The Prison Litigation Reform Act: Threshold Considerations in Individual Litigation

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This outline is intended to highlight PLRA issues of particular importance in representing individual prisoners, focusing on those that should be considered in initially determining whether a case is viable legally and economically, and in deciding how and when to file and frame the complaint to enhance the likelihood of success. More extensive discussions of all aspects of the PLRA can be found in Boston & Manville, *Prisoners' Self-Help Litigation Manual*, ch. 9 (Oceana [Oxford University Press], 4th ed. 2010), and in Boston, *The Prison Litigation Reform Act* (CLE materials, updated regularly, available from the author).

Contents

I. Cases "brought by a prisoner"—by someone locked up at time of filing—

A. Are subject to certain PLRA provisions

1. Administrative exhaustion requirement, 42 U.S.C. § 1997e(a); *see* Norton v. The City Of Marietta, OK, 432 F.3d 1145, 1150 (10th Cir. 2005); Greig v. Goord, 169 F.3d 165, 167 (2d Cir. 1999).

2. Physical injury requirement, 42 U.S.C. § 1997e(e); *see* Kerr v. Puckett, 138 F.3d 321, 322 (7th Cir. 1998)

3. Attorneys' fees limits, 42 U.S.C. § 1997e(d); *see* Janes v. Hernandez, 215 F.3d 541, 543 (5th Cir. 2000).

4. Filing fees and "three strikes" provisions, 28 U.S.C. § 1915(b), (g); *see* Harris v. City of New York, 607 F.3d 18 (2d Cir. 2010) (§ 1915(g)); McGann v. Commissioner, 96 F.3d 28 (2d Cir. 1996) (holding § 1915(b) cannot apply to non-prisoners because the payment provisions are keyed to plaintiffs' institutional accounts).

B. So you don't want your case to be "brought by a prisoner"

1. If your client is in, and you can wait for release and have time to file and take discovery and identify defendants within the limitations period, do so.

2. If your client is out, ***FILE NOW!*** Former prisoners have a regrettable habit of becoming current prisoners again, which may be as damaging to their litigation positions as to their personal circumstances.

3. If your client is out but the case was filed while he or she was in, consider taking a voluntary dismissal and refiling the case while the client is out—or refiling after dismissal if necessary. *See* Cox v. Mayer, 332 F.3d 422, 425-26 (6th Cir. 2003); Dixon v. Page, 291 F.3d 485, 488 n.1 (7th Cir. 2002); Ahmed v. Dragovich, 297 F.3d 201, 210 (3d Cir. 2002); Younker v. Ohio State University Medical Center, 2013 WL 3222902, *5 (S.D.Ohio, June 25, 2013), *report and recommendation adopted*, 2013 WL 3761130 (S.D.Ohio, July 16, 2013); Dilworth v. Goldberg, 2011 WL 3501869, *15 (S.D.N.Y., July 28, 2011) (declining to dismiss case refiled after release for non-exhaustion, notwithstanding that plaintiff previously filed some of the same claims while incarcerated), *report and recommendation adopted*, 2011 WL 4526555 (S.D.N.Y., Sept. 30, 2011); Reddic v. Evans, 2011 WL 2181311, *3 n.1 (N.D.Cal., June 3, 2011); Bloothoofd v. Danberg, 2011 WL 1230268, *3 (D.Del. Mar 31, 2011) (approving plaintiff's filing of new action after release to avoid the exhaustion requirement); Bloothoofd v. Danberg, 2011 WL 1287973, *2-3 (D.Del., Mar. 17, 2011) (same); Ladd v. Dietz, 2007 WL 160762 at *1 (D.Neb., Jan. 17, 2007) (holding or stating in dictum that doing so is permissible); *see* Harris v. City of New York, 607 F.3d 18, 24 (2d Cir. 2010) (holding prisoner with three strikes disqualified from *in forma pauperis* status can refile after release and reapply for IFP status after dismissal like any other litigant).

C. Know what a "prisoner" is and what your client's status is

1. A prisoner is anybody presently subject to any form of criminal confinement in "any facility." 42 U.S.C. § 1997e(h); *see* Blank v. Eavenson, 2012 WL 685460, *4 (N.D.Tex., Feb. 14, 2012) (person in home detention is not a prisoner for PLRA exhaustion purposes).

2. So far, dead people, their families and estates seem not to be prisoners. Not to be ghoulish, but if your client is on death's door and an injunction won't help . . . wait.

- As to dead persons, *see* Anderson v. County of Salem, 2010 WL 3081070, *2 (D.N.J., Aug. 5, 2010); Torres Rios v. Pereira Castillo, 545 F.Supp.2d 204, 206 (D.P.R., Aug. 28, 2007); Rivera Quinones v. Rivera Gonzalez, 397 F.Supp.2d 334, 340 (D.P.R., Oct. 28, 2005); Simmons ex rel. Estate of Simmons v. Johnson, 2005 WL 2671537 at *2 (W.D.Va., Oct. 20, 2005); Greer v. Tran, 2003 WL 21467558 at *2 (E.D.La., June 23, 2003); Treesh v. Taft, 122 F.Supp.2d 887, 890 (S.D.Ohio. 2000); *see also* Burke v. Thompson, 2016 WL 2587996, *10-11 (W.D.Ky., May 4, 2016) (construing state PLRA analogue consistently with federal PLRA on this point).

- As to families and estates, *see* Tretter v. Pennsylvania Dept. of Corrections, 558 Fed.Appx. 155, 157 (3d Cir. 2014) ("The exhaustion of administrative remedies requirement is of no moment to plaintiffs who file actions on behalf of a deceased inmate."); Arms-Adair v. Black Hawk County, Iowa, 2013 WL 2149614, *3-4 (N.D.Iowa, May 16, 2013) (holding suit filed by mother of deceased prisoner was not brought by a prisoner); Anderson v. County of Salem, 2010 WL 3081070, *2 (D.N.J., Aug. 5, 2010); Torres Rios v. Pereira Castillo, 545 F.Supp.2d 204, 206 (D.P.R., Aug. 28, 2007) (noting that an estate cannot be imprisoned or accused, convicted, or sentenced for a criminal violation, and it therefore not a prisoner); Netters v. Tennessee Dept. of Correction, 2005 WL 2113587 at *3 n.3 (W.D.Tenn., Aug. 30, 2005); Rivera Rodriguez v. Pereira Castillo, 2005 WL 290160 at *5-6 (D.P.R., Jan. 31, 2005) (holding that a prisoner's guardian is not a prisoner); Greer v. Tran, 2003 WL 21467558 at *2 (E.D.La., June 23, 2003); *see also* Lister v. Prison Health Services, Inc., 2006 WL 1733999 at *1-2 (M.D.Fla., June 22, 2006) (holding that a female prisoner suing over the death of her child was barred for non-exhaustion, but the estate of the child might have a claim if it was born alive).

- *But* suits brought by prisoners' conservators or guardians, who do not have separate legal claims, may be considered suits brought by a prisoner. Braswell v. Corrections Corp. of America, 2009 WL 2447614, *4 (M.D.Tenn., Aug. 10, 2009), *rev'd on other grounds*, Braswell v. Corrections Corp. of America, 419 Fed.Appx. 622 (6th Cir. 2011) (unpublished).

3. Parolees are generally not prisoners, Kerr v. Puckett, 138 F.3d 321, 322 (7th Cir. 1998) ("The statutory language does not leave wriggle room; a convict out on parole is not a 'person incarcerated or detained in any facility who is . . . adjudicated delinquent for, violations of . . . the terms and conditions of parole."); Robinson v. Sheppard, 2012 WL 2358252, *1 n.2 (S.D.Tex., June 20, 2012) (holding parolee was unaffected by three strikes provision); Murray v. Raney,

2012 WL 5985543, *4 (D.Idaho, Nov. 29, 2012) (holding parolee is not a prisoner required to exhaust); Bisgeier v. Michael [sic] Dept. of Corrections, 2008 WL 227858 at *4 (E.D.Mich., Jan. 25, 2008) ("While there may be certain conditions imposed upon Plaintiff as a parolee, there can be no doubt that he is neither 'confined,' 'incarcerated,' nor 'detained in' any jail, prison, or other correctional facility.")

—that is, unless they are paroled to an institution in which they are "confined." Jackson v. Johnson, 475 F.3d 261, 265-67 (5th Cir. 2007).

4. People civilly committed are generally not prisoners, including

- immigration detainees, Agyeman v. I.N.S., 296 F.3d 871, 885-86 (9th Cir. 2002); LaFontant v. INS, 135 F.3d 158 (D.C.Cir. 1998);

- sex offenders committed after their prison sentences, Merryfield v. Jordan, 584 F.3d 923, 927 (8th Cir. 2009); Michau v. Charleston County, S.C., 434 F.3d 725, 727-28 (4th Cir. 2006); Troville v. Venz, 303 F.3d 1256, 1260 (11th Cir. 2002); Page v. Torrey, 201 F.3d 1136, 1139-40 (9th Cir. 2000);

- persons committed psychiatrically, Perkins v. Hedricks, 340 F.3d 582, 583 (8th Cir. 2003), including those found not guilty by reason of insanity. *See* Koloctronis v. Morgan, 247 F.3d 726, 728 (8th Cir. 2001); Mullen v. Surtshin, 590 F.Supp.2d 1233, 1240 (N.D.Cal. 2008), *leave to file for reconsideration denied*, 2009 WL 734673 (N.D.Cal., Mar. 18, 2009); Phelps v. Winn, 2007 WL 2872465 at *1 (D.Mass., Sept. 27, 2007) (so holding, notwithstanding that the plaintiff is held by the Bureau of Prisons).

—but be careful and be sure you understand the legal nature of the confinement. If their criminal charges or sentences remain in the picture they may still be prisoners, *e.g.*

- sex offenders in programs that divert them from the criminal process while leaving their charges pending. *See* Kalinowski v. Bond, 358 F.3d 978, 979 (7th Cir. 2004) (holding that persons held under the Illinois Sexually Dangerous Persons Act are prisoners for PLRA purposes);

- persons found incompetent to stand trial. *See* Gibson v. City Municipality of New York, 692 F.3d 198, 201-02 (2d Cir. 2012) (per curiam); Holbach v. North Dakota, 2014 WL 295153, *1 (D.N.D., Jan. 24, 2014); Banks v. Thomas, 2011 WL 1750065, *2 (S.D.Ill., May 6, 2011); Ruston v. Church of Jesus Christ of Latter-Day Saints, 2007 WL 2332393 at *1 (D.Utah, Aug. 13, 2007); In re Rosenbalm, 2007 WL 1593207 at *2 (N.D.Cal., June 1, 2007); Gibson v. Commissioner of Mental Health, 2006 WL 1234971 at *6 (S.D.N.Y., May 8, 2006), *relief from judgment denied*, 2006 WL 2192865 (S.D.N.Y., Aug. 2, 2006).

