

## NACDL ETHICS ADVISORY COMMITTEE

Opinion 12-02 (February 2012)

Approved by the NACDL Board of Directors, February 19, 2012

### ***Question Presented:***

The NACDL Ethics Advisory Committee has been asked by the Office of Chief Defense Counsel, Office of Military Commissions, the following question:

The Commander of Joint Task Force-Guantanamo has issued two new orders governing contact and communication with our clients, detainees in his custody. Although a number of provisions in these orders are troubling, we are especially concerned about the provision requiring us to submit confidential attorney-client communications for review by a “Privilege Team” composed of law enforcement and intelligence officers without judicial oversight, and the provisions barring us from communicating on certain topics with our clients, whether or not those topics are directly related to our representation. May we comply with these requirements consistent with our ethical obligations?

This question references two orders issued by the Commander, Joint Task Force Guantanamo (JTF-GTMO), Rear Admiral D.B. Woods dated December 27, 2011, entitled *Order Governing Written Communications Management for Detainees Involved in Military Commissions* (hereinafter “Communications Order”) and *Order Governing Logistics of Defense Counsel Access to Detainees Involved in Military Commissions* (hereinafter “Logistics Order”).

### ***Digest:***

It is NACDL’s position, having considered the Commander’s Orders and NACDL Ethics Advisory Committee Opinions 03-04 (August 2003) and 02-01 (November 2002), and the authorities relied on therein, that it would be unethical for a criminal defense lawyer to abide by the Communications Order and/or Logistics Order issued December 27, 2011 by JTF-GTMO Commander Rear Admiral D.B. Woods because the conditions imposed by those Orders make it impossible for counsel to provide adequate or ethical representation, or effective assistance of counsel. Defense counsel cannot contract away his or her client’s rights, including the right to effective assistance of counsel, which includes protection of the attorney-client privilege, and the right to zealous advocacy. Yet, the Orders’ claims notwithstanding, the clear language of “Attachment A” to both Orders would require counsel to accede to invasion of the attorney-client privilege and abandonment of zealous advocacy in contravention of ethical obligations. Consequently, defense counsel cannot abide by the terms of the Orders and sign Attachment A con-

sistent with ethical standards imposed by civilian and military rules of professional conduct absent informed consent of the client. An attorney alone cannot accede to the conditions in the Orders on the client's behalf.

Also, the Orders create a conflict between defense counsels' duty to not disclose client confidences without the client's informed consent and counsels' duty to provide competent representation. As a result of the Commander's Orders, their ethical obligation requires them to cease meaningful communications with their clients to protect confidences. Lawyers cannot ethically communicate with their clients in a manner that gives third parties access to the communications. This is an impossible situation for an American lawyer and every notion of American criminal justice.

A criminal defense attorney has an ethical and constitutional duty to pursue affirmative means of protecting confidential attorney-client communications from government surveillance and interception, including a duty to challenge the substance of administrative orders that prevent a lawyer from having meaningful communications, and therefore prevent the lawyer from providing competent representation. That includes seeking judicial review and remedies, and/or, if necessary, appropriate protective orders. The "privilege team" proposed by the Orders is, in NACDL's view, plainly insufficient to protect the attorney-client privilege and resolve the insoluble ethical problem the Orders present. Nor may defense counsel rely simply on the prospect of *post hoc* relief provided by the exclusionary rule. Thus, NACDL agrees with the assessment by Chief Military Defense Counsel, Col. Jeffrey P. Colwell, USMC, that the Orders "require Defense Counsel to violate the Rules of Professional Responsibility, placing Defense Counsel in an untenable ethical position."<sup>1</sup> Specifically, the Ethics Advisory Committee finds that:

1. Without the client's informed consent, a lawyer cannot communicate with his or her client, or record and preserve communications with the client or create and preserve other written work product, in a manner that allows others to have access to the communications.
2. A criminal defense lawyer's avoiding communications and writings that might be accessed by third parties seriously impedes the ability to render competent and zealous representation to carry out the client's objectives and otherwise comply with ethical and fiduciary obligations to render effective representation.
3. In addition to not communicating while the Orders are in place, the lawyer must challenge the Orders in an effort to remove this impediment.

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<sup>1</sup> Letter from Military Counsel to Commander, Joint Task Force Guantanamo, at 2 (Dec. 22, 2011).

***Ethical Rules, Statutes, and Constitutional Provisions Involved:***

Model Rules of Professional Conduct, Rules 1.1 and 1.6  
28 U.S.C. § 530B  
RMC 502(d)(7)  
MCRE 502(a)  
RMC 701(j)  
ABA Guidelines for the Appointment and Performance of Defense Counsel in Death  
Penalty Cases Stds. 10.5 and 10.11  
U.S. Const., Fourth, Fifth, Sixth, and Eighth Amendments

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*Opinion:*

**I. Introduction**

The question presented herein has arisen for years in both the military and civilian justice systems, and emerges in this context after nearly eight years of practice in the military commissions system—after an order attempting to balance the attorney-client privilege and security needs of the detention facility had been operational without significant incident for nearly three years. This issue also looms as the commissions begin the first capital case instituted under the newly revised Military Commissions Act of 2009 (“MCA 2009”).

**A. NACDL’s Previous Committee Positions on the Question Presented**

NACDL’s Ethics Advisory Committee has twice in the last decade issued ethics opinions addressing government monitoring of attorney-client communications. The first, NACDL Ethics Advisory Opinion 02-01 issued in November 2002, was largely in response to a Bureau of Prisons (“BOP”) regulation, namely 28 C.F.R. § 501.3(d), granting BOP authority to monitor attorney-client communications in BOP facilities under certain narrow circumstances. The Second, NACDL Ethics Advisory Opinion 03-04 issued in August 2003, addressed the November 13, 2001, Executive Order that created the Guantanamo military commissions and authorized their implementing instructions. That Opinion included analysis of a provision that would have required civilian defense counsel, as a condition of participation in the military commissions, to agree that attorney-client communications would be monitored.

NACDL concluded as follows with respect to such a condition:

... [I]t is unethical for a criminal defense lawyer to represent a person accused before these military commissions because the conditions imposed upon defense counsel before these commissions make it impossible for counsel to provide adequate or ethical representation.

NACDL Ethics Advisory Committee Op. 03-04, at 1 (Aug. 2003).<sup>2</sup>

The Opinion added that “NACDL will not condemn criminal defense lawyers who undertake to represent persons accused before military commissions because some may feel an obligation to do so.” However, “[i]f defense counsel undertakes representation and can abide by these rules, counsel must seek to raise ... every conceivable good faith argument concerning the jurisdiction of the military commission, the legality of denial of application of the Uniform Code of Military

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<sup>2</sup> <http://www.nacdl.org/ResourceCenter.aspx?id=6477> (All prior opinions of the NACDL Ethics Advisory Committee can be accessed on this website).

Justice (UCMJ), international treaties, and due process of law, including resort to the civilian courts of the United States to determine whether the proceedings are constitutional.” Ultimately, upon objection by civilian defense counsel, that provision, contained within Annex B, an affirmation civilian defense counsel was required to sign, was eliminated prior to any civilian defense counsel participating in the initial commissions.

The 2002 Opinion also concluded that:

A criminal defense attorney has an ethical and constitutional duty to take affirmative action to protect the confidentiality of attorney client communications from government surveillance. This includes seeking relief from the jailers, if possible, or judicial review and seeking of protective orders. Defense counsel should argue that the Sixth Amendment right to counsel and a fair trial and the Fifth Amendment right to due process and a fair trial protect attorney-client communications from disclosure to the government.

NACDL Ethics Advisory Committee Op. 02-01, at 1 (Nov. 2002).<sup>3</sup>

This opinion does not supersede the Committee’s prior opinions. Indeed, much of the analysis in this opinion is identical to the analysis in the previous two opinions, and simply supplements it with updated case law, and adapts it to the most recent Orders issued by the Commander JTF-GTMO.

## **B. Substance of the Orders in Question**

On December 27, 2011, Rear Admiral D.B. Woods, Commander, JTF-GTMO, issued the separate Communications and Logistics Orders setting forth conditions governing, respectively, defense counsels’ written communications with detainees currently held at the detention facility at Guantanamo Bay, Cuba, and access to and/or meetings with those detainees. On January 8, 2012, Department of Defense Chief Defense Counsel, Colonel J.P. Colwell, USMC, issued an ethics instruction to all military commissions defense counsel regarding compliance with the Orders. Col. Colwell advised counsel under his command not to submit attorney-client privileged materials for review to the “Privilege Team,” and not to sign the Acknowledgments found as Attachment A to both Orders.<sup>4</sup>

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<sup>3</sup> *Id.*

<sup>4</sup> Memorandum for the Office of the Chief Defense Counsel on Professional Responsibility Guidance on the JTF-GTMO-CDR Orders (January 13, 2012), *available at* <http://www.nacdl.org/NewsReleases.aspx?id=23429&libID=23399>.

