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The Attorney-Client Relationship in Guantanamo Bay

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Mark Denbeaux and Christa Boyd-Nafstad

Abstract

First, the government restrictions found in the Protective Order and the new regulations severely limit the amount of contact the attorney can have with the client and the type of information that can be shared with the client. Second, the stay of the court proceedings since December 2004 has prevented any opportunity to present issues in the courts. Third, cultural barriers between attorneys and clients, including but not limited to the clients' inability to understand the rule of law and the role of lawyers in the Common Law adversary model in general, and in the U.S. legal system in particular, further inhibit their decision-making capacity. This Essay considers the role of the defense attorney in Guantanamo Bay. Part I looks at models of cause lawyering, compares the tactics used by radical attorneys to those used by Guantanamo defense attorneys, and considers the rule of law as a "cause." Part II looks to the restrictions put on the attorney-client relationship by the U.S. government and the client's diminished decision-making capacity, and argues that paternalism is allowed in the relationship by the Model Rules of Professional Conduct. Part III considers the cultural gap that inhibits attorney client relationship in addition to the other barriers that were presented.

ESSAYS

THE ATTORNEY-CLIENT RELATIONSHIP IN GUANTANAMO BAY

*Mark Denbeaux &
Christa Boyd-Nafstad**

INTRODUCTION

Lawyers for Guantanamo detainees seek to assert the rule of law on behalf of their clients. However, few can have a client-centered, client-autonomous relationship because of the restrictions imposed by the government. Litigation has been denied and/or stayed almost since its inception, and cultural differences between lawyers and most of the clients make representation more difficult. As a result, the lawyers of the Guantanamo detainees represent their clients the way “cause” lawyers represented their clients during the legal and social turmoil of the 1960s. There are two differences for lawyers for Guantanamo detainees. First, the cause is not controversial since it is the rule of law. The other difference is that the client centered autonomy is scarce and the paternal role of the lawyer at its zenith.

There are certain principles upon which this Essay rests:

- The relationship between attorney and client is one of inequality.
- The degree of inequality varies, but the relationship is one of client dependence.
- There are always conflicts between the lawyer’s interests and the interests of the client.¹
- The law regulates the boundaries of the attorney-client relationship and the process of decision making.

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1. If for no other reasons, the attorneys are working for the client but they expect the client to pay for the services that they provide.

- The manner and substance of the regulation of the attorney-client relationship is controversial.

While there are many models, the polar alternatives are between the client-centered and the attorney-centered (paternal) models. The attorney-centered model assumes that the attorney knows best and accepts the role of the attorney's use of power as paternal. The client-centered model assumes that the client knows best and encourages the maximum autonomy for the dependent client.

The paternal model is often associated with attorneys who have an agenda that may be larger than one particular client. Such relationships are often characterized as "cause" or public-interest lawyering. The literature expounding on these relationships is rich and comprehensive. Paternal lawyering encompasses lawyers trying to change the system in some fundamental way and has a long history in our legal system. The client centered model, on the other hand, is free from any paternalism because the lawyer has no agenda greater than that of his client and the representation is centered on the client and nothing else. Paternal cause lawyering has been associated with the lawyers and the causes of the 1960s and 1970s, though its history pre-dates the Civil War.

The lawyers representing the detainees in Guantanamo are providing services similar to those of other public-interest cause lawyering. The cause driving the Guantanamo attorney-client relationship is different only because the cause is less social change than the assertion of the rule of law and the role of lawyers, which are not usually thought of as a "cause" in the same sense as other political causes or public interest lawyering.

In non-democratic countries the rule of law is a cause that lawyers fight for using tactics from litigation to media to protest, and for which many lawyers end up in jail or harassed in other ways. The Guantanamo defense attorneys started out using litigation as their main tool, and, when denied access to the courts and to their clients, turned to other methods of lawyering that are very similar to those used by cause lawyers in third world countries and by members of the bar in the United States in the 1960s and 1970s.

Another difference between cause lawyering models and the present situation is that the former assumes that clients have

some opportunity to assert their interests and a forum in which to assert them. They assume a lawyer working in collaboration with a client to achieve the lawyer's cause and the client's goals.

In Guantanamo Bay, paternalism has been very broadly applied. Indeed, paternalism has overwhelmed the normal role of client autonomy or even client participation. Guantanamo lawyers have planned their litigation strategies without consulting their clients and have had to make decisions on behalf of their clients using only their best judgment, and some have even ignored sporadic, ambivalently expressed dismissals by their clients.²

The minimal role for client autonomy and client participation does not arise as a result of choice by counsel. Three conditions cause the enhanced paternalism.

