ILLINOIS STATE BAR ASSOCIATION

JUNE 2016 VOL 14 NO. 4

Federal Civil Practice

The newsletter of the Illinois State Bar Association's Section on Federal Civil Practice

So you've been asked to take a prisoner litigation case

BY STANLEY WASSER, FELDMANWASSER, SPRINGFIELD, IL

Yes, as a member of the federal bar, you may be called upon to take on a prisoner litigation case. In other words, a state prisoner has filed a *pro se* lawsuit alleging one or more civil rights claims, and possibly pendant state claims, against one or more correctional supervisors or employees, and possibly against nurses, doctors, or corporate entities with whom the state has contracted with to furnish medical services to its prisoners. The case may have been pending for some time. Prior requests by the prisoner for appointment of counsel may have been denied. There may be one or more summary judgment rulings in the record. The case could be coming up on the trial calendar. The federal judge has contacted you to take the case *pro bono*. Assuming no conflicts of interest, the case is now yours. Take a deep breath. Don't panic. You can do it—even if you have not handled a civil rights case before.

This article is intended as a general guide to get you familiar with and to walk you through some of the essentials of handling this type of case.

First, the obvious: you need to promptly "get your hands around" the file. So download from PACER the case docket and get the key case filings. As with any other case that you take on that did not originate with your office, study the complaint, the answers and any affirmative defenses; review any prior Rule 12 motions and orders thereon; review any prior summary judgment motions and orders thereon. Also, review any written discovery requests and responses and the transcripts of any depositions taken to date.

Second, locate your client and find out how to communicate with him/her. Assuming your client is serving a prison term in an Illinois correctional facility, first click on and read the Attorney facts page of Illinois DOC found at: <http://www.illinois.gov/idoc/aboutus/Pages/AttorneyFAQ.aspx>. See also the IDOC rules at 20 Illinois Administrative Code Part 525 regarding visitation, mail, and telephone calls. Contact the facility and learn what telephone numbers you will need to call and who you may need to speak to in order to arrange phone conferences and in-person visits with your prisoner client. There will be time limits on the phone calls and visits. Find out what they are and be prepared to stick to them. I have found that if you prepare an agenda of topics that you want to cover, you can have a productive conversation within the time limits. The correctional personnel you talk to about this can be helpful, so treat them kindly.

Also, make sure that you read the Illinois DOC rules regarding how to handle mail from an attorney to your client. Your envelopes must bear the logo "Legal Mail" or "Privileged" and must show your firm's name. I suggest making a sticker label that you can attach to the envelope that reads: "PRIVILEGED CLIENT/ATTORNEY CORRESPONDENCE - LEGAL MAIL - OPEN ONLY IN PRESENCE OF RESIDENT." I also suggest that letter itself prominently indicates that it is "Privileged & Confidential - Attorney-Client Mail." For any papers you send your client as an attachment to your letter, I suggest that you sandwich them between a brief cover at the top and bottom; that you put several pieces of tape around the edge of this paper sandwich so that your client can tell if someone was reading the papers; that you spell out in your first communication to your client that this is how you will be transmitting paperwork to him/her; and that you alert your client to let you know if he/she suspects tampering with the paperwork. I further suggest that you tape the outer envelope shut. Keep track of when you sent mail to your client and

confirm with him/her when they received it so that you can know if the facility mail room is properly processing your attorney-client mail. Likewise, as you certainly will be getting letters from your client, save the envelope and compare the date your client puts on his/her letter (tell him/her to date their letters) with the postmark date. Oftentimes, your client's letter and your last letter may have crossed in the mail. Also, don't forget—no staples, paperclips, binding clips or apparatus can be sent to your client.

As for visiting your client in-person, you likely will not be able to take a brief case into the facility; so you have to carry your papers in folders. Again, no staples, paperclips, or binders of any kind. You and your paperwork will be searched. Leave your money, wallet, phone, and change in your car. Bring only your driver's license, ARDC card, and a quarter so that you can use the locker in the processing point for locking up your car keys, your hat and coat, and anything you brought with you that is not allowed in the facility. Be prepared to possibly wait to process in, so arrive and get yourself checked in early.