- persons found guilty but insane. Lewis v. Oklahoma Dept. of Mental Health, 2012 WL 5574174, *1 (N.D.Okla., Nov. 15, 2012); Magnuson v. Arizona State Hosp., 2010 WL 283128, *1 n.5, *2 (D.Ariz., Jan. 20, 2010);

- persons psychiatrically committed from prison while serving their sentences. McQuilkin v. Central New York Psychiatric Center, 2010 WL 3765847, *10 (N.D.N.Y., Aug. 27, 2010), *report and recommendation adopted*, 2010 WL 3765715 (N.D.N.Y., Sept. 20, 2010); Jones v. Sherman, 2010 WL 3277135, *3 n.1 (E.D.Ky., Aug. 18, 2010); Roland v. Wenz, 2010 WL 2834828, *3 n.7 (N.D.N.Y., July 16, 2010), *report and recommendation adopted*, 2010 WL 2817485 (N.D.N.Y., July 16, 2010); *see Vitek v. Jones*, 445 U.S. 480 (1980).

5. Where both prisoners and non-prisoners are plaintiffs (e.g., prisoner and family member), most decisions hold the non-prisoners' claims are not governed by the PLRA. *See* Arsberry v. Illinois, 244 F.3d 558 (7th Cir. 2001) (holding that prisoner plaintiffs were barred for non-exhaustion but non-prisoners' claims could be decided on the merits); Miller v. Hartley, 2012 WL 1229884, *7 n.3 (D.Colo., April 12, 2012) (holding prisoner's mother's claim not governed by exhaustion requirement); Carter v. Jones, 2006 WL 2320807 at *6 (W.D.Okla., Aug. 9, 2006) (same); Apanovich v. Taft, 2006 WL 2077040 at *4 (S.D.Ohio, July 21, 2006) (dismissing prisoner's claim about execution procedures for non-exhaustion, allowing claims of newspaper and non-profit organization to go forward); Turner v. Wilkinson, 92 F.Supp.2d 697, 704 (S.D.Ohio 1999) (holding that a case filed by a prisoner husband and his non-prisoner wife was not "brought by a prisoner" and therefore PLRA fees limits did not apply). *But see* Johnson v. Martin, 2006 WL 1361771 at *5 n.6 (W.D.Mich., May 15, 2006) (applying PLRA attorneys' fees limitations where only two plaintiffs–a religious organization and its president–were non-prisoners, where the "primary benefits" went to prisoners, and there was no "intelligent way" to differentiate between hours spent on prisoner and non-prisoner claims). It may be prudent to bring separate complaints for prisoner and non-prisoner plaintiffs. ***DO NOT*** file on behalf of a prisoner and then have a non-prisoner intervene or join in an amended or supplemental complaint, since that case is literally "brought by a prisoner" and the non-prisoner may be stuck with PLRA rules. *See* Montcalm Pub. Corp. v. Com. of Va., 199 F.3d 168, 171-72 (4th Cir. 1999) (publisher who intervened in a prisoner's challenge to prison censorship was bound by the PLRA attorneys' fees provisions).

II. Do state law or state court get you away from the PLRA? It depends.

A. State PLRA analogues:

Many states have them. *E.g.*:

- "No inmate may maintain a civil action for monetary damages in any state court for mental or emotional injury without a prior showing of physical injury." Kentucky Revised Statutes § 454.405(5).

- "No prisoner suit may assert a claim under state law for mental or emotional injury suffered while in custody without a prior showing of physical injury." LSA-R.S. 15:1184(E) (Louisiana).

New York does not have such provisions.

B. Exhaustion requirement, 42 U.S.C. § 1997e(a)

A case "brought under" §1983 or any other federal law is subject to it.

1. State law claims in state court or federal court are not subject to PLRA exhaustion, Artis-Bey v. District of Columbia, 884 A.2d 626, 631 (D.C. 2005); Davis v. Abercrombie, 2013 WL 1568425, *9 (D.Haw., Apr. 11, 2013), *reconsideration denied*, 2013 WL 2468356 (D.Haw., June 6, 2013);Hagopian v. Smith, 2008 WL 3539256 at *3 (E.D.Mich., Aug. 12, 2008); Shaheed Muhammad v. Dipaolo, 393 F.Supp.2d 80, 92 n.5 (D.Mass. 2005); Torres v. Corrections Corp. of America, 372 F.Supp.2d 1258, 1262 (N.D.Okla. 2005), though they will have to have satisfied any applicable state law exhaustion requirements. Hendon v. Baroya, 2006 WL 1791349 at *2 (E.D.Cal., June 27, 2006), *report and recommendation adopted*, 2008 WL 482868 (E.D.Cal., Feb. 20, 2008), *aff'd*, 320 Fed.Appx. 717 (9th Cir. 2009).

2. § 1983 claims or other federal statutory causes of action are subject to the PLRA exhaustion requirement even if filed in state court. Johnson v. State of La. ex rel. Dep't of Public Safety & Corr., 468 F.3d 278, 280 (5th Cir. 2006) ("The PLRA's exhaustion requirement applies to all Section 1983 claims regardless of whether the inmate files his claim in state or federal court."); Blakely v. Ozmint, 2006 WL 2850545 at *2 (D.S.C. Sep 29, 2006); Hodge v. Louisville/Jefferson County Metro Jail, 2006 WL 1984723 at *4 (W.D.Ky., July 12, 2006); Alexander v. Walker, 2003 WL 297536 at *2 (N.D.Cal., Feb. 10, 2003).

3. Is a case asserting federal claims, but brought in state court under that court's general jurisdiction or other state law jurisdictional authorization, "brought under" federal law? Does "brought under" refer to the substantive basis of the claim, or only to the law that gets it into a particular court? Beats me; this may be worth trying if you must have a federal claim and the PLRA exhaustion requirement clearly prevents you from litigating it under § 1983.

C. Physical injury requirement

1. "No Federal civil action may be brought" by a prisoner for mental or emotional injury without physical injury, 42 U.S.C. § 1997e(e)—but "Federal civil action" is not defined.

2. Arguably, a case brought in state court is not a "Federal civil action" even if it asserts federal rights, especially since the exhaustion requirement, unlike the physical injury requirement, *does* state its scope in terms of the rights asserted. 42 U.S.C. § 1997e(a) (referring to "action . . . under section 1983 of this title, or any other Federal law"). So this argument may be worth pursuing before a judge who actually pays attention to statutory terms. *But see* Napier v. Preslicka, 314 F.3d 528, 532 (11th Cir.2002) ("[T]he phrase 'Federal civil action' means all federal claims, including constitutional claims."); VanValkenburg v. Oregon Dep't of Corrections, 2016 WL 2337892, *12-13 (D.Or., May 2, 2016) (following *Napier*; extensive analysis); Jackson v. Verdini, 19 Mass.L.Rptr. 539, 2005 WL 1457748 at *6-7 (Mass.Super. 2005) (assuming without analysis that § 1997e(e) applies to federal claims in state court); Thomas v. Ripper, 2002 WL 31627996 at *1-2 (Tex.App.-Beaumont 2002) (same); *see also* Mitchell v. Brown & Williamson Tobacco Corp., 294 F.3d 1309, 1315 (11th Cir. 2002) (hinting but not holding explicitly that removed federal claims are subject to § 1997e(e)).

3. If a case filed in state court is not a Federal civil action, then removing it to federal court doesn't bring the case within the scope of this provision, because "No Federal civil action [was] brought" by a prisoner—rather, the prisoner plaintiff filed a "State civil action" and the defendant—*not* a prisoner, presumably—brought it into federal court. (A removed case is considered by be "institut[ed]" by removal, and the removing party—the defendant—must pay the filing fee. 28 U.S.C. § 1914(a) ("The clerk of each district court shall require the parties instituting any civil action, suit or proceeding in such court, whether by original process, removal or otherwise, to pay a filing fee of $350. . . .").) The physical injury requirement would not apply.

4. Several courts have held, either explicitly or in effect, that a state law claim filed in federal court under the court's supplemental jurisdiction is a "federal civil action"—that is, the statutory term refers to the court of filing, not the law asserted. *See* O'Connor v. Carnahan, 2014 WL 293457, *10 (N.D.Fla., Jan. 27, 2014); Jacobs v. Pennsylvania Dept. of Correctons, 2011 WL 2295095, *23 (W.D.Pa., June 7, 2011) (holding federal civil action means "an action in which civil claims over which the federal court has jurisdiction are brought, i.e., all claims over which the court has original jurisdiction under 28 U.S.C. § 1331, and supplemental jurisdiction under 28 U.S.C. § 1367"); Schonarth v. Robinson, 2008 WL 510193, *4-5 (D.N.H., Feb. 22, 2008); Hines v. Oklahoma, 2007 WL 3046458 at *6 (W.D.Okla., Oct. 17, 2007). *Contra*, Mercado v. McCarthy, 2009 WL 799465, *2 (D.Mass., Mar. 25, 2009) (expressing doubt as to provision's application to state law claims); Bromell v. Idaho Dep't of Corrections, 2006 WL 3197157, *5 (D.Idaho, Oct. 31, 2006) (holding provision inapplicable to supplemental state claim).

D. Attorneys' fees limits

1. Apply to cases where fees are sought under 42 U.S.C. § 1988

2. So a state court suit in which you must rely on § 1988 for fees will be subject to the limits, while a claim with another basis for recovery of fees will not.

III. Administrative exhaustion, 42 U.S.C. § 1997e(a)

A. Must be completed *before* suit is filed

. . . meaning that the prisoner has appealed to the final stage of the administrative process and the time for a response has passed before suit is filed. Gonzalez v. Seal, 702 F.3d 785, 787-88 (5th Cir. 2012) (overruling contrary authority); Johnson v. Jones, 340 F.3d 624, 627-28 (8th Cir. 2003) (citing cases); Neal v. Goord, 267 F.3d 116, 122 (2d Cir. 2001); Powe v. Ennis, 177 F.3d 393, 394 (5th Cir. 1999) ("A prisoner's administrative remedies are deemed exhausted when a valid grievance has been filed and the state's time for responding thereto has expired.").

B. Applies to challenges to "prison conditions"

If it happened in prison to a prisoner, it's probably a prison condition, and arguments to the contrary are not likely to prevail. *See* Porter v. Nussle, 534 U.S. 516, 532 (2002) (§ 1997e(a) 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"; rejecting distinction between conditions and single incidents). Since *Porter*, courts have held "prison conditions" to encompass, *inter alia*:

- intrusions on attorney-client correspondence and telephone conversations, notwithstanding argument that attorney-client relationship "transcends the conditions of time and place." Krilich v. Federal Bureau of Prisons, 346 F.3d 157, 159 (6th Cir. 2003);

- statutorily required collection of DNA. U.S. v. Carmichael, 343 F.3d 756, 761 (5th Cir. 2003);

- denial of in-person interviews in connection with parole release decisions (this one is a stretch). Martin v. Iowa, 752 F.3d 725, 726 (8th Cir. 2014);

- an order by prison officials that the plaintiff cease all attempts to contact his son. Pryor v. Harper, 2006 WL 2583302 at *2 (S.D.Ohio, Sept. 7, 2006);

- alleged antitrust violations affecting telephone service charges. Ray v. Evercom Systems, Inc., 2006 WL 2475264 at *5 (D.S.C., Aug. 25, 2006);

- challenge to execution procedures; it involves "the effects of actions by government officials on the lives of persons confined in prison." Dennis v. Taft, 2004 WL 4506891 at *4 (S.D.Ohio, Sept. 24, 2004);

- inability to obtain an application for an absentee ballot in a timely manner. Johnson v. Luttrell, 2005 WL 1972579 at *3 (W.D.Tenn., Aug. 11, 2005);

- requirement that prisoners name the prison as their place of residence for the Census. Woltz v. FCI Beckley, 2011 WL 4916102, *2-3 (S.D.W.Va., Oct. 17, 2011).

