Fed. R. Civ. P. and Rule 26(f), Fed. R. Civ. P.

13. Rule 26(f), Fed. R. Civ. P.

14. Official Comment, Rule 26(f), Fed. R. Civ. P.

15. Rule 26(b), Fed. R. Civ. P.

16. Rule 26(b)(1), (2), Fed. R. Civ. P.

17. Zubulake, 229 F.R.D. at 432-434.

18. Rule 34(b), Fed. R. Civ. P.

19. Official Comment, Rule 34(b), Fed. R. Civ. P.

20. Rule 37, Fed. R. Civ. P.

21. Id.

Implementation of CM/ECF in Fall 2007
District Court Seeks Advisory Committee Members

The District Court, Western District of Wisconsin is planning the implementation of a new case management and electronic case files system. This new system, known as CM/ECF (Case Management/ Electronic Case Files), will provide the court with updated and enhanced case management tools, the capability to store court documents in electronic format and a streamlined process for accepting electronic filings. CM/ECF will provide benefits to lawyers by allowing them to continue to electronically file documents, providing automatic email notice of case activity to all parties registered in the system, and potentially reducing courier fees.

The CM/ECF system uses standard computer hardware, an Internet connection and a browser, and accepts documents in Portable Document Format (PDF). Documents are automatically docketed as part of the filing process and are immediately available electronically. The system is easy to use. Filers prepare a document using conventional word processing software, and then convert it to PDF. After logging onto the court's web site with a court-issued password, the filer answers a few questions that will allow creation of the docket entry, attaches the PDF document and submits it to the court. A Notice of Electronic Filing (NEF) is generated and sent by email to the filer automatically. Other parties in the case also may register for email notification of action in the case.

There are no added fees for filing documents over the Internet using CM/ECF; existing document filing fees do apply. Electronic access to court data is available through the Public Access to Court Electronic records (PACER) program at a current rate of $.08 per page. Litigants receive one free copy of documents filed electronically in their cases. Additional copies are available to lawyers and the general public for viewing or downloading at $.08 per page.

The court will convene an advisory committee in April/May of 2007. If you or a member of your staff are interested in participating on this committee please contact Theresa Owens, Clerk of Court, at

theresa_owens@wiwd.uscourts.gov

or (608) 261-5723.

GARCETTI V. CABELLOS: THE SUPREME COURT LIMITS FIRST AMENDMENT PROTECTION FOR PUBLIC EMPLOYEES

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I. Introduction.

It is well-settled that citizens do not surrender their First Amendment rights by accepting public employment. Since 1968, this principle has been applied through a balancing test that weighs the employees' interest, "as a citizen, in commenting upon matters of public concern," with "the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[1] Through this test, the Supreme Court created a qualified right that is recognized after the public employee demonstrates, as a threshold matter, that he or she was speaking about an issue that touched matters of "public concern."[2] This is a question of law in which the court is required to determine whether the employee was speaking "as a citizen upon matters of public concern" or "as an employee upon matters only of personal interest."[3] Courts have made this distinction by analyzing the "content, form and context" of the speech and then balancing the weight of the public interest contained in that speech with the government's interest in "promoting efficiency" and "preventing workplace disruption."[4]

Prior to 2006, the Supreme Court did not directly decide whether a public employee was entitled to First Amendment protection when the underlying speech was made in fulfillment of a prescribed employment duty. Under the Pickering balancing test, outlined above, the world of employee free speech was divided into two categories: speech made "as a citizen" on matters of "public concern" and speech "as an employee" regarding "matters of personal interest." If the "content, form and context" of the speech indicated that the speaker was addressing a matter of public concern, as a citizen, then the speech was protected as a matter of law. If, under that same test, the employee was speaking on "matters of personal interest," the speech was not protected. In making this assessment, lower courts necessarily made *factual* determinations regarding the content, form and context of the speech at the summary judgment stage.

FREE SPEECH ANALYSIS (PRE-GARCETTI)

CONTENT, FORM, AND CONTEXT — **CAPACITY --**

↓

CITIZEN OR EMPLOYEE

PUBLIC CONCERN: **(Protected)**

PRIVATE MATTER: **(Unprotected)**

This fact-intensive inquiry led to inconsistencies in the law, particularly when the employee speech was linked to the performance of an assigned job duty. Pickering and Connick do not explain whether the distinction between "speaking as a citizen" and "speaking as an employee" is dispositive or merely one factor to be considered in the balancing calculus.[5] The Fourth Circuit Court of Appeals adopted the former view, holding that public em-

ployees are presumptively not entitled to First Amendment protection when the allegedly protected speech is linked to the performance of their job.[6] The Ninth Circuit rejected this *per se* rule and concluded that such speech, "like all other public employee speech, is subject to the full two-part Connick test," as set forth above.[7] This split set the stage for a fairly controversial ruling, in which the newly aligned Supreme Court concluded that public employees are not entitled to First Amendment protection because they are not speaking as *citizens* when they make statements pursuant to their official duties.[8]