The Communications Order describes three categories of written communications: (1) lawyer-client communications, including attorney work product;<sup>5</sup> (2) “other case-related material,” including discovery; and (3) non-legal mail.<sup>6</sup> The Order requires counsel to divide their communications into those three categories and mark each page of communication with the respective “class” of communication.<sup>7</sup> The Order also prohibits defense counsel from including “contraband” within any of the three categories of communications.<sup>8</sup> The Order further defines two types of “contraband”: physical contraband and information contraband.<sup>9</sup> Under the terms of the Order, “Physical contraband” includes paper fasteners, money, weapons, drugs, and cigarettes,<sup>10</sup> but does not include written communications.<sup>11</sup>

Regarding the second category of contraband, “information contraband,” the Order lists the following examples:

- (a) Information relating to any ongoing or completed military, intelligence, security or law enforcement operations, investigations or arrests or the results of such activities by any nation or agency;
- (b) Current political or military events in any country; historical perspectives or discussions on jihadist activities, including information generated or distributed by or on behalf of foreign terrorist organizations, individuals or groups engaged in terrorist activities, to include material such as “Inspire” magazine;
- (c) Information about security procedures or changes to security procedures at JTF-GTMO or the U.S. Naval Station at Guantanamo Bay; information about the physical layout of the detention facilities;
- (d) Information about the operation of or changes to the detention facility;
- (e) Information about present and former detention personnel or other U.S. Government personnel (including their names, locations or assignment history); and

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<sup>5</sup> Attorney work-product, however, is not defined in the Commander’s Order. Communications Order § 2(e)(2), *infra* note 6.

<sup>6</sup> Order from the Commander, Joint Task Force Guantanamo Governing Written Communications Management for Detainees Involved in Military Commissions, § 2(e)-(g) (Dec. 27, 2011) (hereinafter *Communications Order*), available at [http://images.politico.com/global/2012/01/order\\_governing\\_written\\_communications.pdf](http://images.politico.com/global/2012/01/order_governing_written_communications.pdf).

<sup>7</sup> Communications Order § 4.

<sup>8</sup> *Id.* § 4(a).

<sup>9</sup> *Id.* § 2(h)-(i).

<sup>10</sup> *Id.* § 2(i).

<sup>11</sup> *Id.*

- (f) Information regarding the status of other Detainees (including former Detainees) at Guantanamo and information regarding any detention of Detainees; and classified, Controlled Unclassified Information or Sensitive but Unclassified Information that has not been approved by the Government for release to the Detainee-Accused.<sup>12</sup>

Thus, the Order includes written communications within the definition of “information contraband.” Also, the Communications Order further defines “contraband” as “any physical item or prohibited information that Commander, JTF-GTMO, or his designee, has deemed to be impermissible or inappropriate for a Detainee to possess, be informed of (orally or in writing) or view, subject to the exception[s]...”<sup>13</sup>

The Communications Order also creates a “Privilege Team,” and requires counsel to submit all written communications addressed to their clients to that team for review before written communications can be sent to or shared with the client.<sup>14</sup> The privilege team is comprised of Department of Defense personnel, including attorneys, intelligence, and law enforcement personnel, and interpreters and translators “who have not taken part in, and, in the future, shall not take part in, a military commission ....”<sup>15</sup>

The Communications Order also directs that “[t]he Privilege Team shall open the envelopes to inspect the contents for Physical Contraband and to verify that each page of the material includes the markings” as required by the Order. In addition, “[t]he inspection shall not include review of the substantive content of the Incoming Mail, but enables the Privilege Team to flag for different processing any items that *appear to violate this Order that are apparent (in plain view) from the inspection for Physical Contraband.*”<sup>16</sup> The Order further mandates that physical contraband be removed from the envelopes. Moreover, “[i]f, in executing its inspection, ... the Privilege Team observes material that appears to be *Contraband, as defined by this Order*, that

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<sup>12</sup> *Id.* § 2(h) (the Communications Order further provides that certain categories of information contraband may not be contraband “if defense counsel reasonably believe they are directly related to the military commission proceedings involving the Detainee-Accused: (a) Information relating to an ongoing or completed military, intelligence, security, or law enforcement operations, investigations, or arrests, or the results of such activities, by any nation or agency; (b) Information relating to current political events in any country; (c) Information concerning living conditions of Detainees at JTF-GTMO; and (d) Information relating to the status of other Detainees, including former detainees. *Id.*).

<sup>13</sup> *Id.* § 2(h)(1).

<sup>14</sup> *Id.* § 6.

<sup>15</sup> *Id.* § 2(d).

<sup>16</sup> *Id.* § 6(f) (emphasis added).

material shall not be processed for delivery to the Detainee-Accused.”<sup>17</sup> The Order also provides that “the Privilege Team may consult with security and intelligence experts at JTF-GTMO as needed regarding potential Contraband or other unauthorized information the Privilege Team becomes aware of when executing its responsibilities under this Order.”<sup>18</sup> Defense counsel may bring to a meeting with a detainee client only material previously inspected by the Privilege Team.<sup>19</sup>

Pursuant to the terms of the Communications Order, the Privilege Team operates under instructions from and authority of the Commander, JTF-GTMO, because the Order requires the Privilege Team to report to the Commander any information that could harm national security or threaten operations at the detention facilities. The Commander may then share this information with law enforcement, military, and intelligence officials.<sup>20</sup> The Order explicitly does not provide detainees or their counsel any substantive or procedural rights with respect to the implementation or operation of the Order.<sup>21</sup>

The Order requires that defense counsel and support personnel, before being permitted to communicate in writing with his or her client, or granted access to him, agree to comply fully with the Order and sign an acknowledgment to that effect.<sup>22</sup> That acknowledgment, “Attachment A,” provides as follows:

The undersigned hereby acknowledges that he/she has read the Order Governing Written Communications Management for Detainees Involved in Military Commissions, understands its terms, and agrees to be bound by each of those terms.... The undersigned understand that failure to comply with the provisions of this order may result in written communications not being processed for introduction into the detention facilities.<sup>23</sup>

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<sup>17</sup> *Id.* § 6(f)(3) (emphasis added).

<sup>18</sup> *Id.* § 5(b).

<sup>19</sup> *Id.* § 8; Order from the Commander, Joint Task Force Guantanamo Governing Logistics of Defense Counsel Access to Detainees Involved in Military Commissions, § 5(a) (Dec. 27, 2011) (hereinafter *Logistics Order*), available at [http://images.politico.com/global/2012/01/order\\_governing\\_logistics.pdf](http://images.politico.com/global/2012/01/order_governing_logistics.pdf).

<sup>20</sup> Communications Order § 5(d).

<sup>21</sup> Communications Order § 1(d).

<sup>22</sup> *Id.* § 3(b); Logistics Order § 4(b).

<sup>23</sup> *Id.* Attachment A.

However, the Ethics Advisory Committee has been informed that defense counsel have refused to execute the Attachment to the Orders or submit documents for Privilege Team review. As a result, they have not been permitted to send their clients written communications of any kind. While counsel have been permitted access to their clients, they have not been permitted to take notes or share documents with their clients during those meetings.<sup>24</sup>

In sum, the Orders would allow third parties who are not affiliated with defense counsel, and therefore not subject to the attorney-client privilege to read privileged communications between counsel and his or her client, as well as notes taken during attorney-client meetings.

## **II. What Ethical Standards Govern Lawyer Conduct In the Commissions?**

When military or civilian lawyers appear in the Guantanamo military commissions, which ethical standards govern their conduct? It is clear that lawyers appearing before a military commission must adhere to the Rules of Professional Conduct and are mandated to provide competent, independent, and zealous representation.

### **A. Standards Imposed by the Military Commissions**

#### **1. Rules for Military Commissions (“RMC”) 502(d)(7)**

The Discussion relevant to 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.”

#### **2. Military Commission Rule of Evidence (“MCRE”) 502(a)**

Similarly, MCRE Rule 502(a) provides that “[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client ....”<sup>25</sup>

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<sup>24</sup> The Communications Order § 1(b), also claims reliance on the U.S. Bureau of Prisons’ Special Administrative Measures (“S.A.M.’s”) that place significant restrictions on an inmate’s communications with persons other than his family and attorneys. However, the S.A.M.’s do not contain any provision that authorizes in any way content-oriented review of legal (attorney-client) mail. Also, while 28 C.F.R. § 501.3 authorizes monitoring of attorney-client conversations, it does so under only a very narrow set of circumstances, and has never once been implemented in the decade it has been in effect.

<sup>25</sup> *See also* United States v. Markum, 60 M.J. 198, 209 (C.A. A.F. 2004) (noting that “[t]he principle of confidentiality is given effect in both the attorney-client privilege and the rule of confidentiality. 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

### 3. Rules for Military Commission (“RMC”) 701(j)

RMC 701(j) provides that “[e]ach party shall have adequate opportunity to prepare its case and no party may unreasonably impede the access of another party to a witness or evidence.”

### 4. Additional Military Regulations

Regulations applicable to lawyers serving in the various branches of the U.S. military provide that military lawyers are governed by the Model Rules of Professional Conduct. *See* Army Regulation 27-26 (Rules of Professional Conduct for Lawyers of 1 May 1992) Rules 1.6(a), Air Force Rules of Profession Conduct (AFRPC of 17 Aug. 2005) Rules 1.6(a), and Professional Conduct of Attorneys Practicing Under the Supervision of the Judge Advocate General of 9 Nov. 2004 Rules 1.6(a).<sup>26</sup> In that context, while the government contends that zealous representation is required of detailed counsel or civilian counsel, the Orders nevertheless impose such severe limits on counsel that they are rendered unable to prepare and present an effective defense. NACDL finds these limits inimical to the need for, and recognition of, zealous advocacy inherent in our system of justice.

### B. Model Rules of Professional Conduct 1.1 and 1.6

Rule 1.1 provides that “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and *preparation* reasonably necessary for the representation.”<sup>27</sup>

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even beyond the courtroom doors. The confidentiality rule covers all information relating to the representation from whatever the source, not merely to matters communicated in confidence by the client and prohibits the disclosure of such information except as authorized or required by the Rules of Professional Conduct or other law.”), *United States v. Ankey*, 30 M.J. 10, 13-14 (C.M.A. 1990).

