Inherent in the relationship between institutional public defenders and their administrative supervisors is the question of how the government employer honors and respects the professional independence of its litigators while administratively managing and supervising these lawyers. This equation is further complicated by the reality that the defenders’ ultimate loyalty is and must be to their individual clients, not to the office that employs them. The Supreme Court’s recent decision in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006), despite its pronouncement of a bright-line rule on the First Amendment rights of government employees, appears ill suited in application to the unique role of the institutional public defender as a public employee.

In *Garcetti*, the Supreme Court addressed the question of “whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee’s official duties.” (*Id.* at 1955.) Ceballos, a deputy district attorney, filed a 42 U.S.C. § 1983 action against his employer, claiming his First and Fourteenth Amendment rights were violated when his employer allegedly retaliated against him based on a memo he wrote as part of his official duties as a prosecutor. The memo addressed specific problems in a particular case.

In this context, the Supreme Court held that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” (*Id.* at 1960.) In the Court’s analysis, “[t]he significant point is that the memo was written pursuant to Ceballos’ official duties” as an employee, not as a private citizen. Consequently, the Court reasoned, Ceballos had no First Amendment protection from his employer’s alleged retaliatory actions for the speech contained in the memo.
Does Garcetti apply to public defenders?

Undeniably, the First Amendment litmus test forged in Garcetti that asks whether the public employee’s statement was made pursuant to “official duties” or “official responsibilities” will be capable of easy and efficient application and resolution in many instances of government employment, whether at the federal, states or local level. However, reasonable doubt exists as to whether the Garcetti test even applies to institutional public defenders and, assuming it does, what calculus will be used to determine what aspects of a defender’s work are performed pursuant to his or her “official duties” as a government employee. Garcetti explains that “[t]he proper inquiry” as to a government employee’s duties “is a practical one.” (Id.)

Although employed and paid by a defender program, an institutional public defender is unlike virtually any other government employees, a distinction that the Supreme Court has frequently acknowledged. “First, a public defender is not amenable to administrative direction in the same sense as other employees of the State.” (Polk County v. Dodson, 454 U.S. 312, 321 (1981).) “[A] defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior.” (Id.) Unlike the normal supervisory relationship that exists between the government as employer and the government employee, the public defender staff lawyer is an independent officer when fulfilling his or her professional responsibilities. “ ‘The personal attorney-client relationship established between a deputy [public defender] and a defendant is not one that the public defender,’ ” the employer, “ ‘can control.’ ” (Polk County at 451 n.11, quoting approvingly Sanchez v. Murphy, 385 F. Supp. 1362, 1365 (Nev. 1974).)

Public defender programs exist to replicate through government funding the same relationship between lawyer and client that exists when a criminal defendant has access to funds to select and retain a criminal defense lawyer of his or her own choosing. “The legal representation plan for a jurisdiction should be designed to guarantee the integrity of the relationship between lawyer and client.” (ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES (3d Ed. 1992), Standard 5.1-3(a), Professional Independence.) This integrity is maintained by ensuring that the assigned public defender will always be able to exercise his or her independent professional judgment on behalf of the client.

A public defender is required to adhere to the same standards of competence and integrity as retained counsel. No lawyer, whether private or public, shall “permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.” (MODEL RULES OF PROF’L CONDUCT, R. 5.4(c) (2007), Professional Independence of a Lawyer; (emphasis added).)

This compelling precept of a lawyer’s code appears in yet another section of the ethical rules. Should a lawyer face such interference from his or her nonclient employer, it would be a debilitating conflict of interest that would require, if unabated, counsel to decline or withdraw from the representation. “A lawyer shall not accept compensation for representing a client from one other than the client unless,” inter alia, “there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship.” (MODEL RULES OF PROF’L CONDUCT, R. 1.8(f)(2) (2007), Conflict of Interest: Current Clients: Specific Rules.)

When a retained criminal defense lawyer, with the consent of the defendant, agrees to be paid by a third party, the private lawyer may not take direction from the third party simply because that individual is the one who is footing the bill. An institutional public defender’s relationship to his or her employer is no different. Whether a private citizen or a government employer underwrites the cost of representation, he who pays the piper does not call the tune.