First, the government restrictions found in the Protective Order and the new regulations severely limit the amount of contact the attorney can have with the client and the type of information that can be shared with the client.

Second, the stay of the court proceedings since December 2004 has prevented any opportunity to present issues in the courts.

Third, cultural barriers between attorneys and clients, including but not limited to the clients' inability to understand the rule of law and the role of lawyers in the Common Law adversary model in general, and in the U.S. legal system in particular, further inhibit their decision-making capacity.³

This Essay considers the role of the defense attorney in Guantanamo Bay. Part I looks at models of cause lawyering, compares the tactics used by radical attorneys to those used by Guantanamo defense attorneys, and considers the rule of law as a "cause." Part II looks to the restrictions put on the attorney-client relationship by the U.S. government and the client's diminished decision-making capacity, and argues that paternalism is allowed in the relationship by the Model Rules of Professional Conduct. Part III considers the cultural gap that inhibits attor-

2. Which usually come interspersed with requests to be represented.

3. Because of these restrictions, the client is similarly situated to the one assumed in Rule 1.14 of the American Bar Association ("ABA") Model Rules, whose capacity to make adequately considered decisions in connection with a representation is diminished. *See* MODEL RULES OF PROF'L RESPONSIBILITY R. 1.14 (2002).

ney client relationship in addition to the other barriers that were presented.

I. *GUANTANAMO BAY ATTORNEY CLIENT RELATIONSHIP:
CLIENT CENTERED OR CAUSE LAWYERING?*

A. *Client Centered Attorney-Client Relationship*

We all know the danger of using courtrooms as political forums. And it is important to oppose political extremists who make illegitimate use of our courts.

—John Lindsay, Mayor of New York, speaking on the Abbie Hoffman trial.⁴

Since the emergence of the “client-centered” approach to lawyering made popular in the 1980’s by David Binder and Susan Price’s seminal work;⁵ the use of paternalism in the law has fallen out of favor. The American Bar Association’s Model Rules have more or less embraced the theory of the client-centered approach as a reaction against the so-called political lawyering or cause lawyering of the 1960s and 1970s.⁶

Since that time, attorneys representing non-traditional clients, ranging from grassroots activist groups to aging clients in estates work, have tried to find ways around this model in theory and in practice. Others, while not disregarding the “client-centered” approach altogether, have recognized its shortcomings.

This section will examine the criticisms of the client-centered model, and look at other models of attorney-client relationships that have been proposed, then compare these “activist” models to the current situation facing detainees and defense attorneys in Guantanamo Bay, specifically in regards to client free will and what actions “cause lawyers” take on behalf of their clients compared with Guantanamo defense attorneys. A discussion of cause lawyering for the rule of law will end the section.

The client that Binder and Price had in mind in their “client-centered” approach was a sophisticated individual or corporation. This client would secure the services of the attorney for

4. *THE TALES OF HOFFMAN* (Mark L. Levine et al., eds., 1970).

5. See DAVID A. BINDER & SUSAN PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977).

6. See MONROE FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS’ ETHICS* 64–65 (3d ed. 2004).

the purpose of litigation that would result in the upholding of the status quo. In Binder and Price's world, the lawyer does not guide the client to decisions but listens with great sensitivity and "empathetic understanding" to the client's carefully thought-out choices. If the client is someone for whom the lawyer has no empathy, the lawyer is supposed to reflect "feeling in a way that creates the impression" of empathetic understanding.⁷

This theory works best for "clients who enjoy economic leverage over their attorneys, clients whose own expertise rivals their lawyers' knowledge,"⁸ in short, powerful clients who are not intimidated by the legal system.

For other clients, the "client-centered" approach leads to coercion and manipulation by lawyers. Stephen Ellmann, a supportive critic of Binder and Price, points out in his article *Lawyers and Clients* that lawyers under this model frequently resort to manipulation to avoid costly and distressing combat with clients.⁹ For Ellmann, this manipulation is an automatic feature of the attorney-client relationship, and is justified when it is in the best interests of the client, lawyer, or a third-party.¹⁰

B. *Paternal Attorney-Client Relationship: Cause Lawyering*

A recognition that the lawyer is in reality an activist, shaping the ideas and concepts of bodies of existing law to serve the needs of the forces that the lawyer represents, was the most valuable lesson to emerge. . . . It led me to ask a fundamental question. If skilled lawyers for the corporations and for the government understand this fact and function this way in the interest of their establishment clients, why cannot lawyers for the people . . . ?