II. Garcetti v Cabellos: : "Official Speech" Loses Its Protection.

Garcetti has a unique history given Justice Samuel Alito's ascendancy to the bench. First scheduled for argument in October of 2005 (prior to Alito's confirmation), the Court ordered re-argument for March 30, 2006 (after Alito's confirmation) because it appeared deadlocked in Justice O'Connor's absence. In a prior decision, Justice Alito acknowledged that the First Amendment may protect "official," employee speech that raises policy issues or alleges violations of the law.[9] Alito was invited to reconsider this perspective as he cast the deciding vote when the Supreme Court finally decided Garcetti in May of 2006.

A. The Facts.

Richard Cabellos was a deputy district attorney for the Los Angeles District Attorney's Office.[10] In 2000, a defense attorney asked Ceballos to review a case in which the police allegedly used a false affidavit to obtain a search warrant. After examining the affidavit, Ceballos determined that it contained serious misrepresentations. After receiving an unsatisfactory explanation from the officer who prepared the warrant, Ceballos relayed his findings to his supervisors and followed through by preparing a disposition memorandum that explained his concerns and recommended dismissal of the case. In a subsequent meeting, which "allegedly became heated," Cabellos was criticized for his handling of the case. Despite Cabellos' concerns, the District Attorney's office decided to continue its prosecution of the case. Cabellos was then called to testify regarding his observations concerning the affidavit.

Following these events, Cabellos alleged that he was subjected to a series of retaliatory employment actions, including loss of a promotion and "freeway therapy" by being reassigned to a remote office with a long commute. Following an unsuccessful grievance, Cabellos filed a lawsuit in the United States District Court for the Central District of California alleging that his supervisors retaliated against him for speaking out about the search warrant, in violation of the First Amendment and 42 U.S.C. § 1983. The District Court granted defendants' motion for summary judgment after concluding that Ceballos was not entitled to First Amendment protection for the contents of his disposition memorandum. The Ninth Circuit reversed after concluding that "Cabello's allegations of wrongdoing in the memorandum constituted protected speech under the First Amendment."[11]

In reaching this conclusion, the Ninth Circuit relied on the traditional balancing test set forth in Pickering and Connick. In applying this framework, the court concluded that Cabellos' memorandum addressed matters of governmental misconduct, which are "inherently a matter of public concern."[12] Notably, the court did not consider whether the speech was made in Cabellos' "capacity as a citizen." Instead, the court relied on Ninth Circuit precedent that rejected the notion that "a public employee's speech is deprived of First Amendment Protection whenever those views are expressed . . . pursuant to an employment responsibility."[13] After concluding that Cabellos' memorandum satisfied the public concern requirement, the Court balanced Cabellos' interest in pursuing that speech against his supervisor's interests in responding. The Court rejected the supervisor's contention that Cabellos ' speech interfered with the efficient administration of government and struck this balance in Cabellos' favor.[14] In a special concurrence, Judge Duarmaid O'Scannlain emphasized the distinction between speech offered by a public employee acting *as an employee* in carrying out his *ordinary job duties* and that offered by an employee *acting as a citizen* and expressing his opinion on *disputed matters of public import*.[15] Seizing on this distinction, the Supreme Court granted certiorari.

B. The Opinion.

Emphasizing, yet again, that public employees "do not surrender all their First Amendment rights by reason of their employment," the Supreme Court reversed. Noting the "difficulty" in applying the Pickering balancing test to all circumstances, the Court identified "two inquiries" that guide protection accorded to public employee speech:

> "The first requires determining whether the employee spoke as a citizen on a matter of public concern. * * * If the answer is no, the employee has no First Amendment cause of action based on

his or her employer's reaction to the speech. * * * If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant governmental entity had an adequate justification for treating the employee differently from any other member of the general public. * * * This consideration reflects the importance of the relationship between the speaker's expression and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations."[16]

After providing this framework, the Court examined Ceballos' claim. After rejecting the suggestion that Ceballos' speech was not protected because it was expressed "inside his office" and was related to his job, the Court identified the "controlling factor," namely, that Cabellos' "expressions were made pursuant to his duties as a calendar deputy."[17] According to the Court, this factor "distinguished Ceballos' case from those in which the First Amendment provides protection against discipline."[18] Based on this premise, the Court held that employees are not speaking as *citizens* for First Amendment purposes when they make statements pursuant to their duties and, consequently, "the Constitution does not insulate their communications from employer discipline."[19]