C. You're probably doing *post hoc* damage control

1. Grievance time limits are mostly so short it is a rare case where counsel will be retained early enough to shape exhaustion from the first. *See* Woodford v. Ngo, 548 U.S. 81, 95-96 (2006) (noting that deadlines "are typically 14 to 30 days according to the United States and even shorter according to the plaintiff"). Most grievance systems make no provision for counsel or other representative to pursue the grievance anyway.

2. There is one recent and important exception: the National Standards to Prevent, Detect, and Respond to Prison Rape, recently promulgated under the Prison Rape Elimination Act (PREA) and sometimes called the "PREA Standards," provide that third parties, including attorneys and other outside advocates, may help inmates file sexual abuse complaints and may also file them on behalf of inmates, though the prison may require that the inmate complainant agree to have a third party file the complaint and that the complainant personally pursue any any subsequent steps (e.g. appeals). 28 C.F.R. § 115.52(e).

3. If the time limit has not expired, or if your claim is a continuing violation such that the grievance is still arguably timely, you will want to explore to what extent you can exhaust for, or at least advise, your client. Most courts have held that a grievance about an ongoing condition cannot be untimely. Ellis v. Vadlamudi, 568 F.Supp.2d 778, 784 (E.D.Mich. 2008); *accord*, Mitchell v. Cate, 2013 WL 635964, *9-10 (E.D.Cal., Feb. 20, 2013) (noting that ongoing condition could be grieved at any time while it persisted under state's rules), *report and recommendation adopted*, 2013 WL 1625390 (E.D.Cal., Apr. 15, 2013); Cullen v. Pennsylvania Dept. of Corrections, 2012 WL 6015724, *8 (W.D.Pa., May 29, 2012) (holding "the leaky roof was of the continuing event variety, and plaintiff's grievance must be deemed timely"), *report and recommendation adopted in part, rejected in part on other grounds*, 2012 WL 6015721 (W.D.Pa., Dec. 3, 2012); Parisi v. Arpaio, 2009 WL 4051077, *3 (D.Ariz., Nov. 20, 2009) (". . . [T]he Court finds that no specific date would be required if Plaintiff is complaining about a policy that would affect him on a daily basis; therefore, the Court rejects Defendant's argument that the grievance was outside the time frame."); Hudson v. Radtke, 2009 WL 1597259, *4 (W.D.Wis., June 5, 2009) (holding grievance about confiscated books was timely where the books were still being withheld at the time of the grievance); Jones v. Caruso, 2008 WL 4534085 at *7 (W.D.Mich., Sept. 2, 2008) (claim of ongoing exposure to second-hand smoke was not limited by "date of incident" on grievance; citing *Ellis*), *report and recommendation adopted in part, rejected in part on other grounds*, 2008 WL 4534081 (W.D.Mich., Sept. 29, 2008); Rollins v. Magnusson, 2007 WL 2302141 at *5 (D.Me., Aug. 9, 2007) (declining to credit dismissal as untimely, since the plaintiff was "clearly grieving the *continued* confiscation of his legal material") (emphasis supplied); Holloway v. Correctional Medical Services, 2007 WL 1445701 at *5 (E.D.Mo., May 11, 2007) (holding grievance timely since plaintiff was grieving "the continual denial of information and treatment" that "continued to occur" when he filed his grievance and afterward); Abuhoran v. Morrison, 2005 WL 2140537 at *6 (E.D.Pa., Sept. 1, 2005) (noting that finding of procedural default did not prevent plaintiffs from filing a new grievance challenging ongoing policy "at any time"); *see also* Richardson v. Raemisch, 2008 WL 5377872 at *4 (W.D.Wis., Dec. 23, 2008) (where prisoner's previous grievances were procedurally inadequate, those complaints did not necessarily bar a new grievance about an ongoing problem); Wilkerson v. Beitzel, 2005 WL 5280675 at *3 n.4 (D.Md., Nov. 10, 2005) (holding plaintiff had exhausted, notwithstanding dismissal under rule that any complaint concerning a prison policy must be raised within 30 days of arrival at the prison, regardless of whether complaint is ongoing; court says policy "borders on sophistry"), *aff'd*, 184 Fed.Appx. 316 (4th Cir. 2006). *Contra*, Andrade v. Maloney, 2006 WL 2381429 at *6 (D.Mass., Aug. 16, 2006).

D. Exhaustion is an affirmative defense, need not be pled.

Jones v. Bock, 549 U.S. 199, 212-16 (2007). If you *can* plead without elaboration that all available administrative remedies have been exhausted, doing so may simplify the response to a motion to dismiss. If it's not that simple, leave it out of the complaint. The defendants have the burden to show that a remedy was available for a particular prisoner's complaint, and to do so by more than "vague and conclusory" statements from their officials. Hubbs v. Suffolk County Sheriff's Dept., 788 F.3d 54, 61 (2d Cir. 2015).

E. "Available" remedies

The PLRA requires exhaustion of "available" administrative remedies. Booth v. Churner, 532 U.S. 731, 736 (2001) (emphasis supplied) (a remedy is presumptively available unless it "lacks authority to provide *any* relief or to take *any* action whatsoever in response to a complaint"; holding unavailability of damages did not make remedy unavailable); Snider v. Melindez, 199 F.3d 108, 133 n.2 (2d Cir. 1999) (stating "the provision clearly does not require a prisoner to exhaust administrative remedies that do not address the subject matter of his complaint.") That means you must find out up front what those remedies are *for your client's claim*.

The Supreme Court has just elaborated on the meaning of "availability" in *Ross v. Blake*, 2016 WL 3128839, ___ S.Ct. ___ (2016), generally endorsing the body of case law discussed below in this section, though stating some issues more broadly or more narrowly than pre-existing case law:

> Building on our own and lower courts' decisions, we note as relevant here three kinds of circumstances in which an administrative remedy, although officially on the books, is not capable of use to obtain relief. . . .
>
> First, . . . an administrative procedure is unavailable when (despite what regulations or guidance materials may promise) it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates. . . . Suppose, for example, that a prison handbook directs inmates to submit their grievances to a particular administrative office—but in practice that office disclaims the capacity to consider those petitions. The procedure is not then "capable of use" for the pertinent purpose. . . . So too if administrative officials have apparent authority, but decline ever to exercise it. . . . When the facts on the ground demonstrate that no such potential exists, the inmate has no obligation to exhaust the remedy.
>
> Next, an administrative scheme might be so opaque that it becomes, practically speaking, incapable of use. In this situation, some mechanism exists to provide relief, but no ordinary prisoner can discern or navigate it. As the Solicitor General put the point: When rules are "so confusing that ... no reasonable prisoner can use them," then "they're no longer available." . . . That is a significantly higher bar than CRIPA established or the Fourth Circuit suggested: The procedures need not be sufficiently "plain" as to preclude any reasonable mistake or debate with respect to their meaning. . . . When an administrative process is susceptible of multiple reasonable interpretations, Congress has determined that the inmate should err on the side of exhaustion. But when a remedy is, in Judge Carnes's phrasing, essentially "unknowable"—so that no ordinary prisoner can make sense of what it demands—then it is also unavailable.

> And finally, the same is true when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation. In *Woodford*, we recognized that officials might devise procedural systems (including the blind alleys and quagmires just discussed) in order to "trip[ ] up all but the most skillful prisoners." . . . And appellate courts have addressed a variety of instances in which officials misled or threatened individual inmates so as to prevent their use of otherwise proper procedures. As all those courts have recognized, such interference with an inmate's pursuit of relief renders the administrative process unavailable.

INSERT PAGE CITE WHEN AVAILABLE; NOTE FOOTNOTE OMITTED

1. Sometimes grievance systems exclude certain issues from coverage and makes them "non-grievable." *See, e.g.*, Owens v. Keeling, 461 F.3d 763, 769-70 (6th Cir. 2006) (noting classification matters excluded from Tennessee grievance system); Mojias v. Johnson, 351 F.3d 606, 608-10 (2d Cir. 2003) (reversing dismissal of assault claim for non-exhaustion in a system that does not hear assault claims); Figel v. Bochard, 89 Fed.Appx. 970, 971, 2004 WL 326231 at *1 (6th Cir. 2004) (unpublished) (noting that Michigan system makes non-grievable issues that "involve a significant number of prisoners").

2. Sometimes informal practices have the same effect as formal exclusion—as acknowledged in *Ross v. Blake*, despite paper rules, "officers [may be] unable or consistently unwilling to provide any relief to aggrieved inmates" or officials [may] have apparent authority, but decline ever to exercise it. . . . When the facts on the ground demonstrate that no such potential exists, the inmate has no obligation to exhaust the remedy." ____ **CITE** Lower courts have cited many variations on this theme. *See, e.g.*, Smith v. Lagana, 574 Fed.Appx. 130, 132-33 (3d Cir. 2014) (holding evidence of "culture of not processing, nor responding to [grievances] against correctional guards," with evidence of efforts to exhaust, raises a factual question barring summary judgment of availability of remedy); Miller v. Coning, 2014 WL 808023, *7-8 (D.Del., Feb. 28, 2014) (holding remedies unavailable where plaintiff was told his complaint was non-grievable contrary to written grievance policy; noting "this is not the first instance in which the court has commented on *ad hoc* grievance procedures in Delaware prisons"), *report and recommendation adopted*, 2014 WL 3896605 (D.Del., Aug. 7, 2014); Wigfall v. Duval, 2006 WL 2381285 at *8 (D.Mass., Aug. 15, 2006) (citing evidence that use of force claims were not treated as grievances); Scott v. Gardner, 287 F.Supp.2d 477, 491 (S.D.N.Y.2003) (holding that allegations that grievance staff refused to process and file grievances about occurrences at other prisons, claiming they were not grievable, sufficiently alleged lack of an available remedy), *on reconsideration*, 344 F.Supp.2d 421 (S.D.N.Y. 2004) and 2005 WL 984117 (S.D.N.Y., Apr. 28, 2005); Casanova v. Dubois, 2002 WL 1613715 at *6 (D.Mass., July 22, 2002) (finding that, contrary to written policy, practice was "to treat complaints of alleged civil rights abuses by staff as 'not grievable'"), *remanded on other grounds*, 304 F.3d 75 (1st Cir. 2002); Livingston v. Piskor, 215 F.R.D. 84, 86-87 (W.D.N.Y. 2003) (holding that evidence that grievance personnel refused to process grievances where a disciplinary report had been filed covering the same events created a factual issue precluding summary judgment); *see* Marr v. Fields, 2008 WL 828788 at *6

(W.D.Mich., Mar. 27, 2008) (evidence that hearing officers interpreted grievance policy broadly to exclude all grievances with any relationship to a disciplinary charges could excuse failure to exhaust).