—Professor Arthur Kinoy.¹¹

There are many alternative models of attorney-client relationship for lawyers with clients who are not legally sophisticated. These include the collaborative model, facilitative model, directive model, activist model, and cause lawyering. Under the

7. BINDER & PRICE, *supra* note 5, at 34.

8. See Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 718 (1987).

9. See *id.* at 762–63.

10. See *id.* at 761–65 (arguing that client manipulation can be justified as long as it is in *someone's* best interests).

11. ARTHUR KINOY, *RIGHTS ON TRIAL: THE ODYSSEY OF A PEOPLE'S LAWYER* 47 (1983).

collaborative model the attorney and client are “friends;” they make decisions together.¹² While the lawyer gives advice to the client, he does not do it in legal jargon, but in the client’s terminology.¹³ The lawyer is encouraged to become part of the client’s struggle and use non-legal courses of action in solving clients’ problems.¹⁴ The facilitative model contemplates the problem of attorneys working for social change who wish to protect their clients’ autonomy.¹⁵ This model is less “self-consciously political” than the collaborative model, and prescribes a more circumscribed role for the attorney.¹⁶ It proposes to maintain client autonomy by restricting the lawyer’s activities to litigation and legal strategies only.¹⁷ The model thus allows a political agenda, while prohibiting political action. The directive model gives the attorney the power to decide moral issues that arise in representing a client: when professional obligations and moral obligations conflict, the directive lawyer will pick the moral obligation. This lawyer works for “justice” and has a long tradition in American jurisprudence.¹⁸ The activist model contemplates an attorney who interacts with the client on a “non-hierarchical” basis using regular speech rather than legal jargon as in the collaborative model, and, also as in the collaborative model, espouses a view of the lawyer’s work that is more inclusive than strictly legal work. This model goes farther, however, in advocating active participation with the clients in planning and implementing non-legal strategy direct action. This model sees the attorney as an activist organizer.¹⁹

Finally, cause lawyering as a model encompasses or overlaps with all previous models. At the heart of this model is the “belief in a cause and a desire to advance that cause.”²⁰ Austin Sarat and Stuart Scheingold in their 1998 collection of essays on cause

12. See Robert F. Cochran, Jr. et al., *Symposium: Client Counseling and Moral Responsibility*, 30 PEPP. L. REV. 591, 598–99 (2003).

13. See GERARD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* (1992).

14. See *id.*

15. See Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 HUM. RTS. L. REV. 67, 100–01 (2000).

16. See *id.* at 99.

17. See *id.* at 101.

18. See Cochran et al., *supra* note 12, at 594–95.

19. See, e.g., Diamond, *supra* note 15, at 122–23.

20. Thomas M. Hilbink, *You Know the Type. . . : Categories of Cause Lawyering*, 29 LAW & SOC. INQUIRY 657, 659 (2004).

lawyering state that cause lawyering is “everywhere a deviant strain within the legal profession.”²¹ Cause lawyers choose clients and cases in order to pursue their own ideological goals; monetary gains are not the motivating factor.²² Cause lawyers pursue their goals through litigation, but this is only one of many strategies. Cause lawyers have been accused of “trying their case in the media” as many of their strategies revolve around conferences, speeches, and other events that aim at getting media coverage. Some give interviews to the media, while in some cases the filing of the complaint or the court case itself is designed to attract media attention.

Our legal history reads like a time-line of cause lawyering. The Dred Scott²³ case in the 1850s was designed to attract media attention, and it did. Although Scott lost the case, his lawyers succeeded in sparking a national dialogue about the future of slavery in the country. Cause lawyers such as Clarence Darrow and Thurgood Marshall took cases that had little chance of success in order to push a larger agenda. Darrow’s two most prominent cases were both failures in the courthouse but successes in the media and infamous among the public²⁴ both because of the subject matter at hand and because of Darrow’s antics in the courtroom. The Scopes Monkey Trial may be Darrow’s most dramatic example of legal defeat leading to social change.

Marshall succeeded in court for his cause. However, his cause was not fulfilled until other lawyers and other activists joined the cause. *Brown v. Board of Education*, while a legal triumph, was only completed by other cause lawyers and other activists. *Brown* had the same effect as Darrow’s losses: engaging the public in dialogue and creating attention to his cause.

Sometimes complaints were filed when the attorney has no chance of winning: Arthur Kinoy describes bringing a lawsuit on behalf of the United Electrical Workers in the 1940s when he knew the “chances of immediate legal success were virtually non-

21. Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Responsibility*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 3 (Austin Sarat & Stuart Scheingold eds., 1998).

