**ANATOMY OF A PRISONER**

 **CIVIL RIGHTS CASE**

 **-an effective, efficient and economical approach-**

 **August 7, 2014-Federal Courthouse, Chicago, IL**

**Facilitators** Jim Chapman, Alan Mills, Peter Coladarci

Sources “Federal Court Prison Litigation Handbook” www.ilnd.courts.gov

On-line lectures on prisoner litigation by J. Chapman: www.illinoislegaladvocate.org under “Legal resources,”- then “Prisoners rights”

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**INTRODUCTION**

Court’s unique program

**Move quickly!!**

The “crippled case”-why this challenging type of case is instructive for all types of litigation.

**THE** **CLERK HAS JUST INFORMED YOU THAT YOU HAVE BEEN**

**APPOINTED TO REPRESENT A PRISONER IN A *PRO SE* ACTION:**

**WHAT DO I DO?!!!**

-some deep breathing;

-read the appointment letter carefully

 -name and number of case

 -help that is available to you.

-obtain:

 a) the *pro se* complaint;

 b) the docket sheet (what has happened, what is going to happen-the next date);

 c) any critical orders and adversary pleadings, if any.

 d) the Court’s 28 U.S.C. § 1915A order, if any.

The nature of the § 1915A order (see sample, Appendix #1 attached)

-its purpose

-what it may contain:

 -that a cause(s) of action has been properly alleged;

 -what *causes of action* or *parties* have been dismissed;

 -whether the complaint has been dismissed, but not the action; and that

 appointed counsel has 60 days to do FRCP 11 due diligence and file an

 amended complaint if that is appropriate;

 -arrangement of narrative *pro se* allegations into counts;

 -service of summons is stayed.

 -appointment of counsel.

-impact of finding that a cause of action has been alleged on a subsequent motion to dismiss if one filed.

**ESTABLISHING A SOUND RELATIONSHIP WITH THE PRISONER-CLIENT**

**–**determine where you client is located.

 -if in a prison operated by the Illinois Department of Corrections (IDOC), check the IDOC’s web-site (www.idoc.state.il.us.gov);

 -if the Cook County Jail: http://www.cookcountysheriff.org/doc/doc\_main.html

-the client may already have received a court notification of your appointment, but write him immediately to introduce yourself, that you are reviewing his complaint, doing other investigation, and plan to see him on \_\_\_\_, 2013.

**How your envelope should be addressed** (so your mail will not be returned)

-double check on the IDOC web-site where you client is located and what his registration number is.

-on the envelope, write carefully:

 a) you client’s correct name and number;

 b) the prison’s address for inmate mail;

 c) “Confidential attorney-client communication” or words to that effect.

 d) Your personal name as it is stated at the ARDC, not your firm’s name; the prison will check your registration. For example:

 James P. Chapman, Esq.

 Attorney at Law

 3629 S. Prairie Ave. (*where my office is*)

 Chicago, IL 60653

**Consider a client retention letter** (Appendix #2). The form attached raises among other matters, the following points:

 1. The scope of your services;

 2. How long your services will continue.

 3. Other associates in the Firm may assist me, but I will remain in charge;

 4. Your responsibilities as the appointed lawyer

 5. You will obtain the client’s approval for important decisions.

 6. You will keep client informed of case progress;

 7. Policy on telephone calls;

 8. Client’s responsibilities;

 9. Fee agreement. See Northern District Local Rule LR 83.41b. Keep

 track of time; court approval required.

Other considerations in developing a sound attorney-client relationship

-Cut the client a little slack-look where he’s imprisoned (think: “Shawshank Redemption”)

-Treating your client as you would a fee paying commercial client.

-The power of “NO”

-Good communication-get client’s materials and thoughts

-Fear

-Ethics require that we be affirmative in our analyses and recommendations-we are not “potted plants;” but the client has the last word unless we are requested to do something improper.