3. Sometimes there are multiple remedies with different coverage, and the prisoner must use the correct one. *See, e.g.*, Owens v. Keeling, 461 F.3d 763, 769 (6th Cir. 2006) (holding prisoner who filed classification appeal exhausted, notwithstanding failure to complete inapplicable grievance procedure); Richardson v. Spurlock, 260 F.3d 495, 499 (5th Cir. 2001) (holding that filing an "administrative" appeal rather than the required "disciplinary" appeal did not exhaust).

- The remedies the PLRA requires are generally prison grievance systems or other *internal* complaint or appeal systems (e.g., disciplinary or classification appeal), *see* Alexander v. Hawk, 159 F.3d 1321, 1326 (11th Cir. 1998) ("available" remedies under the PLRA refers to prison administrative remedy programs)—not state tort claim notices, *see* Rumbles v. Hill, 182 F.3d 1064 (9th Cir. 1999); the U.S. Department of Justice disability complaint system, *see* O'Guinn v. Lovelock Correctional Center, 502 F.3d 1056, 1062-63 (9th Cir. 2007); Veloz v. State of N.Y., 339 F.Supp.2d 505, 519 (S.D.N.Y., Sept. 30, 2004), *aff'd*, 178 Fed.Appx. 39 (2d Cir. 2006); *contra*, Brown v. Cantrell, 2012 WL 3264292, *7-8 (D.Colo., Feb. 9, 2012), *report and recommendation adopted*, 2012 WL 4050300, *3 (D.Colo., Sept. 14, 2012); Haley v. Haynes, 2012 WL 112946, *1 (S.D.Ga., Jan. 12, 2012); impartial hearing requirement of the Individuals with Disabilities in Education Act, *see* Handberry v. Thompson, 2003 WL 194205 at *11 (S.D.N.Y., Jan. 28, 2003) ("In *Porter [v. Nussle]*, the Court noted that Congress wished to afford corrections officials the opportunity to address complaints internally. . . . This observation is inconsistent with a rule requiring exhaustion of a remedy which is outside of the prison and which does not involve prison authorities."), *aff'd in part, vacated in part, and remanded on other grounds*, 446 F.3d 335 (2d Cir. 2006); a state statutory procedure for seeking a declaratory judgment from a state agency, Aiello v. Litscher, 104 F.Supp.2d 1068, 1074 (W.D.Wis. 2000); or state medical malpractice administrative procedures. McGraw v. Hornaday, 2007 WL 2694634 at *2 (S.D.Ind., Sept. 10, 2007).

- Internal law enforcement-type remedies such as internal affairs bureaus are generally not accepted as satisfying the exhaustion requirement, *see* Pavey v. Conley, 663 F.3d 899, 905 (7th Cir. 2011); Panaro v. City of North Las Vegas, 423 F.3d 949, 953 (9th Cir. 2005) (holding that participation in an internal affairs investigation did not exhaust because it did not provide a remedy for the prisoner, even though the officer was disciplined); Freeman v. Francis, 196 F.3d 641, 644 (6th Cir. 1999) (holding that investigations by prison Use of Force Committee and Ohio State Highway Patrol did not substitute for grievance exhaustion even though criminal charges were brought against the officer)—unless prison officials instruct prisoners to use them, *see* Ross v. Blake, _____ (noting that Administrative Remedy Procedure might be unavailable in light of evidence that complaints were dismissed where the Internal Investigation Unit was investigating the same incident); Reynolds v. Smith, 2015 WL 1968867, *9-10 (S.D.Ohio, May 1, 2015) (denying summary judgment for failing to grieve sexual assault where officials had proffered multiple alternative ways to complain about it), *report and recommendation adopted*, 2015 WL 5212053, *2-3, 5-7 (S.D. Ohio, Sept. 8, 2015); Ray

v. Jones, 2007 WL 397084 at *2 (W.D.Okla., Feb. 1, 2007) (declining to dismiss for failing to grieve where plaintiff was repeatedly advised that an internal affairs investigation would substitute for the grievance process), and sometimes not even then. *See* Doe v. Michigan Dep't of Corrections, 2016 WL 465496, *4 (E.D.Mich., Feb. 8, 2016) (holding creation of multiple means of reporting sexual abuse did not mean they substituted for pursuing a grievance), *reconsideration denied*, 2016 WL 2591871 (May 5, 2016); Amador v. Superintendents of Dep't of Correctional Services, 2007 WL 4326747 at *7-8 (S.D.N.Y., Dec. 4, 2007) (dismissing sexual abuse claims of prisoners who complained to Inspector General, as official instructions said they could, rather than filing grievances), *appeal dismissed in part, and vacated and remanded in part on other grounds*, 655 F.3d 89 (2d Cir. 2011).

- Exhaustion by informal means, seemingly recognized in some earlier decisions, is probably a dead letter. *Compare* Marvin v. Goord, 255 F.3d 40, 43 (2d Cir. 2001) (holding a prisoner who succeeded in resolving his complaint informally had exhausted, since the grievance policy says that the formal process was intended to supplement, not replace, informal methods) *with* Braham v. Clancy, 425 F.3d 177 (2d Cir. 2005) (holding prisoner who had obtained relief he sought through required informal complaint should have gone on to file a formal grievance because that process could have effected policy changes, staff discipline, etc.); Ruggiero v. County of Orange, 467 F.3d 170, 177 (2d Cir. 2006) (prisoner who obtained transfer by complaining to investigator did not exhaust; *Marvin v. Goord* "does not imply that a prisoner has exhausted his administrative remedies every time he receives his desired relief through informal channels."); *see also* Macias v. Zenk, 495 F.3d 37, 43-44 (2d Cir. 2007) ("after *Woodford*, notice alone is insufficient" without compliance with "critical procedural rules"). Most decisions hold that simply writing a letter to the warden or other free-form complaint does not exhaust, *see, e.g.*, Yousef v. Reno, 254 F.3d 1214, 1221-22 (10th Cir. 2001) (holding that a letter to the Attorney General was insufficient to exhaust as to actions that had been authorized by the Attorney General, despite the government's lack of clarity as to what authority the administrative remedy procedure might have over the Attorney General's decisions); Withrow v. Taylor, 2007 WL 3274858 at *6-7 (N.D.N.Y., Nov. 5, 2007) (letters are not grievances and do not exhaust). Authority to the contrary, *see, e.g.*, Camp v. Brennan, 219 F.3d 279 (3rd Cir. 2000) (holding that use of force allegation that was investigated and rejected by Secretary of Correction's office need not be further exhausted), is probably not reliable after *Woodford v. Ngo*, discussed below. If anything survives of informal exhaustion, it is probably outside the Second Circuit in cases where the informal procedure is prescribed in the grievance policy. *See, e.g.*, Barrett v. Maricopa County Sheriff's Office, 2010 WL 46786, *4-5 (D.Ariz., Jan. 4, 2010) (prisoner who got his medication, which was all he sought, through the pre-grievance informal process had exhausted).

- Remedies may be unavailable to a particular plaintiff because of that plaintiff's limited capacities, temporary or permanent, physical or mental. Beaton v. Tennis, 460 Fed.Appx. 111, 113-14 (3d Cir. 2012) (unpublished) (evidence that prison staff took advantage of plaintiff's confused mental state arising from a skull fracture and post-concussion syndrome to make him withdraw his grievance raised a factual issue barring

summary judgment for non-exhaustion); Hurst v. Hantke, 634 F.3d 409, 411-12 (7th Cir. 2011) (holding remedy would be unavailable if prisoner was incapacitated by stroke during time when he was required to file grievance, and he was not allowed to file a late grievance), *cert. denied*, 132 S.Ct. 168 (2011); Braswell v. Corrections Corp. of America, 419 Fed.Appx. 622, 625 (6th Cir. 2011) (unpublished) (holding defendant must show mentally disabled plaintiff "was actually capable of filing" a grievance seeking mental health treatment, including whether he "even knew that he needed mental health treatment—much less that he needed to communicate that need to CCA personnel," whether he "was mentally capable of filing a grievance," and whether he "sufficiently understood the detention facility's grievance system" and knew he had to fill out a form); Days v. Johnson, 322 F.3d 863, 867 (5th Cir. 2003) (noting that "one's personal ability to access the grievance system could render the system unavailable"; plaintiff could not write a grievance because his hand was broken); Millner v. Biter, 2016 WL 110425, *6 (E.D. Cal., Jan. 11, 2016) (holding sworn allegations of inability to exhaust because of mental and physical conditions required a hearing), *report and recommendation adopted*, 2016 WL 888126, *1 (Mar. 9, 2016); Warner v. Cate, 2015 WL 9480625, *3-5 (E.D. Cal., Dec. 29, 2015) (holding remedy unavailable because of plaintiff's mental condition as documented in medical records), *report and recommendation adopted*, 2016 WL 696422 (E.D.Cal., Feb. 22, 2016); Hale v. Rao, 768 F.Supp.2d 367, 377 (N.D.N.Y., Mar. 8, 2011) ("Hale's illiteracy and poor understanding of the IGP rendered the grievance procedure unavailable"; court mentions that plaintiff had a recorded IQ of 71; failure to exhaust is "excused"); Childers v. Bates, 2010 WL 1268143, *6-7 (S.D.Tex., Jan. 14, 2010) (remedy that required identification of defendants was not "personally available" to prisoner who could not do so because of a head injury and memory loss), *report and recommendation rejected on other grounds*, 2010 WL 1268139 (S.D.Tex., Mar. 26, 2010); Williams v. Hayman, 657 F.Supp.2d 488, 495-97 (D.N.J. 2008) (evidence of the deaf plaintiff's inability to communicate in writing or with his counselor raised a factual issue concerning availability to him of the grievance remedy); Johnson-Ester v. Elyea, 2009 WL 632250, *6-8 (N.D.Ill., Mar. 9, 2009) (where prisoner could not write, ambulate, or make himself understood, and may have been irrational or delusional at times, he was not capable of pursuing a grievance; letters from his mother and lawyer about his condition put officials on sufficient notice they should have assisted him in filing a grievance; grievance system made no provision for outside persons to use it); Whitington v. Sokol, 491 F.Supp.2d 1012, 1019 (D.Colo. 2007) (refusing to dismiss for non-exhaustion where plaintiff alleged he had no remedies because he was mentally incapacitated and was transferred to a mental institution shortly after the incident he sued about). Note that this category of unavailability—based on characteristics of the prisoner rather than the grievance policy or the actions of staff and officials—was not mentioned in *Ross v. Blake*. I do not think that means the Court is *sub silentio* disapproving it; the facts of *Ross* did not make it salient.

Counsel representing a plaintiff who has not exhausted for such a reason should consider adding a claim under the Americans with Disabilities Act and the Rehabilitation Act for failure to accommodate the client's disability, *e.g.*, by refusing to allow counsel to exhaust for the client out of time. However, if the grievance system nominally has accommodations for the disabled, counsel will have to explain and justify the prisoner's

failure to use them. *See* Smith v. Sharp, 2010 WL 3609527, *4 (D.S.C., July 23, 2010) (holding injuries did not justify non-exhaustion where staff assistance was available for disabled prisoners, and physical inability to file was a recognized basis for allowing late filing), report *and recommendation adopted*, 2010 WL 3609492 (D.S.C., Sept. 13, 2010), *aff'd*, 409 Fed.Appx. 673 (4th Cir. 2011) (unpublished).

