Searching for the State’s Guilty Mind: Mens Rea Evidence Against the Authors of the Torture Memos Under Federal Law and the Model Rules

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BY DANIEL HORNAL

I. INTRODUCTION

This article analyzes the mens rea required for a criminal conviction of lawyers in the Office of Legal Counsel (hereinafter OLC) under a theory that they aided and abetted torture when they wrote the so-called torture memos. It then speculates as to what form the evidence to prove that mens rea would take, if it exists. It then looks at the D.C. Bar’s Rules of Professional Conduct to see which rules the OLC lawyers may have violated, based on information in the public record. Finally, it analyzes each rule to determine the minimum mens rea necessary to violate that rule and speculates as to what evidence might prove that mens rea.

II. BACKGROUND OF THE TORTURE MEMOS

The torture memos were a series of legal opinions issued by the OLC between 2002 and 2005. In the memos, the OLC was asked to provide information on the legality of proposed (or already-in-progress) interrogation techniques. These memos have been widely panned by commentators and legal analysts. The OLC lawyers were asked to answer many difficult questions upon which reasonable lawyers could disagree: for example, the distinction between tactics that are “severe” and less than severe, or the precise definition of “prolonged” mental harm. Given the difficulty of the questions, one would expect competent lawyers, as the OLC lawyers surely were, to reach nuanced conclusions with strong caveats. However, the OLC, without exception, stated that each technique suggested by the CIA was legal. Many commentators believe that the authors of the memos should be punished or disbarred.

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1 The Office of Legal Counsel is a part of the Justice Department. Its opinions are generally considered binding on the Executive Branch. See http://www.justice.gov/olc/
3 See, e.g., DAVID LUBAN, The Torture Lawyers of Washington in LEGAL ETHICS AND HUMAN DIGNITY, 163 (2007) (“With only a few exceptions, the torture memos were disingenuous as legal analysis, and in places they were absurd.”).
4 Cole, supra note 2, at 3-4.
5 Luban, supra note 3.
6 Cole, supra note 2, at 4.
However, it seems novel that government lawyers might be guilty of a crime for legal advice given in wartime, and anathema to a free society to punish lawyers for the advice they give. After all, advocates make disingenuous arguments all the time. While the desirability of the adversary system is debatable, it is unfair to single out the OLC lawyers.

However, there are three key problems with this analysis. First, the torture memos were not written in the context of the adversary system, rather, they purported to give a neutral statement of the law. Therefore, punishing the memos’ authors would not create the same legal problems as would, for example, punishing a criminal defense attorney for arguing for a novel application of the necessity defense. Second, these memos did not justify an ordinary crime; they justified torture, a jus cogens crime. Finally, the memos were neither simply academic nor an after-the-fact legal defense. Rather, the OLC’s arguments provided legal cover for the ongoing treatment of detainees in U.S. custody, and this could be seen as active participation in a crime, not merely the provision of legal advice.

There is precedent for the prosecution of advisors for the advice they gave. In United States v. von Weizsaecker (The Ministries Case), the Nuremburg tribunal convicted defendants Ernst von Weizsacker and Ernst Woermann for failing to object to actions that amounted to crimes against humanity. In March of 1942, Eichmann wrote to the Foreign Office, where Weizsacker and Woermann worked, requesting the deportation of 6000 Jews from France to Auschwitz. The Foreign Office replied that it “had no objection.” Just like the OLC, the Foreign Office did not initiate the request; it was simply asked if the government could go forward with its plan.

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7 See id. at 41.

8 As mentioned in the Scope and Assumptions section, infra part III, this paper is assuming that torture, or cruel, inhuman, or degrading punishment occurred when government agents acted within the guidelines issued by the OLC.

9 Prosecutor v. Furundzija (Trial Judgment), Case no. IT-95-17/1-T, International Criminal Tribunal for the Former Yugoslavia (ICTY), Dec. 10, 1998, para. 154, available at http://www.unhcr.org/refworld/docid/40276a8a4.html (“Clearly, the jus cogens nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community.”).


13 Weizsacker and Woermann were the State Secretary and Undersecretary, respectively, in the Foreign Office. In those positions, they were the Nazi government’s primary legal advisors. See Heller, supra note 11.

While admittedly [the Foreign office] could not compel the government or Hitler to follow its advice, both von Weizsaecker and Woermann had both the duty and the responsibility of advising truthfully and accurately. . . . It is idle to speculate as to whether or not contrary advice would have been followed. There is a vast difference between saying “no” and saying “no objection.” The first would exonerate, the second is criminal.  

III. LEGAL BACKGROUND, SCOPE, AND ASSUMPTIONS

Mens rea is Latin for “guilty mind,” and is a necessary element of almost all crimes.  Mens rea is key for blameworthiness: we would not criminally punish an elevator maintenance person for false imprisonment if she failed to maintain an elevator where someone got trapped for a day, even though her actions caused someone to be imprisoned. Similarly, we would not punish an honest doctor for torture, even if he inflicted severe pain and suffering on a patient in the course of treatment. State of mind matters. In this article, I limit my analysis to the mens rea elements of the crimes and ethical violations the torture lawyers may have committed because a rigorous analysis of this question has not been published elsewhere, and because without an understanding of the lawyers’ mens rea, the righteous indignation about the torture memos from commentators and philosophers seems misplaced.

