

# **GARDEN STATE CLE LESSON PLAN**

**A 2.0 credit course**

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## **DEFENDING DETAINEES AT GUANTANAMO BAY**

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**Featuring...**

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### **Program description**

This 2.0 credit CLE program takes a look inside the tangled web of representing “enemy combatants” with Prof. Mark Denbeaux. Prof. Denbeaux has made more than 50 trips to Guantanamo Bay, and he has represented multiple “Gitmo” detainees; this experience led him to spearhead an internationally recognized series of reports on the Guantanamo Bay Detention Camp coming out of Seton Hall University.

## **I. Introduction**

- **10 years ago – Supreme Court held that detainees at Guantanamo were entitled to some sort of due process proceeding**
- **Started representing 2 clients**
- **Attempt of how to invent a legal system, what standards count, are we as lawyers doing what we are supposed to or are we part of a sham that is trying to look like a legal process**

## **II. What is the role of lawyers when inventing a legal system?**

- **Supreme Court said that detainees had right to legal counsel**
- **Appointed to represent 2 Tunisian men**
- **Filed habeas corpus on their behalf**
- **How do you represent someone who has not asked to be represented**
- **Appointed by government to represent them – not sure they wanted a lawyer**
- **Not allowed to talk to clients by phone – had to meet in person and get security clearance first**
- **Clearance took 6 months**
- **1 year after appointed – were able to visit their clients**
- **When met clients they did not believe that they were really lawyers**
- **Lawyers from all over the country flying in to represent detainees**
- **All habeas applications had to be filed in Washington, DC**
- **Clients were chained to floor during interview to protect the attorneys – no danger – never has been**
- **One client was approved for release in 2006 and 2009 – still there**
- **Lawyers have won nothing and have gained nothing for their clients – so are they acting as attorneys**
- **Habeas petitions filed but never lead to release**

## **III. Attorney client relationship**

- **Can only see clients for 2.5 hours per day for 2 days**
- **Only in person**
- **Cannot call client**
- **Can only fly down there**
- **Guards would tell attorneys that clients would throw feces at them but turns out that it never happened**
- **Clients would ask who is paying attorneys? Do you work for the government?**
- **Clients believed that attorneys were interrogators**

- **Interrogators had dressed up like attorneys to get information so when real attorneys come in they are not trusted**
- **Difficult to establish relationship with client because lack of trust, client doesn't know who attorney is and attorney does not know client**
- **Attorneys did not know why clients were there – so how can attorneys help?**
- **Unable to discuss information in classified files that attorneys were given which includes what the charges are against them**
- **Are we lawyers in a system that is not really a system?**
- **Lawyers are misinformed about cultural, religious, and language issues held by each client**
- **Members of the bar came out in full force to represent the detainees**
- **After you see the client, the client must sign a retainer agreement asking attorney to represent him**
- **Clients would not sign because in English and does not make sense – but if cannot sign then cannot be represented**
- **Attorneys have not accomplished much by visiting clients and filing papers**
- **Clients can send attorneys written communications – takes 3 weeks to be sent – reviewed by a review team – held outside Washington in a file that does not leave – must go to see the actual document**
- **Difficult to have written communication because of language barrier – translators must also have security clearance**
- **Attorney-client privilege is not important until attorney-client relationship is established because without relationship client won't tell attorney anything that falls within the privilege**
- **Early on the clients did not know English so it was difficult to communicate with clients – interpreters reduced amount of time that could spend with client because time to interpret conversation – now clients have learned English**
- **Restrictions on attorney client relationship**
- **Opportunity to talk to clients privately and freely is a real problem**
- **Not clear to the lawyers what they are doing in Guantanamo Bay**
- **Lawyers would figure out ways to communicate with clients what the charges were about without actually telling them**

- **Lawyers all told that there were really bad people being detained there**
- **Lawyers felt that allegations against clients did not make sense**