Within a public defender program, an administrative supervisor, who has no actual attorney-client relationship with the defendant, may not on the basis of employer status substitute his or her professional judgment for that of the lawyer assigned to represent the indigent criminal defendant. “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.” (MODEL RULES OF PROF’L CONDUCT, R. 2.1, (2007) Advisor; (emphasis added).) Even in the context of an appointed counsel, “[r]epresentation of an accused establishes an inviolable attorney-client relationship.” (PROVIDING DEFENSE SERVICES, supra, Standard 5-6.3, Removal.) The employer-employee relationship does not create an exemption to these ethical principles.

“Second, and equally important, it is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages.” (Dodson,
The federal Constitution’s right to counsel in criminal cases rests on “the assumption that counsel will be free of state control,” functioning as “an effective and independent advocate.” (Id.) When performing a lawyer’s traditional functions as counsel to a defendant in a criminal case, a public defender “is not acting on behalf of the State; he is the State’s adversary.” (Id.)

**Government as both prosecutor and defender**

The conundrum of an institutional public defender program is that the government that is prosecuting the indigent criminal defendant is also funding and employing the lawyer who will provide the defendant’s representation. In such a situation there is no doubt that the government by its funding choices and its control over the defender program’s chief administrators influence how each individual public defender functions. “Administrative and legislative decisions undoubtedly influence the way a public defender does his work.” (Polk County, supra at 321.) Government decisions regarding a public defender’s caseload and available resources impact the environment in which counsel exercises his or her independent professional judgment. However, actions by public defender administrative supervisors that restrict or supplant the institutional defender’s professional judgment cannot be countenanced or justified by resort to the vagaries of employment decisions and the employee-employer relationship.

The executive directors and administrative supervisors in any given public defender program would undoubtedly respond that they too are both independent and adversaries of the state. Yet their administrative functions are either influenced or dictated by available government resources and at best their administrative decisions are made to benefit all the program’s clients. But most importantly, despite protestations to the contrary, these defender administrators never enter into a viable attorney-client relationship with the clients of their individual staff lawyers.

Institutional defender programs may announce to the world that each individual indigent defendant is the client of the defender program or of the chief administrator of the program, but that is a fiction. The defender program as an entity cannot enter into an attorney-client relationship with any individual indigent defendant. The program’s administrator will make no attempt to meet with the client or to learn the facts or law pertinent to the client’s case. By any ethical or constitutional test, the program’s chief executive officer would be judged incompetent or rendering ineffective assistance of counsel to any or all of the program’s indigent clients, save the ones the CEO may be personally representing as their action lawyer. Any contention that the attorney-client relationship is with the defender program as an entity or its CEO rather than with the lawyer to whom the case is assigned contravenes reality.

Admittedly, the Supreme Court in *Polk County v. Dodson* made the above pronouncements and analyses in the context of deciding whether a public defender is a state actor for purposes of 42 U.S.C. § 1983 when providing representation to an indigent client. Yet the Supreme Court has frequently returned in the context of other cases and issues to this exact analysis of both the function of the individual public defender and the defender’s relationship to the state.

The *Garcetti* Court did not address the problems with administering the “official duties” test to institutional public defenders who are undoubtedly government employees, even when representing indigent defendants in criminal cases. However, in response to a dissenting justice’s contention, the *Garcetti* Court acknowledged that “there is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence.” (Garcetti at 1962.) As a result, the Court did not decide whether the “official duties” analysis would have the same application in a case involving speech related to scholarship or teaching. Implicit in this observation is the Supreme Court’s recognition that unique instances of government employment, differentiated by other constitutional interests, may not be susceptible to resolution under the unmodified “pursuant to official duties” test.

Due to the unusual nature and ramifications of their professional speech, institutional public defenders and government-employed academics may require a more sophisticated test for delineating the extent of their First Amendment rights as government employees than simply whether the speech was made pursuant to their official duties or responsibilities.

The Supreme Court has previously explored in *Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001), whether congressional restrictions on the use of Legal Services Corporation (LSC) funds violated the First Amendment rights of LSC grantees, i.e., legal aid programs, and their clients. In *Velazquez*, Congress prohibited...
LSC recipients from providing legal representation if that representation involved any attempt to contest or change existing welfare laws. Both LSC and the government interpreted this restriction as barring a legal aid lawyer from arguing on behalf of a client that a state law was in conflict with a federal law or that a federal law was in violation of the federal Constitution.