F. "Proper" exhaustion

1. Prisoners have to follow the rules of the grievance system. If they don't use the right remedy, or if their grievances are rejected for procedural noncompliance, including missing time limits, their claims are procedurally defaulted. Woodford v. Ngo, 548 U.S. 81, 90-91 (2006) (holding the PLRA "demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings."). The extent to which there can be exceptions to this "proper exhaustion" rule is addressed in § H, below.

2. Conversely, if prisoners *do* follow the grievance rules, they have exhausted; their claims may not be dismissed for non-exhaustion based on other considerations. Jones v. Bock, 549 U.S. 199, 218 (2007) (holding "it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion."); *accord*, Ross v. Blake, _____ n.1 (stating "our adherence to the PLRA's text runs both ways). As noted below, claims may also not be dismissed for non-exhaustion for failure to follow rules that are not made known to the prisoners. *See* subsection 6, *infra*.

3. If prisoners' grievances are addressed on the merits notwithstanding procedural errors (including missing time deadlines), then prison officials cannot rely on those the procedural errors in subsequent litigation. Reyes v. Smith, 810 F.3d 654, 658 (9th Cir. 2016); Whatley v. Warden, Ware State Prison, 802 F.3d 1205, 1213-14 (11th Cir. 2015); Hammett v. Cofield, 681 F.3d 945, 947 (8th Cir. 2012); Hill v. Curcione, 657 F.3d 116, 125 (2d Cir. 2011); Maddox v. Love, 655 F.3d 709, 722 (7th Cir. 2011) ("Where prison officials address an inmate's grievance on the merits without rejecting it on procedural grounds, the grievance has served its function of alerting the state and inviting corrective action, and defendants cannot rely on the failure to exhaust defense."); Reed-Bey v. Pramstaller, 603 F.3d 322, 325 (6th Cir. 2010); Gates v. Cook, 376 F.3d 323, 331 n.6 (5th Cir. 2004); Riccardo v. Rausch, 375 F.3d 521, 524 (7th Cir. 2004); Spruill v. Gillis, 372 F.3d 218, 234 (3rd Cir. 2004); Ross v. County of Bernalillo, 365 F.3d 1181, 1186 (10th Cir. 2004); Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002).

4. ***YOU MUST FIND OUT ASAP*** what your client did to exhaust, and what the result was. If your client did not exhaust, and do so properly, you must either cure the deficiency *before* filing suit, or have an argument for why the exhaustion requirement should not be enforced.

5. Find out what the grievance or other relevant rules were, and just as importantly, the information *the client* had about the operation of the grievance system. Inmate handbooks, orientation presentations, or instructions by prison staff may not be consistent with the formal regulation or policy directive.

6. There are several recurring situations in which prisoners have not been held to a "proper exhaustion" standard, *e.g.*:

- Prisoners' claims cannot be dismissed for failure to comply with rules that are not made available to them. *See* Hill v. Snyder, 817 F.3d 1037, 1040 (7th Cir. 2016) (refusing to find non-exhaustion where officials refused to process a grievance for reasons not in the grievance policy, and failed to indicate as the policy *did* require what correction the plaintiff needed to make in order to proceed); Thomas v. Reese, 787 F.3d 845, 847 (7th Cir. 2015) (holding remedy unavailable to a prisoner who did not have access to the grievance policy in a segregation unit; while he had possessed it briefly upon admission, the PLRA "imposed no duty on Thomas to memorize it during that time"); Hurst v. Hantke, 634 F.3d 409, 411 (7th Cir. 2011) (refusing to find non-exhaustion where prisoner violated apparent "secret supplement to the state's administrative code, requiring that claims of good cause for an untimely filing be accompanied by evidence"), *cert. denied*, 132 S.Ct. 168 (2011); Jackson v. Ivens, 2007 WL 2261552 at *4 (3d Cir. 2007) (unpublished) ("We will not condition exhaustion on unwritten or 'implied' requirements."); Goebert v. Lee County, 510 F.3d 1312 (11th Cir. 2007) (refusing to dismiss for non-exhaustion where the prisoner had failed to use an appeal procedure not disclosed in any document available to prisoners).

- Prisoners' claims cannot be dismissed for non-exhaustion where officials have failed to make clear which remedy is applicable to their problem. Westefer v. Snyder, 422 F.3d 570, 580 (7th Cir. 2005) (refusing to dismiss for non-exhaustion where prison policies did not "clearly identif[y]" the proper remedy and there was no "clear route" for prisoners to challenge certain decisions); Giano v. Goord, 380 F.3d 670, 678-79 (2d Cir. 2004) (holding failure to exhaust properly was justified where distinction between grievance and disciplinary appeal was not made clear and the plaintiff arguably guessed wrong).

- Where the actual practice in grievance system diverges from written rules, a prisoner who complies with the actual practice exhausts. Curtis v. Timberlake, 436 F.3d 709, 712 (7th Cir. 2005); *accord*, Greenup v. Lee, 2014 WL 471715, *5-6 (W.D.La., Feb. 5, 2014) (declining to hold plaintiff to time limits in state regulations where the prison warden made up his own procedures with different time limits); Smith v. Merline, 719 F.Supp.2d 438, 445 (D.N.J. 2010) ("Courts have recognized that an inmate may satisfy the exhaustion requirement where he follows an accepted grievance procedure, even where that procedure contradicts a written policy.").

- Prisoners cannot be held responsible for anomalous situations in which the prison rules give no direction how to proceed. *See* Hill v. Snyder, 817 F.3d 1037, 1040 (7th Cir. 2016) ("The administrative exhaustion requirement of § 1997e(a) serves important purposes but does not invite prison and jail staff to pose guessing games for prisoners."); Troche v. Crabtree, 814 F.3d 795, 800-01 (6th Cir. 2016) (holding a prisoner who got no response to his grievance was not obliged to treat the non-response as a response and appeal it in the absence of a rule to that effect); Turner v. Burnside, 541 F.3d 1077, 1083-84 (11th Cir. 2008) (holding a prisoner whose grievance was torn up by the warden was not required to file another one or grieve the warden's action; "[n]othing in [the rules]

requires an inmate to grieve a breakdown in the grievance process"); Dole v. Chandler, 438 F.3d 804, 811-12 (7th Cir. 2006) (holding a prisoner had exhausted when he did everything necessary to exhaust but his grievance simply disappeared, and he received no instructions as to what if anything to do about it); Miller v. Berkebile, 2008 WL 635552, *7-9 (N.D.Tex., Mar. 10, 2008) (where official refused to process grievances contrary to policy, prisoners were not required to take steps not prescribed in the policy to get around him). The Supreme Court may have altered the relevant standard: It noted that "an administrative scheme might be so opaque that it becomes, practically speaking, incapable of use. In this situation, some mechanism exists to provide relief, but no ordinary prisoner can discern or navigate it." However, it went on to say: "That is a significantly higher bar than CRIPA established or the Fourth Circuit suggested: The procedures need not be sufficiently "plain" as to preclude any reasonable mistake or debate with respect to their meaning. . . . When an administrative process is susceptible of multiple reasonable interpretations, Congress has determined that the inmate should err on the side of exhaustion." Ross v. Blake, ____ **CITE** Whether this means prisoners will be held responsible for guessing wrong about unclear rules remains to be seen.

- Prisoners' claims cannot be dismissed where they have reasonably relied on officials' representations about how to exhaust or whether an issue is grievable or appealable. *See, e.g.*, Ross v. Blake, ___ (citing cases where remedy was unavailable because prisoner was misled); Swisher v. Porter County Sheriff's Dept., 769 F.3d 553, 555 (7th Cir. 2014) (holding a prisoner told by officials that he need not exhaust may rely on their statements); Marella v. Terhune, 568 F.3d 1024, 1027 (9th Cir. 2009) (where appeal was screened out with a form stating the decision was not appealable, prisoner was not required to appeal further); Brownell v. Krom, 446 F.3d 305, 312 (2d Cir. 2006) (citing erroneous advice to abandon property loss claim and file a grievance in finding special circumstances excusing failure to exhaust correctly); Pavey v. Conley, 170 Fed.Appx. 4, 8-9, 2006 WL 509447 at *4-5 (7th Cir., Mar. 3, 2006) (unpublished) (stating that "inmates may rely on the assurances of prison officials when they are led to believe that satisfactory steps have been taken to exhaust administrative remedies. . . . [P]rison officials will be bound by their oral representations to inmates concerning compliance with the grievance process"; plaintiff, who could not write, could reasonably rely on assurances that his oral complaint would be investigated); Brown v. Croak, 312 F.3d 109, 112-13 (3d Cir. 2002) (holding that if security officials told the plaintiff to wait for completion of an investigation before grieving, and then never informed him of its completion, the grievance system was unavailable to him); Miller v. Tanner, 196 F.3d 1190 (11th Cir. 1999) (holding that grievance decision that stated it was non-appealable need not have been appealed); Johnson v. Van Boening, 2008 WL 4162901 at *4 (W.D.Wash., Sept. 3, 2008) (plaintiff exhausted despite failure to appeal to third and final level where decisions at first two levels said complaint was non-grievable); Smith v. Westchester County Dept. of Corrections, 2008 WL 361130 at *3 (S.D.N.Y., Feb. 7, 2008) (plaintiff reasonably believed his claim was not grievable where a Sergeant told him so). This rule will generally be restricted to cases of explicit staff representations about the grievance system. *See, e.g.*, Lyon v. Vande Krol, 305 F.3d 806, 809 (8th Cir. 2002) (holding that warden's statement that a decision about religious matters rested in the hands of "Jewish experts" did not excuse non-exhaustion, but was at most a

prediction that the plaintiff would lose; courts will not consider inmates' subjective beliefs in determining whether procedures are "available"); Jackson v. District of Columbia, 254 F.3d 262, 269-70 (D.C.Cir. 2001) (holding that a plaintiff who complained to three prison officials and was told by the warden to "file it in the court" had not exhausted).

G. Curing non-exhaustion

1. This is not a high-percentage move but you should try it anyway under some circumstances. Many prison grievance systems have provisions for filing late grievances for good cause, mitigating circumstances, etc. If your client's grievance was dismissed for untimeliness or for other procedural error, or if the client did not grieve at all, and if the client has a plausible excuse, it may be advantageous to advise your client to file a new grievance, invoking the exception for good cause or mitigating circumstances and explaining what they were. Prisoners seem to have great difficulty in understanding this notion and you should probably help them formulate their argument. If the rules allow a representative to file the grievance, do it for them. The grievance will probably be rejected, but the more your client has done, the better position you will be in to argue for some flexibility in application of the statute. In addition, it may help avoid a Catch-22 in the law: some courts have held that a prisoner who did not file a timely grievance, even for good reason, is obliged to file an untimely one, even if it would seem that doing so would be a nullity. *See, e.g.*, Bryant v. Rich, 530 F.3d 1368, 1373 (11th Cir. 2008) (holding prisoner who said he didn't grieve for fear of assault should have exhausted after transfer); Mayhew v. Gardner, 2008 WL 4093130 at *4-5 (M.D.Tenn., Aug. 22, 2008); In re Bayside Prison Litigation, 2008 WL 2387324 at *5 (D.N.J., May 19, 2008); Chavez v. Thorton, 2008 WL 2020319 at *4-5 (D.Colo., May 9, 2008).