For the purpose of this article, I assume, arguendo, that government agents, working entirely within the guidelines of the torture memos, committed torture as defined by 18 U.S.C. §§ 2340-2340A. It is not important for the purposes of this memo if any government agent acted outside the framework set out in the torture memos. It is irrelevant if any government agents are actually prosecuted for torture: aiding and abetting liability does not require a conviction for the predicate crime. All analysis for criminal liability will be limited to 18 U.S.C. §§ 2340-2340A.

15 Id. at 496, 958-59.
16 The criminal law does contain a few strict liability crimes, such as statutory rape.
17 (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 (other than pain or suffering incidental to lawful sanctions) 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—(A) the intentional infliction or threatened infliction of severe physical pain or suffering; (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (C) the threat of imminent death; or (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.
and aiding and abetting as defined by 18 U.S.C. § 2(a). I am specifically excluding the crimes against humanity statute, the murder statute, and the assault statute. If the lawyers wrote the memos in bad faith, they could be prosecuted under 18 U.S.C. § 1001, but that possibility will not be explored here.

In the criminal section, I assume that the memos were written in bad faith, as would be necessary to show criminal liability. In the Model Rules of Professional Conduct (hereinafter MRPC) section, I look to see what mens rea level is required for each possible breach of the MRPC, and explore evidence that could show said breach.

I will not examine questions of actus reus, causation, the propriety of prosecution, civil liability, or possible legal justifications or excuses.

IV. THE MENS REA SPECTRUM APPLIED TO AIDING AND ABDETING

In modern criminal law, there are four main classifications of mens rea. The Model Penal Code (hereinafter MPC) provides a systematic method to understand these classifications. The most culpable state is “purposely” (also commonly called “intentional”). The MPC defines purposely as “his conscious object to engage in conduct of that nature or to cause such a result; and . . . if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.” The second most culpable state is “knowing,” the third “reckless,” and the least “negligence.”

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19 “Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”
23 Prohibiting materially false, fictitious or fraudulent statements or representations about any matter within the jurisdiction of the executive, legislative or judicial branches.
25 Id.
26 MODEL PENAL CODE § 2.02(b) (“A person acts knowingly . . . (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.” Awareness of a high probability is sufficient to prove knowledge, unless the accused actually believes it does not exist.”).
27 Id. at § 2.02(c) (“A person acts recklessly . . . when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.”)
28 Id. at § 2.02(d).
Torture is a specific intent crime. In the August 1, 2002 memo to Alberto Gonzales (hereinafter Memo 1), the OLC argues that as a matter of law, to commit the specific intent crime of torture:

[Knowledge alone that a particular result is certain to occur does not constitute specific intent. Thus, even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective he lacks the requisite specific intent even though the defendant did not act in good faith.

The memo later states that juries are very likely to convict if the perpetrator knows his actions will produce the prohibited result. The mens rea for aiding and abetting is quite distinct from the mens rea required for the predicate crime.

Technically only the perpetrator can (and must) manifest the mens rea of the crime committed. Accomplice liability is premised on . . . an equivalent mens rea. This equivalence is found in intentionally encouraging or influencing the nefarious act . . . thus, to be a principal to a crime . . . the aider and abettor must intend to commit the offence or to encourage or facilitate its commission.

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29 18 U.S.C. § 2340 ("'Torture' means an act specifically intended to inflict severe physical or mental pain or suffering.").
30 The specifics of which OLC members wrote what is beyond the scope of this article.
31 Cole, supra note 2, at 44-45. His statement of law is questionable. In United States v. Belfast, 06-20758-CR-ALTONAGA (The Chuckie Taylor Case) Doc. No. 580 (Jury instructions) (S.D. Fla. 2009), the judge instructed, for the crime of torture:

Specific intent to inflict severe physical pain or suffering” means to act with the intent to commit the act as well as the intent to achieve the consequences of the act, namely the infliction of the severe physical pain or suffering. An act that results in the unanticipated or unintended severity of pain and suffering is not torture.