In ruling that the LSC restriction was a violation of the First Amendment, the Velazquez Court rejected the idea that the legal representation provided by the legal aid lawyers to their indigent clients was governmental speech. “The advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept.” (Velazquez at 542-43.) The Supreme Court recognized that the LSC lawyer “speaks on the behalf of his or her private, indigent client” and “is not the government’s speaker.” In reaching this conclusion, the Velazquez Court referenced its prior decision in Polk County v. Dodson.

Like the LSC program in Velazquez, public defender programs are “designed to facilitate private speech, not to promote a governmental message” and are funded by government “to provide attorneys to represent the interests of indigent clients,” albeit in the criminal courts rather than in civil litigation. In this regard, an institutional public defender’s advice to his or her indigent client and the legal representation given are essentially indistinguishable from that the LSC lawyer provides.

When a public defender program, due to severe budget problems, requires its appellate defenders in every appeal to justify to an administrative supervisor the need for the defender to file a reply brief or to request oral argument, the program has, as a condition of employment, interfered with each staff lawyer’s exercise of his or her independent professional judgment. When a defender director prohibits the program’s lawyers from challenging the constitutionality of a specialty court to obtain relief for any individual client because the public defender office was instrumental in designing and implementing the court in question, the employer has impermissibly limited the staff counsel’s independent professional judgment. When an administrative supervisor vetoes a defender’s motion to disqualify a particular judge or prosecutor because of the impact such a motion may have on the cases of other defender clients, the government as employer has trampled on the client’s right to the independent judgment of appointed counsel.

All of these employer restrictions on defenders’ speech undermine or eradicate the staff lawyer’s independent professional judgment. This, in turn, perverts the criminal courts. “Restricting [public defender] attorneys in advising their clients and in presenting arguments and analyses to the court distorts the legal system by altering the traditional role of the attorneys” who represent criminal defendants. (Velazquez at 544.) The public defender employer that stifles the independent judgment of its lawyers violates the guarantees of the First Amendment. “By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts,” public defender employer restrictions of this nature “[p]rohibit[] speech and expression upon which courts must depend for the proper exercise of judicial power.” (Id. at 545.)

The micromanaging of individual public defenders in their various cases by a public defender supervisor is a fatal flaw in a public defender program. Under the guise of ensuring quality representation to all defender clients, defender managers can intentionally or unwittingly deprive the program’s indigent clients of independent counsel, the very commodity defender programs were created to provide. This type of employer-imposed restriction is “inconsistent with the proposition that attorneys should present all the reasonable and well grounded arguments necessary for proper resolution of the case.” (Velazquez at 545.) When the defender employer, acting outside of the attorney-client relationship, decides which arguments in a given case are reasonable and well grounded, the indigent client is deprived of a single advocate dedicated to that client’s interests. This in turn restricts or undermines the ability of the judiciary to function properly. “An informed, independent judiciary presumes an informed, independent bar.” (Id.)

The templates provided in Velazquez and Polk County strongly indicate that the statements made by a public defender when performing the traditional functions of a criminal defense lawyer are protected by the First Amendment from the retaliation of the defender’s government employer, despite the test enunciated in Garcetti.

In role as defender, lawyer’s speech is protected

Applying the Velazquez analysis, the statements the defender makes, although made pursuant to the lawyer’s “official duties” as a government employee (a publicly funded institutional defender), cannot be classified as governmental speech, but rather must be considered protected private speech made on behalf of the indigent client. The government’s position in cases involving public defenders is presented not by the public defender, but by the prosecutor or comparable representative of the executive branch in the litigation. If the speech in question is by its very nature not governmental speech, then the Garcetti test of whether the speech was made pursuant to official duties is not applicable. As Garcetti recognized, “the First Amendment protects a public employee’s right, in certain circumstances, to speak as citizens addressing matters of public concern.” (Garcetti at 1957.) A public defender’s speech when serving in the traditional role of a criminal defense lawyer would qualify for this protection.

