PROTECTING YOUR **HEALTH & SAFETY**

A LITIGATION GUIDE FOR INMATES

WRITTEN BY ROBERT E. TOONE

EDITED BY DAN MANVILLE

SPLC Southern Poverty Law Center

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A PROJECT OF THE SOUTHERN POVERTY LAW CENTER

Protecting Your Health & Safety
A Litigation Guide For Inmates

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Design Director Russell Estes

Contents

Preface

Every year, prisoners write hundreds of letters to legal organizations like the Southern Poverty Law Center complaining about the policies, practices, and conditions in the jails and prisons across the United States. After the 1995 passage of the Prison Litigation Reform Act (PLRA), which erected huge barriers to successful prison litigation and reduced the amount of attorney's fees that can be collected in successful cases, many private attorneys are no longer able or willing to file prison cases. As a result, many prisoners have had to litigate their claims without the benefit of counsel.

The results have been far too predictable. When powerless people confront a mammoth system without the tools necessary to protect their interests, they usually fail to obtain relief. Statistics show that the majority of pro se prisoner petitions are dismissed, usually on procedural grounds. Given the widespread problems in facilities and penal systems all over the country, the dismissal of so many pro se cases reflects the fact that most prisoners cannot protect their rights without legal assistance.

This manual is designed to provide some of the legal assistance pro se litigants so desperately need. Although no manual can replace the professional services of dedicated lawyers, it is our hope that this book will help equalize the playing field for inmates attempting to assert their rights in federal courts.

The staff of the Southern Poverty Law Center is extremely grateful to Robert E. Toone for writing the first edition of this book and to Dan Manville and his students at the University of Denver College of Law for their work updating the law and adding new sections to this second edition.

Rhonda Brownstein
Southern Poverty Law Center
Montgomery, Alabama
November 2008

CHAPTER 1

Introduction

A. WHAT THIS MANUAL DOES

This manual does two things. First, it explains some basic rights that you have as an inmate in a jail or prison in the United States. It deals mainly with rights relating to your health and safety. It does not address criminal procedure — this manual will not help you to defend yourself against criminal charges at trial or challenge your conviction on appeal. Second, this manual explains how you can enforce your rights to health and safety within your jail or prison and, if necessary, in court.

The manual is available for $10.00 (this price includes the costs for shipping and handling). To order a copy, send a check or money order to this address:

PLN[1]
2400 NW 80th Street #148
Seattle, WA 98117-4449

Be sure to include your name, identification number (if any), and mailing address. It may take up to eight weeks to receive your copy, so be patient.

This manual is written for inmates who do not have the help of a lawyer. These days, few lawyers are able and willing to help inmates in civil rights lawsuits. Most inmates who want to enforce their rights must do it on their own. In court, such inmates are said to be "unrepresented" or "*pro se*." This manual is meant to help these inmates help themselves.

This manual tries to explain inmates' rights and the legal system in a simple, straightforward manner. Unfortunately, these subjects are sometimes hard to understand. Even judges and lawyers are confused trying to figure them out. Furthermore, this area of the law has changed greatly in the last ten years due to a new federal statute — the Prison Litigation Reform Act (PLRA) — and several rulings by the U.S. Supreme Court. The law will continue to change after this manual is published. If you decide to file a lawsuit, you must do your best to find out whether there have been changes in the law since 2008 that affect your case.

Do not rely on this manual alone! Find out as much as you can about your rights before you act. Read whatever books there are on inmates' rights and the legal

1 NOTE: Due to the nature of the institutional mail systems, please allow up to eight weeks from the date of your order. Also, make sure to include with any order all institutional restrictions on incoming mail that your facility may have (for example, no padded envelopes or first class mail only). If your order is returned by your institution PLN is unable to refund your payment. If your address changes once your order has been processed, PLN is unable to forward it to a different address. PLN can not distribute this manual free to prison law libraries.

system in your law library, if your jail or prison has one. If you can, read decisions on inmates' rights published in the federal courts in the circuit where you live. The Appendix also lists several other publications that you can order by mail.

B. HOW THIS MANUAL IS ORGANIZED

Although the Constitution gives you certain rights as an inmate, rights are meaningless unless you know how to enforce them. At the same time, you cannot win a lawsuit if you do not understand the rights you are trying to enforce. To be successful, you must understand both *substantive law* (what your rights are in theory) and *procedural law* (how to enforce your rights in the legal system).

The first part of this manual discusses substantive law. (It begins in **Chapter 2** with an overview of where the law of the rights of prisoners are found).

Chapter 3 deals with your *First Amendment* rights of access to the courts, not to be retaliated against, freedom of religion, access to family, communication with outside people, and the standard that prison rules are evaluated against.

Chapter 4 deals with your right to due process of the law where you have a liberty interest, misconduct, classification, segregation, work, property, programs inside and outside prison, parole, revocation of parole, and search and seizure.

Chapter 5 deals with *equal protection of the law* by describing the different standards this right is evaluated under and how these standards are applied to issues of race, national origin, sexuality, gender, disability and religion.

Chapter 6 explains *deliberate indifference*: the "state of mind" requirements for rights discussed in Chapters 8, 9 and 10.

Chapter 7 deals with your right to freedom from *excessive force* and other abuse by jail and prison officials.

Chapter 8 deals with your right to *protection from assault* by other inmates.

Chapter 9 deals with your right to *medical care*.

