

Getting Legal Advice Can Be Torture

Perhaps to the surprise of many, lawyers in America must follow rules of ethics. If a lawyer violates a rule, a court can suspend or revoke the lawyer's license to practice law.

Recently, the conduct of certain lawyers has attracted a great deal of media attention. When the Obama Administration declassified legal memoranda advising the C.I.A. on its interrogation methods, debates arose over the accuracy of the advice.

Critics of the advice decried the lawyers' failure to declare illegal the C.I.A.'s methods. Of the issues arising from the Memoranda, whether the C.I.A.'s methods constituted torture does not pose the greatest threat to the American system of justice. The greatest threat arises from the lawyers' failure to adhere to established ethical standards and the widespread acceptance of this failure as routine in the providing of legal service.

Among the professions, lawyers hold a uniquely powerful place in American society. Laws control the interaction among Americans. When a conflict arises, either between individuals or between an individual and the government, our system empowers the courts to decide the outcome. Because lawyers are specifically trained to anticipate a court's analysis, a lawyer is like the guide expertly leading a traveler through and around dangerous terrain.

Thus, a fundamental premise of American society is that the assistance of lawyers will result in lawyers and clients acting within standards set by the courts. This premise is evident in the demands that courts place on lawyers. A lawyer's license to practice law is dependent upon the lawyer's compliance with the Rules of Professional Conduct. In general, the Rules set the minimum standards for the lawyer's relationship with clients and others. Notable among the Rules is the requirement that

Getting Legal Advice Can Be Torture

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Lawyers are not merely required to give advice that is competent; the advice must be provided without concern for the possibility that the client may not like the lawyer's opinion.

The utility of this demand is debatable. Plainly, lawyers provide their clients with "independent professional judgment" and "candid advice". Just as plainly, lawyers are among the least trusted people in America. A 2004 Gallup Poll ranked lawyers at the very bottom of professions with high ethical and honesty standards. Only eighteen percent of the public gave lawyers a very high or high rating. A 2006 Harris poll found that only eighteen per cent of Americans trust lawyers completely. A survey of America's largest businesses found that two-thirds were seeking to replace their lawyers.

Certainly, the low regard for lawyers may be the result of a lawyer's good legal advice that a client does not like. The polls, however, concern trust, and if all lawyers adhere to the standards of the profession, then clients would be receiving - and thus expecting - similar advice from all competent lawyers. Instead, it appears, lawyers are viewed not as independent professionals but as purveyors of specific skills at the disposal of those most likely to generate fortune or fame. This notion of lawyers as little more than tools of their clients has been reinforced by lawyers' television advertizing, sensational reports of lawyers' cases, and political campaigns.

The greatest threat to the rule of law and, consequently, our society, may well be the acceptance by lawyers of this derogation of their obligation. So widespread is this acceptance

Getting Legal Advice Can Be Torture

that, at a time when lawyers were called upon to exercise the independent judgment demanded of them, they most critically failed. In 2002, the C.I.A. requested advice on whether certain interrogation techniques would violate a federal law that prohibits torture. Instead, the C.I.A. received a document that, rather than advise, focused on justifying the C.I.A.'s proposed conduct and guiding the C.I.A.'s operatives. Rather than provide a dispassionate and careful analysis to their fellow public servants, these lawyers accepted their role as intellectual lackeys rather than as independent advisers.

In the Summer of 2002, the C.I.A. was frustrated by its inability to gain information from one of its prisoners, a presumed high-ranking member of an international terrorist organization. Believing that more physically challenging methods would assist the interrogation but concerned with the application of anti-torture laws, the C.I.A. contacted the Office of Legal Counsel, a part of the U.S. Department of Justice. The Office exists to provide legal advice to the Executive Branch, and the C.I.A. properly requested an opinion on the legality of certain identified interrogation techniques. Among the first responses was a Memorandum dated August 1, 2002.

The Memorandum began by noting that the C.I.A. had in custody a known terrorist named Zubaydah and that the C.I.A. intended to use ten new techniques in his interrogation. These techniques, it was recited, had been used to prepare American military personnel for capture and interrogation. According to reports, trainees had rarely revealed any long term difficulties from use of these techniques in the training program. Military experts concluded that mentally strong individuals were best able to withstand the techniques. Returning to Zubaydah, the Memorandum accepted the premise that, as a "highly self-directed individual" with "vast

Getting Legal Advice Can Be Torture

knowledge of interrogation techniques”, the prisoner would be able to “cope with the interrogation”.

After this explanation of the possible information that Zubaydah held and his anticipated ability to withstand the techniques, the advisory opinion identified the law that was directed at precluding these techniques. In pertinent part, the statute provides:

18 U.S.C § 2340. Definitions

(1) “torture” means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering . . . upon another person within his custody or physical control;

(2) “severe mental pain or suffering” means the prolonged mental harm caused by or resulting from [] the intentional infliction or threatened infliction of severe physical pain or suffering . . . [or] the threat of imminent death. . . .