-pay attention!!! Prisoners know where the ARDC is!

Visit the client as soon as possible

-determine where the client is (again)-prisoners are transferred all the time

-contact the prison or jail legal liaison or coordinator

 -when can you visit

 -what must you submit, if anything, to visit

 -what can you bring with you like legal materials, etc.

 -don’t even think about bringing your laptop, cell phone;

-write your client that you are coming.

 -advise him what documents to bring to visit, esp. grievances (see section on Exhaustion of Administrative Remedies below), and all other documents;

-determine if client is in *segregation*; alters nature of visit.

-bring your state identification (driver’s license) and ARDC card;

-if client in a prison 150 miles or more from your home or office, consider driving to town near prison the night before; so you can get into prison early.

 -ask how early you can get in.

Telephone calls to prisoner

-discuss procedure with legal liaison; make sure call is secure.

**EXHAUSTION OF ADMINISTRATIVE REMEDIES**-**DEAL WITH FIRST!!!** (There is a separate seminar on this subject-more detail-if necessary ask Jim Chapman for seminar outline)

The Prison Litigation Reform Act (PLRA) 42 U.S.C. § 1997(e):

“(a) Applicability of administrative remedies. No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”

Administrative regulations regarding grievance procedure:

 IDOC prisons: See 20 Ill. Admin. Code § 504.800 et seq.

 A County Jail Determine if jail has procedure; if so, obtain.

PLRA section really means what is says See -*Pavey v. Conley*, 544 F.3d 739 (7th Cir. 2008)-leading case:

 -applies even if administrative process cannot give relief prisoner seeks (esp. $).

 -Affirmative defense that can be waived.

 -Court must resolve exhaustion issue, if raised, before any other aspect of case proceeds;

 -Hearing before the trial judge, not a jury.

 -Defendant may raise in answer followed by motion for summary judgment

 -Exhaustion must occur before suit is filed, cannot occur after suit filed.

 -If no exhaustion or excuse for no exhaustion, then court must dismiss without prejudice (unless no way exhaustion could ever occur).

 -Judges conduct hearings in different ways.

**For excellent analysis and unlimited citations, see “The Prison Litigation Reform Act” by John Boston**

 http://www.illinoislegaladvocate.org/uploads/8032theplra0312.pdf

 Don’t print-very long.

There are many variations on the theme as well as “wiggle room” despite prisoner’s lack of strict compliance

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**Practice points**

-although failure to exhaust in an affirmative defense, start preparing immediately.

-see if *pro se* complaint contains grievance materials as exhibits or if client has made allegations about his attempts to grieve.

-obtain from client all his materials on grievances/exhaustion.

-if a defendant’s answer raises failure to exhaust, ask opposing counsel if she or he is really serious; if not, ask that defense be withdrawn, esp. when you can show through documents you have that exhaustion has occurred.

 -if serious, then ask for agreement to appear before trial judge to set schedule to resolve the exhaustion issue before work on the substantive case starts with discovery limited to the exhaustion issue.

**SHOULD I FILE AN AMENDED COMPLAINT?**

Considerations:

-the *pro se* complaint is verbose, disorganized, difficult to follow (most of the time);

-the trial judge has directed that I file an amended complaint *after* I have accomplished my FRCP 11 due diligence and have concluded the claim is viable;

-the trial judge in the 28 U.S.C. § 1915A order has dismissed certain *pro se* claims and I agree with the dismissal;

-my investigation has unearthed causes of action not present in the *pro se* complaint;

-the *pro se* complaint names improper parties or parties I have determined are not responsible under applicable civil rights provisions;

-other?

**IF I DECIDE TO FILE AN AMENDED COMPLAINT, WHAT MATTERS SHOULD I KEEP IN MIND?**

**Causes of action are based on the U.S. Constitution, its amendments, and applicable Federal statutes like Americans With Disabilities Act, not 42 U.S.C. § 1983**

42 U.S.C. §§ 1983 is the basis of Federal Court jurisdiction-it is not a cause of action:

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the *deprivation of any rights, privileges, or immunities secured by the Constitution and laws*, shall be liable to the party injured in an action at law, suit in equity . . .”