#### **IV. Torturing clients**

- **CIA withheld evidence about treatment**
- **FBI complained about CIA's treatment of detainees**
- **Over 211 abusive techniques**
- **Harming of genitals**
- **Denial of food and water**
- **Religious abuse – forced baptisms**
- **Turned heat off**
- **Not allowed to go to bathroom**
- **Clients won't talk about abuse**
- **Treatment led clients to doubt American legal system**
- **Habeas clients were first to leave**
- **FBI agents were reporting what was happening**
  - **Detainees chained in fetal position to the floor and left for 18+ hours**
  - **Interrogators told MPs to keep detainees in that position**
  - **Turned on heat such that detainees were almost unconscious**
- **Attorneys had no idea of this torture to clients which lead to distrust by clients because attorneys were uninformed**

#### **V. Legal process**

- **2 aspects of litigation: habeas litigation and military commission litigation**
- **Habeas litigation:**
  - **Law not very helpful**
  - **Detainee remained in Guantanamo during hearing and would be on video with one lawyer in court and another lawyer with client – client can only hear declassified information**
  - **Federal judge can grant habeas but cannot force the state department to remove someone, to send to another country, or send to US – separation of judicial branch and executive branch**
  - **Even if won habeas motion, could not get out**

- **Court of Appeals adopted policy that said court must assume that all gov't evidence is reliable, i.e. anonymous information as a result of torture**
- **Military commission:**
  - **If prosecuted this way, you did not want to win because if won would be enemy combatant who would remain at Guantanamo Bay indefinitely**
  - **Prosecutions are complete disaster – not working**
  - **If plead guilty cannot be executed**
  - **FBI contacted paralegal for defense team and then disclosed information and signed failure to disclose document – but now that has come to light – waiting for independent investigator to resolve issue**
  - **Cannot use the word “torture” in oral argument or anywhere else – part of rules**
  - **Individuals being convicted for laws that were ex post facto laws – Court of Appeals reversed convictions because of this**
  - **Must be a violation of the laws of war but these laws do not recognize conspiracy**
  - **Individuals had to be prosecuted for actual acts – if cannot prosecute for conspiracy then how do you prosecute?**
  - **Reliable hearsay is admissible – defendant won't know where the hearsay comes from because it is classified**
  - **Sometimes need client to stipulate to facts that are not true in order to plead guilty and be released – ethical dilemma**
  - **No right to be charged and if you are charged no right to speak at trial**
  - **No credit for time served until you are charged**

## **VI. Structure of Guantanamo Bay**

- **Guards are 18-19 years old**
- **Guards cannot tell detainees their names because of safety threat**
- **Guards told that detainees are out there to kill Americans and you are there to save and protect**
- **There is little control because of youthful age of guards**
- **FBI attorneys prevented FBI from torturing detainees – no the same for CIA**
- **Law enforcement has interrogation techniques that work without torture**

- **Judges during trial have the ability to screen out classified information**
- **Judges are military judges**
- **CIA had control over the buttons that regulated what evidence and information was coming out at trial**
- **Cameras in interview rooms “for safety” – systematically recording interviews with attorneys**
- **Former CIA intelligence facility is where attorneys were meeting with clients**
- **Hearing devices disguised as smoke detectors**
- **Cameras in interview rooms are so powerful that can read attorney notes**
- **Even after eavesdropping on attorneys was discovered government denied that it was being used because guards were told not to use, said that equipment was not working, equipment was repaired, did not exist, did not function, power supplies were removed when attorneys discovered it – all contradictory excuses**
- **Any documents that attorney wants to provide to client – all 4 government agencies must see and approve first**
- **Government does not care about role of attorney client relationship and confidentiality**
- **Listening devices were so strong that can be sent to a building 100 feet away and then transmitted to where ever**

## **VII. Future of Legal Representation in Guantanamo Bay**

- **Attorneys as a profession will overcome the issues attorneys are faced at Guantanamo**
- **Nothing distinguished background check for secret or top secret information**
- **Can only look at top secret documents in secure facility in Washington**
- **Pressure on lawyers were enormous because protective order took months to complete**
- **Need attorney client relationship and discussions that are protected**
- **Most lawyers don't believe that clients have not done anything wrong**
- **ICRC can only report to the government where the violations are taking place**