18 U.S.C § 2340A. Torture

(a) Offense.— Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

The statute does not provide an exception when the prisoner is withholding important information. The statute does not exempt conduct that is used by the American military to prepare our soldiers to withstand torture. The statute is concerned only with the way that Americans treat their prisoners.

Based on the C.I.A.’s reports, the Memorandum concluded that the techniques did not cause severe pain. Accepting that mental pain was also prohibited, the Office considered

Getting Legal Advice Can Be Torture

whether a prisoner could reasonably view any of the techniques as suggestive of imminent death. Only two were treated as potentially prohibited. One was the placement of the prisoner in a box with an insect. Zubaydah appeared to have an irrational fear of insects. Rather than advise the C.I.A. as to how courts or prosecutors might view this technique, the government's lawyers explained that, to get around the statute, the C.I.A. could inform the prisoner that the insect was harmless. The use of the waterboard was the other technique acknowledged as potentially posing a threat of imminent death.

From the vantage point of any reasonable person undergoing this procedure in such circumstances, he would feel as if he is drowning at every moment of the procedure due to the uncontrollable physiological sensation he is experiencing.

The government's lawyers concluded, however, that waterboarding is legal, because it generates no "prolonged mental harm". The support for this conclusion came from unexplained assumptions and reports from the training program.

The Office acknowledged it could not "definitively" decide whether imposing the techniques in a pattern of increasing physical confrontation "would cause a reasonable person to believe that he is being threatened with severe pain or suffering". In continuing its failure to analyze the underlying reason that the C.I.A. sought to deploy these techniques, the Memorandum advised that those causing severe pain and suffering could avoid criminal sanctions if they had an honest belief that their actions would not cause severe pain or suffering. Lawyers serving the U.S. government wrote:

Although an honest belief need not be reasonable, such a belief is easier to establish where there is a reasonable basis for it. Good faith may be established, by among other things, the reliance on the advice of experts.

Getting Legal Advice Can Be Torture

According to the “advisory opinion”, the presence of personnel with medical training at the interrogations proved the benign intent of the interrogators.

That Americans were engaged in the interrogation techniques described in the Memorandum troubles many Americans. That lawyers disregarded their obligations to their clients may have a greater and more direct impact on all Americans. Worse, it appears, the lowered esteem of lawyers has so greatly pervaded our culture that even those reviewing the conduct of lawyers find nothing troubling about the Memorandum.

In response to calls for punishing the government’s lawyers, the senior legal ethics counsel for the District of Columbia Bar wrote a Letter to the Editor that appeared in The Washington Post on May 11, 2009. The “ethics counsel” announced:

If a client instructs his lawyer, “I want to perform a certain act; find me a legal way to do it,” the lawyer's professional duty is to find a good-faith basis in the law to meet the client's needs while carefully advising the client of the risks of pursuing such a course of action. Such a lawyer not only acts well within the Rules of Professional Conduct, but he also serves his client well.

Waterboarding is a perfect example. A lawyer may personally believe that such a practice constitutes torture, but there is, at the very least, a good-faith argument to be made that it is not -- as evidenced by the fact that even now respected authorities argue that this is not torture. Thus, even if the ultimate arbiter decides that waterboarding is torture, that does not mean that lawyers who advised to the contrary should be professionally disciplined.

It is conceivable that some parts of the Letter to the Editor were not published. It is inconceivable that the Letter, as it appeared, is consistent with the Rules of Professional Conduct.

The advice sought from the Office of the Legal Counsel concerned the applicability of a criminal statute to the intended action of the C.I.A. The conduct at issue was not, as the Letter suggests, a routine matter. The C.I.A. was asking whether otherwise criminal conduct, assaulting

Getting Legal Advice Can Be Torture

another human being, might be viewed as lawful. The Letter's premise, that there is a "legal way" to commit a crime, is patently false. Proof that the legal culture in failing in practice and that strict enforcement of existing rules is the solution is readily apparent from the ethics counsel's failure to acknowledge the following Rule:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

In their Memorandum of August 2002, the government's lawyers abdicated their professional responsibilities. By counseling the C.I.A. to manufacture a facade of "good faith", the Office of Legal Counsel failed to comply with the Rules of Professional Conduct. While many have placed the blame for the use of the techniques solely on the C.I.A.'s operatives, the Memorandum's description of the context for the interrogations, as well as history, makes clear that the C.I.A. was desperately seeking information to protect Americans. Although on a far more personal scale, people routinely confront challenges that will seemingly destroy their world. When they seek legal counsel, the lawyer's obligation is to provide the "independent judgment" based on the lawyer's training and experience, along with a long-range, rational perspective. It is consistent with legal ethics and the interests of the client to reject the role as a facilitator of conduct that is dubious both in its legality and in its benefit.