Third—network. Reach out and find another attorney who has handled a prisoner litigation case at your courthouse. Their assistance will be invaluable. In addition, promptly review the various publications which the ACLU issues and which the AELE Law Enforcement Legal Center issues on the various aspects of prisoner litigation. These can be found easily on the internet. You may also want to look at and pull up documents on PACER from other prisoner litigation case dockets from your court. Another helpful resource is the "Federal Court Prison Litigation Project Handbook Part II" which is available on the internet.

You are now ready to proceed. If you are fortunate, you will have time to do these first three steps before the first court hearing in which you appear. You will learn that your client may appear via video. Be prepared to caution your client if he/she starts speaking about things that they probably should not say out loud, other than to you. Also remember, that there are correctional officers very near your client when he/she is on video so the conversation you have with your client can be overheard. If you need to you might the federal judge to permit you to remain for a brief time in their courtroom after the first hearing ends so that you can speak briefly with your client before the video feed shuts off. Again, there is no privacy in that conversation. Confidential matters should be left to the phone calls or the letters or the personal visits.

Just like any other case, you need to marshal and master the facts and the law. Just like any other case, a good starting point is the federal jury instructions. Any summary judgement orders previously entered in the case may prove helpful. If your client's claims involve discrimination or retaliation claims, you will want to pay close attention to the case law that addresses the allocation of burdens of proof and persuasion in mixed-motive cases.

One statute you must review is the Prisoner Litigation Reform Act of 1996 ("PLRA"), 42 U.S.C. '1997e. That Act is likely to cover every federal claim your client has filed, for it covers any "action... brought with respect to prison conditions under section 1983 of this title, or any other Federal law...." 42 U.S.C. '1997e(a). "Prison conditions" has been defined to include "any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but do not include habeas corpus proceedings challenging the fact or duration of confinement in prison." 18 U.S.C. ' 3626(g)(2). The Supreme Court in *Porter v. Nussle*, 534 U.S. 516, 532 (2002), held that "the PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." Complaints about medical treatment in prison are complaints about "prison conditions". *McCarthy v. Bronson*, 500 U.S. 136 (1991)

Persons held under the Illinois Sexually Dangerous Persons Act are prisoners for PLRA purposes. *Kalinowski v. Bond*, 358 F.3d 978, 979 (7th Cir.), *cert. denied*, 542 U.S. 907 (2004).

The PLRA damage limitation provisions and the exhaustion requirements (both discussed below) covers claims under the federal Rehabilitation Act of 1973 [42 U.S.C '701 *et seq*.] or the federal Americans with Disabilities Act ("ADA"). [42 U.S.C. '' 1211112213], which acts apply to prisoners. *See Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206 (1998); *Cassidy v. Indiana Dept. of Corrections*, 199 F.3d 374 (7th Cir. 2000). The only difference between a Rehabilitation Act claim and an ADA claim is the element that the defendant IDOC received federal funds. *Jaros v. Illinois Department of Corrections*, 684 F.3d 667, 671-72 (7th Cir. 2012) (relief under the Rehabilitation Act and ADA are coextensive and the analysis under both acts is the same, save for the element of federal funding under the Rehabilitation Act); *Wagoner v. Lemmon*, 778 F.3d 586, 592 (7th Cir. 2015) (Rehabilitation Act and ADA are "functionally identical"). As discussed below, the attorney's fee limitations provisions of the PLRA do not apply to Rehabilitation Act, but may apply to ADA claims.

