

Choose or Lose: Should Corporate Clients Ask Outside Counsel to Give Up Unpopular Pro Bono?

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A handful of lawyers in Texas — in private practice and at the University of Texas School of Law — represent suspected terrorists held in custody at the U.S. Naval Station at Guantanamo Bay in Cuba. It's pro bono work three of the lawyers say is vitally important, because they believe the detainees are entitled to lawyers.

But their work came under fire this month after a senior Pentagon lawyer suggested during a radio interview that corporate clients of the firms representing Guantanamo detainees should pressure the firms to choose between the corporate work or the pro bono detainee work.

"I think, quite honestly, when corporate CEOs see that those firms are representing the very terrorists who hit their bottom line back in 2001, those CEOs are going to make those law firms choose between representing terrorists or representing reputable firms," Cully Stimson, the deputy assistant secretary of defense for detainee affairs, said during a Jan. 11 interview on Federal News Radio, the timing of which was linked to the fifth anniversary of the opening of the detainee prison at Guantanamo.

Stimson's remarks were met by a firestorm of criticism from defense lawyers representing Guantanamo detainees, civil rights groups, bar associations and law school deans. On Jan. 17, Stimson apologized in a letter published in the Washington Post, but his remarks raise an interesting question: Should corporate clients have the right to ask their outside counsel to give up pro bono work for unpopular causes?

Probably not, according to three Texas lawyers who represent detainees, three general counsel of Texas companies and others.

"Any attempts to undermine that [pro bono work] goes against all the values of justice that the legal profession holds dear. I find it highly unlikely that would have any negative impact on the lawyers or the firms," says Scott Sullivan, an assistant professor at the UT law school who has represented detainees since February 2005 when he was an associate with the New York office of United Kingdom firm Allen & Overy.

At Allen & Overy, Sullivan was on a team that represents 11 Guantanamo detainees. At UT, where he is part of a team representing four detainees, Sullivan works with

Derek Jinks, another assistant professor, and Jack Ratliff, an emeritus professor. Jinks could not be reached for comment before presstime on Jan. 19. Ratliff did not respond to requests for an interview before presstime.

According to the New York-based Center for Constitutional Rights, which is recruiting, training and supporting lawyers representing Guantanamo detainees, about 500 volunteer lawyers are filing writs of habeas corpus for the Guantanamo detainees. In Texas, in addition to the UT team, Murray Fogler, a partner in McDade Fogler in Houston, and Fulbright & Jaworski partner Rachel Clingman and associate Audrey Cummings represent a detainee; and Austin's Dicky Grigg, a partner in Spivey & Grigg, also represents detainees.

Fogler, a commercial litigator, and Grigg, who does plaintiffs personal-injury work, each say their clients aren't complaining about their Guantanamo work. In fact, they note, many of their clients go out of their way to express their support for their efforts.

"The people who have mentioned it to me, even if they disagree with a number of aspects of the rights of the detainees, they still don't have any problem with the principle that they deserve representation," Fogler says. "I've had no flak whatsoever."

Fogler says one client has teased him about the fact that when the client does an Internet search for Fogler's name, one of the first items that comes up in search results is the Guantanamo representation, but Fogler says that by and large, his clients have reacted positively. [See "*The Guantanamo Bar Association*," *Texas Lawyer*, Jan. 23, 2006, page 1.]

Grigg notes that even clients who are conservative politically support his detainee work.

Grigg says Stimson's remarks are "despicable, disgusting and bordering on unethical" while Fogler says the Pentagon lawyer's remarks are "morally repugnant and ethically ridiculous."

In addition to suggesting corporate clients should pressure their outside counsel to give up the Guantanamo work, Stimson also said during the interview that "it's not clear" who is paying the U.S. lawyers to defend the hundreds of individuals who have been held in Guantanamo Bay.

"Some will maintain they are doing it out of the goodness of their heart, that they are doing it pro bono, and I suspect they are. Others are receiving monies from who knows where, and I'd be curious to have them explain that," Stimson said.

Fogler and Grigg are working pro bono on the detainee cases.

Stimson's remarks "attacked one of the factors that makes American law great, or I guess so much better than anywhere else — the legal system believes everybody has access to representation," Grigg says.

Grigg is one of a handful of lawyers in Texas who represent Guantanamo detainees, but he is not alone in his view of Stimson's remarks.

"He's been rightfully criticized by virtually every segment of the bar. The ABA has come out against him, a group of [law] professors has come out against him and of course, the Guantanamo lawyers are up in arms against him. It distracts from the issues," Fogler says.

Karen Mathis, president of the American Bar Association, said in a statement that the ABA believes everyone facing a loss of freedom deserves legal representation.

"Had Stimson's suggestion gained currency, had corporations been bullied into not doing business with law firms that protect unpopular clients, we all would have been put at risk. Such out-of-court tactics could be used to undermine any American's right to a fair defense in a criminal trial," wrote Mathis, a partner in the Denver office of McElroy, Deutsch, Mulvaney & Carpenter.