22. See Hilbink, *supra* note 20, at 660.

23. See Dred Scott v. Sanford, 60 U.S. 393 (1856).

24. Darrow’s two cases were the Haymarket riot case of 1886, and the Scopes Monkey Trial of 1925.

existent.”²⁵ The complaint charged certain companies and members of Congress with conspiracy to violate workers’ Constitutional rights. This complaint was handed around like a pamphlet, read by all in the plants and town, and gave courage and strength to the oppressed, but it was thrown out of court.²⁶

In the 1960s and 1970s, the bar association looked unkindly upon cause lawyers for such organizations as the Students for a Democratic Society or the Black Panthers. Lawsuits were filed as “vehicles for gathering information, positioning adversaries, and asserting bargaining leverage.”²⁷ Gary Bellow, in his essay on “political lawyering” describes a practice that he used as the faculty of a law school clinic. It was a “focused case” strategy which, in order to stop tenant evictions, created “eviction-free zones” and signed up as many clients as possible from those areas. Once the clinic had clients, they “pressed the cases in ways that not only sought to preserve tenants’ possession of the property, but communicated directly to landlords the risk of increased cost and exposure that would accompany efforts. . . [to evict tenants].”²⁸

C. *Guantanamo Bay and Cause Lawyering*

The Center for Constitutional Rights (“CCR”) began to actively recruit attorneys to represent detainees, and to sign up detainees who wanted representation. Many of the detainee-clients were signed up by other detainees as “next of friend.” The bar association took an active part in securing representation for the detainees. The president of the New York City Bar, Bettling Plevan, took an active role in recruiting large law firms to represent detainees. Some of the largest law firms in the country signed up to represent detainees;²⁹ many of the firms list their

25. KINOY, *supra* note 11, at 71.

26. The German Bar Association has followed in the path of Arthur Kinoy in filing lawsuits that have little to no chance of success. Hannes Honnicker, General Secretary of the German Bar is leading a group of lawyers in representing former prisoners at Abu-Graib in charging Donald Rumsfeld with torture. Honnicker says: “[w]e have no realistic hope of seeing Rumsfeld in court” NRK Nyheter, Rumsfeld Saksøkes i Tyskland [Rumsfeld Sued in Germany] (Nov. 14, 2006), <http://www.nrk.no/nyheter/utenriks/1.1318816> (last visited Apr. 11, 2007).

27. Gary Bellow, *Steady Work: A Practitioner’s Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297, 300 (1996).

28. Bellow, *supra* note 27, at 299.

29. For example, Perkins Coie; Shearman & Sterling; Proskauer, Rose; Mayer,

pro bono work for the detainees on their websites and use the representation as a recruiting tool for attracting new associates. The website for Perkins Coie announces that the judge hearing their habeas case stated that the work they are doing for the detainees is in “the greatest tradition of the bar and the country.”³⁰ The purpose of the lawsuit is to make the point that this behavior will not be tolerated in a civil society.

D. Attorney Activities on Behalf of Guantanamo Detainees

While the model of cause lawyering captures the activities that Guantanamo defense attorneys are employing, it does not capture the relationship between client and attorney. The cause lawyering model assumes unrestricted access between attorney and client, and that the client has something to say and a forum to say it in. As discussed more thoroughly in the next section, the clients in Guantanamo Bay have very little access to their lawyers or chance to participate actively in their representation. Since the Military Commissions Act was signed, they also have no forum to hear their complaints. Even before the Act was signed, no detainee had actually had his habeas case heard in any court.³¹

The cause the attorneys are fighting for in this instance is the rule of law, specifically the autonomy of the attorney and the sacredness of the attorney-client privilege. While the rule of law is not viewed as a “cause” in industrialized democracies, in the dictatorships of the world, the rule of law is the primary “cause” for cause lawyers. There are over 200 groups in the “third world” whose main focus is on the rule of law, independence of judges and lawyers, administration of justice, and legal aid.³² Speaking from experience in Argentina, Stephen Meili observed that attorneys practicing “cause lawyers in most authoritarian

Brown, Rowe & Maw; Blank Rome; Manatt, Phelps & Phillips; Allen & Overy; Paul, Weiss; Hunton & Williams; Holland & Hart; Dorsey & Whitney; and Covington & Burling all signed up to represent detainees.

30. PERKINS COIE, PRO BONO ANNUAL REPORT 3 (2004), available at <http://www.perkinscoie.com/content/aboutperkins/relatedlinks/2004annual.pdf>.

31. See U.N. Econ. & Soc. Council (“ECOSOC”), Comm. on Human Rights, *Report: Situation of Detainees at Guantanamo Bay* ¶ 27, U.N. Doc. E/CN.4/2006/120 (Feb. 27, 2006) [hereinafter *U.N. Report*].