The PLRA imposes a significant limit on damages. The Act provides that unless you establish physical injury, you cannot recover for mental or emotional distress. [42 U.S.C. ' 1997e(e)] The requirement of physical injury only applies to money damages; it does not apply to claims for injunctive or declaratory relief. There is some case law that would indicate that nominal or punitive damages could be recovered even if compensatory damages are barred by reason of lack of evidence of physical injury. You will also need to research the issue of what constitutes sufficient harm to qualify as physical injury if you intend to seek recovery for mental/emotional distress. The basic standard is that the physical injury must be more than *de minimis* to defeat the emotionalinjury bar under 1997e(e), but the physical injury need not be significant. *See Outlaw v. Newkirk*, 259 F.3d 833, 839 (7th Cir.2001) (swelling, bruising, discoloration, and numbness of inmate's hand constitutes *de minimis* injury that "strongly suggests" that the force applied was *de minimis*); *DeWalt v. Carter*, 224 F.3d 607, 620 (7th Cir.2000)

(bruises suffered by inmate after being shoved into wall by guard were *de minimis* as this was a single, isolated act that did not result in further force and the prisoner's injuries were not particularly serious). For an instructive discussion on the issue of what is a *de minimis* injury, *see Schultz v. Pugh*, 728 F.3d 619, 621 (7th Cir. 2013).

The PLRA also addresses attorney's fees. Although you are taking the case *pro bono*, you may prevail and be entitled to recover attorney's fees under Section 1988. Although not worded clearly, the Act has been interpreted to limit attorney's fees in damage cases to a maximum of 150% of the awarded damages and with up to 25% of the awarded damages being used to pay attorney's fees. The PLRA further provides that in prison actions "in which attorney's fees are authorized under section 1988," such fees may not be "based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18. 42 U.S.C. ' 1997e(d)(3). *See e.g. Johnson v.* Daley, 339 F. 3d 582, 608 (7th Cir. 203); *Shepherd v. Goord*, 662 F.3d 603, 607 (2011) (notwithstanding that this law is "not a model of clarity" the court felt no need to apply cannons of construction nor resort to legislative history).

For a good overview of the Act, see the ACLU publication found at ACLU's website [aclu.org] by entering the Act's name in their search box. You will come up with a significant list of helpful "know your rights" publications prepared by ACLU that will aid you in your representation. You can refine your search term as need be, such as searching further for disabilities. See also the AELE paper on attorney's fees found at <http://www.aele.org/law/2016all01/201601MLJ301.pdf>.

If you prevail on a federal Rehabilitation Act claim, you have an independent basis to seek attorneys under 29 U.S.C. '794a(b) [fee provision of 505(b) of the Rehabilitation Act] because the Rehabilitation Act is not included in the list of statutes to which Section 1988 applies. *See Armstrong v. Davis,* 318 F.3d 965 (9th Cir. 2003), holding that Section 1997e(d)(3)'s cap on awards of attorney's fees authorized by 42 U.S.C. '1988 does not apply to the successful litigation of ADA or RA claims. *See also Beckford v. Irvin*, 60 F. Supp. 2d 85, 88 (W.D.N.Y. 1999) ("The PLRA does not limit the award of attorney's fees to a prevailing plaintiff whose award is authorized under a statute separate from ' 1988."); *accord Caruthers v. Proctor & Gamble Mfg. Co*., 177 F.R.D. 667, 668 n.1 (D. Kan. 1998) ("The ADA is not one of the statutes embraced by the fees-shifting provision in 42 U.S.C. ' 1988(b)."). But see *Cassidy v. Indiana Dept. of Correction*, 199 F.3rd 374, 376 (7th Cir.1999), suggesting that the PLRA attorney fee limitations apply to ADA cases even though the ADA has its own remedial scheme designed to redress discrimination, including a separate attorney's fees provision, 42 U.S.C. sec. 12205. Other circuit courts say that the PLRA limitations do not apply. *See e.g. Armstrong v. Davis*, 318 F.3d 965, 973-974 (9th Cir. 2003).