Chapter 10 deals with your right to humane *conditions of confinement*, such as protection from overcrowding, poor sanitation, denial of exercise and unhealthy food.

The second part of the manual discusses procedural law. It begins in **Chapter 11** by summarizing how the legal system works. This chapter explains the difference between state courts and federal courts, what claims you may raise in each and some basic skills that you need to do legal research and to write legal documents. The manual then discusses how to enforce your rights in court.

Chapter 12 deals with *exhaustion of administrative remedies*, something you must do before you file a federal lawsuit, and now what most states are requiring.

Chapter 13 explains the *basics of a federal lawsuit*. It reviews the two causes of action that inmates use in civil rights lawsuits, officials and governmental entities that you can sue, remedies that you can request, how to match the facts of your case with the legal requirements of your claims, factors to consider in deciding whether to file a lawsuit, and the path that a typical lawsuits takes.

Chapter 14 explains *how to write and file a complaint* — the document that begins a lawsuit. It also explains how to request "pauper" status (if you cannot pay in one lump sum the filing fees and other costs), serve your lawsuit on a defendant, request the appointment of a lawyer, and ask for a preliminary injunction to stop an ongoing violation of your rights.

Chapter 15 explains *how to respond to a motion to dismiss* — a defendant's attempt to defeat your lawsuit based on what you alleged in your complaint.

Chapter 16 deals with *discovery* — your chance to find out information about your case from the defendants and others.

Chapter 17 explains *how to respond to a motion for summary judgment* — a defendant's attempt to defeat your lawsuit on the ground that you do not have enough evidence to win your case at trial.

Chapter 18 deals with *settlement and trials*, two different ways that you can win your lawsuit.

Footnotes (notes in smaller type at the bottom of a page) offer additional discussion and cite cases that support points in the main text. Because not all inmates have access to a law library, many of the citations in this manual contain in parentheses — "()" summaries of the cited cases' holdings. Chapter 11 explains how to read citations and look up cases in a law library.

Finally, the Appendix of this manual contains a glossary (a list of important words and their definitions), a list of all the federal district courts in the United States, and a list of some other legal resources that you can order by mail.

C. HOW THIS MANUAL IS WRITTEN

The glossary in the Appendix defines certain words that are used throughout this manual. The manual also defines some words as it goes along. Two common abbreviations should be mentioned now:

"e.g." means "for example." When you see "e.g.", what follows

is one or more examples of the point just made.

"i.e." means "in other words."

Also, "§" is a symbol for the word "section." This manual uses this symbol to refer you to other sections of the manual. It is also found when a statute is cited: e.g., 42 U.S.C. § 1983.

This manual uses the word 'inmate' to refer to all people imprisoned in jails, other detention centers, and prisons. Some people prefer to be called "prisoners," but this word does not technically cover pretrial detainees (people who have been charged with, but not yet convicted of, crimes and are awaiting trial), people who have been civilly committed, immigration detainees, juvenile detainees, and others. There are some important differences between the rights of detainees and the rights of people who are serving criminal sentences. This manual uses the word "inmate" to discuss the law as it applies to both detainees and convicted inmates generally.

Unfortunately, there is not a single word that refers to all the buildings and institutions in which inmates are held: e.g., jails, detention centers, work camps, correctional institutions, prisons, penitentiaries. Whenever this manual uses the phrase "jail or prison," you can assume it is referring to the facility in which you are held as an inmate.

This manual uses the word "official" to refer generally to people who work in jails and prisons: e.g., sheriffs, wardens, jailers, guards, nurses, and doctors. Anyone who is charged with carrying out a government function is an "official," whether he is directly employed by the government or not.

This manual sometimes refers to inmates, officials, lawyers, or judges as "he," sometimes as "she." This is not meant to confuse you, but rather to avoid favoring a particular gender throughout the manual. Except where noted, all the information in this manual applies to men and women equally.

The Southern Poverty Law Center commissioned the update of this manual, which was authored by Robert E. Toone. The editor of this second edition, Daniel E. Manville, wishes to thank the following law students from University of Denver College of Law for their work on updating particular chapters: Laura Pearson, Chapter 3; Christopher Massey, Chapter 5; May Kiernan, Chapter 7; Steven Baum, Chapter 8; Josie McSwain-Levin, Chapter 9; Amber Trzinski, Chapter 10; Karl Kuenhold, Chapter 14; and Karen Lamprey, Chapter 15.

Please note: the SPLC no longer distributes this manual. Please do not send requests or money to the Center. See page 15.

PART I

CHAPTER 2

Overview of the Law

A. INTRODUCTION: RIGHTS AND DUTIES

Many people talk about their *rights*, but not everyone understands what that means. Talking about rights is another way of talking about the law. A right is a form of power or protection that exists under the law. It gives you legal power to act in a certain way or legal protection from certain conduct by others.

For every right that a person has, someone else has a *duty*. For example, if an employee has a right to be paid for her work, her boss has a duty to pay. This right and duty exist under the law of contracts. Every person has, at the same time, a right not to be robbed on the street *and* a duty not to commit robbery. This right and duty exist under criminal law.

This manual deals with what is often called *prisoners'* or *inmates' rights*: powers and protections that the law gives to inmates. As a general matter, these are rights that apply only against government officials, or people who carry out government functions. For example, you have a right to be free from excessive force, and the officials who guard you have a duty not to use excessive force against you.[1]

It is easy to talk about rights in the abstract. The first part of this manual (Chapters 3-10) essentially does this, by explaining the rights that inmates have relating to their health and safety. Keep in mind, however, that the mere fact that you have a right is meaningless unless you know how to *enforce* it. For each case that this manual cites, at least one inmate had the courage and determination to file a civil rights lawsuit and follow it through. The second part of this manual (Chapters 10-18) explains how you can enforce your rights in jail or prison and, if necessary, in court.

