LEGAL DEFENSE TRUST

MICHAEL P. STONE, GENERAL COUNSEL
6215 River Crest Drive, Suite A, Riverside, CA 92507
Phone (951) 653-0130 Fax (951) 656-0854

TRAINING BULLETIN

Vol. 2014, Issue No. 4 JUNE 2014

PUBLIC EMPLOYEE'S SWORN TESTIMONY IS ENTITLED TO FIRST AMENDMENT PROTECTION

Lane v. Franks decided June 19, 2014 in the Supreme Court of the United States

By Michael P. Stone, Esq. and Muna Busailah, Esq.

The United States Supreme Court has unanimously held that a public employee's sworn testimony is entitled to First Amendment protection, **when it is given outside the scope of ordinary job duties**. While an important decision for public employees nationwide, it actually brings the law into line with the existing rule in the Ninth Circuit, which covers California, that sworn testimony by public employees concerning their job duties can be protected. In *Clairmont v. Sound Mental Health* (2011), the Ninth Circuit found protection for trial testimony, and in *Karl v. City of Mountlake Terrace* (2012), the Ninth Circuit found protection for deposition testimony. [1]

In *Lane v. Franks*, the Supreme Court clarified previous rulings in which the court said that public employees had

[1] Both the *Clairmont* and *Karl* cases were cited by the Ninth Circuit in *Dahlia v. Rodriguez* (2013), where the firm of Stone Busailah, LLP filed an amicus brief in support of the police officer whose claim of First Amendment protection for his whistleblowing activity, about corruption within his department to an outside law enforcement agency, was allowed to proceed.

free-speech rights when they were acting as "citizens", but not necessarily when they were testifying about what they learned while doing their jobs and not when they were required to speak because of their specific job duties [*Garcetti v. Ceballos* (2006)]. Public employees who are called to testify are now protected by the First Amendment just as other citizens are, and should not have to choose between "the obligation to testify truthfully and the desire to avoid retaliation and keep their jobs," wrote Justice Sonia Sotomayor. "It would be antithetical to our jurisprudence to conclude that the very kind of speech necessary to prosecute corruption by public officials - speech by public employees regarding information learned through their employment - may never form the basis for a First Amendment retaliation claim," she said.

Justice Clarence Thomas noted in a concurring opinion, that the Court's decision in *Lane* did not address public employees whose job requirements include testifying in court, such as police officers and laboratory analysts. It was argued by government lawyers in the case, that many government employees testify frequently as part of their job responsibilities and their supervisors need to preserve the ability to discipline such government employees who fail to prepare adequately to testify or who otherwise do sloppy work when their job responsibilities include testimony. The Court left the constitutional questions raised by these scenarios for another day.

At least one judge in the Ninth Circuit has however, spoken on this subject. In his dissent in *Dahlia v. Rodriguez*, O'Scannlain, Circuit Judge, wrote, "[t]he case [of *Christal v. Police Commission of City and County of San Francisco* (1933)] explained that '[w]hen police officers acquire knowledge of facts which will tend to incriminate any person, it is their duty to disclose such facts to their superiors and **to testify freely concerning such facts when called upon to do so before any duly constituted court or grand jury**.' *Christal* went so far as to say that '[i]t is for the performance of these duties that police officers are commissioned and paid by the community.'" Judge O'Scannlain compared *Christal* with *Garcetti*, where it was explained that when the plaintiff "performed the tasks he was paid to perform" he had "acted as a government employee" (and not as a "citizen) and therefore did not have First Amendment protection.

In *Garcetti*, the Supreme Court held that only when a public employee speaks as a "citizen" on a matter of

public concern is he or she entitled to First Amendment protection. It is unknown at this time, how the Ninth Circuit or the current Supreme Court will rule on a case if, and when, a peace officer is retaliated against for testimony in a case, when such testimony is given within the scope of his or her ordinary duties. In such a case, the court may focus on whether the nature of the testimony was routine or possibly focus on the motive behind the "retaliation" by the employing agency. For now, peace officers must understand that they are unlikely to be treated like any other "citizen" when they testify, **as a peace officer**, in a criminal or civil matter.