This is at variance with the memo’s suggestion that if a defendant anticipated severe pain, but did the act for the reason of obtaining information, then the prosecution could not prove the required mens rea.
32 Id. at 45. But see United States v. Gumbs, 283 F.3d 128, 134 (3d Cir. 2002) (“We read § 2(b) as establishing two general mens rea elements. First, to be guilty under § 2(b), a defendant must possess the mens rea required by the underlying criminal statute that the defendant caused the intermediary to violate . . . § 2(b) also requires the defendant to possess the intent to cause the act prohibited by the underlying statute.”); MODEL PENAL CODE § 2.02(a).
33 Kadish & Schulhofer, supra note 18, at 616, quoting People v. Luparello, 231 Cal. App. 3d 832, 849 (Cal. Ct. App. 1987), quoted in
Thus, the aiding and abetting mens rea does not depend on the mens rea of the crime actually committed; rather, the mens rea is intentionally encouraging or influencing the bad act.\(^{34}\) Command responsibility is not required for 18 U.S.C. § 2 liability. In fact, the D.C. Court of Appeals found no error when a jury was given an aiding and abetting instruction in a drug dealing case where a drug courier acted entirely under the orders of his superior, and did not deliver the drugs to the final recipient, but rather, brought them to his superior who then sold them.\(^{35}\)

V. APPLYING AIDING AND ABETTING LIABILITY TO LAWYERS?

Criminal aiding and abetting liability has been imputed to lawyers. The highest profile modern cases involve lawyers charged under 18 U.S.C. § 2 for helping a client defraud the IRS. For example, in the case United States v. Cinquegrani,\(^{36}\) a partner at Arnold & Porter pled guilty to aiding and abetting tax evasion for conduct including preparing a legal opinion declaring the legality of a tax shelter that he knew to be illegal.

In several reported decisions, tax protesters were convicted on an aiding and abetting theory for providing advice on avoidance of taxes.\(^{37}\) The analogy to the torture lawyers should be clear: 18 U.S.C. § 2 can criminalize the giving of bad advice, if that advice was given intending to further criminal conduct. Similarly, as mentioned in section II, supra, the Nuremberg tribunals convicted several legal advisors for failing to object, when given the opportunity, to Nazi crimes against humanity.

VI. WHAT EVIDENCE COULD SHOW INTENTIONAL ENCOURAGEMENT?

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\(^{34}\) Federal jury instructions for several jurisdictions for aiding and abetting are available in Adam Harris Kurland, To “Aid, Abet, Counsel, Command, Induce, Or Procure The Commission Of An Offense”: A Critique Of Federal Aiding And Abetting Principles, 57 S.C. L. REV. 85, 90-91 (2005). Sometimes the instructions can be very unfavorable to the defendant. See United States v. Thompson, 279 F.3d 1043, 1050 n.9. (“Any person, who in some way intentionally participates in the commission of a crime, aids and abets the principal offender. . . . To find that the defendant aided and abetted in committing a crime, you must find that the defendant knowingly associated himself with the person who committed the crime, that he participated in the crime as something he wished to bring about, and that he intended by his actions to make it succeed.”).

\(^{35}\) United States v. Thompson, 279 F.3d 1043, 1046 (D.C. Cir. 2002).


\(^{37}\) United States v. Chisum, 502 F.3d 1237, 1239-40 (10th Cir. 2007) (holding that a self-styled business and estate planner could be liable under 18 U.S.C. § 2 for setting up sham LLC and advising client on using the LLC to avoid taxes); United States v. Causey, 835 F.2d 1289, 1290 (9th Cir. 1987) (Holding that a person can be liable for aiding and abetting the submission of tax returns to the government, even if those who actually submit the documents do not know that the documents are false).
Finding that the torture lawyers’ advice furthered an illegal scheme is the easy part. More challenging is proving the appropriate mens rea. Two elements must be proven to satisfy the mens rea requirements in this case: a) that the lawyers knew that their memos were not an accurate statement of the law, or at the very least, a reckless disregard for their accuracy and b) that the lawyers knew that the memos would be used to advance an illegal scheme.\footnote{38 See United States v. Gumbs, 283 F.3d 128, 131 (3d Cir. 2002).} This section will look to what quantum of evidence might answer each question in turn.

**A. KNOWING FALSITY OR DISREGARD FOR THE TRUTH (BAD FAITH)**

There are several pieces of evidence that a reasonable jury could use to determine bad faith. The first is the internal evidence of the memos: namely, that lawyers this good could not write anything this bad.\footnote{39 Interview with Professor David Luban (Sept. 23, 2009). Luban breaks down the evidence into three categories, which I follow here: evidence internal to the memos themselves, evidence external to the memos (such as missing cases), and the chronology of the torture program.} The memos contain substantive misstatements of the law which have been discussed widely elsewhere.\footnote{40 E.g. W. Bradly Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 68 (2005) (“[T]his is not legal analysis of which anyone could be proud. The overwhelming response by experts in criminal, international, constitutional, and military law was that the legal analysis in the government memos was so faulty that the lawyers’ advice was incompetent.”); Luban, supra note 3, at 176-80 (“These conclusions range from the doubtful to the loony.”).} While a jury is not usually asked to determine matters of law, a jury could, though presentation of evidence from experts, determine if the memos were plausible statements of law, and then could decide if the OLC lawyers actually believed what they were writing. While this sounds like a difficult task, juries are regularly asked to make determinations about internal states of mind from indirect evidence.