The government, as defender program employer, vio-
lates a staff public defender’s First Amendment rights by restricting or restraining that staff lawyer from exercising his or her independent professional judgment on behalf of the indigent client. This type of restriction prevents the public defender lawyer from acting in conformity with his professional obligations to the indigent client. Similarly, when the defender program employer takes retaliatory disciplinary action, after the fact, against a staff lawyer for refusing to follow employer restrictions on counsel’s independent professional judgment in a case, that government employer also violates the staff defender’s First Amendment rights.

After-the-fact disciplinary action against a public defender for exercising independent professional judgment in violation of an administrative supervisor’s direction undoubtedly will chill or even eliminate that lawyer’s independence when representing indigent clients in the future. But the impact will not end with the staff lawyer who is disciplined. Other defender staff counsel, seeing their colleague punished, will have to decide whether their employment as public defenders is more important than their ethical and constitutional obligations to their indigent clients. Faced with this choice, some may accept these restrictions rather than suffer retaliatory discipline or terminated employment.

The public defender employer can restrict the future private speech of the office’s staff lawyers through after-the-fact disciplinary action almost as effectively as the employer can restrict the speech of the staff lawyers by before-the-fact directives to one or more of the program’s lawyers.

The ethical duties and constitutional obligations of a public defender, when fulfilling the role of a criminal defense lawyer, render the truisms expressed in Garcetti inappropriate and irrelevant. According to the Garcetti decision, “[r]estricting speech that owes its existence to a public employee’s professional responsibilities . . . simply reflects the exercise of employer control over what the employer itself has commissioned or created.” (Garcetti at 1960.) This equation simply does not fit the speech of a public defender whose responsibility is to advocate for his or her indigent client by using counsel’s independent professional judgment.

Garcetti also emphasized that “[e]mployers have heightened interests in controlling speech made by an employee in his or her professional capacity.” (Id.) But that type of control by a public defender administrator over the staff lawyer’s independent professional judgment would be ethically and legally impermissible. In routine government employment, “[w]hen a public employee speaks pursuant to employment responsibilities . . . there is no relevant analogue to speech by citizens who are not government employees.” (Id. at 621.) In contrast, when a staff public defender speaks as a criminal defense lawyer, there is no relevant analogue to the ordinary public employee speaking pursuant to his or her official duties and responsibilities.

**Circumstances where Garcetti applies to defenders**

This is not to say that Garcetti has no application to a public defender’s First Amendment rights as a government employee. Institutional public defenders often will have job duties and responsibilities that are distinct and severable from “a lawyer’s traditional function as counsel to a defendant in a criminal proceeding.” Public defender programs may use their staff lawyers in a variety of full-time or part-time administrative positions such as training directors, research consultants, newsletter staff, legislative liaisons, organizational representatives to government committees and boards, and public relations specialists. The Supreme Court in Polk County noted, without deciding, that a public defender may “act under color of state law while performing certain administrative and possibly investigative functions.” (Polk County at 325.)

Similarly, institutional public defenders who make hiring and firing decisions for their defender programs pursuant to their official duties perform a function comparable to other government employees. (See Branti v. Finkel, 445 U.S. 507 (1980).)

When public defenders act pursuant to these types of official duties, they are in function no different than any other government employee and would appear to be subject to the Garcetti standard when seeking the protection of the First Amendment to shield themselves from government employer retaliation.

Public defender program managers and supervisors must be very careful not to read Garcetti as providing a foolproof rationale for depriving staff lawyers of their First Amendment rights for speech performed pursuant to their official duties as advocates for their clients. Public defender lawyers should not assume that post-Garcetti their First Amendment rights as criminal defense counsel are forfeited because they are employed by a government entity, a public defender program. On the other hand, public defenders must realize the “official duties” test of Garcetti will apply to the speech they make as public employees with the probable exception of the nongovernment speech defenders generate in their role as traditional criminal defense lawyers.

If public defender administrators use the principles enunciated in the Garcetti decision to justify retaliatory discipline against staff lawyers for speech generated in the course of representing their individual clients, then the First Amendment rights of the staff defenders and their clients will be violated and the nation’s criminal justice system will suffer from this corruption of the function of a public defender as an independent advocate acting on behalf of each individual client.