See also 42 U.S.C. § 1331: “The district courts shall have original jurisdiction of all civil actions arising under the Constitution . . .of the United States.”

Consider statutes like the ADA and the Rehabilitation Act

**What portions of the United States Constitution will apply in most cases?**

The Eighth Amendment: Excessive bail shall not be required, nor excessive fines imposed, . . . *nor cruel and unusual punishments inflicted*

 A penitentiary-in other words, *after* client has been sentenced: Eighth (assaults, medical);

The Fourteenth Amendment: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws.

 A jail (county or city)-that is, for pre-trial detainees

 (assaults, medical, access to the law,) same substantive rules as

 similar Eighth Amendment claims).

 Penitentiary and jail: access to the law, improper hearings, etc.

 The First Amendment : Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

 Penitentiary or jail: religion, retaliation, speech, etc

**Theses are improper parties in most instances and should be eliminated**

The State of Illinois

The Illinois Department of Corrections

Stateville Correctional Center

Cook County Jail

Cermak Hospital of Cook County Jail

Director of the IDOC

Superintendent (warden) of the Cook County Jail

The Warden of an IDOC prison

Cook County, for example

**Whether a defendant can be sued is a question of *State*, not Federal law**.

 *Departments of a suable entity like the County of Cook are not suable entities*.

 The State of Illinois is immune from suit (except in the Illinois Court of Claims).

 “Judicial immunity”-possibly for members of Prisoner Review Board, Grievance/Discipline hearing officials. *See Trotter v. Klincar*, 778 F.2d 1177, 1180 (7th Cir. 1984)

**Should I name prison staff in their official v. individual capacities or both**? Claim against an *official* is a claim against the entity that employs him. *Kentucky v. Graham*, 473 U.S. 159, 165 (1985)

 -money damages: individual capacity;

 -injunctive relief: official capacity.

**If I sue individuals, how will a case settle or a judgement be collected**?

 Public employees v. private service providers

 County or City as a nominal party defendant for collection purposes

**REQUIREMENTS FOR LIABILITY OF INDIVIDUAL DEFENDANTS**

 Must be personal involvement- *a constant principle*

 May be sin of *commission* (*i.e.*, an assault) or *omission* (*i.e.*, **knowing** failure to intervene when wrongful conduct by officer or other prisoner observed or **knowing** failure to provide medical care where prisoner’s serious medical condition observed).

 See jury instructions discussed hereafter.

 No *respondeat* *superior* liability

**HOW CAN I DETERMINE WHO ARE PROPER PARTIES DEFENDANT BEFORE I FILE AN AMENDED COMPLAINT?**

Prisoners have difficulty in identifying the correct names of correctional personnel and other prisoners

 Example: the *Dorn* case (painful);

 Rule 15: adding a party after statute has run-very difficult

 Prisoners very often have nicknames-real names unknown.

**Sources to determine who should be defendants**

Disciplinary Reports –See *App.3* attached;

Offenders Grievance -See *App.4* attached;

Incident reports –See *App.5* attached;

Internal Affairs Investigation –See *App. 6* attached;

Sign-in logs– See *App.7* attached;

Medical records –See *App. 8* attached;

 The Illinois Department of Corrections (files follow the prisoner)

 Cook County Jail-Cermak Hospital (files stay at Jail after prisoner released or transferred to IDOC penitentiary).

 Private hospitals (like University of Illinois at Chicago Hospital) where

 prison or jail sends prisoner for treatment.

 Wexford Health Sources-provider to IDOC facilities.

 -has office in IDOC main offices in Springfield

Other providers like Aramak (for example provides Kosher means)

Daily logs or print-outs of prison or jail-show where prisoners celled and personnel assigned.