B. SOURCES OF LAW THAT GIVE INMATES RIGHTS

1. The Federal Constitution

There are many sources of law in this country. The most important is the *United States Constitution* (also called "the federal constitution"), the document on which the United States is founded.[2] The Constitution is the supreme law of the land. It trumps all other sources of law: federal and state statutes, state constitutions, agency regulations, etc. No federal, state, or local government official has the

1 Inmates also owe duties to each other. For example, you have a right under tort and criminal law not to be assaulted by other inmates, just as you have a duty not to assault someone else. This manual does not address these rights and duties.

2 The original Constitution was adopted by the people of the United States in 1789. The first ten amendments to the Constitution (called the "Bill of Rights") were adopted at the same time. The Constitution has since been amended 17 times.

authority to violate the U.S. Constitution.

Many different parts of the Constitution affect, directly or indirectly, the rights of inmates. The rights with which this manual is mainly concerned — inmates' rights to health and safety, discussed in Chapters 3 through 10 — are based on three constitutional provisions. The *Eighth Amendment* to the Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The *Fifth Amendment* and the *Fourteenth Amendment* both require government officials to provide "due process" of law before depriving people of "life, liberty, or property." The Fifth Amendment applies to the federal government, and the Fourteenth Amendment applies to state and local governments.[3]

"Cruel and unusual punishment" and "due process" are vague phrases. You may think that a certain condition at your prison is "cruel and unusual," but another person may disagree. How can you tell whether the condition actually violates the Eighth Amendment? In our legal system, we rely on courts to *interpret* the various provisions of the Constitution, to explain more specifically how they apply in actual cases. The U.S. Supreme Court has the final word in interpreting the Constitution. Over time, legal rules develop based on what the Supreme Court, lower federal courts, and state courts have said about particular constitutional provisions. Court decisions thus add flesh to the skeleton of the Constitution, by telling us how its vague phrases apply in real life.

2. Federal Statutes

A *federal statute* is a law enacted by the United States Congress. All federal statutes currently in effect are listed in the United States Code (abbreviated as "U.S.C." or "U.S.C.A."). Some federal statutes establish the procedures by which inmates can enforce their rights in federal courts. For example, 42 U.S.C. § 1983 is the statute[4] that gives people a *cause of action* to seek a remedy for violations of their federal rights by state and local government officials. Section 1983 is discussed in more detail in Chapter 13. Only a few federal statutes give inmates substantive rights:

The *Americans with Disabilities Act* (ADA)[5] prohibits government — including jail and state and federal prison officials[6] — from discriminating against people who have disabilities. A disability is "a physical or mental impairment that

3 Technically, the Eighth Amendment, like the Fifth, applies only to the federal government. The first ten amendments to the Constitution originally limited the power of the federal government, not state or local governments. This changed with the Civil War and the ratification of the Fourteenth Amendment. In legal terms, the Fourteenth Amendment "incorporated" the Eighth Amendment, which means that the Eighth Amendment now applies to state and local governments also. *See* Robinson v. California, 370 U.S. 660, 666-67, 82 S.Ct. 1417 (1962).

4 For an explanation of how statutes are cited, *see* § A of Chapter 11.

5 42 U.S.C. §§ 12101 et seq.

6 In *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 118 S.Ct. 1952 (1998), the Supreme Court held that the ADA protects inmates in state prisons.

substantially limits one or more of the major life activities of [an] individual."[7] As far as reasonably possible, a disabled inmate should be treated just like inmates without disabilities and given an opportunity to participate in the same programs and activities. The ADA is discussed in more detail in C.3 of Chapter 9.

The *Rehabilitation Act*[8] is an older statute that provides essentially the same protections as the ADA, except only against government agencies that receive funding from the federal government.

Until it was ruled unconstitutional in its application to the states, the *Religious Freedom Restoration Act* (RFRA)[9] provided greater protection to a person's right to exercise his religion than the protection provided under the First Amendment, as interpreted by the Supreme Court. After the RFRA was held not applicable to the states, Congress then enacted the *Religious Land Use and Institutionalized Persons Act of 2000* (RLUIPA)[10] which provides similar protection to the RFRA. RFRA and RLUIPA are discussed in § D of Chapter 3.

Another statute provides that no juvenile committed under federal law "may be placed or retained in an adult jail or correctional institution in which he has regular contact with adults..."; such juveniles must be provided "adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, counseling, education, training, and medical care including necessary psychiatric, psychological, or other care or treatment."[11] Also, the *Individuals with Disabilities Education Act* (IDEA)[12] requires that children with disabilities receive special education and related services designed to address their unique educational needs. Courts have applied the IDEA to school-age inmates in juvenile detention centers and adult jails.[13]

3. State Constitutions and Statutes

Federal law is not the only important source of law. Washington, D.C. and the 50 states all have their own legal systems. Some state constitutions and statutes give inmates rights that they do not have under federal law. For example, Connecticut has a statute that gives inmates additional freedom to exercise their religion.[14] The highest court in New York has ruled that pretrial detainees receive more

7 28 C.F.R. § 35.104.