The Association of Corporate Counsel, the Washington, D.C.-based group of in-house lawyers, issued a statement saying its members want their outside counsel to do pro bono work, such as the Guantanamo representation.

And on Jan. 16, 130 U.S. law school deans — including James Alfini of South Texas College of Law in Houston, Cynthia Fountaine of Texas Wesleyan University School of Law in Fort Worth, Walter Huffman of Texas Tech University School of Law in Lubbock, Bill Piatt of St. Mary's University School of Law in San Antonio and Lawrence G. Sager of the UT law school — signed a statement criticizing Stimson's remarks.

In the statement, the deans said they are appalled by Stimson's remarks and say that it's important that the Guantanamo detainees receive legal representation.

"At this moment in time, when our courts have endorsed the right of the Guantanamo detainees to be heard in courts of law, it is critical that qualified lawyers provide effective representation to these individuals. By doing so, these lawyers protect not only the rights of the detainees, but also our shared constitutional principles," the deans wrote.

Stimson said during the radio interview that 395 suspected terrorists are being detained at Guantanamo and 377 others have been transferred or released.

Hire Power

Three general counsel in Texas say an outside counsel's pro bono work, even controversial work such as representing Guantanamo detainees, isn't a big concern of theirs.

Joe A. Davis, executive vice president and general counsel of Crosstex Energy Inc. in Dallas, says it's possible that a firm's political position on an issue could affect how

he feels about a firm, but Guantanamo representation isn't one of those issues.

"Certainly at times, all businesses take political positions that are going to affect who they do business with, but lawyers are a little different, because there is that underlying obligation to represent people who need representation. They need more latitude," Davis says.

For example, Davis says, it's clear to him that a lawyer who is defending an individual charged with multiple murders is not an advocate of mass murder.

But Davis says it's offensive that Stimson, as a U.S. Department of Defense lawyer, would suggest that CEOs should pressure their lawyers to give up controversial pro bono work.

"Could you imagine the Dallas County DA coming out and saying that people ought to boycott law firms that represent criminals?" Davis asks.

John Torres, senior vice president, general counsel and secretary of Freescale Semiconductor in Austin, says pro bono work such as the Guantanamo detainee representation would not be a factor in his decision on whether to hire a particular firm.

"My view is everybody is entitled to adequate legal representation in our legal system, so I'm not going to bear a grudge," he says.

Torres says he looks at the quality of the lawyers in the firm, the ease of doing business with them — their availability and responsiveness — and cost. Also, he says, he looks at the number of minority attorneys a firm assigns to his work.

Michael Nichols, senior vice president, general counsel and secretary of Sysco Corp. in Houston, says he looks at lawyers' competence in their practice areas, not their political or social affiliations. He notes that lawyers have a responsibility to their communities to do some kind of pro bono work.

James Sales, counsel at Fulbright in Houston who is chairman of the Texas Access to Justice Commission, says he would be surprised to hear of situations where a corporate client objects to a firm's pro bono work.

"I think most clients, at least the ones we generally represent, are sophisticated users of legal services and as a consequence, they understand the lawyers' obligation that results from the privilege of being licensed to practice law — that is to serve the public good and represent anyone who needs the representation," Sales says.

"Everyone, even the most unsavory of people, have an opportunity to be represented in court," he says.

Clingman, the Fulbright partner working with Fogler on a Guantanamo case, was on vacation last week and could not be reached for comment.

Stewart Gagnon, a partner in Fulbright in Houston who oversees the firm's pro bono efforts, says corporate clients do ask him about the firm's pro bono work, but those clients are inquiring because they want to know if the firm is doing a public service by helping people. That's not information the firm is trying to hide, he says.

Gagnon says since he has been at the firm, he has not been aware of any client ever asking the firm about specific types of pro bono work with the goal of forcing the firm to refrain from a particular type of work.

Years ago, the firm took some grief from clients over work done by partner Leon Jaworski, Gagnon notes.

"I know from a historical standpoint that when Col. Jaworski helped integrate the public schools in Mississippi, we had some clients who weren't happy with that representation. That was back in the early '60s . . . but we did it anyway," he says.

The situation is different today, Gagnon says. He says some of the firm's clients, instead of trying to get the firm to refrain from a particular type of pro bono work, instead ask the firm to help them with a pro bono project. Gagnon says, for instance, Fulbright and client Exxon Mobil Corp. of Irving do pro bono work together for Avenue CDC, a community development corporation in Houston, and have partnered with the legal department at Shell Oil Co. in Houston on pro bono clinics.

In his apology letter on Jan. 17, Stimson says his comments left the misimpression he questions the integrity of lawyers working on the defense of detainees in Guantanamo.

He notes that he mentioned during the interview that he supports pro bono work, he worked as a criminal-defense lawyer while serving in the Navy Judge Advocate General's Corps, and he represented unpopular clients during that time.

"I apologize for what I said and to those lawyers and law firms who are representing clients at Guantanamo. I hope that my record of public service makes clear that those comments do not reflect my core beliefs," Stimson wrote in the letter.