You should also be aware that at the time of your appointment as counsel, your client will likely receive a fee agreement form that your client must sign acknowledging that any fees due will remain as a lien against any further settlement or judgment award and that you will be reimbursed fees and/or costs from any settlement or any award that you may receive.

While we are on the subject of damages, and particularly if you have not done civil rights work, understand that in *Memphis Community School District v. Stachura* 477 U.S. 299, 306 (1986) (a First Amendment rights case), the Supreme Court held that "damages based on the abstract 'value' or 'importance' of constitutional rights are not a permissible element of compensatory damages" in '1983 cases. Thus unless you establish an injury other than the violation of your client's constitutional rights, the most that you can recover in compensatory damages is nominal damages of $1. *Carey v. Piphus*, 435 U.S. 247 (1978). You may be able to recover punitive damages [*Smith v. Wade,* 461 U.S. 30, 56 (1983)] but, as you know, given what you have to establish by way of proof—the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others—punitive damages may not be likely unless you have a dramatic fact pattern.

You may find that your prisoner client does not have an understanding of the limitations which the law imposes on his/her ability to recover damages. Your client may have been subjected to retaliation for exercising his/her First Amendment grievance rights and spent three days in solitary with loss of privileges. But whereas your client may believe they should get significant monies if they win this claim, the law says otherwise. I suggest that it is prudent to write out a memorandum that you give to your client, early on in your representation, outlining the law regarding the damages that he/she may recover for the various asserted claims, as well as spelling out any restrictions or limitations on the ability to recover such damages, either by way of settlement or at trial.

Since the possibility of recovering attorney's fees exists, you will want, from the first moment to keep accurate and detailed time records, broken down as much as possible on a claim by claim/defendant by defendant basis. For you may end up going to trial on less than all claims that you work on and you may not prevail on all claims at trial.

One of the first lawyer things you are going to want to do is to decide if you need to file an amended complaint. Don't be surprised to find the case pending on the first, second, or third *pro se* amended complaint. There may be claims which your prisoner client has asserted that have little or no merit and should be dropped. Make sure you discuss this with your client before moving to dismiss claims. There may be claims which your prisoner client has asserted that should be restated, especially if the *pro se* complaint contains unnecessary commentary or remarks, particularly inflammatory remarks. There may be claims which the federal judge in a pretrial ruling or order has indicated may exist that are not included in the pending complaint and thus need to be added. For example, your client may have alleged Eighth Amendment claims of deliberate indifference to a serious medical condition, and the federal judge has recognized that a claim against the State may exist under the federal Rehabilitation Act.

Another lawyer thing that you are going to want to get on top of quickly is whether you need further discovery. The federal judge will likely allow this. But keep in mind that if you add new things into the complaint or disclose additional witnesses or documents, or even if you are permitted to conduct some additional discovery, the defendant(s) are likely also to be allowed some additional discovery. At a minimum you are going to want to get your client's IDOC records, such as grievance file records; disciplinary records; and medical records. See the IDOC rules regarding access to records set out at 20 Illinois Administrative Code Section 107.310.

What about the defenses that you may confront? The commonly asserted defenses are (i) failure to exhaust the grievance process; (ii) qualified immunity; (iii) lack of personal involvement; and (iv) failure to mitigate damages.

Exhaustion

Section 1997(e)(a) of the PLRA provides that "[n]o action shall be brought with respect to prison conditions ... by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." The IDOC grievance process is set forth at 20 Illinois Administrative Code Part 504, Subpart F. You will therefore want to make sure that you get from your client, or through additional discovery, the entire grievance record underlying each claim. Review the paperwork and make sure that your client did in fact exhaust the necessary grievance procedure before filing suit on a claim. You will want to pay close attention to the specific grievance your client did make in his/her grievance paperwork and compare it to the claim which your client set out in his/her *pro se* complaint to make sure that you can avoid an exhaustion defense. If your client did not file the necessary grievance prior to filing suit, you can either take the initiative and dismiss the claim, or alternatively, sit tight and see if the defendant seeks summary judgment to have the claim dismissed. If neither of these steps happen, be prepared to have the defense raise the failure to exhaust defense. Whether your client properly exhausted his/her remedies is decided by a court hearing, not by a jury. *Pavey v. Conley*, 544 F.3d 739, 742 (7th Cir. 2008) (prisoners have no Seventh Amendment right to a jury trial on fact issues related to exhaustion).