<sup>26</sup> Both AFRPC Rule 1.6(a) and JAGINST 5803.1C Rule 1.6(a) provide that a lawyer “shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are implicitly authorized in order to carry out the representation.” Army Regulation 27-26 Rule 1.6(a) imposes the same obligation of confidentiality as the Army and Navy, with the addition that disclosure is permitted when required or authorized by law.

<sup>27</sup> Model Rules of Professional Conduct Rule 1.1 (emphasis added). While Rule 1.1 requires counsel to provide competent representation to a client, the Preamble to the Model Rules states “[a]s advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.” “A lawyer’s responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a

Rule 1.6(a) provides that “[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).”<sup>28</sup> As Comment 3 to Rule 1.6 states,

The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.

However, of course, Rule 1.6(b)(6) provides that “a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary” in order to comply with a court order. Notwithstanding that subsection, comment 13 to Rule 1.6 provides that

A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law.

In contrast to Rule 1.6’s provision that a lawyer *may* disclose information pursuant to a *court* order, the Orders at issue herein do not involve directives by a court or any other tribunal, but rather only by the Commander, JTF-GTMO, an administrator without formal authority in the military commissions. Thus, the Order does not satisfy Rule 1.6’s predicate(s) for disclosure of client confidences. And, even if a Commission judge ordered a criminal defense lawyer to comply with the Order and disclose confidences, the judge’s order would then likely violate the constitutional provisions already cited and must be appealed before even attempting to comply with them.

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lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.” Model Rules of Professional Conduct, Preamble ¶¶ 2 and 8.

<sup>28</sup> Model Rules of Professional Conduct Rule 1.6(a).

ABA Model Rules 1.1 and 1.6 “require lawyers to take reasonable care to protect the confidentiality of client information.” ABA Op. 11-459 (2011); *see, e.g.*, ABA Op. 08-451 (2008) (“the obligation to ‘act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision’” requires a lawyer outsourcing legal work “to recognize and minimize the risk that any outside service provider may inadvertently—or perhaps even advertently—reveal client confidential information to adverse parties or to others who are not entitled to access ... [and to] verify that the outside service provider does not also do work for adversaries of their clients on the same or substantially related matters”). Comments 16 and 17 to ABA Model Rule 1.6 elaborate on this requirement.<sup>29</sup>

### C. 28 U.S.C. § 530B

The “McDade Amendment,” 28 U.S.C. § 530B(a) provides as follows:

#### § 530B. Ethical standards for attorneys for the Government

An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

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<sup>29</sup> *Id.*:

[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

While it was written for U.S. Attorneys,<sup>30</sup> its text is not limited to them at all. In fact, it fits hand in glove with all the Service regulations adopting rules of professional conduct for military lawyers. All attorneys working for any branch of government are subject to their state's ethical standards because even government lawyers are licensed and regulated by state courts or state bars by delegation. In federal court, government lawyers are at the minimum governed by the ABA Model Rules.<sup>31</sup>

### III. The Ethical Issues Presented by the Orders

#### A. Attorney-Client Privilege and Confidentiality

The attorney-client privilege is the law's oldest confidential communications privilege. *Swidler & Berlin*, 524 U.S. 399, 403 (1998); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981), quoting *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure"). It existed in Roman Law two millennia ago, and under English common law since at least 577. Hazard, note 33, *infra*, at 1071; 1 MCCORMICK ON EVIDENCE § 87 (5th ed. 1999); 8 WIGMORE, EVIDENCE § 2290, at 542 n. 1 (McNaughton rev. 1961) (collecting authorities).

As the Supreme Court has explained, "[t]he privilege is intended to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'" *Swidler & Berlin*, 524 U.S. at 403, quoting *Upjohn*, 449 U.S. at 389.<sup>32</sup>

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<sup>30</sup> See 28 U.S.C. § 530B(b)-(c).

<sup>31</sup> *Mendoza Toro v. Gil*, 110 F.Supp.2d 28, 36-37 (D. P.R. 2000), citing *Schneider v. Colegio de Abogados de Puerto Rico*, 187 F.3d 30, 39 n. 16 (1st Cir. 1999) (Lipez, J., concurring).

<sup>32</sup> In *Upjohn*, the Court also held, 449 U.S. at 389, 390-91, that,

[a]s we stated last Term in *Trammel v. United States*, 445 U.S. 40, 51 (1980): "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in *Fisher v. United States*, 425 U.S. 391, 403 (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys." This rationale for the privilege has long been recognized by the Court, see *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure"). ... [T]he privilege exists to protect not only the giving of professional advice to those who can act on it but

The attorney-client privilege is evidentiary, and the product of litigation. Accordingly, it has developed through judicial interpretation, and has been codified only relatively recently. The ethical requirement of attorney-client confidentiality, however, developed as an internal rule of conduct imposed on lawyers, and written by lawyers for themselves in anticipation that states would adopt and formalize them.<sup>33</sup> Both the privilege and the ethical prescriptions safeguarding it are premised on the same weighty public policy consideration: that attorneys best serve their clients, and represent client interests, only when there exists full and frank disclosure between the client and attorney, and that the client's freedom from fear of disclosure by the attorney fosters the client's full disclosure.

Confidentiality in ethical rules is thus broader than the privilege because it governs the conduct of lawyers everywhere and all the time, not just in court. As stated in the ABA Code of Professional Responsibility, EC 4-1:

Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance. (footnotes omitted)

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also the giving of information to the lawyer to enable him to give sound and informed advice. See *Trammel, supra*, at 51; *Fisher, supra*, at 403. The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant. See ABA Code of Professional Responsibility, Ethical Consideration 4-1: ... [quoted in the text, *infra*]. See also *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).” (bracketed material added).

<sup>33</sup> See generally Fred C. Zachairas, *Harmonizing Privilege and Confidentiality*, 41 S. Tex. L. Rev. 69 (1999); Harry Schaffner, *Reconciling Attorney-Client Privilege with the Rules of Professional Conduct*, 81 Ill. B.J. 410 (1993); Susan B. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. Rev. 1389 (1992); Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 Cal. L. Rev. 1061 (1978).

The broader ethical rules do not govern application of the attorney-client privilege, but instead operate independently as ethical standards to which attorneys must adhere. Model Rules of Professional Conduct, Scope ¶ 7.

## **B. Duty to Challenge the Commander's Orders**

Should defense counsel continue to represent clients subject to the Commander's Orders, defense counsel has a duty to challenge those Orders to the best of his or her ability, raising every conceivable good faith argument against their implementation, including ethical challenges as well as substantive legal challenges to the lawfulness of the Orders. NACDL believes that there are serious ethical and constitutional problems with the Orders.

The discussion that follows provides a framework of the arguments counsel should consider in challenging the Commander's Orders, including constitutional challenges under the Fourth, Fifth, and Eighth Amendments. Counsel should argue that the Sixth Amendment right to counsel and a fair trial and the Fifth Amendment right to due process and a fair trial, as well as the Eighth Amendment protections against cruel and unusual punishment protect attorney-client communications from disclosure to the government.

### **1. Constitutional Considerations**

While it remains unclear which constitutional provisions apply directly to the military commissions, certainly the principles that underlie such constitutional protections, such as due process, self-incrimination, search and seizure, and effective assistance of counsel are relevant in the commissions, if not controlling.<sup>34</sup> Moreover, an attorney's ethical obligations stem from the rules of the state(s) in which they are admitted, and are not creatures of the commission system.

#### **a. Sixth Amendment**

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<sup>34</sup> NACDL believes those provisions of the Constitution applicable to criminal prosecutions apply in the military commissions. Nor do the Orders at issue in this Opinion suggest that those constitutional provisions do *not* apply in the military commissions under current law. In *Hamdan v. Rumsfeld*, 548 U.S. 557, 631-632 (2006), the Supreme Court held that Common Article 3 to the Geneva Conventions applies to non-international armed conflicts, which is the nature of the conflict arising under the 2001 Authorization for Use of Military Force, and requires trial by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." The Court noted that "[t]he regular military courts in our system are the courts-martial established by congressional statutes." At a minimum, a military commission 'can be 'regularly constituted' by the standards of our military justice system only if some practical need explains deviations from court-martial practice.'" *Id.* at 633. (internal citations omitted). Therefore, it is arguable that the Constitution fully applies in the military commissions because it fully applies in the courts martial system.

NACDL's Ethics Advisory Committee has always maintained that preserving client confidentiality is, in fact, presumptively a Sixth Amendment principle because confidentiality is the foundation of the attorney-client relationship, and has always been a fundamental attribute of the right to counsel and the effective assistance of counsel. However, while the Supreme Court has not expressly held that confidentiality is subsumed within the Sixth Amendment right to counsel, it has suggested that it might be. *See Weatherford v. Bursey*, 429 U.S. 545, 554 n. 4 (1977).