8 29 U.S.C. § 794. Section 504 of the Rehabilitation Act states that "no qualified individual with a disability in the United States shall be excluded from, denied the benefits of, or be subjected to discrimination under" any program or activity that requires federal funding.

9 42 U.S.C. § 2000bb. The RFRA is applicable to federal prisoners, but it was held not to be applicable to the states. *See* O'Bryan v. Bureau of Prisons, 349 F.3d 399, 400-01 (7th Cir. 2003).

10 42 U.S.C. § 2000-cc-(1)(a)(1)-(2), provides in part: "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden furthers "a compelling governmental interest," and does so by "the least restrictive means." The constitutionality of this statute was upheld by the U.S. Supreme Court in Cutter v. Wilkinson, 544 U.S. 709, 125 S.Ct. 2113 (2005).

11 18 U.S.C. § 5039.

12 20 U.S.C. §§ 1400-1485.

13 Handberry v. Thompson, 92 F. Supp.2d 244 (2000) (declaring that New York City failed to provide adequate educational services to inmates aged 16 through 21 years at Rikers Island jail facilities); Alexander S. by and through Bowers v. Boyd, 876 F. Supp. 773, 800-03 (D. S.C. 1995) (requirements of IDEA apply to juvenile correctional facilities).

14 Conn. Gen. Stat. § 52-571b.

protection under that state's constitution than under the U.S. Constitution.[15]

Because of limited space, this manual deals with only federal law. You should investigate whether you have additional rights under the constitution and statutes of your state. Be aware, though, that you cannot always enforce your state-law rights in federal court. If you are thinking about trying to enforce such rights, you may want to consider filing a lawsuit in state court.

4. Tort Law

Tort is a legal word that means a wrong or injury. *Tort law* is the law that provides remedies for people who have been wronged or injured. Common tort claims include assault, battery, trespass, negligence (including medical malpractice), and intentional infliction of emotional distress. Tort claims are generally brought in state courts, which apply both *common law* rules (rules developed in court decisions) and state statutes to decide the claims.

If you believe that a state or local government official has committed a tort against you, you may be able to sue that official in state court. In many states, however, officials have broad *immunity* from lawsuits, making it difficult for you to get a remedy. There are also often complex procedural rules that you must follow: *e.g.*, notice-of-claim requirements, rules about whom you may and may not sue, heightened proof requirements in medical malpractice cases. You must study your state's tort law carefully before you file such a lawsuit.

The *Federal Tort Claims Act* (FTCA)[16] allows a federal inmate to sue the United States directly when a federal official has committed an act that would be a tort under the law of the state where it occurred. The United States, however, is not responsible for acts performed in the course of a "discretionary function or duty."[17] Some courts have applied this exception broadly, making it nearly impossible for inmates to win FTCA lawsuits. The FTCA also has a strict administrative exhaustion requirement: before filing suit, you must file a claim with the agency responsible for the wrongdoing.[18] Read the FTCA carefully before pursuing a claim under it.

Finally, lawsuits brought to enforce a person's constitutional rights, under either 42 U.S.C. § 1983 or the *Bivens* causes of action (see Chapter 13, § A), are sometimes referred to as *constitutional torts*. Do not let this confuse you. Both the substantive and procedural law involved in such cases is federal law. State court decisions applying state tort law do not affect your ability to enforce your federal constitutional rights.

15 Cooper v. Morin, 399 N.E.2d 1188, 1193-96 (N.Y. 1979).
16 28 U.S.C. §§ 1346(b), 2671-80.
17 28 U.S.C. § 2680(a).
18 28 U.S.C. § 2674. A federal inmate who wishes to file an FTCA claim should ask prison staff for a SF-95 ("Claim for Damage, Injury, or Death") form.

5. Regulations

Regulations are rules and orders issued by government agencies. Many state prison systems issue regulations for their employees, so that all facilities within the system operate properly and in the same way. The federal Bureau of Prisons issues regulations also.

In general, regulations do not give you a liberty interest that you can enforce in federal court.[19] For example, you cannot argue that an official violated your rights because he did not follow a regulation requiring him to provide you daily outdoor exercise. You may challenge the denial of exercise only if it violates the Constitution: *i.e.*, if it is serious enough to deprive you of a basic human need, and the responsible officials have acted with deliberate indifference. See § C.9 of Chapter 10.[20]

In a few cases, where extremely poor conditions of confinement are involved, the Due Process Clause of the Fifth and Fourteenth Amendments may impose on officials a duty to comply with regulations that govern when and for how long inmates are held in administrative or punitive segregation. This issue is discussed in § 4.A of Chapter 4.

6. International Human Rights Law

Since World War II, international human rights law has become increasingly important. This law is set forth in treaties that countries have ratified, and also includes principles of customary international law that bind all countries. The United States has ratified several important treaties, including the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the International Covenant on Civil and Political Rights. In ratifying these treaties, however, the United States issued several *reservations* that require courts to interpret these treaties in a way that does not give Americans any rights greater than those provided under the Constitution.[21]

For this and other reasons, many judges in the United States do not take claims based on international human rights very seriously. This might change in the future. For now, though, you are best off focusing on your rights under federal and state law.

19 Wilkinson v. Austin, 545 U.S. 209, 223 (2005) (rules and regulations do not create liberty interests).

20 You might argue, however, that an official's failure to follow a regulation shows his deliberate indifference to your health and safety. *See* Chapter 6.