Here are some pertinent legal principles regarding the exhaustion requirement: In order to exhaust, a prisoner "must take all steps prescribed by the prison's grievance system." *Ford v. Johnson*, 362 F.3d 395, 397 (7th Cir.2004). An inmate must comply with the rules established with respect to the form and timeliness of grievances. See *Pozo v. McCaughtry*, 286 F.3d 1022, 1023B25 (7th Cir.2002) (barring a prisoner who failed to avail himself of the administrative grievance process in a timely manner from pursuing relief in federal court). The Illinois Administrative Code, provides that prisoner grievances:

> shall contain factual details regarding each aspect of the offender's complaint, including what happened, when, where, and the name of each person who is the subject of or who is otherwise involved in the complaint. This provision does not preclude an offender from filing a grievance when the names of individuals are not known, but the offender must include as much descriptive information about the individual as possible.

20 Ill. Admin. Code ' 504.810(b). Your client must only exhaust those administrative remedies which are available to him, so if prison officials have failed to respond to your client's grievance or indefinitely delayed their response, the grievance remedies will be rendered "unavailable," and. *Lewis v. Washington*, 300 F.3d 829, 833 (7th Cir. 2002) Note: There is no exception on the basis that exhaustion would be futile or that money damages or other relief or remedy cannot be provided. *Perez v. Wisconsin Dept. of Corrections*, 182 F.3d 532, 536-37(7th Cir. 1999)

Qualified Immunity

This defense is a commonly asserted defense in civil rights litigation. You will need to get up to speed about this defense. In a nutshell, this defense means that even if the defendant committed the alleged act, the defendant is still immune from liability if the defendant can show that at the time the defendant committed the act the defendant's conduct did not violate established statutory or constitutional rights of which a reasonable person would have known. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) For a right to be "clearly established at the time of the alleged violation", there need not be binding precedent on all fours with the current case. Instead, the unlawfulness must have been apparent in light of pre-existing precedent and officials may be on notice even in "novel, factual circumstances". *Miller v. Jones*, 444 F.3d 929, 934 (7th Cir. 2006), *citing Anderson v. Creighton,* 483 U.S. 635, 640 (1987) (the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right) and *Hope v. Pelzer,* 536 U.S. 730, 741 (2002) (officials may be on notice even in "novel factual circumstances"). To overcome this defense, you need not point to a case identical to your client's case. Rather, you need only show that "in light of pre-existing law, a reasonable defendant would have known that his actions were unlawful." *Alvarado v. Litscher*, 267 F.3d 648 (7th Cir. 2001). You need not cite a case at all if the constitutional violation is obvious. *Eberhardt v. O'Malley*, 17 F.3d 1023, 1028 (7th Cir. 1994).

Lack of Personal Involvement

This defense may present itself where your client has asserted claims against correctional supervisors, officers, or employees who had no personal involvement in the conduct that your client complains about. A[A]n official meets the 'personal involvement' requirement when 'she acts or fails to act with a deliberate or reckless disregard of plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent.' A *Black v. Lane*, 22 F.3d 1395, 1401 (7th Cir.1994) (quoting *Smith v. Rowe*, 761 F.2d 360, 369

(7th Cir.1985)); *Walker v. Rowe*, 791 F.2d 507, 508 (7th Cir. 1986); *Duckworth v. Franzen*, 780 F.2d 645, 650 (7th Cir. 1985) *accord Volkman v. Randle*, Not Reported in F.Supp.2d, 2011 WL 5547685 C.D.Ill.,2011 citing *Conner v. Reinhard*, 847 F.2d 384, 397 (7th Cir.1988) ("The requisite causal connection is satisfied if the defendant set in motion a series of events that the defendant knew or should reasonably have known would cause others to deprive the plaintiff of her constitutional rights").