Pictures of personnel to be examined at prison by prison.

Deposition of key personnel, esp. pursuant to FRCP30(b)(6). See next section.

**Procedural methods to learn identity of proper parties**

-Adversary attorney (occasionally)

-if substantial difficulty, especially where plaintiff has named only named very high ranking officers, move the Court for leave to do discovery prior to filing the amended complaint, naming the warden, for example, as a nominal party plaintiff for purposes of discovery.

Formal discovery

 Distinction between IDOC and individual officers-in most instances, IDOC and County (jail) are not a party and Attorney General or State’s Attorney appear only for individuals, not prison or jail.

 Same is true for Wexford which is often not a party; insurance attorneys

 appear only for individual medical personnel named as defendants.

 FOIA requests and written consents very slow and often unsatisfactory.

FRCP 34: requests for production of documents. Runs only to parties.

FRCP 45: subpoena for persons and documents and access to premises-same scope as FRCP 34-runs to *non-parties.*

Rule 30(b)(6) Notice of deposition requires party to produce individual(s) and documents that relate to stated subject matter. *See Appendix 8.*

This portion of the rule states:

6) Notice or Subpoena Directed to an Organization. In its notice or subpoena, a party may name as the deponent a public or by corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

 FRCP 45 subpoena requires a *non-party* to do the same.

 Great time and expense saver-puts burden of identification on prison, jail, Wexford, etc. The rule can be used to identify additional defendants, the names on medical records where unreadable; who is an organization that has knowledge of facts you develop-*i.e.* policies and practices.

Qualified professional especially to help read medical records, identify individual providers mentioned in records.

**THE STATUTE OF LIMITATIONS-THAT IS, MOVE QUICKLY!!!**

-Statute of limitations and “John Doe Defendants” 4

 Two years, no relation back;

 See discovery rule (State law) in medical cases;

 Case might be considered mailed (filed)when given to prison officer  *Jones v.Bertrand*, 171 F.3d 499, 501 (7th Cir.)-“the mail box rule

 applies to time of filing grievances, etc.

**THE FORM AND CONTENT OF THE AMENDED COMPLAINT**

This is Torts 101 with some twists (you lawyers remember?): duty, breach of duty, proximate cause, damages. The source of duty is normally found in Amendments (the Bill of Rights) to the U.S. Constitution and Federal statutes.

**What kinds of claims should I include in the Amended Complaint**

Keep it simple!

Supplemental jurisdiction allows claims that could not have entered federal court on their own to be heard by a federal court if they are part of a case over which the court has subject matter jurisdiction. For example, if a correctional officer assaults a prisoner, this conduct could violate the Eighth Amendment to the U.S. Constitution and Illinois State Law (battery) which the Federal Court would normally have no jurisdiction to hear*. The real question: do you really want to bring these claims?*

**Can I and do I want to sue a county, a municipal corporation, or a City or Town, a municipal corporation, that operated the jail where plaintiff was harmed in addition to their employees?**

 Remember: these entities normally not liable for acts of employees.

 The *Monell* doctrine-*Monell v. New York City*, 436 U.S. 658, 694 (1978); See *Los Angeles County v. Humphries*, 131 S.Ct. 447 (2010) for detailed explanation.

 Required proof is much broader: the existence of a policy or practice that was the *proximate* cause of plaintiff’s injuries.

**What about private providers under contract to the IDOC in addition to their employees?** Should I make them parties defendant?

 Medical (*e.g.* Wexford).

 Food (Aramak)

Same proof requirement as cities and counties

**Factual specificity-enhanced U.S. Supreme Court requirements**

Must allege enough facts to show likelihood of ability to prove cause of action. Read *Bell Atlantic Corp. V. Twombly*, 550 U.S. 554 (2007). For example, consider the Seventh Circuit’s pattern jury instruction (see Seventh Circuit web-site for all of these instructions-don’t print-very long!):

#7.11 Failure to protect:

“1.[ *Describe who the attackers were and what they did, e.g., hit, kicked or struck the Plaintiff*];

2. Defendant was deliberately indifferent to the substantial risk of [that] [such an] attack;

3. Defendant’s conduct caused harm to Plaintiff;

[4. Defendant acted under color of law].