21 *See* Tel-Oren v. Libyn Arab Republic, 726 F.2d 808 809 (D.C. Cir. 1984 (Bork, J., concurring) (treaties are phrased in broad generalities, suggesting that they are declarations of principles, not a code of legal rights).

CHAPTER 3

First Amendment Rights

Civil liberties are rights shared by all people in the United States. These rights limit the government's power to interfere with what people say, think, and do. You do not lose all of your civil liberties when you become confined in a jail or prison. Jail and prison officials, however, may limit your civil liberties to further other goals, such as maintaining security or promoting rehabilitation.

"Prison walls," the Supreme Court has written, "do not form a barrier separating prison inmates from the protections of the Constitution."[1] This manual focuses on inmates' rights relating to their health and safety: the rights of inmates to freedom from excessive force and other abuse by jail and prison officials, protection from assault by other inmates, adequate medical care, due process, equal protection, and humane conditions of confinement. The following eight chapters will address these rights. This section will take a brief look at any First Amendment rights that inmates have under the U.S. Constitution.

A. POLITICAL RIGHTS

Political rights allow American citizens to take part in our democracy. They include the right to vote, the right to serve on a jury, and the right to run for political office.

The Constitution allows, but does not require, states to take away the *right to vote* from people who have been convicted of felonies.[2] Many states remove this right from inmates while they are serving out felony sentences in prison, and restore the right upon their release. A few states take away the right to vote from convicted felons for life; in these states, there is usually a process by which a released felon can ask the state to restore the right. A state cannot deny you the right to vote because you are a pretrial detainee, or because you have been convicted of a misdemeanor. For pretrial detainees and other inmates eligible to vote, officials must allow them to exercise this right.[3] Inmates usually vote by *absentee ballot*, which can be requested by mail from your local voting commission.

States may also disqualify felons from running for local and state political offices. However, like the right to vote, a person can petition his state to get this right, and the right to serve on a jury, back. The federal constitution does not bar convicted felons from running for federal political office.[4] In fact, in 1920, Eugene Debs

1 Turner v. Safley, 482 U.S. 78, 84, 107 S.Ct. 2254 (1987).
2 U.S. Const. XIV; Richardson v. Ramirez, 418 U.S. 24, 55-56, 94 S.Ct. 2655 (1974).
3 O'Brien v. Skinner, 414 U.S. 524, 530-31, 94 S.Ct. 740 (1974).
4 *See* U.S. Const. Art. I, §, cl. 2; Art. I, § 3, cl. 3; Art. II, § 1, cl. 5; U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 115 S.Ct. 1842 (1995)

ran for President of the United States while imprisoned at the Atlanta federal penitentiary — and won nearly a million votes!

The First Amendment guarantees the rights to assemble peaceably and to associate with others for the advancement of beliefs and ideas.[5] Inmates, however, do not generally retain these rights. The Supreme Court has ruled that a prison may prohibit inmates from taking part in a union organized for the purpose of criticizing prison policies.[6] Officials may ban inmate group activity that they reasonably believe poses a threat to security.[7]

B. ACCESS TO THE COURTS

The First Amendment guarantees the right "to petition the Government for a redress of grievances." Prisoners have a constitutional right to file certain petitions with the courts: criminal appeals (including post-conviction appeals and habeas corpus petitions) and challenges to conditions of confinement.[8] This is called the right of *access to the courts*. Prison officials must provide the tools prisoners need "to attack their sentences, directly or collaterally, and in order to challenge their conditions of confinement."[9] In a 1996 decision, *Lewis v. Casey*, the Supreme Court cautioned that the right of access to the courts is not a freestanding right to a law library or legal assistance: officials can use a variety of methods to enable prisoners to file criminal petitions and civil rights lawsuits.[10]

To challenge a denial of access to the courts, a prisoner must show that he has suffered an "actual injury" as a result of the denial: *e.g.*, "that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim."[11] Most access-to-courts claims fail because prisoners do not show an actual injury. Importantly, an inmate needs not prove that he would have necessarily won his legal claim, but only that the claim was "arguably actionable" or "nonfrivolous."[12] If you file an access-to-courts lawsuit, be sure that you can point to a nonfrivolous legal claim that you were prevented from

(holding that "a state amendment is unconstitutional when it has the likely effect of handicapping a class of candidates and has the sole purpose of creating additional qualifications indirectly").

5 U.S. Const. Art. I; *see also* Boy Scouts of America v. Dale, 530 U.S. 640, 660-61, 120 S.Ct. 2446 (2000); Roberts v. United States Jaycees, 468 U.S. 609, 622, 104 S.Ct. 3244 (1984).

6 Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 129-35, 97 S.Ct. 2532 (1977).

7 Fraise v. Terhune, 283 F.3d 506, 528 (3rd Cir. 2002); *In re* Long Term Admin. Segregation of Inmates Designated as Five Percenters, 174 F.3d 464 (4th Cir.1999).

8 Lewis v. Casey, 518 U.S. 343, 355, 116 S.Ct. 2174 (1996); Hudson v. Palmer, 468 U.S. 517, 523, 104 S.Ct. 3194 (1984) (stating that "prisoners have the constitutional right to petition the Government for redress of their grievances, which includes a reasonable right of access to the courts").

9 *Lewis*, 518 U.S. at 355; *see also* Bounds v. Smith, 430 U.S. 817, 828, 97 S.Ct. 1491 (1977) (holding "that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.").