As for supervisor liability, *see Kernats v. O'Sullivan* 35 F.3d 1171 (7th Cir. 1994) (police chief is not liable for subordinate's wrongdoing absent an allegation that the chief "observed, directed, ignored, approved, participated in any way, or even knew about the incidents" alleged to be constitutional violations). A defendant's position as a supervisory correctional official is insufficient to support an inference of personal involvement in an alleged constitutional violation. *Williams v. Faulkner*, 837 F.2d 304, 308 (7th Cir.1988). Mere awareness of an alleged violation likewise does not make the official personally responsible. *Crowder v. Lash*, 687 F.2d 996, 100506 (7th Cir.1982) (plaintiff's allegations that he informed the defendant personally and by letter of the claimed constitutional violations do not constitute personal involvement sufficient to assert liability under ' 1983). Rather, your client must show personal participation by the supervisor, or that the challenged actions occurred based on the supervisor's order or by the supervisor's consent. Supervisory liability may attach where a supervisor, with knowledge of a subordinate's conduct, approves of the conduct and the basis for it. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988); *Fiorenzo v. Nolan*, 965 F.2d 348, 351 (7th Cir.1992); *Jones v. City of Chicago*, 856 F.2d 985, 992 (7th Cir.1988) ("The supervisors must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see.").

Mitigation of Damages

This defense may be an issue in your case, especially if your case involves an Eighth Amendment claim for deliberate indifference to a serious medical condition. Make sure you explore this defense with your client. Seventh Circuit Pattern Jury Instruction 3.12 is the mitigation instruction but you will need to adapt the instruction to your case.

Anyone who has done civil trial practice in federal court knows that coming into the final pretrial hearing, the parties will need to submit a pre-trial order. See your local district court's rules. Although the format between district courts may be a little different, this order will set out a statement of the claims and defenses; outline the material facts that are agreed to; outline the material fact issues that will be addressed at trial; outline an agreed statement of the applicable legal principles; outline the parties' individual contentions about legal principles that are not agreed to; list the parties' witnesses; and list the parties' evidentiary exhibits. So knowing this is coming, you should be working up your case in a manner that allows you then to be prepared to easily prepare the pre-trial order.

I suggest that once you take on the case that you start preparing individual file memorandum on each of the claims. Outline the facts from the pleadings, the written discovery, the depositions, or otherwise. Outline the case law that applies to the claim and any defenses thereto, as well as the subject of damages. Outline what the jury instructions will require. You can and perhaps should lay out your thoughts about the strengths and weaknesses, both factually and legally, about the claim. Not only can you keep building on theses memorandum to guide you through handling the case, but that you give copies of these memorandum to your client so he/she better understands what their case is about and what is coming down the pike in the courtroom at trial. These memoranda also serve the purpose of helping to prepare your client for any depositions they must give as well as preparing them to testify at trial.

One of the more ticklish areas in civil rights practice arises for claims involving First Amendment retaliation claims, Discrimination Claims, or ADA/ Rehabilitation Act claims. Under the applicable law, there is a burden shifting matrix that you have to navigate and that will have to be properly spelled out in the jury instructions. Presently the Seventh Circuit Pattern Civil Instructions are not that helpful and you will have to build the jury instructions from the applicable case law. The Seventh Circuit has mixed motive instruction 4.02 in the ADA context. On the Seventh Circuit's website, you will see Section 1983 case instructions under consideration that touch on how to address mixed motives. You are going to want to look at the following cases: *Volkman v. Randle*, Not Reported in F.Supp.2d, 2011 WL 5547685 at *10-11 (C.D.Ill.,2011) *citing Greene v. Doruff*, 660 F.3d 975, 979-80 (7th Cir. 2011) (retaliation claims); *Serwatka v. Rockwell Automation Inc.*, 591 F3d 957 (7th Cir. 2010) (ADA claim); *Hoffman v. Bradley University,* Not Reported in F.Supp.2d, 2012 WL 4482173 (C.D.Ill.,2012) (citing *Serwatka* for Rehabilitation Act claim).