As an example of the sort of legal conclusion a jury might be asked to evaluate, in Memo 1, the OLC writes “[a]ny effort to apply Section 2340A in a manner that interferes with the President’s direction of such core war matters as the detention and interrogation of enemy combatants would thus be unconstitutional.”\footnote{41 Cole, supra note 2, at 80.} There is little doubt that the OLC in general, and in particular the lawyers involved in the OLC in 2002, does indeed hold expansive views of executive power.\footnote{42 See generally John C. Yoo, *The First Claim: The Burr Trial, United States v. Nixon, and Presidential Power*, 83 MINN. L. REV. 1435 (1999).} It is not bad faith to advocate for this position. However, this particular position on executive power is far outside the legal mainstream, and the OLC lawyers knew it when they
wrote the memos.\textsuperscript{43} It is telling that in this part of Memo 1, they did not cite a single case to back up their position.\textsuperscript{44} Despite the lack of authority for their position, and an abundance of available contrary evidence, some of which is known to almost every first-year law student,\textsuperscript{45} the OLC did not qualify this statement by acknowledging that this belief was far outside the mainstream, or that similar claims have been rejected by the Supreme Court.\textsuperscript{46}

There are also problems with the form and methods of the arguments in the memos. For example, in Memo 1, the OLC uses a definition from a 1935 dictionary to define “severe” as used in the torture statute, even though the torture statute was adopted in 1990.\textsuperscript{47} A jury could hear evidence from experts as to what are acceptable methods of statutory interpretation and decide if lawyers of the caliber working at OLC could have made such an enormous “good faith” error.

Even worse, Memo 1 contains a sentence which reads, “Leading scholarly commentators believe that interrogation of such individuals using methods that might violate Section 2340A would be justified under the doctrine of self-defense.”\textsuperscript{48} The author cites a law review article, which, on the very page cited, states, “the literal law of self-defense is not available to justify . . . torture. But . . . the moral basis of the defense may be applicable.”\textsuperscript{49} A jury might find, given the rest of the memos’ content, that the OLC authors did not intend to make moral arguments, and knowingly citing a moral opinion as if it were a legal conclusion is bad faith.

Other material omissions include an analysis on the legality of waterboarding that fails to mention \textit{United States v. Lee},\textsuperscript{50} a reported federal case in which the judge repeatedly and unequivocally called a procedure materially indistinguishable from waterboarding, “torture.” The OLC also failed to include \textit{United States v. Lee} in an appendix purporting to list “[c]ases in which U.S. courts have concluded the defendant tortured the plaintiff.”\textsuperscript{51} It is possible that the OLC lawyers simply never found this

\begin{footnotesize}
\textsuperscript{43} Cf. \textit{id} at 1435 (In which OLC torture memo author John Yoo cites to and demonstrates his knowledge of cases which limited the executive power).
\textsuperscript{44} Cole, \textit{supra} note 2, at 80.
\textsuperscript{45} Youngstown Sheet & Tube Co. v. Sawyer (\textit{Steel Seizure}), 343 U.S. 579 (1952).
\textsuperscript{46} See generally Senate Judiciary Committee Subcommittee on Administrative Oversight and the Courts Hearing: “What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration,” May 13, 2009 at 6-7 (Testimony of David Luban).
\textsuperscript{47} Cole, \textit{supra} note 2, at 47; 18 U.S.C. § 2340(a).
\textsuperscript{48} Cole, \textit{supra} note 2, at 96.
\textsuperscript{50} 744 F.2d 1124, 1125-27 (5th Cir. 1984).
\textsuperscript{51} Cole, \textit{supra} note 2, at 101-5. The heading of this section would technically exclude the \textit{Lee} case, as the plaintiff is the United States. A jury may instead have to ask why the appendix would include only civil, not criminal cases, when the memo was designed to speak to criminal liability.
\end{footnotesize}
case. If they knew about it but did not include it when evaluating whether waterboarding was torture, this would be strong evidence of bad faith.

The OLC lawyers were indeed asked to analyze some difficult questions.\textsuperscript{52} Neither “torture” nor “cruel, inhuman and degrading treatment” is clearly defined. The words “severe” and “prolonged” also have a wide spectrum of possible meanings. However, no matter what, the OLC’s answer always seemed to be “yes, the CIA can do what it wants.”\textsuperscript{53} Any individual legal distinction could be a mere difference of opinion or an error, but when every single distinction and difficult question is resolved in favor of the CIA’s plan, a jury could infer bad faith.

Finally, the timing of the memo’s drafting provides circumstantial evidence of bad faith. The torture program was approved by the Director of Central Intelligence and the National Security Advisor on July 17, 2002, subject to a determination of legality by OLC.\textsuperscript{54} The drafters of the memos likely knew (actual knowledge could likely be proven during discovery) that the program was already underway while the memos were being drafted. A jury could find that this establishes the possibility of a strong motive: if the OLC lawyers found that the enhanced interrogation techniques were indeed torture, there would be an official OLC opinion that stated that other members of the executive branch had committed a heinous crime. The political fallout to such a declaration would have been disastrous for the administration.

