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BARRIERS TO RECOVERY

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THE PRISON LITIGATION REFORM ACT: CONSIDERATIONS IN INDIVIDUAL LITIGATION

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BIOGRAPHICAL SUMMARY

John Boston is Director of the Prisoners' Rights Project of the New York City Legal Aid Society, where he has worked for many years, and is co-author of the *Prisoners' Self-Help Litigation Manual*.

BIOGRAPHICAL INFORMATION

This outline is intended to highlight PLRA issues of particular importance in representing individual prisoners, focusing on those that should be considered at the threshold, both in 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.

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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).
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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. *See* Dixon v. Page, 291 F.3d 485, 488 n.1 (7th Cir. 2002); Ahmed v. Dragovich, 297 F.3d 201, 210 (3d Cir. 2002); 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, ___ F.3d ___, 2010 WL 2179151, *5 (2d Cir. 2010) (holding prisoner with three strikes disqualified from *in forma pauperis* status can refile 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. 42 U.S.C. § 1997e(h). *But see* Khatib v. County of Orange, 603 F.3d 713, 715-16 (9th Cir. 2010) (courthouse holding cell is not a correctional or detention facility under the PLRA).

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

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."); 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* 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. 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, as in *Vitek v. Jones*, 445 U.S. 480 (1980). (I'm not aware of direct authority on the PLRA status of such persons, but I think the answer is clear.)

5. The status of litigation where both prisoners and non-prisoners are plaintiffs (e.g., prisoner and spouse) is not settled, though 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); Carter v. Jones, 2006 WL 2320807 at *6 (W.D.Okla., Aug. 9, 2006) (holding prisoner's mother's claim not governed by exhaustion requirement); 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 is prudent to bring separate complaints. ***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); 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. See 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 prevents you from litigating it.

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 *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* 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. But at least one court has applied § 1997e(e) to state law claims filed in federal court under the court's supplemental jurisdiction. *See* Hines v. Oklahoma, 2007 WL 3046458 at *6 (W.D.Okla., Oct. 17, 2007).

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 time for reply from the final stage of the administrative process has passed before suit is filed. 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).

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 are prison conditions, 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);
- 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).

C. You're Probably doing *Post Hoc* Damage Control

1. Grievance time limits are 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. 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*, 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 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.

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.*

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. *See, e.g.*, 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*, Burgess v. Garvin, 2003 WL 21983006 at *3 (S.D.N.Y., Aug. 19, 2003), *on reconsideration,* 2004 WL 527053 (S.D.N.Y., March 16, 2004); 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* 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* 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* 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 docketed*, No. 08-2079-pr (argued June 15, 2009).

- Exhaustion by informal means 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).

4. Remedies may be unavailable to a particular plaintiff because of that plaintiff's limited capacities, temporary or permanent. 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); 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).

   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.

F. "Proper" Exhaustion

1. Prisoners have to follow the rules of the grievance system. If they didn'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. If prisoners' grievances are addressed on the merits notwithstanding procedural errors (including missing time deadlines), then prison officials have waived the procedural errors. 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).

3. ***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.

4. 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.

5. 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* 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).

- 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).
- Prisoners cannot be held responsible for anomalous situations in which the prison rules give no direction how to proceed. *See* 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).
- 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.*, 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. Bryant v. Rich, 2007 WL 1558718 at *2 (11th Cir., May 31, 2007) (unpublished) (holding prisoner who said he didn't grieve for fear of assault should have exhausted after transfer), *superseded on other grounds*, 530 F.3d 1368 (11th Cir. 2008), *cert. denied*, 129 S.Ct. 733 (2008); 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 will 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* 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* 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, 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. Brown v. Croak, 312 F.3d 109, 112-13 (3d Cir. 2002); Miller v. Tanner, 196 F.3d 1190 (11th Cir. 1999).

2. There may be "special circumstances" under which it would be unfair to dismiss a prisoner's claim for failure to exhaust or to exhaust properly. 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). *But see* Dillon v. Rogers, 596 F.3d 260,270 (5th Cir. 2010) (rejecting special circumstances exception, holding disruption in a grievance system should be addressed as a matter of availability of remedies).
3. 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. *See* 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). *But see* Dillon v. Rogers, 596 F.3d 260, 270 (5th Cir. 2010) (holding estoppel can only arise from misconduct of named defendants).

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. 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).

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.*, 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. 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* 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). 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, and counsel must generally contact the Administrative Office of the Courts to find it out. (The 2010 CJA rate is $139 an hour.) *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). This information is, amazingly, not documented in a publicly available source.

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."); Ilick v. Miller, 68 F.Supp.2d 1169, 1173 n. 1 (D.Nev. 1999). This proposition has 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 where the trier of fact awards only nominal damages. 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 even under the *in Forma Pauperis* Provisions

1. Ordinarily, they pay from their prison accounts by installments. 28 U.S.C. § 1915(b).
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) generally cannot use the *in forma pauperis* provisions, 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.

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 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* In re Prison Litigation Reform Act, 105 F.3d 1131, 1137-38 (6th Cir.1997) (single filing fee should be divided among multiple plaintiffs).

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.

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