Because the principle of confidentiality dates from the common law, it should be a part of the Sixth Amendment right to counsel,<sup>35</sup> and certain state courts have indeed included the attorney-client privilege within the constitutional right to counsel. *State v. Kociolek*, 23 N.J. 400, 413-14, 129 A.2d 417, 424 (1957), citing *In re Seslar*, 15 N.J. 393, 403-06, 105 A.2d 395, 400-03 (1954) (which recites the common law history of the privilege at length).<sup>36</sup> For example, in *State v. Swearingen*, 649 P.2d 1102, 1104 (Colo. 1982), the Colorado Supreme Court stated:

The purpose of the privilege is to encourage full and frank communications between attorneys and their clients which promote the administration of justice and preserve the dignity of the individual. *Law Offices of Bernard D. Morley v. MacFarlane*, 647 P.2d 1215 (Colo.1982) (Quinn, J., concurring). Although the privilege is not explicitly grounded in constitutional protections, the inviolability of the privilege in criminal prosecutions is closely interrelated with the individual's right to immunity from self-incrimination under the Fifth Amendment to the United States Constitution and his right to counsel under the Sixth Amendment, which necessarily includes the right to confer in private with his attorney. *Geders v. United States*, 425 U.S. 80, 96 S. Ct. 1330, 47 L. Ed .2d 592 (1976); *Law Offic-*

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<sup>35</sup> In construing the Fourth Amendment, the Supreme Court looks first to the common law as it existed in 1791. *Carroll v. United States*, 267 U.S. 132, 149 (1925); *California v. Hodari D.*, 499 U.S. 621, 624 (1991); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995). The due process components of the Fifth and Fourteenth Amendment are viewed under the common law at the time of adoption of the Constitution and the Bill of Rights. *Powell v. Alabama*, 287 U.S. 45, 62 66 (1932). The common law of immunity from suit was impressed into § 1983 litigation. *See, e.g., Imbler v. Pachtman*, 424 U.S. 408, 424-29 (1976). The Sixth Amendment, however, was expressly designed to overcome common law limits on the right to counsel in felony cases. *United States v. Ash*, 413 U.S. 300, 306-10 (1973); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963); *Powell v. Alabama*, *supra*, 287 U.S. at 60-66.

<sup>36</sup> *Kociolek*, 23 N.J. 413-14, 129 A.2d at 434:

The principle [of full disclosure to counsel] is the essence of the ancient common law attorney-client privilege, in this country and in England and the continental countries deemed a basic civil right, indispensable to the fulfillment of the constitutional security against self-incrimination and the right to make defense with the aid of counsel skilled in the law. *See In re Seslar, supra.* (bracketed material added)

*es of Bernard D. Morley v. MacFarlane, supra* (Quinn, J., concurring); *State v. Kociolek*, 23 N.J. 400, 129 A.2d 417 (1957); Note, “The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement,” 91 Harv.L.Rev. 464 (1977)<sup>37</sup>; Note, “The Right of a Criminal Defense Attorney to Withhold Physical Evidence Received from his Client,” 38 U.Chi.L.Rev. 211 (1970). (footnote added)

Governmental actions intended to intrude into the attorney-client relationship have been held violations of the right to counsel. *See, e.g., Geders v. United States*, 425 U.S. 80, 88-89 (1976) (trial court directive that testifying defendant could not consult with client during overnight recess denied right to counsel; the lawyer needs to be able to consult with the defendant about the events of the day, and vice-versa, to plan effectively for the remainder of the trial)<sup>38</sup>;

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<sup>37</sup> Note, 91 Harv. L. Rev. at 485-86:

The fifth amendment to the United States Constitution provides individual criminal defendants with a right against self-incrimination. This right protects such persons from having their own testimony placed in evidence against them through the compulsion of the judicial process. Considered alone, however, the fifth amendment does not entitle defendants to have all their communications privileged; statements volunteered to a third person, for example, can be introduced against a defendant. Nevertheless, the state has no right to demand from the defendant an admission of guilt. A court cannot, through direct coercion, infringe the defendant's personal province of fifth amendment protection. The Constitution also grants defendants a right to counsel under the sixth amendment. There are, of course, qualifications on that right which the sixth amendment does not foreclose. Defendants are not, for example, guaranteed the shrewdest counsel, or the most experienced, or the most articulate. Nor, under the sixth amendment, are they necessarily guaranteed a privilege for communications with lawyers. Unless legal communications would completely collapse without a right to privilege, it is hard to see why the absence of the privilege would violate the provisions of the sixth amendment. But when the fifth and sixth amendments are considered together, the individual accused of crime does seem to have a right to attorney-client privilege. Without a right to privilege, the exercise of either constitutional right would require a waiver of the other. To preserve his right against self-incrimination, the defendant would have to forgo communicating with an attorney, lest the communication be subpoenaed. Similarly, to enjoy even the most minimal use of his right to an attorney, the defendant would have to surrender his testimony to the court. Yet, neither of these restrictions can be permitted. Each conditions a constitutional right upon the waiver of another and thus turns a guarantee into a fiction. A right to attorney-client privilege is the only safeguard against the evisceration of these constitutional rights. The fifth and sixth amendments together must therefore provide individual criminal defendants with a right to prevent the disclosure at trial of their legal communications. (footnotes omitted)

<sup>38</sup> *See also Herring v. New York*, 422 U.S. 853, 857-58 (1975) (denying defense counsel the right to deliver summation violated the right to counsel); *Brooks v. Tennessee*, 406 U.S. 605, 613

*Bishop v. Rose*, 701 F.2d 1150, 1156-57 (6th Cir. 1983) (state’s seizure of 14-page handwritten letter to counsel from defendant’s cell and use of it at trial established violation of Sixth Amendment right to counsel and did not require demonstration of prejudice); *Shillinger v. Hawthorn*, 70 F.3d 1132, 1140 (10th Cir. 1996) (deputy sheriff’s listening to and reporting on defendant’s meetings with counsel constituted an intentional violation of Sixth Amendment); *Coplon v. United States*, 89 U.S. App. D.C. 103, 112, 191 F.2d 749, 756 (1951) (stating, in context, of wiretapping of attorney-client communications, “It is well established that an accused does not enjoy the right to effective aid of counsel if he is denied the right of private consultation with him[;]” decided also as a due process claim); *State v. Garza*, 99 Wash. App. 291, 296, 994 P.2d 868, 871 (2000), *rev. denied*, 141 Wash.2d 1014, 10 P.3d 1072 (2000) (legal materials seized and read in jail; “Effective representation requires that a criminal defendant be permitted to confer in private with his or her attorney.”), *citing State v. Cory*, 62 Wash.2d 371, 373-74, 382 P.2d 1019, 1020-21 (1963) (police detective read defense counsel’s legal pad during trial; “It is also obvious that an attorney cannot make a ‘full and complete investigation of both the facts and the law’ unless he has the full and complete confidence of his client, and such confidence cannot exist if the client cannot have assurance that his disclosures to his counsel are strictly confidential.” (bracketed material added)).<sup>39</sup>

Here, as discussed in more detail below, it is inconceivable that detainees who are accused of committing war crimes against U.S. citizens, including soldiers, will be forthcoming when they know that all of their attorney-client communications will be monitored – even if they do trust their particular assigned military defense (or civilian) counsel. Nor, under such circumstances, would a detainee make disclosures to his attorney about the identity and location of helpful witnesses, as the detainee could well conclude that such information could be used by U.S. authorities to capture or even kill those persons overseas. In the capital context, that would include witnesses who would be useful for mitigation purposes.

Since its inception in 1990 the Ethics Advisory Committee, in informal opinions, has relied on those authorities in always urging NACDL members to assert client confidentiality as part of a client’s Sixth Amendment right to counsel, as well as a related but independent ethical duty of counsel.

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(1972) (statute requiring defendant to testify first or not at all denied right to have counsel determine trial strategy).

<sup>39</sup> In the context of law office searches, *see, e.g.*, *De Massa v. Nunez*, 770 F.2d 1505, 1507 (9th Cir. 1985) (*per curiam*); *United States v. Neill*, 952 F.Supp. 834, 839-40 (D. D.C. 1997); *United States v. Skeddle*, 989 F.Supp. 890, 896-97 (N.D. Ohio. 1997); *United States v. Stewart*, 2002 WL 1300059, \*5 (S.D. N.Y. 2002); *People v. Nash*, 418 Mich. 196, 341 N.W.2d 439, 447 (1983).

## **b. Fourth Amendment**

Many courts have held that the Fourth Amendment rights of clients may be violated by a search of a lawyer's office. *See, e.g., De Massa v. Nunez*, 770 F.2d 1505, 1507 (9th Cir. 1985); *O'Connor v. Johnson*, 287 N.W.2d 400, 405 (Minn. 1979). NACDL believes this rationale can be extended to any confidential communication seized by the government.

It is settled that a person in pretrial or post-conviction custody does not have the same expectation of privacy of those not in jail, and every criminal defense lawyer knows it. Accordingly, a detainee may be subjected to searches of his person and belongings without a showing of particularized need, as long as jail security requires it, even if it is a random search. *Bell v. Wolfish*, 441 U.S. 520 (1979) (confinement conditions evaluated under Due Process Clause). However, this does not justify seizing presumptively confidential and privileged communications between lawyer and client, even if in jail, or condition counsel's access to the client on surrender of the attorney-client privilege and other ethical constraints on attorney revelation of client confidences.

## **c. Fifth Amendment**

The Supreme Court has held that a client does not waive his Fifth Amendment privilege by providing information to an attorney. *Fisher v. United States*, 425 U.S. 391, 403-05 (1976); *United States v. Zolin*, 491 U.S. 554, 562 (1989). *Fisher* can be read only to incorporate the attorney-client privilege into the privilege against self-incrimination in order to enable the client to communicate freely with his or her lawyer, *id.*, 425 U.S. at 404, about past wrongdoing. *Id.* at 403; *Zolin*, 491 U.S. at 562-63.

## **d. Right to a fair trial with effective and informed counsel**

In *Estelle v. Williams*, 425 U.S. 501, 503 (1976), the Supreme Court stated,

The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice. Long ago this Court stated: 'The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.' *Coffin v. United States*, 156 U.S. 432, 453 (1895).