\textbf{B. INTENTIONALLY AIDING AN ILLEGAL SCHEME}

For liability to arise under 18 U.S.C. § 2, the prosecutor must prove that the defendant intended to aid the illegal scheme.\textsuperscript{55} Evidence of this could come in several forms. The simplest would be that of a smoking gun email that painted a picture of intent. Alternatively, legal proof of intent to aid the torture scheme could flow from the same evidence used to establish bad faith in the drafting of the memos: e.g. the lawyers knew that drafting an opinion unfavorable to the practices of the administration would amount to saying that the administration was already committing torture. They knew that torture would probably continue if they released a memo that misstated the law, and that they intentionally misstated the law anyway. It is possible that this would only technically prove a “knowing” rather than “purposeful” mens rea: the jury may then look to extrinsic evidence. This evidence might include statements and writings by the torture lawyers that endorsed the torture policies of the Bush administration. A jury could take this as evidence of motive for intent and,

\textsuperscript{52} Id. at 4.
\textsuperscript{53} Id. at 9-10.
\textsuperscript{54} Narrative by Senator John D. Rockefeller IV, \textit{reprinted in Cole}, supra note 2, at 278.
\textsuperscript{55} Kurland, \textit{supra} note 34, at 90-91.
absent contrary evidence, believe beyond a reasonable doubt that the lawyers’ actions were intended to further their stated policy goals.\footnote{56 See, e.g., Scales v. United States, 367 U.S. 203, 226-27 (1970) (“We can perceive no reason why one who actively and knowingly works in the ranks of that organization, intending to contribute to the success of those specifically illegal activities, should be any more immune from prosecution than he to whom the organization has assigned the task of carrying out the substantive criminal act.”). See generally e.g. JOHN C. YOO, WAR BY OTHER MEANS (2006) (providing a full-throated defense of the Bush Administration’s policies in combating al Qaeda).}

VII. DISCIPLINE UNDER THE MODEL RULES

The MRPC provide another method to condemn participation in the torture program.\footnote{57 I am limiting my analysis to the Model Rules. However, the OLC lawyers could face discipline simply for violating the prohibition on moral turpitude. In \textit{In re Robbins}, 678 A.2d 37, 38-39 n.1 (D.C. 1996), the court defined moral turpitude as conduct that: (1) ‘offends the generally accepted moral code of mankind,’ (2) is one ‘of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of rights and duty between man and man;’ or (3) is ‘[c]onduct contrary to justice, honesty, modesty, or good morals.’ Given that the lawyers are accused of contributing to the violation of an international preemptory norm, it seems that it would not be difficult to convince a factfinder to find that the lawyers offended the generally accepted moral code of mankind. See STEPHEN GILLERS, REGULATION OF LAWYERS 771 (8th ed. 2009).} Each of the torture memos were written within the District of Columbia. The D.C. Bar Rules mirror the MRPC. The vast majority of bar discipline procedures in every state are kept secret, and most often even if the result is reported, the reasoning and facts are not reported. Therefore, the reasoning in this section relies on this limited supply of cases, and necessarily includes cases from many jurisdictions. The limited supply of materials makes it necessary to rely heavily on the text of the rules and official comments. This section will first examine what mens rea is required for each rule, and examine what would be required to show that the torture memo writers had each mens rea.

For discipline under the MRPC, no showing of harm is necessary, merely a breach of duty.\footnote{58 See \textit{In re Thyden}, 877 A.2d 129, 137 (D.C. 2005).} The burden of proof for disciplinary charges in D.C. is clear and convincing evidence.\footnote{59} A. THE RULES OF PROFESSIONAL CONDUCT (1.16, 1.2, 1.4, 2.1, 3.3, 4.1, 8.3, 8.4), AND THE APPLICABLE MENS REA STANDARD

D.C. Rule of Professional Conduct 1.2(e) (Scope of Representation) reads:

\begin{quote}
(1) ‘offends the generally accepted moral code of mankind,’ (2) is one ‘of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of rights and duty between man and man;’ or (3) is ‘[c]onduct contrary to justice, honesty, modesty, or good morals.’
\end{quote}
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.

For a violation of this rule, the committee on bar discipline would need to prove either that 1) the OLC lawyers knowingly assisted the administration in conduct known to be criminal, or 2) that the memos were written in bad faith, that is, knowing that they are false or with reckless disregard for their truth or falsity.

D.C. Rule of Professional Conduct Rule 1.4(b) (Communication) reads: “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” There are no standard mens rea words in the rule nor in the comments. Comment 2 reads:

The lawyer must be particularly careful to ensure that decisions of the client are made only after the client has been informed of all relevant considerations. The lawyer must initiate and maintain the consultative and decision-making process if the client does not do so and must ensure that the ongoing process is thorough and complete.

Negligence is a simple failure of the duty of care. Therefore, the phrase “particularly careful” seems to indicate a standard between negligence and strict liability.