32. This figure is from the 1994 Human Rights Internet Master list (now called The List): *A Listing of Organizations Concerned with Human Rights and Social Justice Worldwide* (Ottawa, Human Rights Internet, 1994).

countries . . . have an interest in strengthening the rule of law and democratic state institutions (including the judiciary).”³³ The work of these cause lawyers is inherently political, as it necessarily involves challenging unjust political power.³⁴

For U.S. attorneys committed to the rule of law, the question arises: when there is no forum to hear my client’s case, and my client is incapacitated, how do I proceed?

II. THE ATTORNEY-CLIENT RELATIONSHIP IN GUANTANAMO BAY

A. Protective Order

The relationship between the attorney and client detained in Guantanamo Bay is severely limited in two major respects. First, the Protective Order of 2004 and the new regulations hinder the flow of information between attorney and client. Second, the client has little to no knowledge of the U.S. legal system, and there is a cultural barrier between the client and the lawyer. Because of these two phenomena, this section argues that the traditional approach to lawyering, whether client-centered or cause-lawyering, is not a viable option; instead, this situation should fit under the Model Rules provision for a client with diminished capacity, which allows paternalism on the part of the attorney.

The Protective Order prohibits the attorney from sharing any classified information with his client.³⁵ Classified information refers to anything written or oral that the government has in its possession or has ever had in its possession that it marks as classified or tells the attorney is classified;³⁶ this includes most of the information relating to the facts of the client’s detainment and information necessary to defend the client.

Contrast this with Model Rule 1.4, which mandates that the

33. Stephen Meili, *Cause Lawyering for Collective Justice: A Case Study of the Amparo Colectivo in Argentina*, in *THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE* 383, 396 (Austin Sarat & Stuart A. Scheingold eds., 2005).

34. See Stephen Ellmann, *Cause Lawyering in The Third World*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES*, *supra* note 21, at 349, 369–70.

35. See *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174, 180 (D.D.C. 2004) (“Petitioners’ counsel shall not disclose classified information not provided by petitioner-detainee to that petitioner-detainee.”). See generally Brendan M. Driscoll, Note, *The Guantánamo Protective Order*, 30 FORDHAM INT’L L.J. 873 (2007).

36. See *id.* at 176–77; see also Executive Order No. 13,292, 68 Fed. Reg. 15,315, 15315–18 (Mar. 25, 2003) (describing what qualifies as classified information).

attorney explain all matters pertaining to the client's legal affairs, and keep the client updated on all matters, in a way that allows the client to make decisions concerning the representation.³⁷ Rule 1.4 also puts a duty on the attorney to keep the client reasonably informed about the status of a matter.³⁸ Attorneys cannot easily communicate with their clients; the government does not allow access to email for detainees; and the Protective Order does not allow telephonic communication. Before the new regulations were enacted, an attorney sending legal mail under the Protective Order was assured at least a reasonable amount of privacy, as the system it established allowed the military to search incoming legal mail for contraband only, and required that they forward the mail to the detainee addressee within two days.

B. *Attorney-Client Privilege and Privilege Team*

With the new regulations in place as of October, a "privilege team" will read all mail from the attorney before sending it to the client. The attorney is not allowed to write about anything concerning "unnecessary outside information"; if the correspondence contains anything the privilege team deems unnecessary, the letter will not be forwarded to the client. Not only does this regulation inhibit meaningful dialogue between attorney and client, it also runs afoul of the United Nations Basic Principles on the Role of Lawyers, which states "[g]overnments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential."³⁹

After the suicides in Guantanamo in July 2006, the military confiscated over 1000 pounds of the detainees' correspondence, including envelopes marked "attorney-client privilege."⁴⁰ After the government investigators captured all legal correspondence

37. See MODEL RULES OF PROF'L CONDUCT R. 1.4 (2006) (stating that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation").

38. See *id.*

39. Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Aug. 27–Sept. 7, 1990, *Basic Principles on the Role of Lawyers* ¶ 22, U.N. Doc. A/Conf. 144/28 (1990).