10 *Lewis*, 518 U.S. at 350-53. The Court in *Lewis* also rejected the suggestion in *Bounds* that the right of access to the courts requires officials to enable prisoners "to discover grievances, and to litigate effectively once in court" — as opposed to simply filing claims that a prisoner already knows about. *Id.* at 354. Importantly, the Second Circuit has held that the "actual injury" requirement of *Lewis* does not apply to pretrial detainees' Sixth Amendment right to counsel. Benjamin v. Fraser, 264 F.3d 175, 185-87 (2d Cir. 2001).

11 *Lewis*, 518 U.S. at 351.

12 *Id.* at 351, 353.

filing or litigating due to these shortcomings.

C. RETALIATION

The First Amendment prohibits jail and prison officials from retaliating against inmates who report complaints, file grievances, or file lawsuits.[13] Retaliation can take many forms: *e.g.*, refusing to provide hygiene materials, reading or interfering with an inmate's legal papers, placing an inmate in segregation or poor living conditions, transferring an inmate to a different cell or different prison, threats, even having the inmate assaulted. Importantly, "government actions, which standing alone does not violate the Constitution, may nonetheless be constitutional torts if motivated in substantial part by a desire to punish an individual for exercise of a constitutional right."[14]

Retaliation claims are difficult to prove.[15] Officials can usually offer non-retaliatory explanations for their actions, and courts tend to believe them.[16] Although you can win relief in court, if you have solid evidence of an official's retaliatory intent, there is a lot that angry officials can get away with. This is something that you must consider when you are deciding whether to file a grievance or lawsuit.

D. FREEDOM OF RELIGION

The First Amendment prohibits the government from interfering with the "free exercise" of religion. The Supreme Court has held that jail and prison officials

13 Thaddeus-X v. Blatter, 175 F.3d 378, 394, 398 (6th Cir. 1999) (*en banc*) (elements of retaliation claims are: was (1) engaged in protected conduct; (2) that he suffered an adverse action; (3) that a causal connection exists between the protected conduct and the adverse action, and (4) it deterred a person of ordinary firmness from exercising his right to access to the courts); Allah v. Seiverling, 229 F.3d 220 (3d Cir. 2000) (holding that retaliation by prison officials on a prisoner attempting to exercise his First Amendment rights presents an actionable claim.); Babcock v. White, 102 F.3d 267, 275 (7th Cir. 1996). The *Babcock* Court held that a prisoner's claim that prison officials had retaliated against him for exercising his right to file grievances through the prison grievance system constituted an actionable claim. However, the *Babcock* Court went on to state that the prisoner has a heavy burden and must show 1) that his protected conduct motivated the official's actions and 2) that events would have transpired differently without the retaliation.; Williams v. Department of Correction, 208 F.3d 681, 682 (8th Cir. 2000) (where the court determined that a prisoner's underlying claim was frivolous, he was still permitted to file a claim against officials for retaliation based on his filing of the original claim); Penrod v. Zavaras, 94 F.3d 1399, 1404 (10th Cir. 1996) ("prison officials may not harass or retaliate against an inmate for exercising his right of access to the courts.") *See also* Crawford-El v. Britton, 523 U.S. 574, 588 n.10, 118 S.Ct. 1584 (1998) (stating that "[t]he reason why... retaliation offends the Constitution is that it threatens to inhibit exercise of the protected right").

14 Thaddeus-X v. Blatter, 175 F.3d at 386; *see also* Allah v. Seiverling 229 F.3d at 224-24 (allegedly retaliatory placement of inmate in administrative segregation was actionable, even if confinement there did not give rise to protected liberty interest); Zimmerman v. Tribble, 226 F.3d 568, 573 (7th Cir. 2000) (even though inmate did not state claim for denial of access to library, "otherwise permissible conduct can become impermissible when done for retaliatory reasons"); Stanley v. Litscher, 213 F.3d 340, 343 (7th Cir. 2000) (inmate stated claim for retaliatory transfer even though transfer did not involve liberty interest); Babcock v. White, 102 F.3d at 275 (claim that official delayed inmate's transfer was actionable "even if [the official's] actions did not independently violate the Constitution"); Rouse v. Benson, 193 F.3d 936, 939 (8th Cir. 1999) (retaliatory transfer is actionable); Hines v. Gomez, 108 F.3d 265, 269 (9th Cir. 1997), *cert. denied*, 524 U.S. 936 (1998) (allegedly retaliatory punishment of ten-day confinement in segregation and loss of television privileges; "prisoners may still base retaliation claims on harms that would not raise due process concerns"); Pratt v. Rowland, 65 F.3d 802, 806-07 (9th Cir. 1995) ("To succeed on his retaliation claim, [the inmate] need not establish an independent constitutional interest in either assignment to a given prison or placement in a single cell....").

15 Dawes v. Walker, 239 F.3d 489, 491 (2d Cir. 2001) ("courts must approach prisoner claims of retaliation with skepticism and particular care"), *overruled on other grounds*, Swierkiewicz v. Soreman N.A., 534 U.S. 506, 122 S.Ct. 2002); *but see* Johnson v. Stovall, 233 F.3d 486, 489 (7th Cir. 2000) ("To state a cause of action for retaliation, 'a complaint need only allege a chronology of events from which retaliation may be inferred.'").