D.C. Rule of Professional Conduct 1.16 (Declining or Terminating Representation) reads: “a lawyer shall . . . withdraw from the representation of a client if: (1) The representation will result in violation of the Rules of Professional Conduct or other law.” This rule is most often invoked parasitically to another violation of the ethics rules. For example, in Attorney Grievance Commission of Maryland v. Pennington, the court wrote: “Respondent clearly violated this Rule because she failed to withdraw from representation of the Butlers after her representation gave rise to their cause of action against her.” A violation of the rule as applied

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60 D.C. R. Prof’l. Conduct 1.2 Cmt. 6 (“[A] lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.”). This interpretation is reinforced by D.C. R. Prof. Conduct 3.3(a)(2), which has nearly identical text, and explicitly establishes a mens rea of knowing.

61 D.C. R. Prof’l Conduct 1.4(b) Cmt. 2.

62 876 A.2d 642, 651 (Md. 2005).
to a violation of the Rules of Professional Conduct requires either a reckless or knowing mens rea. However, because this form is purely parasitic on other rule violations, it does not establish an independent basis of a rule violation and thus is outside the scope of this paper.

The more difficult question is what mens rea is required to show a violation of this rule as it applies to the representation resulting in a “violation of . . . other law.” In In re American Continental Corp.,63 the court explained the validity and enforceability of this rule:

Jones Day contends that it may not be held liable for counseling its client. . . . [However,] attorneys must inform a client in a clear and direct manner when its conduct violates the law. If the client continues the objectionable activity, the lawyer must withdraw ‘if the representation will result in violation of the rules of professional conduct or other law.’64

Later, the court appears to establish a recklessness standard.

Moreover, where a law firm believes the management of a corporate client is committing serious regulatory violations, the firm has an obligation to actively discuss the violative conduct, urge cessation of the activity, and withdraw from representation where the firm’s legal services may contribute to the continuation of such conduct.65

“Believes” is a lower standard than “knowing,” which would require actual knowledge, but higher than “would know with exercise of ordinary care,” which would be a negligence standard.66 Thus, recklessness is the correct standard for the “violation of other law” portion of Rule 1.16.

D.C. Rule of Professional Conduct 2.1 (Advisor) reads: “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.” There have been few prosecutions under Rule 2.1. At least in some cases, a negligence standard has been adopted.67

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64 Id. at 1452 (emphasis added).
65 Id. at 1453 (emphasis added).
66 The court did not require actual causation between the advice and the bad conduct. Rather, it held that the firm must withdraw from representation where its legal services may contribute to the illegal conduct. Id.
67 See Spector v. Mermelstein, 361 F. Supp 30, 39-40 (S.D.N.Y. 1972), Aff'd in relevant part 485 F.2d 474 (2d Cir. 1973) (“If an attorney negligently or willfully withholds from his client information material to the client's decision to pursue a given course of action, or to abstain therefrom, then the attorney is liable for the client's losses suffered as a result of action taken without benefit of the undisclosed material facts.”); accord In re Olsen Indus., Inc., 2000 WL 376398 (D. Del. 2000); c.f. Smith v. Lewis, 530 P.2d 589,
D.C. Rule of Professional Conduct 3.3(a)(2) (Candor to Tribunal) reads: “A lawyer shall not knowingly... [c]ounsel or assist a client to engage in conduct that the lawyer knows is criminal or fraudulent...” Rule 3.3(a)(2) is materially the same as rule 1.2(e), but explicitly deals with candor to the tribunal. It explicitly establishes a mens rea requirement of knowing. Because the OLC lawyers were not writing for a tribunal, Rule 3.3 most likely does not apply. However, because the text is nearly identical to Rule 1.2(e), and far more prosecutions have happened under Rule 3.3(2) than Rule 1.2(e), Rule 3.3(a)(2) can be useful to draw analogies and make predictions. Further, Rule 3.3(a)(1) has a close parallel to Rule 2.1(candor toward client), and can be used for the purpose of analysis.

D.C. Rule of Professional Conduct 4.1 (Truthfulness in Statements to Others) reads: “In the course of representing a client, a lawyer shall not knowingly:... (b) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.” The rule sets a mens rea standard of knowing. A showing that the lawyers knew the administration was going to violate the law and did not disclose this fact could establish a violation of rule 4.1. The discussion of rule 4.1 will be merged with the discussion of rules 1.2(e) and 1.16.

D.C. Rule of Professional Conduct 8.3(a) (Reporting Professional Misconduct) reads: “A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority.” This rule could apply if there was a culture of bad faith at OLC. However, because the substance of the rule is covered by other rules, it is of limited utility standing alone, so it will receive no further analysis here.

D.C. Rule of Professional Conduct 8.4 (Misconduct) reads: “It is professional misconduct for a lawyer to:... (c) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; (d) Engage in conduct that seriously interferes with the administration of justice.” Neither the text nor the comments mention any mens rea standard. Dishonesty, fraud and deceit must be, by definition, at least knowing. In the common law, misrepresentation can be at as low a standard as negligence. The discussion of Rule 8.4 in reported cases is most often intermingled with discussions of violations of other rules, or involves conduct that is so egregious that it does not warrant a discussion of mens rea. However, the courts have disciplined lawyers for engaging in the

595-96 (Cal. 1975) (holding that a failure to argue legal principles ascertainable with minimal research from a hornbook constituted malpractice).