2. Another approach to curing non-exhaustion, on the proper facts, could be a state court challenge to the procedural rejection of a grievance, whether it is a grievance already filed and completed by the prisoner, or a new grievance filed and pursued at the instance and with the assistance of counsel. Suppose a prisoner missed the grievance deadline because he was out of the jail at a hospital with no access to the grievance process; he did not file a grievance on return because he understood (maybe from reading *Woodford v. Ngo*) that it would be ineffective to exhaust. If counsel instructs the prisoner to file a late grievance, explaining the circumstances and the fact that his lawyer has advised him that late exhaustion is appropriate under them, and the late grievance is denied, can counsel then seek judicial review of the grievance denial on state administrative law grounds? If a state court orders that the grievance be heard, presumably the exhaustion requirement will be satisfied. I am not aware of any instance in which this has been tried.

H. When all else fails: excusing non-exhaustion

There is a large body of law about the circumstances under which prisoners who have not exhausted may or may not be excused. There are several ways of characterizing such excuses:

1. A nominally available remedy may not be available in fact because of such circumstances as

- threats and intimidation, *see* Ross v. Blake, _____ **CITE** (noting intimidation and threats can make remedy unavailable); McBride v. Lopez, 807 F.3d 982, 986-87 (9th Cir. 2015); Tuckel v. Grover, 660 F.3d 1249, 1252-54 (10th Cir. 2011) (cited with approval in *Ross*); Verbanik v. Harlow, 441 Fed.Appx. 931, 933 (3d Cir. 2011) (unpublished); Turner v. Burnside, 541 F.3d 1077, 1084 (11th Cir. 2008) ("Remedies that rational inmates cannot be expected to use are not capable of accomplishing their purposes, and so are not available"); Kaba v. Stepp, 458 F.3d 678, 684-86 (7th Cir. 2006); Hemphill v. New York, 380 F.3d 680, 688 (2d Cir. 2004);

- prison rules that obstruct using the grievance system, *see* Church v. Oklahoma Correctional Industries, 2011 WL 4376222, *7 (W.D.Okla., Aug. 15, 2011) (remedy was unavailable where grievance personnel refused to accept a grievance without a date of incident, when the complaint was not about an incident but about an ongoing practice), *report and recommendation adopted*, 2011 WL 4383225 (W.D.Okla., Sept. 20, 2011); Iseley v. Beard, 2009 WL 1675731, *6 (M.D.Pa., June 15, 2009) (remedy was unavailable where copies of documents were required to appeal but there was no copier access in Restricted Housing Unit; grievance authorities said this is "not our problem"); Marr v. Jones, 2009 WL 160787 at 5-8 (W.D.Mich., Jan. 22, 2009) (placed in "modified grievance status" and barred from filing grievance); Cordova v. Frank, 2007 WL 2188587 at *6 (W.D.Wis., July 26, 2007) (denial of postage to indigent to mail a grievance appeal); Daker v. Ferrero, 2004 WL 5459957 at *2-3 (N.D.Ga., Nov. 24, 2004) (exclusion of prisoner in "sleeper" status, who remained officially assigned to another prison, from use of grievance system);

- denial of necessary forms, Hill v. Snyder, 817 F.3d 1037, 1041 (7th Cir. 2016) (where prisoner was denied forms by persons responsible for providing them, prisoner was not obliged to go on a "scavenger hunt"); Miller v. Norris, 247 F.3d 736, 740 (8th Cir. 2001); Dale v. Lappin, 376 F.3d 652, 654-56 (7th Cir. 2004) (per curiam); Mitchell v. Horn, 318 F.3d 523, 529 (3d Cir. 2003); and

- prisoners' reliance on the representations of prison officials as to the operation of the grievance system. Ross v. Blake, ____ **CITE** (noting official misrepresentation can make remedy unavailable); Pavey v. Conley, 663 F.3d 899, 906 (7th Cir. 2011) ("An administrative remedy is not 'available,' and therefore need not be exhausted, if prison officials erroneously inform an inmate that the remedy does not exist or inaccurately describe the steps he needs to take to pursue it."); Brown v. Croak, 312 F.3d 109, 112-13 (3d Cir. 2002); Miller v. Tanner, 196 F.3d 1190 (11th Cir. 1999).

2. Decisions holding that non-exhaustion may be excused based on "special circumstances" have been overruled by the Supreme Court's decision in *Ross v. Blake*,___ **CITE** , which rejected such an extra-statutory exception as contrary to the PLRA's language and history. *See, e.g.*, Brownell v. Krom, 446 F.3d 305, 311-13 (2d Cir. 2006) (reliance on misinformation received from grievance personnel); Giano v. Goord, 380 F.3d 670, 676 (2d Cir. 2004) (lack of clarity in rules leading prisoner to select the wrong remedy). Whether the practical results of such decisions are invalidated must be assessed case by case, since the facts upon which courts have found special circumstances will often similar to those supporting a finding of unavailability, *see*

Giano v. Goord, 380 F.3d 670, 677 n.6 (2d Cir. 2004), and in fact some courts have treated the two concepts as interchangeable or coextensive. *See, e.g.*, Gibson v. Rosati, 2014 WL 3809162, *7, *8-9 (N.D.N.Y., Aug. 1, 2014) (recommending evidentiary hearing to determine whether threats made the remedy unavailable, estopped the non-exhaustion defense, or constituted special circumstances excusing exhaustion); Sandin v. Poole, 575 F.Supp.2d 484, 488 (W.D.N.Y.2008) (finding that the plaintiff's allegation that a prison official's "refusal to accept or forward plaintiff's appeals ... effectively rendered the grievance process unavailable to [the plaintiff]" and would also constitute special circumstances);

3. Many courts have held that prison personnel may be estopped from raising the exhaustion defense by their conduct, *see* Hemphill v. New York, 380 F.3d 680, 689 (2d Cir. 2004); Ziemba v. Wezner, 366 F.3d 161, 163-64 (2d Cir. 2003); or that of grievance personnel.

In my view, estoppel, at least as most commonly understood, is unaffected by the Supreme Court decision in *Ross v. Blake*, **CITE** Estoppel is a general rule of litigation that is applicable in many contexts, and is therefore governed by the rule of *Jones v. Bock*, which holds that the PLRA exhaustion requirement will not be read to displace the usual practices of litigation unless the statute says so. 549 U.S. 199, 220-24 (2007) (holding there is no "total exhaustion" rule under the PLRA, and the usual practice of dismissing only defective claims and allowing others to go forward should apply to exhausted and unexhausted claims).

There is one qualification to this view. In some cases, courts have held an exhaustion defense estopped based on the conduct of persons other than the named plaintiff. *See, e.g.*, Cabrera v. LeVierge, 2008 WL 215720 at *6 (D.N.H., Jan. 24, 2008) ("Defendants' reliance upon undisclosed rules to reject plaintiff's grievance form necessarily estops them from relying upon plaintiff's failure to exhaust those remedies as a defense."); Warren v. Purcell, 2004 WL 1970642 at *6 (S.D.N.Y. Sept. 3, 2004) (holding "baffling" grievance response that left prisoner with no clue what to do next estopped defendants from claiming the defense). Other courts have rejected such applications of estoppel. *See, e.g.*, Dillon v. Rogers, 596 F.3d 260, 270 (5th Cir. 2010) (holding estoppel can only arise from misconduct of named defendants). Estoppel based on the conduct of persons who are not parties to the litigation is arguably *not* a usual practice of litigation that can defeat a defense of non-exhaustion, in which case its application would not survive *Ross v. Blake*..

This question may well be academic. While a number of decisions rely on an estoppel theory, I am not sure I have ever seen one in which the relevant facts could not have been equally well addressed in terms of the availability of remedies.

4. You need to *find out why* your client did not exhaust or did not exhaust correctly in order to know whether this law is helpful or whether there are facts you can prove that will make it helpful.

IV. The physical injury requirement

"No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e).

A. Limit on damages, not "actions"

Most circuits hold that this provision bars compensatory damages, leaving nominal and punitive damages intact. Hutchins v. McDaniels, 512 F.3d 193, 196-98 (5th Cir. 2007); Royal v. Kautzky, 375 F.3d 720, 723 (8th Cir. 2004); Oliver v. Keller, 289 F.3d 623, 629 (9th Cir. 2002);Thompson v. Carter, 284 F.3d 411, 418 (2d Cir. 2002) (citing cases). Two hold that punitives are also barred. Smith v. Allen, 502 F.3d 1255, 1271-72 (11th Cir. 2007); Davis v. District of Columbia, 158 F.3d 1342, 1348 (D.C. Cir. 1998).

B. Intangible constitutional rights

1. Most courts assume that violation of intangible civil liberties is a mental or emotional injury. Fegans v. Norris, 537 F.3d 897, 908 (8th Cir. 2008) (applying § 1997e(e) to deprivation of religious diet); Mayfield v. Texas Dept. of Criminal Justice, 529 F.3d 599, 605-06 (5th Cir. 2008) (applying § 1997e(e) to claims of restricted religious exercise); Geiger v. Jowers, 404 F.3d 371, 374 (5th Cir. 2005) (per curiam) ("To the extent Geiger seeks compensation for injuries alleged to have resulted from a First Amendment violation [*i.e.*, deprivation of magazines], the district court properly determined that his claim is barred by the physical injury requirement of § 1997e(e)."); Allah v. Al-Hafeez, 226 F.3d 247 (3d Cir. 2000) (assuming complaint about deprivation of religious services must be mental or emotional). The contrary argument, that liberty is not in one's head, is little understood or accepted. *See* Rowe v. Shake, 196 F.3d 778, 781-82 (7th Cir. 1999) ("A prisoner is entitled to judicial relief for a violation of his First Amendment rights aside from any physical, mental, or emotional injury he may have sustained."); Shaheed-Muhammad v. Dipaolo, 393 F.Supp.2d 80, 108 (D.Mass. 2005) ("the violation of a constitutional right is an independent injury that is immediately cognizable and outside the purview of § 1997e(e)").

2. Some courts have said (with no basis in the statute) that First Amendment claims are an exception to the physical injury requirement. Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir.1998); Porter v. Caruso, 2008 WL 3978972 at *9 (W.D.Mich., Aug. 22, 2008); Eng v. Blood, 2008 WL 2788894 at *4 (N.D.N.Y., July 17, 2008); *see* Toliver v. City of New York, 530 Fed.Appx. 90, 93 n.2 (2d Cir. 2013) (unpublished) (stating "even if Toliver is unable to establish that any of the injuries complained of in this action stemmed from an incident in which he suffered physical injuries, Toliver may still recover damages for injuries to his First Amendment rights").

3. A few courts get it right, holding generally that claims of constitutional violations (including First Amendment violations) "are distinct from mental and emotional injuries" and are simply not within the terms of the statute. King v. Zamiara, 788 F.3d 207, 213-14 (6th Cir. 2015) (noting that damages in such cases must be based on the circumstances of the violation and not the abstract importance of the right involved), *cert. denied*, 136 S.Ct.