40. See *Evidence of Broader Plot Found in Guantanamo Suicide Investigation*, FOX NEWS, July 9, 2006, <http://www.foxnews.com/story/0,2933,202668,00.html> (last visited Feb. 16, 2006).

between the detainee-clients and their defense attorneys, they filed a motion in federal district court requesting that a special “review panel” be set up to review all documents passing between attorney and client. On September 15, 2006, Judge Robertson issued a Memorandum Order granting their motion.⁴¹ Judge Robertson used the deferential *Turner* test, which was developed by the Supreme Court in the late 1980s to review Constitutional rights of prisoners.⁴² Even under this very deferential test, however, no court has found that prison authorities have unfettered access to review prisoners’ legal mail. Most courts have found that legal mail can only be searched for contraband or skimmed to determine whether it is in fact legal mail, and this must be done in the presence of the prisoner.⁴³ The Memorandum issued by Judge Robertson encroaches on the attorney-client privilege in a way courts had previously not dared to, even when using the same standard of review.⁴⁴

C. Access to Clients

Another alternative to keep the client reasonably informed in the matter is to travel to the base and meet with the client in person. Not only is this extremely time consuming and expensive, but the Protective Order requires security clearances for all attorneys and allows only two visits before the attorney must produce a writing, signed by the client, authorizing the attorney to represent the client.⁴⁵ In addition, attorneys must notify the Department of Defense at least twenty days before they plan to visit their clients, requests made less than twenty days in advance will

41. See *Hicks (Rasul) v. Bush*, 452 F. Supp. 2d 88, 94 (D.D.C. 2006).

42. See *id.* at 101–02 (citing *Turner v. Safley*, 482 U.S. 78, 89 (1987), which held that regulations that violate prisoners’ Constitutional rights are valid if “reasonably related to legitimate penological interests.”).

43. See, e.g., *Cody v. Weber*, 256 F.3d 764, 768 (8th Cir. 2001) (“Privileged prisoner mail, that is mail to or from an inmate’s attorney and identified as such, may not be opened for prisoner.”) (quoting *Jensen v. Klecker*, 648 F.2d 1179, 1182 (8th Cir. 1981)).

44. The majority of courts have held that prisoners have a general constitutional right not to have attorney-inmate mail read. See, e.g., *Kalka v. Megathlin*, 10 F. Supp. 2d 1117, 1123 (D. Ariz. 1998) (listing cases).

45. This writing, called a Notification of Representation, is extremely hard to get from the client as they are loathe to sign anything after being tricked on numerous occasions by military officials who have made misrepresentations to them concerning documents they are signing.

not normally be granted.⁴⁶ At these visits, the rules concerning outside “unnecessary” information apply, greatly restricting what can be said to the client. With all this in mind, it is difficult to see how the attorney can comply with the government’s rules and the rules of professional conduct simultaneously.

After the Military Commission Act of 2006,⁴⁷ the government’s position is that detainees no longer have a right to counsel at all, as there is no longer the possibility to seek habeas relief in the federal civilian courts.⁴⁸ The government asserts that civilian courts no longer have jurisdiction to hear detainees’ claims, so they have no need for a civilian attorney. They will be tried by military tribunal and appointed a military defense attorney.

Contrary to the government’s assertion, the detainee-clients need and have a right to defense counsel now more than ever for the purposes of challenging the Act⁴⁹ and representing them before the military tribunal. While the government claims that detainees have the right to counsel, and “can retain their own civilian counsel,”⁵⁰ the new regulations enacted after the Act was signed by President Bush indicate that the military sees the Act as a license to increase restrictions on access to the client and prohibitions on communications to the client.⁵¹

46. See *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174, 186 (D.D.C. 2004).

47. Military Commissions Act of 2006, Pub. L. No. 109–366, 120 Stat. 2600 (Oct. 17, 2006).

48. The Detainee Treatment Act provides that “no court, justice, or judge shall have jurisdiction to hear or consider (1) an application for writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba.” See Department of Defense Appropriations Act, Fiscal Year 2006, Pub. L. No. 109–148, 119 Stat. 2680, 2742 (2005).

49. The Act is arguably unconstitutional, potentially violating Article I, Section 9 of the U.S. Constitution, which commands that the writ of habeas corpus shall not be suspended unless in cases of invasion or rebellion. In fact, several suits have already been filed by defense attorneys, some even before the law was signed. See Warren Richey, *New Lawsuits Challenge Congress’ Detainee Act*, CHRISTIAN SCIENCE MONITOR, Oct. 6, 2006, at 1.

50. John Bellinger III, State Dept. Legal Advisor, Foreign Press Center Briefing on the Military Commissions Act 2 (Oct. 19, 2006), available at <http://fpc.state.gov/fpc/74786.htm>.