The right to a fair trial is premised on the right to effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984), in which the Court, relying on its prior decisions, pointed out that:

In a long line of cases that includes *Powell v. Alabama*, 287 U.S. 45 (1932), *Johnson v. Zerbst*, 304 U.S. 458 (1938), and *Gideon v. Wainwright*, 372 U.S. 335 (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”

As a result, the Court in *Strickland*, 468 U.S. at 685, concluded that

a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the “ample opportunity to meet the case of the prosecution” to which they are entitled. *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275, 276 (1942); see *Powell v. Alabama*, *supra*, 287 U.S. at 68-69.

The right of the accused to a fair trial is undermined entirely and irrevocably by government conduct that interferes with the right to counsel. Thus, monitoring of attorney-client communications, including conversations, ultimately interferes with the right to a fair trial. Counsel not informed fully of the facts is ineffective counsel, and, if the government is the cause of counsel being uninformed, the accused has been denied his fundamental right to a fair trial.

### **C. The Lawyer’s Duty to Assert Confidentiality**

When the government seeks information about a client that intrudes upon a client confidence, the lawyer has a fundamental and affirmative duty to act to protect the confidence. *In re Advisory Opinion No. 544*, 103 N.J. 399, 406, 511 A.2d 609, 612 (1986); ABA Formal Op. 94-

385 (1994). That duty is also recognized in 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 60(1)(b), 63 & *Comment b* (2000).<sup>40</sup>

This duty is also implied in the lawyer's duty of "act[ing] with reasonable diligence and promptness in representing a client," *see* Model Rule of Professional Conduct, Rule 1.3, and the duty to take prompt action to protect the interests of the accused. ABA STANDARDS, *the Defense Function* § 4-3.6 ("Defense counsel should inform the accused of his or her rights at the earliest opportunity and take all necessary action to vindicate such rights. Defense counsel should consider all procedural steps which in good faith may be taken, including ... moving to suppress illegally obtained evidence ....").

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<sup>40</sup> Section 60(1) provides:

(1) Except as provided in §§ 61-67 [when disclosure permitted], during and after representation of a client: ... (b) the lawyer must take steps reasonable in the circumstances to protect confidential client information against impermissible use or disclosure by the lawyer's associates or agents that may adversely affect a material interest of the client or otherwise than as instructed by the client. (bracketed material added)

Section 63 provides that "[a] lawyer may use or disclose confidential client information when required by law, after the lawyer takes reasonably appropriate steps to assert that the information is privileged or otherwise protected against disclosure." *Comment b* states:

*A lawyer's obligation to invoke available protection.* A lawyer generally is required to raise any reasonably tenable objection to another's attempt to obtain confidential client information (see § 59) from the lawyer if revealing the information would disadvantage the lawyer's client and the client has not consented (see § 62), unless disclosure would serve the client's interest (see § 61). The duty follows from the general requirement that the lawyer safeguard such information (see § 60) and act competently in advancing the client's objectives (see § 16(1)). The duty to object arises when a nonfrivolous argument (see § 110) can be made that the law does not require the lawyer to disclose such information. Such an argument could rest on the attorney-client privilege (see § 86(1)(b)), the work-product immunity (see § 87), or a ground such as the irrelevance of the information or its character as hearsay. When the client is represented by successor counsel, a predecessor lawyer's decision whether to invoke the privilege is appropriately directed by successor counsel or the client. Whether a lawyer has a duty to appeal from an order requiring disclosure is determined under the general duties of competence (see § 16(2)). A lawyer may be instructed by a client to appeal (see § 21(2)). If a lawyer may obtain precompliance appellate review of a trial-court order directing disclosure only by being held in contempt of court (see § 105), the lawyer may take that extraordinary step but is generally not required to do so by the duty of competent representation. In any event, under § 20 the lawyer should inform the client of an attempt to obtain the client's confidential information if it poses a significant risk to the material interests of the client and when circumstances reasonably permit opportunity to inform the client.

A lawyer may be subject to discipline not only for disclosing confidential information knowingly but also for doing so recklessly or negligently. *See Matter of Holley*, 285 A.D.2d 216, 220, 729 N.Y.S. 2d 128, 132 (1st Dept. 2001) (“whether he acted recklessly or [merely] negligently does not matter since, either way, respondent’s failure to take adequate precautions to safeguard confidential materials of a client, even if considered unintentional, was careless conduct that reflects adversely on his fitness to practice law”).<sup>41</sup>

ABA Model Rule 1.6(b) sets forth exceptions to the confidentiality duty, none of which appear to be applicable. The Committee is unaware of any law or regulations that affect the conclusions reached in this opinion regarding Rule 1.6. Although Rule 1.6(b)(6) authorizes a lawyer to reveal confidential information “to comply with other law or a court order,” our attention has not been directed to any law or court order that requires defense lawyers such as the inquirers to communicate with detainee-clients in the proposed manner, which makes their communications accessible to third parties, rather than simply not communicating at all. Further, to the extent that any law or court order might arguably require the disclosure of client confidential information without client consent, lawyers would be required to make any available, non-frivolous challenges to the law before complying. *See, e.g.*, ABA Formal Op. 10-456; N.Y. City Op. 2005-3 (2005).

#### **D. The Duty to Avoid Conflicts of Interest**

An attorney is also duty-bound to avoid conflicts of interest. Model Rule of Professional Conduct 1.7(a)(2) provides that a conflict of interest exists if there is a “significant risk” that the representation of a client will be “materially limited” by the lawyer’s responsibility to a third party. Yet the Orders create intractable conflicts for any attorney involved in representing a de-

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<sup>41</sup> Ample authority recognizes the obligation of lawyers to take precautions to avoid disclosing confidential information to third parties (other than those such as agents or professional colleagues of the lawyer who are committed to keeping the information confidential). *See, e.g.* N.Y. State Op. 820 (2008) (recognized that a lawyer could not properly communicate about client matters on an e-mail provider “if the e-mails were reviewed by human beings or if the service provider reserved the right to disclose the e-mails or the substance of the communications to third parties without the sender’s permission (or a lawful judicial order)”; N.Y. State Op. 708 (1998) (communicating about client matters via the Internet is generally permissible because the law protects against the interception of communications, but noted that “in circumstances in which a lawyer is on notice for a specific reason that a particular e-mail transmission is at heightened risk of interception, ... the lawyer must select a more secure means of communication than unencrypted Internet e-mail.”). *See also* N.Y. State Op. 827 (2008), N.Y. State Op. 718 (1999); N.Y. State Op. 490 (1978); N.Y. State Op. 485 (1978); N.Y. State Op. 800 (2006); N.Y. City Op. 1997-2 (1997).

tainee subject to the Orders. For example, section 3(d) of the Communications Order provides that

The Defense Counsel shall promptly report to the Commander, JTF-GTMO any information learned from a Detainee-Accused that reasonably could be expected to result in immediate and substantial harm to the national security, . . . , or future events that threaten national security, or that presents a threat to the operation of the detentions facilities . . . .

Not only is that directive in conflict with the statutorily authorized form setting forth eligibility criteria for civilian counsel,<sup>42</sup> but it also creates an affirmative reporting requirement that (a) is ambiguous and undefined, and (b) includes information covered by the attorney-client privilege – for example, the government has consistently pressed the position, in court and elsewhere,<sup>43</sup> that its interrogation programs and methods, and the identity of those who participated in such interrogations, are matters affecting national security, yet that is precisely the very type of information an attorney would solicit from a detainee client (particularly those defendants in the 9/11 case), and use effectively in the defense in a variety of contexts (*i.e.*, suppression, speedy trial, outrageous government conduct, penalty mitigation); also, a detainee client’s seeking of advice, such as whether to engage in a hunger strike, or mere discussion about others engaging in a hunger strike, would arguably be covered by this provision;<sup>44</sup> and (c) presents an ongoing and intractable conflict of interest for counsel, whose failure to abide by such mandatory reporting requirement could be the subject of sanctions and professional disrepute.

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<sup>42</sup> In fact, the attorney acknowledgment form required by the Order(s) is materially inconsistent with (and preempted by) *Regulations for Trial by Military Commission* (“RTMC”), November 6, 2011, and promulgated by the Secretary of Defense, *available at* <http://www.mc.mil/Portals/0/2011%20Regulation.pdf>. RTMC Para. 9-5(b)(1) prescribes eligibility criteria for civilian counsel, and mandates in part that the attorney “(vi) has signed an Affidavit and Agreement by Civilian Defense Counsel, MC Form 9-2 (Figure 9.2). That MC Form 9-2 is available at the same link several pages later.

Also, the RTMC does not grant the Commander *any* authority over the eligibility for civilian defense counsel. In addition, ¶ II(i) prescribes a very different standard for the scope of the attorney-client privilege (and which conforms with its contours as defined in the case law and tradition): “I understand that communications with an accused are not protected if they would facilitate criminal acts or a conspiracy to commit criminal acts, or if those communications are not related to the seeking or providing of legal services to the client.”

<sup>43</sup> *See* Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010).

<sup>44</sup> The U.S. Bureau of Prisons recognizes hunger strikes as legitimate forms of inmate behavior, and are covered by a set of regulations that govern forced feedings and other aspects of medical care for those engaging in hunger strikes. Inmates participating in hunger strikes are not punished or penalized in any manner. *See* 28 C.F.R. § 549.

The ambiguity of such a reporting rule would, for counsel operating thereunder, constantly pit their duties toward the client against those prescribed by the Order. Counsel would be continually calculating whether detainee disclosures need be disclosed at the risk of counsels' violation of the Order. In addition, informing the detainee client of the reporting requirement in § 3(d) would, to the extent *any* bond of trust or confidence existed in light of the other objectionable aspects of the Order, eliminate any prospect of the attorney-client relationship achieving the level of trust and confidence sufficient to enable counsel to render effective assistance.