794 (2016); Richardson v. Bauman, 2015 WL 5347557, *2 (W.D.Mich., Sept. 14, 2015) (applying *King v. Zamiara* holding to Eighth Amendment claim).

3. Claims of this nature often result in awards of nominal damages anyway—but they don't have to, especially if you get them to a jury. *See, e.g.*, Sallier v. Brooks, 343 F.3d 868, 880 (6th Cir. 2003) (affirming jury award of $750 in compensatory damages for each instance of unlawful opening of legal mail); Goff v. Burton, 91 F.3d 1188, 1192 (8th Cir. 1996) (affirming $2250 award at $10 a day for lost privileges resulting from a retaliatory transfer to a higher security prison); Lowrance v. Coughlin, 862 F.Supp. 1090, 1120 (S.D.N.Y. 1994) (awarding significant damages for repeated retaliatory prison transfers, segregation, cell searches).

C. Conditions of confinement

Most courts assume that disgusting or extremely restrictive conditions of confinement that don't cause physical injury amount only to mental or emotional injury. *See*, *e.g.*, Williams v. Hobbs, 662 F.3d 994, 1010-11 (8th Cir. 2011) (holding 14 years' segregation did not inflict physical injury and plaintiff was limited to $1.00 nominal damages for each defective review hearing); Harden-Bey v. Rutter, 524 F.3d 789, 795 (6th Cir. 2008) (barring damages for three years in segregation); Harper v. Showers, 174 F.3d 716, 719-20 (5th Cir. 1999) (barring damage claims for placement in filthy cells formerly occupied by psychiatric patients and exposure to deranged behavior of those patients). The contrary argument, that the objective difference between such conditions and constitutionally acceptable conditions is compensable independent of mental or emotional injury, *see* Mitchell v. Horn, 318 F.3d 523, 534 (3d Cir. 2003) (stating that requests for damages for loss of "status, custody level and any chance at commutation" resulting from a disciplinary hearing were "unrelated to mental injury" and "not affected by § 1997e(e)'s requirements."); Fields v. Ruiz, 2007 WL 1821469 at *7 (E.D.Cal., June 25, 2007) (holding prisoner alleging he was confined in a cell with an overflowing toilet for 28 days was not "seeking compensatory damages for mental or emotional injuries"; for Eighth Amendment claims, "the issue is the nature of the deprivation, not the injury"), *report and recommendation adopted*, 2007 WL 2688453 (E.D.Cal., Sept. 10, 2007), is little understood or accepted. *See* Pearson v. Welborn, 471 F.3d 732, 744 45 (7th Cir. 2006) (stating plaintiff sent to segregation for a year "fails to convincingly explain how damages to compensate him for the difference in conditions would be anything but recovery for 'mental or emotional injury' now barred by the PLRA); Royal v. Kautzky, 375 F.3d 720, 724 (8th Cir. 2004) (similar to *Pearson*).

D. Liberty is not just mental or emotional: *Kerman v. City of New York*

1. Litigants in the Second Circuit are better situated to avoid rulings like those cited in the preceding sections because that court has explicitly recognized the distinction between deprivation of liberty and mental or emotional injury. In a non-prison Fourth Amendment/false imprisonment case, it held:

> The damages recoverable for loss of liberty for the period spent in a wrongful confinement are separable from damages recoverable for such injuries as physical harm, embarrassment, or emotional suffering; even

> absent such other injuries, an award of several thousand dollars may be appropriate simply for several hours' loss of liberty.

Kerman v. City of New York, 374 F.3d 93, 125 (2d Cir. 2004).

2. The *Kerman* holding has at last begun to be applied by district courts in prison cases. *See* Rosado v. Herard, 2013 WL 6170631, *10 (S.D.N.Y., Nov. 25, 2013) ("Herard's motion mistakenly assumes that, where no physical injury is alleged, the only injury that a plaintiff may suffer as a result of retaliation is mental or emotional harm. The Second Circuit has held, however, that intangible deprivations of liberty and personal rights are distinct from claims for pain and suffering, mental anguish, and mental trauma." (citing *Kerman*); claim was for violation of privacy rights by disclosure of HIV status); Mendez v. Amato, 2013 WL 5236564, *20 (N.D.N.Y., Sept. 17, 2013) (holding claims based on confinement in Involuntary Protective Custody "involve the loss of such intangibles as liberty through a lack of due process and equal protection" and thus "fall outside of the physical harm requirement of the PLRA"; citing *Kerman*'s distinction between loss of liberty and emotional suffering); Malik v. City of New York, 2012 WL 3345317, *16-17 (S.D.N.Y., Aug. 15, 2012) ("The Defendants' motion mistakenly assumes that the only injury that a plaintiff may suffer without a physical injury is mental or emotional harm. The Second Circuit has held, however, that intangible deprivations of liberty and personal rights are distinct from claims for pain and suffering, mental anguish, and mental trauma. See *Kerman* . . . . Malik's religion and retaliation claims allege deprivations of personal rights under the First Amendment which do not fall under the PLRA's physical injury requirement for compensatory damages."), *report and recommendation adopted*, 2012 WL 4475156 (S.D.N.Y., Sept. 28, 2012).

E. Plead it

If your case involves only intangible rights or non-injurious conditions of confinement, you may as well tackle the issue head-on. Do not plead mental anguish. Plead explicitly that you do not seek compensatory damages for mental or emotional injury; you seek compensation for loss of liberty or for the objective conditions to which the plaintiff was subjected, plus punitive and nominal damages. The court may still ignore the distinction, but you will have given it your best. Here is what an *ad damnum* clause might look like under this approach:

> WHEREFORE, plaintiff requests that the court grant the following relief:
>
> A. Award compensatory damages against Hearing Officer Smith, by reason of the denials of procedural due process set out in ¶¶ ___, above, for:
>
> 1. The loss of privileges and quality of life attendant upon plaintiff's confinement for twelve months in the restrictive conditions of the Special Housing Unit, and the exclusion from normal prison activities and privileges associated with that confinement, in that he was confined for 23 hours a day in a cell roughly 60 feet square, and deprived of most of his personal property as well as the ability to work, attend educational and vocational programs, watch television, associate with other prisoners, attend outdoor recreation in a

congregate setting with the ability to engage in sports and other congregate recreational activities, attend meals with other prisoners, and attend religious services.

2. The economic loss resulting from plaintiff's exclusion from paid employment in the prison during his Special Housing Unit confinement.

Consistently with 42 U.S.C. § 1997e(e), the plaintiff does not seek additional compensatory damages for mental or emotional injury resulting from the above described injuries.

B. Award punitive damages against Hearing Officer Smith for his willful and/or reckless conduct in denying plaintiff the due process of law at his disciplinary hearing.

C. Award nominal damages against Hearing Officer Smith for his violation of the plaintiff's constitutional right to the due process of law.

E. Physical injury

1. Physical injury is not defined in the statute, and the closest the case law comes to a definition is "not *de minimis*"—which does not explain what physical injury *is*. As a result, the line between harm that satisfies the statute and harm that does not is quite indefinite in cases that do not involve outright tissue damage. *Compare* Thompson v. Secretary, Florida Dept. of Corrections, 551 Fed.Appx. 555, 556-57 (11th Cir. 2014) (unpublished) (holding allegations of "headaches, weakness, cold sweats, dizziness, weight loss, numbness in his left arm, and high blood sugar that caused fainting" represented more than *de minimis* physical injury since they constituted "continuing severe physical pain and other symptoms that persisted for an extended period of time and required medical treatment"); Hinton v. Mark, 544 Fed.Appx. 75, 76 n.2 (3d Cir. 2013) (unpublished) (holding plaintiff who attempted suicide by overdose of pills and was hospitalized for two days satisfied § 1997e(e)); Munn v. Toney, 433 F.3d 1087, 1089 (8th Cir. 2006) (holding claim of headaches, cramps, nosebleeds, and dizziness resulting from deprivation of blood pressure medication "does not fail . . . for lack of physical injury"); Bond v. Rhodes, 2006 WL 1617892 at *3 (W.D.Pa., June 8, 2006) (holding allegation of serious diarrhea resulting from food tampering satisfied the requirement at the pleading stage); Williams v. Humphreys, 2005 WL 4905109 at *7 (S.D.Ga., Sept. 13, 2005) (holding allegation of 12 pounds weight loss, abdominal pain, and nausea resulting from denial of pork substitute at meals sufficiently alleged physical injury); Ziemba v. Armstrong, 2004 WL 78063 at *3 (D.Conn., Jan. 14, 2004) (holding that allegation of withdrawal, panic attacks, pain similar to a heart attack, difficulty breathing and profuse sweating, resulting from withdrawal of psychiatric medication, met the physical injury requirement) *with* Johnson v. Rawers, 2008 WL 752586 at *5 (E.D.Cal., Mar. 19, 2008) (claim that medications were administered in a crushed form, causing plaintiff to feel depressed, anxious, nauseous, and paranoid, did not satisfy the statute), *report and recommendation adopted*, 2008 WL 2219307 (E.D.Cal., May 27, 2008); Mitchell v. Valdez, 2007 WL 1228061 at *2 (N.D.Tex., Apr. 25, 2007) (holding chronic headaches causing extreme pain do not meet physical injury requirement); Watkins v. Trinity Service Group Inc., 2006 WL 3408176 at *4 (M.D.Fla., Nov. 27, 2006) (holding diarrhea, vomiting, cramps, nausea, and headaches from food poisoning were de minimis; noting a free person would not have to visit an emergency room or go to a

doctor because of them); Ghashiyah v. Wisconsin Dept. of Corrections, 2006 WL 2845701 at *11 (E.D.Wis., Sept. 29, 2006) (holding 20-30 pound weight loss was not a physical injury).

2. It is not even clear whether actions that approach or amount to torture are compensable under § 1997e(e). As to stress positions, *see* Jarriett v. Wilson, 2005 WL 3839415 (6th Cir., July 7, 2005), in which a prisoner's complaint that he was forced to stand in a two-and-a-half-foot square cage for about 13 hours, naked for the first eight to ten hours, unable to sit for more than 30 or 40 minutes of the total time, in acute pain, with clear, visible swelling in a portion of his leg that had previously been injured in a motorcycle accident, during which time he repeatedly asked to see a doctor. *Id*. at *8 (dissenting opinion). The appeals court affirmed the dismissal of his claim as *de minimis* on the ground that the plaintiff did not complain about his leg upon release or shortly thereafter when he saw medical staff. *Id*. at *4. (The decision was initially published, but Westlaw has removed the opinion from its original citation and replaced it with a note stating that it was "erroneously published." Jarriett v. Wilson, 414 F.3d 634 (6th Cir. 2005).) As to electric shock, *see* Payne v. Parnell, 2007 WL 2537839 at *4 (5th Cir. 2007), in which the court held that being jabbed with a cattle prod was not *de minimis*, despite the lack of long-term damage, in part because it was "calculated to produce real physical harm." As to waterboarding, I have fortunately seen nothing analogous.