16 Courts generally limit recovery for retaliation to nominal and, maybe, punitive damages. *See, e.g.*, Allah v. Al-Hafeez, 226 F.3d 247, 251-52 (3d Cir.2000) (concluding that PLRA cannot constitutionally bar recovering punitive or nominal damages in First Amendment retaliation claim); Rowe v. Shake, 196 F.3d 778, 781-82 (7th Cir.1999) (holding that PLRA cannot bar declaratory relief or nominal damages for First Amendment violation).

must give inmates a reasonable opportunity to exercise their religious beliefs without fear of penalty.[17] All sincerely held religious beliefs are protected by the First Amendment; officials may not favor certain religions over others.[18] However, officials have wide discretion to limit inmates' religious freedom, so long as those limitations are (under the *Turner* test) "reasonably related to legitimate penological objectives."[19] For example, the First Amendment is not violated by a work regulation that applies to all inmates at a prison but has the unintended effect of preventing Muslim inmates from attending Jumu'ah services.[20]

Until its application against state and local governments was ruled unconstitional, the *Religious Freedom Restoration Act* (RFRA)[21] provided greater protection to an inmate's right to exercise her religion than the *Turner* test provides. RFRA is still applicable in the federal context and prohibits government officials from placing a "substantial burden" on a person's exercise of religion unless it showed that the burden was the "least restrictive means" of furthering a "compelling governmental interest."[22] RFRA was ruled unconstitutional in the context of state and local governments in 1997.[23] Local and state inmates must therefore use the *Turner* test to challenge restrictions on their freedom of religion. Federal inmates may still be able to rely on RFRA.

E. FAMILY RELATIONSHIPS

Imprisonment deprives an inmate of the freedom "to be with family and friends and to form the other enduring attachments of normal life."[24] Inmates do, however, have a constitutional right to get married. Limitations on this right must bear a reasonable relationship to legitimate penological interests.[25] Inmates do not have a right to *conjugal visits*: sexual relations with one's spouse.[26]

Generally, courts have found that prison officials' prohibitions against allowing inmates to conceive a child while in prison through artificial insemination are constitutional.[27] Women do not have a constitutional right to keep their children with

17 Cruz v. Beto, 405 U.S. 319, 322 n.2, 92 S.Ct. 1079 (1972).

18 *Id.* at 322 (reversing dismissal of complaint alleging that Buddhist prisoners, unlike Protestant, Jewish, and Roman Catholic prisoners, were denied right to hold religious services); Cooper v. Pate, 378 U.S. 546, 84 S.Ct. 1733 (1964) (holding that officials could not deny a Black Muslim prisoner certain privileges enjoyed by other prisoners). A court may ask whether your religion is genuine or not, and whether you are a sincere believer. However, courts generally do not "presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." Employment Division v. Smith, 494 U.S. 872, 887, 110 S.Ct. 1595 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb (Nov. 16, 1993).

19 O'Lone v. Estate of Shabazz, 482 U.S. 342, 349, 107 S.Ct. 2400 (1987).

20 *Id.* at 350-53.

21 42 U.S.C. § 2000bb.

22 42 U.S.C. § 2000bb-1.

23 City of Boerne v. Flores, 521 U.S. 507, 117 S.Ct. 2157 (1997). If the Supreme Court declares that a state or federal statute is unconstitutional, the statute no longer applies.

24 Morrissey v. Brewer, 408 U.S. 471, 482, 92 S.Ct. 2593 (1972).

25 *Turner*, 482 U.S. at 96-97.

26 *See, e.g.*, Wilson v. Terhune, 319 F.3d 477, 481 (9th Cir. 2001); Champion v. Artuz, 76 F.3d 483, 386 (2d Cir. 1986) (*per curiam*).

27 *See* Goodwin v. Turner, 908 F.2d 1395, 1399-1400 (8th Cir. 1990) (no constitutional right of male inmate to inseminate wife); Gerber v. Hickman, 291 F.3d 617 (9th Cir. 2002) (holding that warden's refusal to allow a prisoner to provide his wife with a sperm specimen was constitutionally permissible).

them in jail or prison; most facilities require female inmates to transfer custody of their children to family or friends. Inmates who are pregnant have a constitutional right to proper prenatal care and medical assistance during labor. They also have a constitutional right to have an abortion early in their pregnancy.[28]

The issues of divorce, custody of children, parental rights, child and spousal support, and inheritance are governed by state law.

F. COMMUNICATING WITH THE OUTSIDE WORLD

The First Amendment prohibits the government from "abridging the freedom of speech, or of the press." Jail and prison officials, however, may limit inmates' ability to speak their mind and communicate with the outside world.

Officials may read and censor your non-privileged *incoming* mail, provided that they act pursuant to regulations or policies that are reasonably related to legitimate penological interests.[29] They may inspect your mail for contraband or censor it for the purpose of maintaining security and discipline, preventing criminal activity, or promoting the goal of rehabilitation (*e.g.*, by denying you violent pornography). A different standard applies to your right to send mail *out* of your jail or prison: officials may interfere with outgoing mail only to the extent "necessary or essential" to protect "important or substantial" interests: *e.g.*, to control mail that discusses escape plans, threats of blackmail, or other criminal activity.[30] Officials may not censor either incoming or outgoing mail simply because it criticizes the courts, jail or prison policies, or the officials themselves; contains disrespectful or inaccurate statements; or expresses "inflammatory political, racial, religious or other views."[31] Officials may not read *privileged* mail (mail to and from courts, attorneys, and paralegals), but they may open incoming privileged mail, in your presence, to see whether it contains contraband.[32] Be sure to mark all privileged mail clearly, so that officials will know not to open it outside your presence or read it.[33]

Jail and prison officials may not prevent you from communicating with the press or media because of what you want to say, but they may decide how your communication will take place.[34] For example, rather than allowing a reporter to interview you in person, officials may require you to write a letter.