A few additional comments about jury instructions. Your client may never have been through a jury trial and may not understand how jury instructions work. You will eventually need to familiarize your client about the standard instructions and verdict forms as well as the more important issue instructions, burden instructions, and instructions that define terms in the burden instruction. You may find that because the federal judge has done numerous prisoner cases, the federal judge will prepare and give you the "court's instructions" for the case, and ask you to submit either a revised version of the court's instruction and/or a supplemental instruction, meaning one covering a topic that the court has not covered in the "court's instructions." Just because they are the "court's instructions" may not mean that they accurately recite the law, so double check them and be prepared to tender and argue an alternative instruction if need be.

One of the most important matters that you will need to address both in *voir dire* and in the jury instructions is that your client, although a prisoner (and most likely a convicted felon) has constitutional rights that are fully in effect while your client is in prison and which rights prison officials and employees cannot, as a matter of law,

violate. *See e.g.* Seventh Circuit Pattern Instruction 1.03 (that you will need to modify). In *voir dire,* you will want the court to explore this with prospective jurors and to ensure that they can accept this principle. You are also going to want to have an appropriate jury instruction given on this principle. Race and gang affiliation may likewise be an issue that you may have to address in *voir dire*.

Unlike a federal civil jury trial where the plaintiff is not incarcerated, representing a plaintiff who is a prisoner presents some unique issues that you will need to address. First, be prepared to argue that your client needs to be present in person throughout the trial, and to not simply appear by video. Second, be prepared to discuss the issue of whther your client must be restrained/ shackled while seated at counsel table, while in the witness box, and moving in/ out of the courtroom outside of the jury's presence. *See Woods v. Thieret*, 5 F.3d 244, 247 (7th Cir.1993) ("[T]he principles from *Allen* [referring to *Illinois v. Allen*, 397 U.S. 337 (1970) (shackling a defendant during trial is an "inherently prejudicial practice," it "should be permitted only where justified by an essential state interest specific to each trial.)] . . . extend...to include not just criminal defendants, but inmates bringing civil actions and inmatewitnesses as well."); *Holloway v. Alexander*, 957 F.2d 529, 530 (8th Cir. 1992) ("In [prisoner civil rights] cases, the district court has a responsibility to ensure reasonable efforts are made to permit the inmate and the inmate's witnesses to appear without shackles during proceedings before the jury."; when physical restraints are necessary, a district court "should take appropriate action to minimize the use of shackles, to cover shackles from the jury's view, and to mitigate any potential prejudice through cautionary instructions".) *see also Lemons v. Skidmore*,985 F.2d 354, 358 n.3 (7th Cir. 1993); *Davidson v. Riley*, 44 F.3d 1118, 1123 (2d Cir. 1995)(when a district court determines that restraints are necessary, it should "impose no greater restraints than are necessary, and...must take steps to minimize the prejudice resulting from the presence of the restraints.")

Third, be prepared to address the clothes that your client will wear. IDOC is supposed to furnish some basic clothing, but it may not fit right or it simply looks like prison clothes. Fourth, be prepared to address with the court the presence of IDOC Correctional Officers sitting near your client, both at counsel table and when he/she is in the witness box. Fifth, be prepared to address your client being adequately fed. IDOC has a thin budget and you likely will hear a complaint from your client.

