March 24, 2011

Via E-mail

Edwin D. Williamson
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1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-5805

Re: Our Exchange

Dear Edwin:

I agree with you that the ethical questions raised by you and Richard, like most questions of the ethics of lawyer behavior, can most intelligently and confidently be addressed in concrete settings, so let me give you five specific factual variants in constructing a scenario in which a lawyer now at DOJ (I'll call him "Lawyer A") or his former firm had represented Detainee X in filing a habeas corpus petition and related efforts to end X's detention. Three of the variants relate to the current status of the detainee client; the remaining two relate to the tasks at DOJ which Lawyer A is asked to undertake.

Variant 1: Detainee X has been cleared for release but remains at Guantanamo because he cannot be repatriated to his home country due to a well-grounded fear of persecution, and another country has not yet accepted him in resettlement.

Variant 2: Detainee X has been charged before a military commission, and the proceedings there remain pending.

Variant 3: Detainee X cannot be brought to trial (whether because of an insufficiency of admissible evidence or for some other reason), but is considered to pose a continuing threat to our national security interests and, therefore, cannot safely be released.

Variant 4: Lawyer A is asked to participate in drafting an executive order providing for the periodic review of detainees at Guantanamo (such as Executive Order 13567 issued March 7, 2011).

Variant 5: Lawyer A is asked to participate in the initial or a subsequent review of the status of a detainee other than X.

You and Richard conclude that "the implementation of the Detainee Executive Order is the same [specific party particular matter] as the representation of a detainee" (*see* your March 9 interlineation of my February 22 letter at 2), and, therefore, whatever the current status of Lawyer A's former client (i.e. whether he fits into variant 1, 2 or 3), Lawyer A may not participate in the review of *any* other detainee. (You don't explicitly state that Lawyer A may not participate in drafting, as distinguished from implementing, an Executive Order (Variant 4), but I believe you would reach that conclusion as well.

I do not believe that participation in the review of detainee Y is the same specific party particular matter as the former representation of detainee X. Your contrary conclusion assumes that all of the 700 or so captures (wherever and whenever they occurred) and subsequent detentions at Guantanamo constitute a single specific party particular matter. The *Sofaer* decision does not support your conclusion, for the "matter" involved there was "a distinct historical event….why and how Pan Am 103 blew up over Lockerbie." *In re Abraham D. Sofaer*, 728 A.2d 625, 627 (D.C. App. 1999). "The 'matter' [was] not terrorism, or even Libyan terrorism." *Id.*

Nor do I think that all Guantanamo detainees are "substantially related" unless there is a specific factual connection between them beyond the mere assertion that they were members or supporters of Al Qaida or otherwise subject to capture under the AUMF. In the absence of such a specific *factual* connection, the only argument against Lawyer A's participation in the review of Detainee Y is that it may be presumed that a lawyer who represents one detainee will be partial to the cause of every other detainee. That is not a sustainable presumption. Lawyers take opposing positions on issues in separate matters all the time without having their ethicality or impartiality challenged.

Of all the scenarios that can be constructed using the variants described above, the only one that I believe raises an ethical question is the combination of variants 3 and 4: a lawyer whose former client is being held in indefinite detention is asked to participate in drafting an executive order such as Executive Order 13567. While I do not believe those two undertakings are either the same or substantially related, I can see a skeptic being concerned that the lawyer might be inclined to propose a procedure, such as calling for periodic reviews every year rather than every other or third year, that might benefit his former client to a greater extent than available alternative procedures. While I view that as a slim basis for questioning the lawyer's impartiality, it might well be prudent in the current environment not to involve the lawyer in drafting the executive order.

It would have been nice to arrive at a common view of whether DOJ lawyers who had represented detainees before entering government service were acting in conformity with ethical requirements imposed by statute, regulation and disciplinary rules, but that objective was not realistically achievable, given the different premises from which we start.

If you still wish to send your letters to Bobby Chesney's listserve, please include mine as well, though I fear that we can both be accused with some justification of imposing "information overload" on his readers.

With best wishes.

Sincerely,

Michael A. Cooper

cc: Richard W. Painter