68 “A lawyer shall not knowingly: [m]ake a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer...”
practice of “ghostwriting” of motions or briefs, and have framed the practice as violating Rule 8.4(c). The courts do not always allege that the lawyers knew that the practice was deceitful. In In re Mungo, the court noted that there were few reported decisions on ghostwriting, but sanctioned the offending lawyer with a public admonishment anyway. The court wrote that future incidences of the same behavior from this or other attorneys could lead to disbarment. The court used what appears to be a civil negligence standard for the question of breach of the rule, and took the offending attorney’s ignorance of the application of the rule into account for the penalty determination.

VIII. SUMMARY OF ANALYSIS OF EVIDENCE TO ESTABLISH THE MENS REA

Below, I categorize the rules into groups according to the facts required to prove each set, and discuss what evidence may exist that would allow a factfinder to find a violation.

It would be sufficient to establish a violation of Rules 1.2(e), 2.1, and 8.4 if the bar could show a reckless disregard as to the truth or falsity of the memos. Rule 4.1 requires a showing of knowingly making a false statement. However, the lawyers implied that they believed each of the statements in the memos to be an accurate statement of the law. If they did not know them to be true, but rather recklessly disregarded the truth of falsity of the statements, they knowingly made a false statement: that is, they knowingly made the false statement that they believed their statements of law to be accurate when they in fact did not hold that belief. Therefore, there is no difference as to the evidence sufficient to show a violation of Rules 1.2(e), 2.1, 4.1, or 8.4.

A negligent failure of the OLC to present a balanced picture of the law would be sufficient to establish a violation of Rule 1.4. There would be two parts to this showing: it would require both a showing 1) that the lawyers knew that the picture was unbalanced and 2) that the lawyers were negligent in not presenting a balanced picture. A negligent failure of candor would be sufficient to show a violation of Rule 2.1.

A showing that the lawyers believed that the administration was breaking the law would be a sufficient mens rea for a violation of Rule

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69 See e.g., In re Mungo, 305 B.R. 762, 769-70 (Bankr. D.S.C. 2003). (“South Carolina Rule of Professional Conduct Rule 8.4(d) states, ‘It is professional misconduct for a lawyer to: ... [e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentations.’ The act of ghost-writing violates SCRPC Rule 3.3(a)(2) and SCRPC Rule 8.4(d) because assisting a litigant to appear pro se when in truth an attorney is authoring pleadings and necessarily managing the course of litigation while cloaked in anonymity is plainly deceitful, dishonest, and far below the level of disclosure and candor this Court expects from members of the bar.”) (internal citations omitted).

70 See id.

71 Id.

72 Id.
1.16. The lawyers would not necessarily need to believe that the interrogation program, as carried out by the administration, amounted to torture. Rather, they would need only to believe that the program violated the law in some form. For example, if the lawyers believed that the torture program violated the Geneva Convention, or that the administration intended to commit the crime of assault, the lawyers could still face discipline under Rule 1.16. Similarly, a showing of knowing assistance to a criminal scheme would be sufficient to establish a violation of Rule 1.2(e).

A. RECKLESS DISREGARD FOR THE TRUTH OR FALSITY OF THE MEMOS (RULES 1.2(E), 2.1, 4.1)

The forms of evidence discussed in Section VII.A., supra, showing knowing disregard, would also be sufficient to show reckless disregard. The evidence of bad faith internal to the memos, that is, that the memos consistently told the executive branch agencies that brutal tactics would not run afoul of the law, is more damning if only recklessness need be proven. For example:

1) While the writers of the torture memos have a very expansive understanding of what powers the Constitution bestows on the President as Commander in Chief, a judge could find that the OLC lawyers consciously disregarded the risk that the courts would not agree with their position.

2) The memos state that a necessity defense would be available to an interrogator charged with torture. A judge could find that the lawyers disregarded evidence to the contrary: that is, that there have been no reported cases where a federal court has accepted a necessity defense for an intentional crime of violence. Evidence could come as computer records of the lawyers’ research trail.

Because bar discipline does not require actual harm, a committee also could look at the later memos without showing that the torture program continued in reliance of those opinions. The later memos stated that the most violent interrogation techniques, besides not being torture, did not even rise to the level of cruel, inhuman, or degrading punishment. The vast array of contrary authority available in the history of jurisprudence under the Geneva Convention could be taken into account by the bar discipline committee. Failure to cite this contrary authority could show a reckless disregard for the veracity of the memos.

B. NEGLIGENT MISREPRESENTATION OF THE TRUTH OR FALSITY OF THE MEMOS (RULE 8.4)

Any of the evidence sufficient for proof in the previous two sections also would be sufficient to show a violation of Rule 8.4. It is possible that, if mere negligence was found, bar discipline could be very light.73 The

73 See id. at 769-70.
lack of repentance and continuing denials of wrongdoing from the implicated lawyers, however, would be considered an aggravating factor, possibly leading to harsher discipline. Because negligence is simply a deviation from the duty of care, a judge could also note the extraordinary step taken by the OLC in repudiating the torture memos indicates that the lawyers did not exercise due care in their original drafting.