#### **IV. The Nature of the Rights and Principles Adversely Affected by the Orders in Question**

The Orders implemented by the Commander, JTF-GTMO seek to monitor and censor the documents and information defense counsel can send to and share with their clients. These Orders intrude deeply into the attorney-client relationship; consequently, the Ethics Advisory Committee concludes that defense counsel cannot abide by the Orders consistent with counsel's ethical obligations. While the Ethics Advisory Committee fully recognizes the axiomatic need for the Commander, JTF-GTMO to run a safe detention facility,<sup>45</sup> and the government's need to protect national security, the Commander cannot do so by forcing defense counsel to violate their ethical obligations. To do so, we believe, would make the proceeding a sham without any notions of fairness contrary to our duties as American lawyers.

In *al Odah v. United States*, the D.C. District Court decided that Guantanamo detainees possess a statutory right to counsel in habeas proceedings.<sup>46</sup> Therefore, the Court did not address the question whether or not detainees have a constitutional right to counsel in such proceedings,<sup>47</sup> but noted simply that “[i]n light of this finding, the Court determine[d] that the Government is not entitled to unilaterally impose procedures that abrogate the attorney-client relationship and its concomitant attorney-client privilege covering communications between them.”<sup>48</sup>

At issue in *al Odah* was the government's implementation of procedures that defense counsel was required to follow in order to communicate with and visit their clients, including real-time monitoring of in-person meetings, *post hoc* classification review of notes counsel took during meeting with their clients, and classification review of legal mail between counsel and

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<sup>45</sup> See *Bell v. Wolfish*, 441 U.S. 520 (1979) in which the Supreme Court analyzed the constitutional rights of pretrial detainees and jailhouse restrictions involving double-bunking, requiring reading materials to come directly from the publisher, and body cavity searches of prisoners after contact visits in the interest of institutional security.

<sup>46</sup> *al Odah v. United States*, 346 F. Supp. 2d 5 (D. D.C. 2004).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

their clients.<sup>49</sup> Additionally, the government instituted a privilege team to review any documents that counsel wanted to provide their clients, including legal and court papers.<sup>50</sup>

In response to counsel's objections, the Court in *al Odah* determined that the government's proposed procedures "inappropriately burden[ed]" the attorney-client relationship, held that the government's "national security considerations c[ould] be addressed in other ways[,]"<sup>51</sup> and explained:

The privilege that attaches to communications between counsel and client has long held an exceptional place in the legal system in the United States. The Supreme Court has stated that "[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) (internal citation omitted). Indeed, the "privilege "is founded upon the necessity, in the interests and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.'" *Id.* (quoting *Hunt v. Blackburn*, 128 U.S. 464, 470, 9 S.Ct. 125, 32 L.Ed. 488 (1888)). The privacy of communications between attorney and client is crucial to this relationship. *See, e.g., Mann v. Reynolds*, 46 F.3d 1055, 1061 (1995) (invalidating prison policy preventing contact visits between inmates and attorneys because prison "policies will not be upheld if they unnecessarily abridge the defendant's meaningful access to his attorney and the courts. The opportunity to communicate privately with an attorney is an important part of that meaningful access.") (quoting *Ching v. Lewis*, 895 F.2d 608, 609 (9th Cir.1990)); *Bach v. Illinois*, 504 F.2d 1100, 1102 (7th Cir.1974) ("An inmate's need for confidentiality in his communications with attorneys through whom he is attempting to redress his grievances is particularly important. We think that contact with an attorney and the opportunity to communicate privately is a vital ingredient to the effective assistance of counsel and access to the courts."); *Adams v. Carlson*, 488 F.2d 619, 631 (7th Cir.1973) (recognizing "that the effective protection of access to counsel requires that the tradi-

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<sup>49</sup> *Id.* at 9.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 8-9.

tional privacy of the lawyer-client relationship be implemented in the prison context.”).<sup>52</sup>

The Military Commission Act of 2009 afforded Guantanamo detainees the statutory right to counsel<sup>53</sup> thereby implicitly incorporating as well the attorney-client privilege within the panoply of rights MCA 2009 granted detainee defendants.<sup>54</sup> Accordingly, the same analysis as the court applied in *al Odah*, and the same case-law precedent at a minimum should control the issues presented by the Commander, JTF-GTMO’s Orders. In addition, because *al Odah* involved civil proceedings, and military commissions are criminal prosecutions, the right to counsel and the sanctity of the attorney-client privilege are even more imperative and compelling in the context of the two Orders at issue herein.

Moreover, while unlike the Court’s resolution of the issues in *al Odah*,<sup>55</sup> the Orders at issue herein were not implemented pursuant to any court order, and neither Order refers to any court as the final arbiter of any disputes arising under the Orders.<sup>56</sup> Therefore, the disclosure exception to Model Rule 1.6 does not apply. As noted previously, Rule 1.6(b)(6) provides “a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary” in order to comply with a court order. Here, as no such court order exists, the exception is inapplicable to the Orders at issue.<sup>57</sup>

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<sup>52</sup> *Id.* at 10.

<sup>53</sup> Military Commissions Act of 2009 §§ 948k and 949a, Pub. L. No. 11-84, 123 Stat. 2190 (2009). In fact, Guantanamo detainees are required to retain a Judge Advocate at all phases of commission proceedings. 10 U.S.C. §949c(b).

<sup>54</sup> *See al Odah, supra*, at 5; RMC 502(d)(7); MCRE Rule 502(a).

<sup>55</sup> In *al Odah*, the District Judge implemented a review procedure whereby all information received from the Guantanamo detainees was considered confidential. Therefore, she permitted the privilege review team to perform *only* a classification review of any materials or information a detainee provided to defense counsel, and which counsel wanted to share with anyone other than counsel. *al Odah*, at 14.

<sup>56</sup> As set forth in the Communications Order, “[t]he Commander, JTF-GTMO, or his designee, is the final arbiter for issues arising from this Order, except to the extent that the matter is within the authority of a detailed military judge ...” Communications Order § 1(g).

<sup>57</sup> Likewise, in the context of a federal criminal proceeding involving classified information, the court enters a protective order governing the use of classified information by counsel. The classification review of any information derived from attorney-client communications is reviewed only pursuant to the court’s order and supervision, and the review is conducted under the auspices of a Classified Information Security Officer who reports to the court. Law enforcement has no role in the review of information derived from attorney-client communications.

The institution of a “Privilege Team” comprised of Department of Defense attorneys, law enforcement and intelligence officials, and possibly interpreters and translators, presents another intractable problem with respect to ethical conduct within the context of the two Orders. The Orders impose a pre-screening regime before counsel can communicate with or visit his or her client. As detailed below, any correspondence between counsel and their clients and any materials that counsel seek to bring into or out of attorney-client meetings, including attorney-client privileged material, is subject to review by members of the Privilege Team and subsequent reporting to others.

The Order requires written material to be reviewed by the Privilege Team for physical contraband and *other contraband* “as defined by the order.” Physical contraband, like paper fasteners, weapons, or cigarettes, is easily identifiable without reviewing the content of a communication. However, information contraband, such as information about “historical perspectives or discussion on jihadist activities,” and information about present and former detention personnel or other U.S. government personnel is more difficult to observe.<sup>58</sup>

Indeed, § 2(d) of the Order notes the use of interpreters and translators, which signifies review of *content*. While in some sections the Order ostensibly limits the Privilege Team’s review to “plain view,” and claims to prohibit review of the substantive content of the material, other sections would appear to make those protections meaningless in light of exceptions that threaten to swallow any Privilege Team protocols that would preserve confidentiality. For example, § 5(d) of the Order provides that the Commander, “[i]n his discretion, . . . may disseminate the relevant portions of information to law enforcement, military, and intelligence officials, as appropriate.”

That completely bypasses any protection afforded by the “Privilege Team” protocols. In fact, the Privilege Team is governed by the *same* undefined and hopelessly elastic standard, as § 5(d) directs that: “The Privilege Team shall report to the . . . Commander any information that reasonably could be expected to result in immediate and substantial harm to the national security, imminent acts of violence, or future events that threaten national security, or that presents a threat to the operation of the detention facilities or to U.S. Government personnel.”

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<sup>58</sup> Nor are such fears fanciful. In the Guantanamo military commissions prosecution of U.S.S. Cole bombing suspect al-Nashiri, at a hearing at which his lawyers challenged the Guantanamo authorities’ reading of legal mail, *Reuters* reported that Adm. Woods testified that “teams of Pentagon contractors, who included lawyers, translators and former intelligence officers, reviewed the mail to ensure it did not contain physical or informational contraband. Under his rules, the screeners divided the mail into three categories.” Jane Sutton, “Al Qaeda Linked Magazine Delivered to Guantanamo,” *Reuters*, January 18, 2012, *available at* <http://www.reuters.com/article/2012/01/19/us-usa-guantanamo-idUSTRE80H2EN20120119>.

Also, § 5(b) of the Order offers another exception to the Privilege Team's confidentiality protocols:

Without disclosing specifics about the information provided by a Detainee-Accused or Defense Counsel, the Privilege Team may consult with security and intelligence experts at JTF-GTMO as needed regarding potential Contraband and unauthorized information the Privilege Team becomes aware of when executing its responsibilities under this Order. Whenever possible, the Privilege Team shall advise the Defense Counsel before consulting with these experts.<sup>59</sup>

That represents yet another abrogation of Privilege Team non-disclosure protocols. These numerous exceptions will swallow any default aspiration for confidentiality. In addition, such determinations *demand* review of the *content* of written attorney-client communications and documents. Thus, the Privilege Team protocols that ostensibly respect the privilege are a chime-ra.