3. There's a statutory approach that no one seems to have noticed that resolves some of these definitional problems. The federal criminal civil rights statute, 18 U.S.C. § 242, requires a showing of "bodily injury" in order to support a sanction of more than one year in prison. There's no definition of bodily injury, but some courts have borrowed a definition from other statutes using that term: "(A) a cut, abrasion, bruise, burn, or disfigurement; (B) physical pain; (C) illness; (D) impairment of a function of a bodily member, organ, or mental faculty; or (E) any other injury to the body, no matter how temporary." 18 U.S.C. §§ 831(f)(5), *inter alia*. *See* U.S. v. Gonzales, 436 F.3d 560, 575 (5th Cir. 2006); U.S. v. Bailey, 405 F.3d 102, 111 (1st Cir.2005); U.S. v. Myers, 972 F.2d 1566, 1572 (11th Cir.1992) (adopting quoted standard in § 242 cases). Although ordinarily different legislative language implies a different meaning, I am not sure what meaningful difference there could be between "bodily" and "physical" injury. If this definition were applied to the PLRA physical injury requirement, the terms "physical pain" and "illness" would resolve numerous borderline cases.

V. Attorneys' fees restrictions

A. Rates

1. The PLRA restricts fees to 150% of the Criminal Justice Act rate. 42 U.S.C. § 1997e(d)(3).

2. There is a conflict among circuits about what the CJA rate *is* for this purpose. *Compare* Hadix v. Johnson, 398 F.3d 863 (6th Cir. 2005); Webb v. Ada County, 285 F.3d 829, 838-39 (9th Cir. 2002); Laube v. Allen, 506 F.Supp.2d 969, 987 (M.D.Ala., Aug. 31, 2007) (holding rate set by Judicial Conference pursuant to its authority to calculate cost of living increases governs PLRA fees) *with* Hernandez v. Kalinowski, 146 F.3d 196, 201 (3d Cir. 1998) (holding that a rate that was authorized but not "implemented" because of budgetary constraints was not the

"established" rate); Jackson v. Austin, 267 F.Supp.2d 1059, 1064-65 (D.Kan. 2003) (assuming the lower funded rates apply).

3. The rate set by the Judicial Conference and applicable under *Hadix*, *Webb*, etc., is not published or documented in a publicly available source, and counsel must generally contact the Administrative Office of the Courts to find it out. *See* Graves v. Arpaio, 633 F.Supp.2d 834, 854 (D.Ariz. 2009) (holding CJA rate was $118, yielding a PLRA rate of $177, during relevant time period), *aff'd on other grounds*, 623 F.3d 1043 (9th Cir. 2010). The current and recent CJA rates are $139 an hour for fiscal years 2011, 2012 and 2013, and $141 an hour commencing January 2014. E-mail, Judy Gallant, Attorney Advisory, Defender Services Office of the Administrative Office of the Courts, Judy_Gallant@ao.uscourts.gov, to Bonnie Tenneriello of Prisoners' Legal Services of Massachusetts (Jan. 13, 2004). **UPDATE THIS?**

4. One federal circuit has approved fee multipliers for excellent results under the PLRA. Kelly v. Wengler, --- F.3d ----, 2016 WL 2957132, *10 (9th Cir. 2016). The court held that the PLRA restrictions are applicable to the initial computation of the lodestar amount, but the PLRA simply does not address the second step of the calculation, which reflects factors not subsumed in the initial figure. *Accord*, Ginest v. Bd. of Cnty. Comm'rs of Carbon Cnty., WY, 423 F. Supp. 2d 1237, 1241 (D. Wyo. 2006) (25% enhancement); Skinner v. Uphoff, 324 F.Supp.2d 1278, 1287 (D.Wyo. 2004) (25% enhancement).

B. Applicability

1. The restrictions apply to fees sought under 42 U.S.C. § 1988, which governs fees in cases under 42 U.S.C. §§ 1981, 1981a, 1982, 1983, 1985, 1986, or 13981, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], or title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.].

2. They do not apply to fees sought against federal defendants under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A), or under the federal disability statutes, which have their own attorneys' fees provisions. 42 U.S.C. § 12205 (ADA); 29 U.S.C. § 794 (Rehabilitation Act).

C. Fees' relation to merits and results

Fees must be "directly and reasonably incurred in proving an actual violation of the plaintiff's rights" to be awarded under the PLRA, 42 U.S.C. § 1997e(d)(1)(A), and must be "proportionately related to the court ordered relief for the violation." 42 U.S.C. § 1997e(d)(1)(B)(i)

1. These provisions call into question the ability to recover fees in cases that are settled, especially where the settlement is not in the form of a judgment enforceable in federal court. They place a premium on settling fees concurrently with the merits. (The relative dearth of PLRA attorneys' fees litigation suggests that most practitioners have figured this out.)

2. Some courts have held that settled injunctive cases may support fee awards where there are findings or a record showing that there was a violation of rights, even if not adjudicated. *See*

Laube v. Allen, 506 F.Supp.2d 969, 979-80 (M.D.Ala., Aug. 31, 2007) (holding that fees may be awarded for injunctive settlements to the extent they satisfy the PLRA's "need-narrowness-intrusiveness" requirement and the fees were "directly and reasonably incurred" in obtaining it); Watts v. Director of Corrections, 2007 WL 1100611 at *3 (E.D.Cal., Apr. 11, 2007) (awarding fees for "proving an actual violation" notwithstanding that case was settled), *amended on reconsideration on other grounds*, 2007 WL 1752519 (E.D.Cal., June 15, 2007); Lozeau v. Lake County, Mont., 98 F.Supp.2d 1157, 1168 n.1 and 1170 (D.Mont. 2000) ("Defendants cannot settle a case, promise reform or continued compliance, admit the previous existence of illegal conditions, admit that Plaintiffs' legal action actually brought the illegal conditions to the attention of those in a position to change them and subsequently allege a failure of proof."). However, a recent appellate decision overrules one of these, noting it has authorized fees under the PLRA "only to those inmates who have affirmatively established violations of protected rights." Kimbrough v. California, 609 F.3d 1027, 1032 & n.7 (9th Cir. 2010) (overruling Ilick v. Miller, 68 F.Supp.2d 1169, 1173 n.1 (D.Nev. 1999)). **"**Affirmatively established" seems to mean by court finding or defendants' concession. Whether a litigant can settle a case without such a record, but make the record in the course of a fee application and obtain fees on the ground it was proving that violation until the point of settlement, remains to be seen, though *Watts* finds an actual violation at the fees motion stage after a record was made previously. The argument for such an award is supported by the reasoning of *Laube v. Allen*, which points out that the statute refers to "proving" a violation rather than "having proved" one. 506 F.Supp.2d at 980. These questions have not been tested in damage litigation to my knowledge.

D. Fees' relation to damages

1. In cases where only damages are recovered, fees are limited to 150% of the damage recovery, 42 U.S.C. § 1997e(d)(2), resulting in awards of $1.50 or less where the trier of fact awards only nominal damages. Wilkins v. Gaddy, 734 F.3d 344, 347 (4th Cir. 2013) (affirming fees of $1.40 on nominal award); Keup v. Hopkins, 596 F.3d 899, 905-06 (8th Cir. 2010); Pearson v. Welborn, 471 F.3d 732, 742-43 (7th Cir. 2006); Boivin v. Black, 225 F.3d 36 (1st Cir. 2000).

2. Up to 25% of money judgments must be used to satisfy attorneys' fees claims. 42 U.S.C. § 1997e(d)(2). Courts have disagreed whether the statutory language "not to exceed" 25% means that the court must apply 25%, *see* Keller v. County of Bucks, 2005 WL 1595748 at *1 (E.D.Pa., July 5, 2005); Jackson v. Austin, 267 F.Supp.2d 1059, 1071 (D.Kan. 2003), or has discretion to apply a lesser percentage. *See* Parker v. Conway, 581 F.3d 198, 205 (3d Cir. 2009) (following *Boesing*, affirming application of 18% of judgment to fees); Boesing v. Spiess, 540 F.3d 886, 892 (8th Cir. 2008) (affirming district court's application of 1% of $25,000 recovery); Siggers El v. Barlow, 433 F.Supp.2d 811, 822-23 (E.D.Mich. 2006) (applying $1.00 of the recovery to attorneys' fees, noting that the jury found that defendants had lied about their conduct and awarded significant damages as punishment and deterrent); Farella v. Hockaday, 304 F.Supp.2d 1076, 1081 (C.D.Ill. 2004) ("The section's plain language sets forth 25% as the maximum, not the mandatory amount."); *see also* Kahle v. Leonard, 563 F.3d 736, 743 (8th Cir. 2009) (in determining percentage, court "should consider: (1) the degree of the opposing parties' culpability or bad faith, (2) the ability of the opposing parties to satisfy an award of attorneys' fees, (3)

whether an award of attorneys' fees against the opposing parties could deter other persons acting under similar circumstances, and (4) the relative merits of the parties' positions," *inter alia*).

F. Fee agreements

The statute does not preclude agreements to pay higher fees than the statute provides. 42 U.S.C. § 1997e(d)(4).

VI. Filing fees

A. Prisoners must pay the fee even under the *in forma pauperis* provisions

1. Ordinarily, they pay from their prison accounts by installments. 28 U.S.C. § 1915(b). The Supreme Court has said they must pay all fees simultaneously, even though a prisoner could end up having nearly all his funds taken under that interpretation. Bruce v. Samuels, 136 S.Ct. 627, 631-33 (2016).

2. Why bother with *in forma pauperis* status? Unless it is significant to have the client pay directly, the only reasons I can see (28 U.S.C. § 1915(c, d)) are:

- The U.S. Marshals will serve process for free (often late and sometimes incorrectly)
- There are savings in preparing the appellate record if necessary.

3. Prisoners with "three strikes" (three prior dismissals as frivolous, malicious, not stating a claim, or seeking damages from an immune defendant) cannot use the *in forma pauperis* provisions unless they assert imminent danger of serious physical injury, 28 U.S.C. § 1915(g), so if the client or family can't pay the fee up front, counsel will have to advance it. *See* Coleman v. Tollefson, 135 S.Ct. 1759, 1763-65 (2015) (holding a dismissal becomes a "strike" when it is entered, not when it becomes final after expiration of appellate options).

B. Fees and joinder in multi-plaintiff cases

Some courts have held that the logic of the filing fees provisions means either that multiple plaintiffs must each pay the entire filing fee, or even that prisoners proceeding IFP cannot file multi-plaintiff complaints notwithstanding the joinder rules. *Compare* Hubbard v. Haley, 262 F.3d 1194, 1197 (11th Cir. 2001) (holding multi-plaintiff complaints barred) *with* Hagan v. Rogers, 570 F.3d 146, 154-56 (3d Cir. 2009); Boriboune v. Berge, 391 F.3d 852, 855-56 (7th Cir. 2004) (both holding PLRA does not alter joinder rules but each plaintiff must pay a separate fee) *and with* In re Prison Litigation Reform Act, 105 F.3d 1131, 1137-38 (6th Cir.1997) (single filing fee should be divided among multiple plaintiffs); Alcala v. Woodford, 2002 WL 1034080, *1 (N.D.Cal., May 21, 2002) (filing fee can be divided among multiple plaintiffs as they see fit).

1. This discussion takes place in *pro se* cases, and much of it is directly related to the problems of managing such litigation.

2. If there is no definitive authority to the contrary in your jurisdiction, and counsel submits the complaint with a check for one filing fee, it will probably be accepted and the issue may never come up.