51. See Farah Stockman, *Curb Sought on Counsel to Detainees*, BOSTON GLOBE, Oct. 25, 2006. The new regulations give a detainee challenging enemy combatant designation one “initial” visit with counsel, and up to three “additional visits.” *Id.*

III. ADDITIONAL BARRIERS TO EFFECTIVE REPRESENTATION: THE CULTURAL CLASH

A. *Common Law Adversary System vs. Civil Law Search for Truth*

The other factor complicating the representation relationship is the culture clash between the attorney and client and the client's corresponding lack of knowledge of the U.S. legal system. While the differences between detainees and their counsel with respect to culture, language, religion, and respective national legal institutions is a broad topic deserving of more in-depth treatment, a few superficial observations with respect to the effect on representation can be made. While some detainees are from English-speaking countries,⁵² most are not. Many do not speak English, and translators are needed to communicate with attorneys. The majority of detainees are from civil law countries, Islamic law countries, or countries using a hybrid of these two systems:⁵³ they are not familiar with the common law system. They are likewise not familiar with, and in fact are suspicious of, the role of the attorney in the adversarial system. Attorneys have more power in our country than anywhere else in the world.

In Tunisia, the home country of some detainees, for example, there are fewer than 4000 lawyers⁵⁴ for over ten million inhabitants.⁵⁵ Compare this figure to over one million lawyers⁵⁶ in the United States, with a population of approximately 300 million.⁵⁷ This breaks down to roughly one attorney for every 300 people in the United States, compared with one attorney for every 2500 people in Tunisia. Lawyers are much fewer in number, and have much less power. In Tunisia, lawyers can be and have been arrested for making negative comments about the

52. For example, there are several detainees from Great Britain and Australia.

53. The Egyptian system is an example of this, and is emulated by other North African countries. It uses the French-style civil law system, where there is a civil code, but judges are supposed to interpret the civil code using *Sharia* law.

54. See P. LYON-CAEN, MISSIONS REPORT: TRIAL AGAINST THE BAR ASSOCIATION, TUNISIA 2 (Nov. 19, 2002 - Apr. 22, 2003), http://www.icj.org/IMG/pdf/Tunisia_Report_Englis_1_.pdf (last visited Apr. 11, 2007).

55. See CIA, World Factbook 2006: Tunisia, available at <https://www.cia.gov/cia/publications/factbook/geos/ts.html> (last visited Feb. 8, 2007).

56. See Del Jones, *Lawyers, Wannabes on the Rise*, USA TODAY, Dec. 26, 2003, at 5B.

57. See CIA, World Factbook 2006: United States, available at <https://www.cia.gov/cia/publications/factbook/geos/us.html> (last visited Feb. 8, 2007).

government in court.⁵⁸ The president of the Tunisian Bar Association has been attacked physically by plain-clothed policemen and has had his offices ransacked on numerous occasions.⁵⁹ Judge Mokhtar Yahyaoui was relieved of his duties after publishing a letter condemning the lack of judicial independence from the executive.⁶⁰ After he wrote the open letter, Judge Yahyaoui's correspondence was monitored, his chambers were ransacked, and he was physically threatened into retracting certain statements made to the foreign press.⁶¹ Faouzi Ben Mourad, a lawyer, found himself with a four-month jail sentence for making comments in the course of a trial that the judge considered "anti-state."⁶² Human Rights lawyers regularly find their offices, and in some cases their houses, have been broken into, their computers and files stolen. The American Bar Association has written two "rule of law" letters to President Ben Ali concerning the detention of trade-union lawyer Nejib Hosni and the burglary of the offices of Human Rights lawyer Radhia Nasraoui.

In Tunisia, anyone accused of "terrorism" is tried by military tribunal, not in the civilian courts; clients are therefore confused and disbelieving that they would have access to the federal courts, and that a lawyer can talk negatively about the government's policies. It is hard for some detainee clients to understand that a lawyer is allowed to represent them against the government, and in a civilian court, and free of charge.

Imagine being escorted into a room; imagine being escorted by an armed guard; imagine you are meeting for the first time a man chained to the floor; imagine that you and the man both know that the entire interview is being filmed; imagine that he is a poor man from Tunisia; and then imagine trying to explain to him what you can do for him and why he should trust you.

58. See Human Rights First, *Tunisian Judge Blows Whistle on Judicial Tampering*, http://www.humanrightsfirst.org/middle_east/tunisia/hrd_tun_1.htm (last visited Apr. 11, 2007).

59. See LYON-CAEN, *supra* note 54, at 4.

60. See Human Rights First, *supra* note 58.

61. See *id.*

62. See Rohan Jayasekera, *President Tells Nation's Lawyers—My Word is Law*, INDEX ON CENSORSHIP, May 8, 2005, available at <http://www.indexonline.org/en/news/articles/2005/2/tunisia-president-tells-nation-s-lawyers-my-shtml>.