Like any client, the C.I.A. had a problem and a proposed solution. The problem was that a man named Zubaydah claimed to know of plans to attack the United States but refused to disclose these plans. The C.I.A. proposed to introduce ten techniques in its interrogation of

Getting Legal Advice Can Be Torture

Zubaydah. Concerned that the use of the techniques was a crime, the C.I.A. consulted with the Office of Legal Counsel. Again, although the stakes had a far greater potential to affect far more people, the obligations of the Office did not change. In fact, one reason for instituting Rules of Professional Conduct is to give lawyers guidelines when confronted the most challenging issues.

From beginning to end, the Memorandum ignores the guidelines. Rather than detail the law that controls the C.I.A.'s proposed conduct, the government's lawyers discussed the possible information withheld by Zubaydah, the mental toughness of Zubaydah, and the reported results of the proposed techniques in training exercises. First, there is no exception in the statute prohibiting torture for the quality of information withheld nor for the quality of the man held. Second, the effect of the techniques performed by and on military personnel would be useful only if the results were universally negative. The reality is that, in the training program, the trainees are not withholding information about plots to kill Americans. Further, unlike Zubaydah, the trainees have the option of removing themselves from the interrogation. In the training program, the interrogators and the interrogated were Americans engaged in an educational exercise.

In rendering advice, the lawyer's job is to gather the facts needed to understand the client's problem and to analyze the logic of the client's proposed solution. The Memorandum demonstrated no such undertaking. Apart from the seriousness of the problem and the solution, the substance of both was quite simple. The C.I.A. believed that, by increasing the physical nature of the techniques deployed in its interrogations, Zubaydah would disclose important information. The Memorandum failed to state plainly what the strategy of the C.I.A. By slapping, slamming, and waterboarding Zubaydah, the C.I.A. was trying to frighten the prisoner.

Getting Legal Advice Can Be Torture

Rather than emphasize that the terrorizing of a prisoner may well violate the statute, the government's lawyers engaged in sophistry. One example of the absurdly inferior advice appears in the comments about the placement of Zubaydah and an insect in a box. This technique was concocted when the C.I.A. learned that Zubaydah had a fear of insects. Based on the analysis provided in the Memorandum, frightening a prisoner and maintaining the threat of repeating the frightening experience violate the law. Instead of advising against the technique, the U.S. Office of Legal Counsel recommended that the C.I.A. first assure Zubaydah that the insect is harmless - and then place him and the insect in the box. Whether Zubaydah is likely to accept the assurance of his captors or whether his fear is a product of entomological ignorance is not mentioned. Apparently, the lawyers assume that Zubaydah will be assured. If Zubaydah has no fear, then, it would seem, the technique has no purpose.

Far worse than the Office's refusal to state the obvious, that the techniques were intended to frighten, was the advice on how to create a deception about the techniques. In rendering this advice, the lawyers not only violated their profession's ethical standards, the lawyers also failed to provide a service to their client. The Memorandum states that, if there is no specific intent to cause severe pain and suffering, then there is no crime. Proof of intent typically comes from the actions of the accused. Thus, the Memorandum recites the fact that medical personnel will be present during the interrogations and will have the authority to stop the interrogations when medically necessary. If, however, as the Memorandum had concluded, the techniques cause no severe harm and if, as the Memorandum suggests, the interrogators have no intent to cause such harm, then the presence of medical personnel represents an unnecessary and deceptive

Getting Legal Advice Can Be Torture

deployment. The only reason for deploying medical personnel, with authority to halt conduct, is because the conduct may be so harmful that the prisoner will be left unable to disclose the information sought.

Thus the Memorandum is not only troubling for some because of the techniques therein described, the Memorandum should be troubling for all Americans because its authors' advice so completely fails to comply with the established standards for the legal profession. More, that this failure met with a general acceptance of the standards exhibited demonstrates that both lawyers and non-lawyers have become acculturated to a general malaise about the character of lawyers.

If, as the Memorandum and the Letter to the Editor make clear, clients should expect that lawyers are merely facilitators of otherwise illegal conduct, then there is no principled rationale for the status of lawyers in American society. The coarsening of the legal profession has undeniably arrived, and only when every lawyer rejects this lowered status can the role of lawyers be justified. It is every lawyer's responsibility to change the lowly expectations and earn the respect through a commitment to the integrity of the profession. Ultimately, client, lawyer, and society are far better served when a lawyer provides every client with legal advice that demonstrates sound judgment based on established principles.