Sixth, also given IDOC's thin budget, IDOC may not be willing to keep your client overnight in a nearby correctional facility, but rather to take your client back/ forth each evening and the next morning from the IDOC facility in which your client is housed. This could be hours away. This could result in IDOC getting your client up at a very early hour to hit the road to get to trial, so don't be surprised if your client looks or acts tired in court. Get him/her coffee or whatever to address that situation. Also, the need to transport your client at the end of each day and to bring your client to court the next morning may leave you little if any time to discuss case matters with your client after the end of each trial day and before the start of the next trial day. So be thinking about this and plan ahead.

Another pretrial matter that you will want to address to the court is the extent to which your client's criminal conviction record can be put before the jury. It will be self-evident from the testimony that the events happened while your client was in prison. You should be prepared to stipulate to the fact that your client, at the time, was a convicted felon. What you will need to prepare to address is (a) not having the jury know, to the extent possible, that your client is still in prison serving time, and (b) to what extent the court will allow the defendants to bring out the crime of conviction. This latter point is very important to focus on. It is black letter law that a party's credibility can be impeached by bringing before the jury not only the fact and date of your client's conviction, the fact that the conviction is of a felony (or in the case of crimes going to truth and veracity, that it is a misdemeanor), but also the nature of the offense. But nothing about the underlying circumstances. *See* Fed. R. Evid. 609; *Mays v. Snyder*, Not Reported in F.Supp.2d, 2014 WL 1304994 at *1 (C.D. Ill. 2014); *Sanders v. Welborn*, Not Reported in F.Supp.2d, 2011 WL 1539857 at *1 (S.D. Ill. 2011).

If your client has multiple felony criminal convictions, you will want to address this in a pretrial *in limine* motion in which you seek to limit the number of convictions that can be raised before the jury. Likewise, if your client's felony convictions are for more serious or heinous crimes, such as murder, sex crimes or pornography offenses, you will want to see by way of a pretrial *in limine* motion to limit the ability of the defendant to bring out the nature of the offense(s) on the grounds that under Federal Rule of Evidence 403(b), the prejudice that would arise from bringing out the nature of these offenses far outweighs their relevance, particularly when the jury is going to otherwise hear that your client is a convicted felon. The Seventh Circuit has stated that trial courts have broad discretion to determine the admissibility of such evidence, and the Seventh Circuit has approved the practice of "sanitizing" a prior felony offense. *Schmude v. Tricam Indus., Inc.,* 556 F.3d 624, 627 (7th Cir.2009) (where the nature of the felony is particularly prejudicial, permits the jury to hear only that a witness has been convicted of a felony). *See also Stanbridge v. Mitchell*, Not Reported in F.Supp.2d, 2012 WL 1853483 (C.D.Ill.,2012), in which the court applied Rule 403 in a prisoner civil lawsuit to bar evidence of plaintiff's crime of aggravated sexual abuse.

Defendants should also be barred from argument or examination which harps on your client's prior convictions or continually parades them before the jury. As noted by the Seventh Circuit in *Campbell v. Greer*, 831 F.2d 700, 707 (7th Cir. 1987), such harping and parading "shift[s] the focus of attention from the events at issue in the present case to the witness' conviction in a previous case. [The opposing party] may not." *Accord Wilson v. Groaning*, 25 F.3d 581, 586 (7th Cir. 1994) (inmate civil rights case).

A further motion *in limine* you will need

to consider is a motion that bars references, if not relevant or unduly prejudicial, to other lawsuits your client may have filed or now has pending; to dismissed parties or claims; to your client's grievance record other than the grievances related to the claims at issue; to your client's disciplinary record; to your client being litigious if that is the case; to your client's counseling record; and to matters within your client's medical records. Also, depending upon the circumstances of your case, you may need to consider a motion *in limine* dealing with any gang affiliation of your client.

So now you are ready. Go try your case and good luck. ■

THIS ARTICLE ORIGINALLY APPEARED IN THE ILLINOIS STATE BAR ASSOCIATION'S FEDERAL CIVIL PRACTICE NEWSLETTER, VOL. 14 #4, JUNE 2016.