Suggestion while par. #1, if completed, is factually sufficient as an allegation,

par. #2 is not: allege facts which demonstrate how defendant *knew* there was a substantial risk of an attack on plaintiff.

**Use the Seventh Circuit pattern instructions, if available, to determine the necessary allegations for your amended complaint**

For example, for a claim of failure to provide medical care (the most numerous type of prisoner claim):

#7.12 Failure to provide medical attention

“To succeed on his claim of failure to provide medical attention, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. Plaintiff had a serious medical need;

2. Defendant was deliberately indifferent to Plaintiff’s serious medical need;

3. Defendant’s conduct caused harm to Plaintiff;

[4. Defendant acted under color of law].”

#7.13 Definition of a serious medical need

“When I use the term “serious medical need,” I mean a condition that a doctor says requires treatment, or something so obvious that even someone who is not a doctor would recognize it as requiring treatment. In deciding whether a medical need is serious, you should consider the following factors:

- the severity of the condition;

- the harm [including pain and suffering] that could result from a lack of medical

care;

- whether providing treatment was feasible; and

- the actual harm caused by the lack of medical care.”

#7.14 Definition of “deliberately indifferent

“When I use the term “deliberately indifferent,” I mean that Defendant actually knew of a substantial risk of [[serious harm] or [*describe specific harm to Plaintiff’s health or safety*]], and that Defendant consciously disregarded this risk by failing to take reasonable measures to deal with it. [In deciding whether Defendant failed to take reasonable measures, you may consider whether it was practical for him to take corrective action.]

[If Defendant took reasonable measures to respond to a risk, then he was not

deliberately indifferent, even if Plaintiff was ultimately harmed.]”

*Be sure to track Court’s § 1915A order if it upholds* pro se *complaint allegations as stating a cause of action.*

*These instructions also are a guide to the* proof *you will require to sustain your cause of action.*

**SERVING THE DEFENDANTS**

Determine status of service when you are appointed. Often the Court will have stayed service until appointed counsel files an amended complaint;

 -Counsel must usuually take the initiative to cause service of process;

 -Failure to serve within a reasonable time could result in dismissal of a party defendant

.

Federal Rule 4(d): Waiver of service. See Rule and Form of waiver in Appendix to Federal Rules of Civil Procedure.

 -work with prison or jail liaison to determine if defendant still at facility and to work out arrangements to send waiver.

If defendant is no longer is system or has retired, file motion in court for leave to subpoena last known address from system or require system to cause waiver to be delivered to defendant.

-The Marshall’s office

**STARTING DISCOVERY-TO DEPOSE OR NOT . . .**

Sequence

Talking to inmate witnesses

Fed. Rule 26: oral depositions-how format might different from our private cases.

 All officers or other witnesses noted in records or on defendant’s witness lists?

 Use your judgment-witness may already be committed in report, etc.

 Video conferencing to save travel

 Telephone depositions

 Do I need a transcript of every deposition?

Documents

Interrogatories

Visiting the scene: Fed. Rules 34, 45.

 See motion form in Prison Litigation Handbook, part I.

**BUILDING THE FAILURE TO PROVIDE MEDICAL CLAIM**

Note: there is a separate, much more detailed seminar on this subject. This is only an introduction. Contact Jim Chapman for copy of seminar outline.