Similarly, § 4(a) of the Order directs that “[i]f Defense Counsel believes information that does or may otherwise constitute Contraband needs to be transmitted to a Detainee-Accused because it is directly related to the military commission proceeding involving that Detainee-Accused, Defense Counsel are strongly encouraged to seek guidance from JTF-GTMO personnel via the Staff Judge Advocate prior to transmitting the information to the Detainee-Accused.”

Again, that completely undermines any confidentiality that the Privilege Team protocols might provide, as “JTF-GTMO personnel via the Staff Judge Advocate” are not covered by any non-disclosure restrictions applicable to the Privilege Team, and therefore such “strongly encouraged” consultation would constitute a violation of the attorney-client privilege and Rule 1.6.

Thus, the Ethics Advisory Committee finds the Privilege Team protocols that would protect the attorney-client privilege to be illusory and quite easily overridden by the other provisions of the Order that create broad and undefined exceptions. Indeed, the Order fails to articulate how Privilege Team members are expected to discover “information contraband,” and determine whether communications are appropriately classified in one of the three categories created by the Order, without to some intolerable extent reading the content of the communications in their possession, including attorney-client privileged communications.

That suspicion is further justified by the employment of translators and interpreters, and intelligence experts on the Privilege Team. In fact, the Order instructs members of the Privilege

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<sup>59</sup> That section introduces another serious problem, as “unauthorized information” is not otherwise defined in the Order. Thus, the general provisions of the Order notwithstanding, these broad exceptions to confidentiality greatly expand the breaches beyond simply interception of “information contraband.”

Review team to “consult with security and intelligence experts at JTF-GTMO as needed regarding potential Contraband and other unauthorized information the Privilege Team becomes aware of when executing its responsibilities under this Order.”<sup>60</sup>

Additionally, the Order requires the Privilege Team to “report to the JTF-GTMO Commander,” *i.e.* the prosecuting authority, any “information contraband” it discovers, and grants the Commander ultimate discretion to disseminate that information to law enforcement, military, and intelligence officials.<sup>61</sup> While the prosecution team in any particular case is not expressly included among those with whom the Commander can share such “information contraband,” it is not excluded, either.<sup>62</sup> Indeed, the Order does not limit the flow of information once the Commander provides it to other entities.

Moreover, as the D.C. Circuit has cautioned, “once the investigatory arm of the government has obtained information, that information may reasonably be assumed to have been passed on to other government organs responsible for the prosecution. Such a presumption merely reflects the normal high level of formal and informal cooperation which exists between the two arms of the executive.”<sup>63</sup> Any possession by the prosecution of any confidential or privileged information would be extremely detrimental to a defendant and the criminal justice process in general.<sup>64</sup>

Likewise, the Logistics Order requires that all documents an accused and/or his counsel bring to a meeting be pre-cleared by the Privilege Team pursuant to the terms of the Communications Order.<sup>65</sup> As set forth previously, an attorney violates his or her ethical obligations by disclosing confidential and privileged information, absent limited circumstances, such as pursuant to a court order or upon an informed and express waiver by the client.<sup>66</sup>

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<sup>60</sup> Communications Order § 5(b).

<sup>61</sup> *Id.* § 5(d).

<sup>62</sup> Also, the Privilege Team exclusions in § 2(d) apply only to the case involving *that* detainee. Thus, nothing prevents the Privilege Team for a particular detainee from including anyone – contractor, military, law enforcement, or intelligence officer – from involvement in a co-defendant’s case, or any other military commission prosecution to which the information reviewed is relevant.

<sup>63</sup> *Briggs v. Goodwin*, 225 U.S. App. D.C. 320, 329, 698 F.2d 486, 495 (1983), *vacated on other grounds*, 229 U.S. App. D.C. 412, 712 F.2d 144 (1983).

<sup>64</sup> *Id.*

<sup>65</sup> Logistics Order § 4(b).

<sup>66</sup> Model Rules of Professional Conduct Rule 1.6.

Yet the Communications and Logistics Orders require defense counsel to do just that, as the Orders condition counsel's access to their clients upon agreeing to the terms of the Order(s) – even *before* counsel have had the opportunity to discuss the Orders with their clients in order to consider whether any waiver would be appropriate.<sup>67</sup> Any such client consent or waiver would have to be obtained *before* counsel agrees to terms of the Order, and not afterward. Therefore compliance with the Orders would require counsel to breach their ethical obligations.

Also, Privilege Team members do not share in the attorney-client relationship and are therefore not bound by the privilege. While the Order suggests that members of the privilege team will be “bound by a non-disclosure agreement to preserve the lawyer-client and other related legally-recognizable privileges to the fullest extent possible . . .,” the Orders do not include any remedial means for a detainee or his counsel to enforce that provision. As a result, Privilege Team violations of the non-disclosure provision – which itself is subject to material and potentially overwhelming exceptions, as noted previously, are not subject to sanction in a manner that remedies the infringement of the privilege, or vindicates a detainee's rights in that regard.

Based on the considerations set forth previously, the Ethics Advisory Committee harbors no doubt that Privilege Team review, notwithstanding the Orders' very limited non-disclosure provisions, will exert a chilling-effect on attorney-client exchanges of information, which process constitutes the fundamental common law justification for confidentiality and the attorney-client privilege.

The content-based restrictions regarding information contraband will have the same effect. Those restrictions seriously impair the attorney's ability to discuss material aspects of the case with his or her client, implicating the accused's right to due process and a fair trial, which encompass the right to present a defense. Often the client is an invaluable source of information about facts, witnesses, and other defense evidence, and material for cross-examination of prosecution witnesses. In addition, preparing the detainee for his testimony, and cross-examination, will prove impossible in an environment in which lawyer and/or client believe confidentiality has been or could be compromised. Moreover, the chilling effect could extend to circumscribing or even eliminating discussion of subjects and events relevant to the mitigation phase of a capital case.

While the Communications Order provides that some categories of defined information contraband may not be considered contraband if “Defense Counsel reasonably believe they are

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<sup>67</sup> As military counsel correctly note in their letter, the dissemination directive that counsel may not “disseminate [the proposed orders] outside of [his] assigned and retained defense counsel population . . . makes it impossible for us to consult with our clients as we are required to do.” Note 1, *supra*.

directly related to the military commission proceedings involving the Detainee-Accused,”<sup>68</sup> the listed exceptions do not include “historical perspectives or discussions on jihadist activities, including information generated or distributed by or on behalf of foreign terrorist organizations, individuals or groups engaged in terrorist activities,” and “[i]nformation about present and former detention personnel or other U.S. Government personnel.”<sup>69</sup> However, as detailed post, especially in a death penalty case, it is imperative for counsel to discuss this kind of information with his or her client in order to compile mitigation evidence—evidence perhaps not directly related to whether the accused is guilty or not guilty, but which is relevant to a jury’s consideration and determination of a just and proportional punishment for the defendant.

Furthermore, both Orders directly implicate the defendant’s right to effective assistance of counsel.<sup>70</sup> The Supreme Court has held that “[A] defendant’s right to the effective assistance of counsel is impaired when he cannot cooperate in an active manner with his lawyer.”<sup>71</sup> These Orders threaten to impair such cooperation to the point that effective assistance would be impossible. In addition, the D.C. Circuit has held that content-based restrictions on the subject matter of attorney-client communications can have a chilling-effect on attorney-client discussions and inhibit the development of a sustainable defense.<sup>72</sup>

A criminal defendant is guaranteed the right to the effective assistance of counsel. The attorney-client privilege, while it has not been elevated to the level of a constitutional right, is key to the constitutional guarantees of the right to effective assistance of counsel and a fair trial. To provide effective assistance, a lawyer must

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<sup>68</sup> Communications Order § 2(h)(4).

<sup>69</sup> See Communications Order § 2(h)(4)(a)-(d).

<sup>70</sup> What constitutes effective assistance of counsel in the mitigation phase of a capital case is of critical importance in this respect and will be discussed infra because these Orders directly implicate so-called “high-value” detainees’ cases, including those of the alleged 9/11 co-conspirators, against whom the government will likely seek the death penalty.

<sup>71</sup> *Riggins v. Nevada*, 504 U.S. 127, 144 (1992) (citing *Geders v. United States*, 425 U.S. 80 (1976) (trial court order directing defendant not to consult with his lawyer during an overnight recess held to deprive him of the effective assistance of counsel)).

<sup>72</sup> *United States v. Eniola*, 282 U.S. App. D.C. 176, 177, 893 F.2d 383, 384 (1990) (“[The] trial court prohibited all defense counsel from advising their respective clients that one of the potential witnesses was a government informant. Because this directive inhibited appellant Bamji’s ability to develop a defense of entrapment, we find that his right to effective assistance of counsel was undermined.); *Mudd v. United States*, 255 U.S. App. D.C. 78, 79, 798 F.2d 1509, 1510 (1986) (“We hold that an order that denies a criminal defendant the right to consult with counsel during a substantial trial recess, even though limited to a discussion of testimony, is inconsistent with the sixth amendment of the Constitution. We also find that the harm caused by this violation is such that reversal is required without a showing of actual prejudice.”).

be able to communicate freely without fear that his or her advice and legal strategy will be seized and used against the client in a criminal proceeding. One of the principal purposes of the attorney-client privilege is to promote the free and open exchange between the attorney and client, and substantial questions of fundamental fairness are raised where, in connection with a criminal prosecution, the government invades that privilege.<sup>73</sup>

As mentioned previously, regardless which constitutional rights apply to the detainees currently confined at Guantanamo Bay, the Supreme Court has held that those detainees are entitled to “meaningful access to the courts” even in civil proceedings, and with that access comes the right to communicate privately with their counsel.<sup>74</sup> In criminal proceedings – to which the detainees affected by these Order are exposed – those considerations, and the corresponding need for fidelity to the confidentiality of attorney-client communications, is amplified exponentially.