C. NEGLIGENT FAILURE TO PRESENT A BALANCED PICTURE OF THE LAW (RULES 1.4, 2.1)

In the role of lawyer as advocate, zealous and one-sided arguments are expected. However, the OLC’s role is different: it is charged with the duty of accurately stating what the law is. The OLC was not asked to draft a brief to the court to explain why the torture program was legal, rather, it was asked to draft a neutral memo. The evidence to show a negligent lack of balance could come entirely from the memos themselves with no need for discovery. A judge could, upon reading the memos, find that no reasonable lawyer could find so much support for state-sponsored torture in the laws and Constitution of the United States. A judge would need only to find that a reasonable lawyer would have discovered material legal evidence that might well have caused a reasonable client to alter their proposed course of conduct. The question is if, given the time constraints under which the OLC lawyers were working, the lawyers failed to fulfill their duty of care by producing legal work that was not candid. Rule 2.1 requires lawyers to inform their clients of the potential adverse consequences if it “appears to be in the client’s best interest.” Failure to disclose a material fact can be equivalent to conscious misstatements. It appears that the OLC had a duty to report relevant case law even if they were instructed, or believed it was reasonable due to the exigency of the

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75 See http://www.justice.gov/olc/.

76 Cole, supra note 2, at 41, 106.

77 The OLC lawyers would prefer to be judged against a “reasonable average lawyer” standard, whereas those who wish for discipline would argue for a standard of “reasonable lawyer of the caliber to be appointed to the OLC.” There is no clear answer as to which standard should be applicable.


79 Those opposed to the legal conclusions leading to the torture memos would argue that the time constraints were irrelevant: though the first memo appeared to have been drafted within a compressed timeframe, the OLC did not retract the findings for years.

80 See Lawyer-Client Relationship Law. Man. on Prof. Conduct (ABA/BNA), (2009).

81 Crispin v. Volkswagenwerk, A.G., 476 A.2d 250, 256 (N.J. 1984) (“In some situations, silence can be no less a misrepresentation than words.”).
“Global War on Terror,” to report only precedents favorable to allowing the torture of detainees.\(^\text{82}\)

**D. A BELIEF THAT THE ADMINISTRATION WAS ENGAGED IN CRIMINAL CONDUCT. (RULES 1.2(E), 1.16, AND 4.1)**

Even if the memos were correct, drafted in good faith, and presented a candid and balanced picture of the law, the Rules still require a lawyer to withdraw from representation, and, in the case of violence, report the wrongdoing to the appropriate authorities, if a lawyer believes that the client will engage in criminal conduct.\(^\text{83}\) The memos were drafted on specific legal questions, such as the standards for conduct for interrogation under 18 U.S.C. §§ 2340-2340A.\(^\text{84}\) However, the torture program as described to the OLC, even if it did not meet the strict definition of torture or happened outside the jurisdictional bounds of U.S. courts and was thus nonjusticiable under the specifics of U.S. law, included activities that easily meet the definition of other crimes. For example, slapping someone or throwing them against a wall meets the definition of assault and battery in any modern legal system. A judge could find that the lawyers believed these crimes would continue but made no effort to withdraw from representation or report them. The Rules offer no quarter to a lawyer who knows his client is likely going to commit a serious crime.\(^\text{85}\)

**IX. CONCLUSION**

The evidence available within the public record as of the date of this article would likely not be sufficient to meet a prosecutor’s burden of showing beyond a reasonable doubt knowing aiding and abetting of torture as defined by 18 U.S.C. §§ 2340-2340A. A prosecutor, with minimally invasive investigation, could uncover this evidence if it does exist. The evidence currently in the public record could likely show criminal aiding and abetting of crimes less than torture.

A judge could find, using only evidence available within the public record, violation of the mens rea for Rules 1.2(e), 1.4, 1.16, 2.1, 4.1 and 8.4, without needing to find that the OLC lawyers recklessly or intentionally wrote the memos in bad faith. Evidence proving or disproving violation of the mens rea of the other Rules may exist, but is not yet in the public record.

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\(^{82}\) *See* H’ford Accident & Indem. Co. v. Foster, 528 So.2d 255, 271 (Miss. 1988) ("The lawyer must give completely honest and straightforward advice to his client, even though unpalatable, at all stages of his legal representation.") C.f. Utah Eth. Op. 02-03 (Stating that lawyers violate their duty of candor by agreeing to limit their independent judgment.)

\(^{83}\) *See* D.C. R. Prof. Cond. 1.2(e), 1.16 and 4.1.

\(^{84}\) Cole, *supra* note 2 at 41.

\(^{85}\) D.C. R. Prof. Cond. 4.1(b) ("In the course of representing a client a lawyer shall not knowingly ... (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.")