

Ellen Yaroshefsky

Attorney

670 West End Avenue, #6A ■ New York, NY 10025

Yaroshef@gmail.com

516-463-5882

October 5, 2017

Mr. Rick Kammen
Kammen and Moudy
135 N. Pennsylvania Street, Suite 1175
Indianapolis, Indiana 46204

Re: Guantanamo Military Commission Case
Charges Against Abd al-Rahim Hussayn Muhammed al-Nashiri

Dear Mr. Kammen:

This letter is in response to your request for an opinion regarding your ethical obligations in this matter.

You have advised me that you are learned counsel (death penalty counsel) for Mr. al-Nashiri who is charged with capital crimes before a Military Commission in Guantanamo Bay. You provided me with the facts set forth below as well as a document, attached hereto, entitled "Governmental Interference with Attorney-Client Communications, Intrusions Into Attorney-Client Relationships, Undisclosed Monitoring, and Infiltration of Defense Teams" (Exhibit A). You are admitted to practice in Indiana.

I have no personal knowledge of the facts of this case. In rendering my opinion, I rely upon the facts set forth below and the document provided (Exhibit A). Some of the facts below contain references to redacted material because some of the information is classified information.

My opinion is predicated upon the standards of care and governing standards of professional conduct set forth in the Model Rules of Professional Conduct (governing lawyers in the various branches of the U.S. military), Indiana Rules of Professional Conduct and that of every state in the country, as well as related ethics opinions and case law. I have also relied upon

standard treatises in the area of legal ethics. The ethical and fiduciary duties identified below are firmly established. My opinion is expressed to a reasonable degree of professional certainty.

My Qualifications

I am the Howard Lichtenstein Professor of Legal Ethics and the Director of the Monroe H. Freedman Institute for the Study of Legal Ethics at the Maurice A. Deane School of Law at Hofstra University in New York.

My qualifications to serve as an expert witness on legal ethics are set forth more fully in my curriculum vitae, attached as Exhibit B. It describes my educational background, legal experience, bar admissions, academic affiliations, professional activities, bar committee memberships, publications and participation as a lecturer at bar seminars, CLE panels and at other organizations on matters related to professional responsibility.

Briefly, I have taught courses in the field of lawyer regulation for the past twenty-three years and was named to my current position in 2016. Before that I was the Director of the Jacob Burns Ethics Center at the Benjamin N. Cardozo School of Law School from 1994-2016. I have published numerous articles in the field and have produced materials for the American Bar Association and other organizations. I have spoken widely on legal ethics including continuing legal education programs before numerous bar associations, lawyer associations, and law schools.

I serve on the New York State Bar Association Committee on Standards for Attorney Conduct as well as the Committee for Professional Responsibility of the Association of the Bar of the City of New York. I am co-chair of the Ethics Advisory Committee of the National Association of Criminal Defense Lawyers. I am also the ethics advisor to the Prosecutorial and Judicial Complaint Center of the New York State Association of Criminal Defense Lawyers. I am on the Board of Advisors of the New York County Lawyers Ethics Institute and a member of its Professional Ethics Committee. I served as co-chair of the ethics committee of the Criminal Justice Section of the American Bar Association.

I regularly consult with lawyers and law firms on a wide range of matters related to legal ethics. I have served as an ethics expert in litigation.

Factual Basis

You have provided the following facts:

- Mr. al Nashiri is charged with capital crimes before a military Commission in Guantanamo Bay. Mr. al-Nashiri was charged in 2008, and his case has been pending since 2011.
- The attached Exhibit A “Governmental Interference with Attorney-Client Communications, Intrusions Into Attorney-Client Relationships, Undisclosed Monitoring, and Infiltration of Defense Teams” established that prior to 2017, there was a significant history of actual and attempted governmental intrusion into the attorney-client relationships, including the placement of listening devices in attorney-client meeting rooms.
- On June 14, 2017, the Chief Defense Counsel, Brig. Gen. John Baker, USMC, issued a memo, notifying defense counsel that he recently came into possession of information raising concerns that defense attorney-client confidentiality had been and/or would be breached again. As a result, he advised all defense counsel to discontinue attorney-client meetings with their clients until they could “know with certainty that improper monitoring of such meetings is not occurring.”
- In late June, 2017, prosecutors represented to the military judge presiding over the Nashiri case that the general’s concerns did not affect the spaces in which Al-Nashiri meets with counsel. However, as reflected in pleadings filed with the US Supreme Court, defense counsel obtained information “then [REDACTED] contradicting the prosecution’s assurances.”
- Furthermore, the Chief Defense Counsel, who is aware of the redacted facts, described above recently stated publicly, “nothing has changed to cause me to change my advice. Indeed, the more I learn, the more resolute I have become in my position.”
- After Mr. al-Nashiri’s defense team received General Baker’s advice in June 2017, it filed a series of motions seeking discovery, an evidentiary hearing, and permission to inform the client about the risks to attorney-client confidentiality. These motions like the redacted information contradicting the prosecution’s assurances are classified.