B. *Detainee's Capacity to Participate in His Legal Decisions*

The Model Rules require that the lawyer "abide by the client's decisions concerning the objectives of representation and consult with the client as to the means by which they are to be pursued."⁶³ Aside from the government-imposed communication restrictions discussed above, the language and culture barriers facing the attorney and client make this rule impossible to follow. Given the differences between the common law systems and the civil law and Islamic law systems, combined with the client's condition of confinement, the extremely restricted access to the client, the client's lack of knowledge concerning the legal system, and the already extended duration of detainment of the client, how should the Model Rule be applied? How could such a client be able to determine the best legal route? What should the attorney do?

One answer might be Model Rule 1.14, which applies when "a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or some other reason."⁶⁴ The lawyer in this relationship may take protective action on behalf of the client, such as seeking a guardian ad litem, but is not required to do so. If not seeking a guardian, the lawyer is advised to maintain the relationship as normally as possible, but paternalism is accepted and expected. In other words, "if the client lacks a guardian or legal representative, the lawyer may be called upon to determine if her client is sufficiently incompetent or incapacitated to justify her taking over as de facto guardian."⁶⁵

The issue of incapacity may be very real for many detainees. There is mental illness in Guantanamo Bay. The long period of detention without access to the judicial process combined with long periods of solitary confinement, questionable interrogation tactics, unsanitary conditions, cultural and religious harassment, and long separation from family have led to serious mental health consequences.⁶⁶

The conditions of confinement have taken such a toll that

63. MODEL RULES OF PROF'L CONDUCT R. 1.2(a).

64. *Id.* R. 1.14(a).

65. Jan Ellen Rein, *Ethics and the Questionably Competent Client: What the Model Rules Say and Don't Say*, 9 STAN. L. & POL'Y REV. 241, 244 (1998).

66. See U.N. Report, *supra* note 31, at ¶¶ 70-71.

in 2003 alone there were 350 acts of self-harm, mass suicide attempts, and widespread hunger strikes resulting in force-feeding.⁶⁷ Detainees who have been subjected to such conditions and tactics for many years may not be in a position to make rational decisions concerning their representation in a foreign legal system.

The Protective Order requires that each client authorize their attorney to act on their behalf by executing a Notification of Representation which must be signed by the client and filed with the court having jurisdiction.⁶⁸ This procedure is not usually required when the client is perfectly competent. The Department of Defense first tried to block attorney access altogether by saying that the Protective Order required the Notification of Representation to be executed before allowing any access to the detainee.⁶⁹ This interpretation did not survive judicial analysis,⁷⁰ but the government now insists that counsel show authorization to meet with their client after two visits and in some cases, even after the Protective Order, the government has continued to deny counsel access at all until authorization is shown.⁷¹ Detainees are loathe to sign the Notification of Representation because they do not know exactly what they are signing and are afraid it will be used against them; they are suspicious of their attorneys because Guantanamo interrogators have often posed as their attorneys to elicit information from them.⁷² They have also been told by officials at Guantanamo that anything they say to their attorneys can be used against them. In this respect, the Notification of Representation acts as an unnecessary roadblock to representation.

CONCLUSION

The actions of the cause lawyers of the 1960s and the actions of lawyers representing detainees in Guantanamo Bay are

67. See PHYSICIANS FOR HUMAN RIGHTS, *BREAK THEM DOWN: SYSTEMATIC USE OF PSYCHOLOGICAL TORTURE* 52-53 (2005), <http://physiciansforhumanrights.org/library/documents/reports/break-them-down-the.pdf> (last visited Apr. 11, 2007).

68. See *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174, 185 (D.D.C. 2004).

69. See Respondent's Opposition, *Doe v. Bush*, No. 05-CV-1704 (D.D.C. 2005).

70. See Memorandum Order, *Doe*, No. 05-CV-1704.

71. First Declaration of George Daly and Jeffrey J. Davis at 1, *Al-Harbi v. Bush*, No. 1:05-CV-01857 (D.C. Cir. 2006).

72. See Eliza Griswold, *American Gulag: Prisoners' Tales from the War of Terror*, *HARPER'S BAZAAR*, Sept. 1, 2006, at 41-43.

very similar. The factors driving these actions are likewise similar, that is, frustration at the inability of traditional law practices to help one's client. The difference is the cause. While both represent groups that are unpopular, radical leftist groups in the 1960s and religious extremists in Guantanamo, the lawyers in the 1960s were seen as embodying the cause they represented, while the law firms representing detainees are seen as upholding the rule of law. The client-centered approach has proved problematic in both cases, and in Guantanamo paternalism is universally applied. Paternalism is necessary due to the restrictions put on the attorney-client relationship by government restrictions and the incapacitation of the client. Rule 1.14 recognizes the necessity of paternalism in these circumstances.