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Disciplining Public Employees for Expressive Activity

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McCarthy. Dies was not appointed to HUAC. He left Congress in 1959, but continued his devotion to the anticommunist cause as a dedicated member of the John Birch society. He died in 1972.

KAREN BRUNER

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See also **House Un-American Activities Committee; John Birch Society; McCarthy, Joseph; New Deal; Roosevelt, Franklin Delano**

DISCIPLINING LAWYERS FOR SPEAKING ABOUT PENDING CASES

Lawyers sometimes believe that it is important to influence public opinion as part of the representation of a client. Perhaps the aim is to present a favorable case to potential jurors, or perhaps the client is a public figure whose reputation may be affected by the outcome of the proceedings. In any event, when lawyers discuss a pending case at a news conference or make statements to reporters, these extrajudicial comments may have a negative impact on the fairness of the trial process. Courts and bar associations therefore seek to limit speech concerning pending cases. These limitations pose a conflict between two constitutional rights: the First Amendment press-freedom guarantee and the litigants' right to a fair trial, protected by the Sixth Amendment.

The Supreme Court has tried to balance these rights. After a mid-century trial accompanied by a media frenzy, the Court granted a writ of habeas corpus sought by a doctor who had allegedly killed his wife, on the grounds that the publicity prevented him from receiving a fair trial (*Sheppard v. Maxwell*, 384 U.S. 333, 1969). In the wake of the *Sheppard* case, many states adopted rules to limit extrajudicial statements by lawyers. The Court considered a First Amendment challenge to one of these rules and concluded in a divided decision that many existing rules were unconstitutionally vague (*Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1991). The rule in effect in most jurisdictions now prohibits a lawyer from making an extrajudicial statement that will have a "substantial likelihood of materially prejudicing an adjudicative proceeding."

W. BRADLEY WENDEL

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Sheppard v. Maxwell, 384 U.S. 333 (1969)
ABA Model Rules of Professional Conduct, Rule 3.6 (2002)

See also **Cameras in the Courtroom; Due Process; Gag Orders in Judicial Proceedings; *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991); Right of Access to Criminal Trials; Rights of the Accused**

DISCIPLINING PUBLIC EMPLOYEES FOR EXPRESSIVE ACTIVITY

A public employee's right to free speech under the First Amendment is not unlimited and employers have the right to discipline employees for expressive activity under certain circumstances (*Pickering v. Board of Education*, 391 U.S. 563, 1968). The employer has an interest in ensuring that its employees do not undermine its operations or interfere with accomplishment of its objectives. At the same time, employees do not give up their constitutional rights when they accept government employment. Indeed, government employees may play a particularly important role in enlightening the public about governmental operations by contributing to public debate and alerting the public about potential wrongdoing. Thus, the courts have developed a test for determining when public employers can discipline their employees for expressive activity.

The threshold requirement for protected speech is that it must relate to a matter of public concern. If speech relates to an employee's private grievance, discipline based on the speech does not implicate the First Amendment. (For further information, see Matters of Public Concern Standard in Free Speech Cases.) In addition, even if the speech addresses matters of public concern, when the employee's speech rights are outweighed by the disruption that the speech causes to the operations of government, the employer can discipline the employee for speech. The more central the speech is to matters of concern to the public, the more disruptive to government operations it must be in order to justify discipline. The impact of the speech on discipline, working relationships, work performance, and government operations is a significant consideration in weighing the government's interests

(*Rankin v. McPherson*, 483 U.S. 378, 1987). In the 2005 term (*Garcetti v. Ceballos*, 361 F.3d. 1168, 9th Cir. 2004, cert. granted, 125 S. Ct. 1395, 2005), the Supreme Court had to decide whether an employee who brings to light suspected wrongdoing in speech required by job duties is protected from discipline, thus further refining the balancing test.

In some cases, the government disputes that discipline was motivated by the employee's protected speech, asserting a lawful basis for the discipline. To prevail on a constitutional claim, the employee must prove that the protected speech was a motivating factor in the employer's decision to discipline (*Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 1977). The employee must show that the person who made the decision was aware of the speech. In addition, proof of actual motivation is necessary; this can involve evidence such as the timing of the discipline in relation to the speech, employer unhappiness with the speech, or the pretextual nature of the employer's asserted reason for the discipline. If the employee proves that the speech motivated the employer, the employer can avoid liability by showing that it would have disciplined the employee for legitimate reasons even if the employee had not engaged in the protected speech. When there is disagreement about what the employee actually said, the employer may rely on what it reasonably and in good faith believes was said in deciding whether to discipline the employee (*Waters v. Churchill*, 511 U.S. 661, 1994). To ensure that it acts reasonably, the wise employer will investigate prior to discipline when employee statements may have First Amendment protection.

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See also **Matters of Public Concern Standard in Free Speech Cases; *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Rankin v. McPherson*, 483 U.S. 378 (1987); Speech of Government Employees**

DISCOVERY MATERIALS IN COURT PROCEEDINGS

In civil as well as criminal court proceedings, discovery serves as a tool whereby all parties to an action can discover, before a trial on the matter's merits, precisely what evidence will be offered at the trial. The discovery process provides each party to an action the opportunity to examine the evidence that will be used against them as well as to find or discover the evidence to be used in their favor. The rules of procedure place few limits on the kinds of evidence subject to discovery, whereas the rules of evidence place significant limits on the admissibility of discovered evidence at trial. For example, a deposition transcript may be used, in whole or in part, but only pursuant to the applicable rules of evidence governing admissibility and the applicable rules of procedure that set out particular conditions precedent to their use.

Because the facts conceded in a party's responses to requests for admission are not subject to dispute at trial, these responses are commonly used for document authentication, for impeachment purposes, or as proof of the existence or nonexistence of an element of a claim. Physical examinations can be used to prove the extent of a party's injuries. Expert witnesses may be called to give their conclusions or opinions regarding information, likely obtained through discovery, provided to them before trial. In court proceedings, discovery is an equalizer, arming all parties to an action access to the same information before it is presented to the trier of fact.

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