- Despite the request for further discovery, to present evidence and to make argument, the military judge issued a series of rulings the body of which are classified.
- The military judge denied the requests for discovery as well as the request to have a hearing to determine the extent to which defense attorney-client confidentiality had been or would be in the future compromised. The Judge denied these requests even though the prosecution's previous assurances had been contradicted.
- The Judge also prohibited Mr. al-Nashi's defense lawyers from informing the client of the General Baker's concerns or the facts underlying those concerns because the information is classified and the military judge has no authority to permit disclosure to someone (Mr. al-Nashiri) who has no clearance.
- You state that "We have no other means by which to assess the level of risk of intrusion into attorney-client confidentiality." You assess that risk to be substantial and ongoing, based upon past practice by the government, (Exhibit A), the evaluation of the Chief Defense Counsel, and classified information within your possession.
- Following the Chief Defense Counsel's advice not to utilize attorney-client meeting spaces in Guantanamo, neither you nor your team have had a substantive meeting with the client since June of 2017.
- Mr. Al Nashiri has expressed concern about the lack of any substantive meeting. You have advised him in sum and substance that the defense is precluded from explaining anything regarding the situation to him, including obtaining his informed consent to the risks of disclosure of his confidences.
- In response to Mr. Al Nashiri's inquiries, the defense has had to tell him "that with respect to our visits, the situation has become even more complicated as a result of rulings that we ethically need to share with him but are precluded from doing so." Your recent correspondence with him included the following statement: "But as for now, for reasons that you absolutely need to know, and have a right to know, but that we are not allowed to tell you, it is necessary that we not visit with you."

Opinion

The conduct of military and civilian lawyers who appear before the Military Commission is governed by Model Rule of Professional Conduct (“MRPC”) and the Rules for Military Commission (“RMC”) as well as the Rules of Professional Conduct of the individual state where the lawyer is admitted to practice. You are admitted to practice in Indiana and subject to the Indiana Rules of Professional Conduct. (“IRPC”). In this matter, the applicable MRPC and IRPC are the same.

A bedrock professional obligation is that the lawyer shall provide competent representation to a client. MRPC 1.1; IRPC 1.1; RMC 502 (5) (specifying duties of defense counsel). Competent representation includes the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. The accompanying commentary to MRPC 1.1 provides that “[c]ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation.” Lawyers must obtain necessary and sufficient information to provide sound and informed advice to a client. Thus, the lawyer must undertake “depth and quality” [in an] investigation to ensure compliance with the law.” *Upjohn v. United States* 449 U.S. 383 (1981).

Essential to competent representation is the lawyer’s corollary duty to maintain confidential communication. The foundation of the attorney-client relationship is the free exchange of information and the frank and full disclosure necessary to provide effective representation. Without this free exchange and promise of confidentiality, especially through language and cultural barriers, the ability to provide competent counsel is seriously impaired. This foundational duty of confidentiality, dating from the common law, has been recognized as fundamental to any representation throughout modern history. See e.g. *In re Seslar*, 15 N.J. 393, 105 A. 32d 395 (1954) (discussing the common law history of the attorney-client privilege).

This duty of confidentiality is in the legal ethics rules of all jurisdictions in the United States and reflected in the RMCs. It requires that the lawyer maintain confidentiality of all information related to representation, both attorney-client privileged information and other “information related to the representation of a client.” MRPC 1.6(a); IRPC 1.6 (a). (See *United States v. Markham*, 60 M.J. 198, 209 (C.A.A.F.) (explaining that the “attorney-client privilege is

a rule of evidence that applies in judicial proceedings while the rule of confidentiality is a mandate of professional ethics that applies beyond the courtroom doors.”). RMC Rule 502 (d)(7) provides that “Defense counsel must: guard the interests of the accused zealously within the bounds of the law...and may not disclose the accused’s secrets or confidences except as the accused may authorize.”

The lawyer may not reveal confidential information without informed consent of the client or except as authorized by specified exceptions to the confidentiality rules. None of those exceptions are applicable here.