The Court made a number of observations in support of this ruling. Emphasizing the fact that Cabellos was not acting "as a citizen" when he prepared, circulated and discussed his memorandum, the Court underscored the importance of providing governmental employees with "sufficient discretion to manage their operations."[20] In emphasizing this discretion, the Court cautioned against a contrary rule that would allow for "the displacement of managerial discretion by judicial supervision."[21] The Court further emphasized that First Amendment protection attaches to employees who make public statements outside of the course of their official duties, provided that those statements satisfy the Pickering balancing test.[22]

III. Conclusion.

The result of Garcetti is relatively straightforward: employee speech that is made pursuant to an employee's assigned job duties is not entitled to constitutional protection. However, questions remain. First, when is speech made pursuant to one's employment duties? The Court conveniently dodged this question: "We . . . have no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in a case where there is room for serious debate."[23] Of course, there *is* room for serious debate, and it is certain that managerial discretion will be subjected to continual judicial discretion until that debate is settled.

The second question is one of causation. How should a court address speech that is made in the employee's official capacity, as an employee, and in her private capacity, as a citizen? If Ceballos had circulated a memorandum *and* spoke out at a public hearing, or through the press, would the result have been different? One can easily see how Garcetti raises new questions of causation that will probably require old answers.

The incentives created by Garcetti are also somewhat obvious. Despite the Court's cautionary remarks, employers will be encouraged to draft job descriptions that cover a wide array of speech, including duties that bear little, if any, resemblance to duties that the employee actually performs. The savvy employee will immediately direct his or her speech to traditional public channels, such as the media, in order to secure First Amendment protection. Finally, the Court refused to address the implications for academic freedom, as Garcetti suggests that expression related to academic scholarship is no longer protected by the First Amendment. Despite the Court's stated goal of removing the judiciary from the day-to-day management of the public workforce, these questions will require judicial guidance.

Garcetti raises a final question regarding the direction of the Court and, importantly, Justice Alito's jurisprudence. It is fair to ask whether Garcetti is consistent with Justice Alito's prior decisions, particularly his suggestion, in Sanguini, that public speech that raises "policy issues" or "violations of the law" is protected under the First Amendment.[24] Whatever the answer to that question, Justice Alito has already made a lasting impression on First Amendment jurisprudence. The law *has* changed, and the Pickering/Connick balancing test has been supplanted into a new paradigm:

FREE SPEECH ANALYSIS (POST-GARCETTI)[25]

CONTENT, FORM, AND CONTEXT ∇	CAPACITY-- CITIZEN	EMPLOYEE
PUBLIC CONCERN:	**(Protected)**	**(Unprotected)**
PRIVATE:	**(Unprotected)**	**(Unprotected)**

Practical questions remain. For employment attorneys, there is an open door for prospective guidance and litigation. Governmental employers should be advised to rewrite job descriptions to accurately and reasonably capture the speech-related duties that a specific position entails. Employees should be guided to speak publicly, outside of internal channels, when they discover misconduct during the course of their job duties. Academicians should carefully bargain for strong protection that surrounds their discourse so as to avoid the possible implications of Garcetti. In the meantime, judicial supervision will continue, and possibly increase, as employers and employees search for assurance in this ever-changing and fascinating area of the law.

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––(Endnotes)

1. See Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

2. See Connick v. Myers, 461 U.S. 138, 146 (1983).

3. Id. at 141-42.

4. Id. at 146, 152.

5. The author believes it is the latter.

6. See Urofsky v. Gilmore, 216 F.3d 401, 409 (4th Cir. 2000).

7. See Ceballos v. Garcetti, 361 F.3d 1168, 1174-76 (9th Cir. 2004), cert. granted, 125 S. Ct. 1395 (2005).

8. See Garcetti v. Ceballos, 126 S. Ct. 1951 (2006).

9. See Sanguigni v. Pitt. Bd. of Public Ed., 968 F.2d 393, 396, 399 (3rd Cir. 1992) (noting that "the day has long since passed when individuals surrendered their right to freedom of speech by accepting public employment," Alito suggested that comments made "as part of judicial or administrative proceedings" and alleged "violations of laws" would be constitutionally protected).

10. The facts of Garcetti are set forth at 126 S. Ct. 1951, 1955-1958.

11. See Cabellos, 361 F.3d at 1168, 1173.

12. Id. at 361 F.3d at 1174.

13. Id. at 1174-1175 (citations omitted).

14. Id. at 1180.

15. Id. at 1187.

16. See Garcetti, 126 S. Ct. at 1958.

17. Id.

18. Id. at 1959-60.

19. Id. at 1960.

20. Id.

21. Id. at 1961.

22. Id.

23. Id.

24. Sanguini, 968 F.3d at 399.

25. I stole this paradigm from Attorney Mike Modl, who deserves full credit.

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