Key to Seventh Circuit pattern jury instructions previously discussed

 The *Thomas* example

Bad medical care: Some care does not necessarily defeat claim. *Snipes v. DeTella*, 95 F.3d 586, 592 (7th Cir. 1996)

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More than negligence: *Estate of Cole v. Fromm* 94 F.3d 254, 261 (7th Cir. 1996)

-but start with negligence -failure to provide care that a reasonably careful physician would provide

-then build to reckless disregard (Eighth or Fourteenth Amendment)-the *Ortaliza* case-inferable that care giver knew what he or she had to know.

-circumstantial evidence (the *Pontiac* case)

“Circumstantial evidence can be used to establish subjective awareness and deliberate indifference, *Hayes,* 546 F.3d at 524" *Thomas v. Cook County*, 588 F.3d 445, 452-3 (7th Cir. 2009).

Obtain medical records of client

Rules 34, 45;

IDOC releases (see Appendix 9)

 Contact prison legal coordinator for current form-and separate form for

 mental health records;

Note: there may be private hospitals as well.

**Learn about the medical issues yourself**

-The client-get his records and discuss his situation with him;

-Hospital/medical records

-Cook County Jail (Cermak Hospital)

-Private Hospital

-Internet-often more than you want to know

-Treatises

-Consultant

**Requirement of physical injury** (PLRA).

Broken bones, bleeding not always necessary. See recent cases in John Boston article.

Expert testimony

**NECESSITY OF RETAINED EXPERT**-**DO I REALLY NEED ONE?**

How can I develop necessary proof-(for example, serious medical need; reckless indifference; proximate cause) without a retained expert?

Note: in many instances, defendant medical care giver or other type of defendant will not deny standard of care (or whatever is in issue) or knowledge of the standard. There will be confession and avoidance. For example:

 -I did not see the patient;

 -The patient refused care;

 -The “wrong” decision was made by another care giver.

**You can develop the standard of care or conduct in several different ways without a retained expert:**

Examine the Federal Rules of Evidence for short cuts that are inexpensive.

For example:

1. Adverse examination of defendant. (Rule 611c);

 Ask leading questions. For example: would patient’s condition be an adequate cause of pain? If untreated, would condition become permanent?

2. Use of learned treatises; Rule 803(18).

3. Public reports and records; Rule 803(8).

4. Judicial notice; Rule 201.

Hospital records, especially outside of prison or jail

 -often will contain orders, directions that prison/jail does not follow;

 -the doctors and other medical providers from outside facilities

Policies, protocols of IDOC and Wexford

**IF I REALLY NEED AN EXPERT, HOW DO I FIND ONE?**

Look to the sources around you:

-your own doctors, at least for recommendations;

-other members of your Firm;

-your Firm’s clients;

-local hospitals

-online

-if really desperate, call Chapman for Nurse Advocate Paulsen.

**SUMMARY JUDGMENT BY**

**THE DEFENDANT(S)**

*Keep in mind constantly and from the beginning.*

-Federal Court’s local rules, if any.

-duty of non-movant: must produce admissible evidence. Cannot rely on unverified complaint. *Celotex v. Catrett*, 477 U.S. 317, 322 (1986)

-affidavits-start planning ahead.

**SETTLEMENT**

-Timing

-Nature of defendant

 IDOC Employee

 Private medical or other provider with insurance

 County or City

-The amount

-Nature of release-contact Jim Chapman for a form with commentary

-claims by prisons, victims: 730 ILCS 5/3-7-6 (allows such claims). statutory exemption *e.g.,* 735 ILCS 5/12-1--1(h)(4); *People v. Booth*, 215 Ill.2d 416 (2005)*.*

**REIMBURSEMENT OF EXPENSES-PREPAYMENT.**

**http://www.ilnd.uscourts.gov/home/LEGAL/NewRules/dcf\_e.pdf**

**A**ppendix E. The District Court Fund: Regulations Governing the Prepayment **and** Reimbursement of Expenses.

**PREPARATION FOR TRIAL AND TRIAL- THAT’S THE NEXT SEMINAR**!

**PLEASE COMPLETE COMMENT SHEETS**