Part and parcel of your ethical duty in this case is to obtain sensitive information necessary to this representation and to provide assurances to the client that the information will be kept confidential – and not shared with the government. Even in circumstances where a confidential meeting space is secured, a lawyer will often have difficulty discussing sensitive information and obtaining the client’s trust. In charges that could result in the death penalty, the fact that the government is privy to the lawyer-client discussions chills any substantive communication. Without the assurance of confidentiality, the client may be reluctant to reveal information to the lawyer and the lawyer cannot seek to obtain such information from a client.

A lawyer is ethically prohibited from communicating with the client, notably about sensitive matters, when that lawyer believes that there is a substantial and ongoing risk that the government can listen to the communication. Once a lawyer or a client “believe that the government is listening, there will be no free exchange of information and the client’s defense is harmed.” *National Association of Criminal Defense Lawyers Ethics Advisory Opinion* 02-02 at 5, n. 4 (2002) (hereinafter “NACDL”). NACDL issued three opinions about the fundamental ethical obligations of civilian counsel in Military Commissions in 2001, 2002 and 2012, *NACDL Ethics Advisory Op.* 02-01 (November 2002); *NACDL Ethics Advisory Op* 03-04 (August 2003); *NACDL Ethics Advisory Op.*12-01 (February 2012). Each of these opinions affirms the fundamental ethical obligation of defense counsel to ensure and protect client confidential communications.

Not only must a lawyer be competent, but the lawyer had a duty of loyalty to the client. The lawyer is the client’s fiduciary and deals with matters “most confidential and vital to the client.” *Restatement of the Law Governing Lawyers*, §16. Assurances of loyalty are essential

and that duty prohibits the lawyer from harming the client. Thus, the lawyer is prohibited from using or disclosing sensitive information about the client and the lawyer has “an ethical duty... to take affirmative action to protect the confidentiality of attorney client communications from government surveillance. *NACDL Ethics Advisory Op.* 02-01 at 1 (Nov 2002).

Consistent with these ethical duties is your obligation of diligence. “A lawyer shall act with reasonable diligence and promptness in representing a client. “IRPC 1.3; MRPC 1.3. Thus, the duties of competence and diligence require you to undertake action to challenge the substance of orders or practices that prevent a lawyer from providing competent representation and assuring confidentiality. *NACDL Ethics Advisory Op.* 12-01 at 2 (February 2012) (duty to challenge orders that interfere with ethical obligations). You have fulfilled this obligation by undertaking necessary steps to seek to end the surveillance, initially by attempting to discover the extent of it. You have filed a series of motions seeking discovery and an evidentiary hearing, and have made arguments to the military judge to attempt to remedy this lack of ability to communicate confidentially with your client. The military judge denied the requests for discovery as well as the request to have a hearing to determine the extent to which attorney-client confidentiality had been or would be in the future compromised. The Judge denied these requests even though the prosecution's previous assurances about confidentiality were later contradicted. You were prohibited from informing Mr. al-Nashiri of General Baker's concerns about intrusion into the attorney-client relationship or the facts underlying those concerns because the information is classified and the military judge has no authority to permit disclosure to Mr. al-Nashiri who does not have clearance. There is no available judicial or other recourse to challenge your inability to communicate confidentially with your client.

Moreover, classified information prevents you from explaining to your client the reasons for lack of confidentiality. Consequently, you cannot even meet with your client in confidence to discuss the reasons that you cannot provide competent representation. Your client has enquired about the fact that you have not met with him. You cannot comply with your ethical duty to communicate with your client under these circumstances.

MRPC 1.4 provides that:

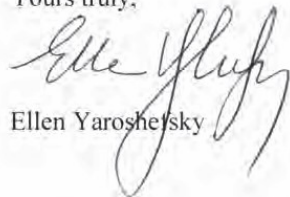
- (a) A lawyer shall:
 - (1) promptly inform the client of any decision or circumstances with respect to which the client's informed consent . . . is required[.]”
 - (2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;
 - (3) keep the client reasonably informed about the status of the matter;
 - (4) promptly comply with reasonable requests for information;
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The current situation set forth in the facts causes you to violate your duty of communication to your client. This situation is untenable.

This ethical quandary is profound and not reconcilable with your ethical obligation under the IRPC and the MRPC to act diligently and competently, to maintain confidentiality, and adhere to the duties of loyalty and communication.

You cannot, consistent with your ethical obligation continue to represent Mr. al-Nashiri. Rule 1.16 (a) (1) of Professional Conduct mandates that you withdraw from representation. It provides that a lawyer “shall withdraw from representation of a client if the representation involves a violation of the rules of professional conduct or other law.” You are required to withdraw as his counsel because continued representation will result in a violation of IRPCs and MRPCs 1.1, 1.3 1.4 and 1.6.

Yours truly,



Ellen Yaroshefsky