The sanctity of the attorney-client privilege, and the constitutional principles underlying the privilege, are directly jeopardized by the Commander’s Orders. The Orders will hinder candid disclosure from both client and attorney, risk the confidentiality of communications, and affect the attorney and client’s ability to discuss material aspects of a case. Therefore, defense counsel cannot comply with the requirements of the Orders and fulfill their ethical obligations.

## **V. Critical Concerns Relevant to Capital Cases**

In capital cases, an attorney’s ability to communicate with his or her client is, in effect, a matter of life and death. In that context, the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (“ABA Guidelines”) are particularly relevant to the Commander’s Orders because of their demonstrably and seriously adverse effect they will have on attorney-client communications and interactions with “high value” detainees, including

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<sup>73</sup> *United States v. Neil*, 952 F.Supp. 834, 839 (D. D.C. 1997) (citations omitted).

<sup>74</sup> *al Odah*, 346 F.Supp. 2d at 11 n. 12:

The Government argues that these cases can be distinguished from the instant litigation because the cases deal with criminal defendants at trial or post-conviction, and that Petitioners are not entitled to the same constitutional protections as a criminal defendant. However, the case law indicates that where the client has been afforded the right to meaningful access to the courts, this right cannot be abridged, and that the ability to communicate in private with counsel is a crucial part of that meaningful access. In the instant case, Petitioners have been afforded access to the courts, which must necessarily be meaningful, and this meaningful access includes the opportunity to consult with counsel in private. (citations omitted)

the defendants in the prosecution charging involvement in the events of 9/11, in which the government has announced its intention to seek the death penalty.

The content-based restrictions on information that can be shared and discussed between counsel and a detainee-client, as well as the unavoidable chilling effect the Privilege Team's monitoring of written communications will have, are in irreconcilable conflict with the unlimited breadth of a capital mitigation investigation and the Sixth Amendment duty of effective assistance of counsel that requires defense counsel to pursue aggressively mitigation evidence in an effort to avoid the death penalty.<sup>75</sup> This is particularly true with respect to the Communication Order's proscription on discussing "historical perspectives on jihadist activities" and "information about present and former detention personnel or other U.S. Government personnel."

For example, potentially during the liability phase, and certainly in the context of the penalty phase, a defendant might present, or even wish to testify about, the "historical perspectives on jihadist activities" in the context of whether he believed he was acting as a soldier rather than as a "terrorist" or criminal. There also might be expert testimony on the issue, which, absent the defendant's particular facts and circumstances (available only from an attorney-client discussion of the topic), would exist only in a vacuum. Also, the conduct of "detention personnel" at Guantanamo and elsewhere might have a material bearing on the ultimate issue of whether the death penalty is appropriate, or even upon threshold or intermediate issues such as admissibility of evidence and/or a detainee's competency to proceed.

ABA Guideline 10.5 provides that counsel must, at all stages of a capital case, "establish a relationship of trust with the client, and should maintain close contact with the client."<sup>76</sup> This includes advising the client of his rights to effective assistance of counsel and to preservation of the attorney-client privilege.<sup>77</sup> In the Guantanamo context, in which uniformed U.S. military officers are assigned to represent persons who (a) often have never been in the U.S. and lack familiarity with its legal system, and (b) are charged with an intention to murder U.S. citizens, and even U.S. military personnel, in large numbers, building that relationship of trust and

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<sup>75</sup> See, e.g., *Wiggins v. Smith*, 539 U.S. 510, 524 (2003).

Counsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client's competency to make such decisions unless counsel has first conducted a thorough investigation with respect to both phases of the case.

ABA, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases Std 10.7 comment (2003) (*ABA Guidelines*).

<sup>76</sup> *Id.* Std. 10.5(A).

<sup>77</sup> *Id.* Std. 10.5(B)(2-3).

confidence between attorney and client is daunting enough without the added obstacle of convincing the detainee client that even though the U.S. authorities are privy to every conversation and communication between attorney and client, the detainee client should disclose facts, impressions, and opinions to the attorney in an accurate and complete fashion.

Also, “[c]ounsel at all stages of the case should engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case, such as” “the development of a defense theory, presentation of the defense case, and *relevant aspects of the client’s relationship with correctional, parole, or other governmental agents...*”<sup>78</sup> Thus, the Commander’s prohibition on discussing “information about present and former detention personnel or other U.S. Government personnel” is a direct contravention of the ABA Guidelines.

It is axiomatic that counsel must be able to consult with the client on strategic and tactical matters, and of course that imperative is even more critical in a capital prosecution.<sup>79</sup> Such discussions include, *inter alia*, which defenses to proffer and which witnesses to call on behalf of the defendant. The Communications Order’s content-based restrictions interfere with these obligations to an extent that renders impossible the type of capital case defense required by the *ABA Guidelines* and pertinent case law. The information that the Order will prevent counsel from learning or discussing is critical to calling and examining effectively appropriate witnesses—both to establish facts of the case and provide testimony on behalf of the defendant in the mitigation phase of sentencing.

In deciding which witnesses and evidence to prepare concerning penalty, the areas counsel should consider include [ ] witnesses familiar with and evidence relating to the client’s life and development, from conception to the time of sentencing, that would be explanatory of the offense(s) for which the client is being sentenced, would rebut or explain evidence presented by the prosecutor, would present positive aspects of the client’s life, or would otherwise support a sentence less than death.<sup>80</sup>

In fact, as the ABA Guidelines instruct, “[c]ounsel at every stage of the case should take advantage of all appropriate opportunities to argue why death is not suitable for their particular client.”<sup>81</sup> Elaborating, the ABA Guidelines point out that “[c]ommunity members such as co-workers, *prison guards*, teachers, *military personnel*, or clergy who interacted with the defendant

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<sup>78</sup> *Id.* Std. 10.5(C)(3, 4, & 7) (emphasis added).

<sup>79</sup> *Id.* Std. 10.5 (comment).

<sup>80</sup> *Id.* Std. 10.11(F)(1).

<sup>81</sup> *Id.* Std. 10.11(L).

or his family, or have other relevant personal knowledge or experience often speak to the jury with particular credibility.”<sup>82</sup> Similarly, the ABA Guidelines add that “[e]vidence that the client has adapted well to prison and has had few disciplinary problems can allay jurors’ fears [of future dangerousness] and reinforce other positive mitigating evidence.”<sup>83</sup>

Even federal sentencing generally (outside the capital context) operates on the principle of unlimited relevance. For example, 18 U.S.C. § 3661 provides that “[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”<sup>84</sup>

There are also federal cases that, in light of the ABA Guidelines, have found defense counsel ineffective for failing to pursue certain mitigation strategies or investigation.<sup>85</sup> What constitutes effective assistance of counsel in the mitigation phase of a capital case is of critical importance and may even implicate the Eighth Amendment’s prohibition on cruel and unusual punishment.

Moreover, the difficulty of building the necessary relationship of trust and confidence between attorney and client—which the attorney-client privilege is designed to promote and facilitate—is aggravated in the context of the Guantanamo military commissions. As discussed previously, uniformed U.S. military lawyers confront a considerable challenge in convincing their clients—some of whom have never spent a minute in the United States—that they (the lawyers) are committed to the client’s interests only, and are not also serving their (the lawyers’) bureaucratic bosses (the U.S. military and government). The Commander’s Orders exacerbate that problem beyond repair.

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<sup>82</sup> *Id.* Std. 10.11 comment (emphasis added).

<sup>83</sup> *Id.*

<sup>84</sup> That scope was recently emphasized in *Pepper v. United States*, 131 S. Ct. 1229, 1235 (2011) (“This Court has long recognized that sentencing judges ‘exercise a wide discretion’ in the types of evidence they may consider when imposing sentence and that ‘[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant’s life and characteristics.’ *Williams v. New York*, 337 U. S. 241, 246–247 (1949). Congress codified this principle at 18 U. S. C. § 3661”). Of course, there are constitutional boundaries on relevance that protect the *defendant’s* rights at sentencing. *See Pepper*, 131 S. Ct. at 1240 n. 8.

<sup>85</sup> *See Wiggins v. Smith*, 539 U.S. 520 (2003); *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000); *Douglas v. Woodford*, 316 F.3d 1079, 1087-89 (9th Cir. 2003); *Brownlee v. Haley*, 306 F.3d 1043, 1070 (11th Cir. 2002).

As the ABA Guidelines emphasize in the capital context, “[e]stablishing a relationship of trust with the client is essential both to overcome the client’s natural resistance to disclosing often personal and painful facts necessary to present an effective death penalty phase defense . . . . Even if counsel manages to ask the right questions, a client will not—with good reason—trust a lawyer who visits only a few times before trial, *does not send or reply to correspondence* in a timely manner, or refuses to take telephone calls.”<sup>86</sup> The resonance of that Commentary to Guideline 10.5 is deafening in the instant context, as implementation of the Commander’s Orders, and the corresponding implications for the confidentiality of attorney-client communications, have caused defense counsel to cease sending any written materials to their clients.

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<sup>86</sup> ABA Guidelines Std. 10.5 comment.