28 *See* Section C.6 of Chapter 9 which addresses the rights of pregnant inmates.
29 *Thornburgh*, 490 U.S. at 409.
30 *Id.* at 412-14.
31 *Id.* at 416.
32 *See* Wolff v. McDonnell, 418 U.S. 539, 575-77, 94 S.Ct. 2963 (1974). *See also* Kaufman v. McCaughtry, 419 F.3d 678, 685-86 (7th Cir. 2005); Sallier v. Brooks, 343 F.3d 868, 876 (6th Cir. 2003); Muhammad v. Pitchers, 35 F.3d 1081, 1084-86 (6th Cir. 1994). *But see* Keenan v. Hall, 83 F.3d 1083, 1094 (9th Cir. 1996) (prisoner's mail from court, unlike mail from lawyer, is not "legal mail" and may therefore be opened outside prisoner's presence).
33 *See* 28 C.F.R. § 540.18(a) (federal regulation allowing Bureau of Prisons officials to open, read, and copy mail unless "the sender is adequately identified on the envelope, and the front of the envelope is marked 'Special Mail — Open only the presence of the inmate'").
34 Pell v. Procunier, 417 U.S. 817, 822-28, 94 S.Ct. 2800 (1974).

The Supreme Court has not decided whether inmates have a right to use the telephone. Lower courts have recognized a right of arrestees and pretrial detainees to call their attorneys.[35] To the extent that inmates have a constitutional right to telephone friends and family, officials may limit this right for security reasons.[36]

Inmates have a constitutional right to have confidential legal visits with attorneys and their paralegals and law students.[37] It is not clear whether they have a right to visit with family and friends. While the Supreme Court has not directly ruled on this question, it has said that inmates do not have a right to "unfettered visitation"[38] or contact visits.[39]

G. STANDARD OF REVIEW OF PRISON REGULATIONS

Courts generally apply a "reasonable relationship" test when inmates challenge official limitations on their constitutional rights.[40] This test was first applied by the Supreme Court in its 1987 decision *Turner v. Safley*.[41] The *Turner* standard applies to informal policies and individualized actions as well as regulations.[42] The *Turner* test requires any limitation on a constitutional right to be "reasonably related to legitimate penological interests."[43] Four factors are used in applying this test: (1) whether there is a "valid, rational connection" between the limitation and the officials' justification for it; (2) whether there is a different way for inmates to exercise the civil liberty; (3) the effect that exercising the civil liberty has on prison operations and other inmates; and (4) whether there is a different way for officials to achieve their goals that still allows inmates to exercise the civil liberty.[44]

35 Tucker v. Randall, 948 F.2d 388, 390-91 (7th Cir. 1991) ("Denying a pre-trial detainee access to a telephone for four days would violate the Constitution in certain circumstances. The Sixth Amendment right to counsel would be implicated if plaintiff was not allowed to talk to his lawyer for the entire four-day period. In addition, unreasonable restrictions on prisoner's telephone access may also violate the First and Fourteenth Amendments.").

36 *Compare* Owens-El v. Robinson, 442 F. Supp. 1368, 1386 (W.D. Pa. 1978) (finding no justification under First Amendment for jail administration's strict limitation on inmates' use of telephone), *with* Benzel v. Grammar, 869 F.2d 1105, 1108 (8th Cir. 1989) ("Although in some instances prison inmates may have a right to use the telephone for communication with relatives and friends, prison officials may restrict that right in a reasonable manner, 'subject to rational limitations in the face of legitimate security interests of the penal institution.'"), and Johnson v. California, 207 F.3d 650, 656 (9th Cir. 2000) ("Although prisoners have a First Amendment right to telephone access, this right is subject to reasonable limitations arising from the legitimate penological and administrative interests of the prison system. There is no authority for the proposition that prisoners are entitled to a specific rate for their telephone calls and the complaint alleges no facts from which one could conclude that the rate charge is so exorbitant as to deprive prisoners of phone access altogether.").

37 Procunier v. Martinez, 416 U.S. 396, 419-22, 94 S.Ct. 1800 (1974) *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401, 109 S.Ct. 1874 (1989); Barnetti v. Centoni, 31 F.3d 813, 816 (9th Cir. 1994) ("A prisoner's right of access to the courts includes contact visitation with his counsel."); Mann v. Reynolds, 46 F.3d 1055, 1057-61 (10th Cir. 1995) (prison policy prohibiting contact visitation between death row inmates and their attorneys violated Sixth Amendment).

38 Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 460-61, 109 S.Ct. 1904 (1989); *see also* Peterson v. Shanks, 149 F.3d 1140, 1145 (10th Cir. 1998) ("prison officials necessarily enjoy broad discretion in controlling visitor access to a prisoner").

39 Block v. Rutherford, 468 U.S. 576, 586-88, 104 S.Ct. 3227 (1984); *see also* Overton v. Bazzetta, 539 U.S. 126, 231-32, 123 S.Ct. 2162 (2003) (court leaves open the question of what rights of association are retained by inmates upon incarceration).

40 This "reasonable relationship" standard applies to substantive rights protected by the Bill of Rights and the Due Process Clause, but not Eighth Amendment or procedural due process rights. *See* Washington v. Harper, 494 U.S. 210, 110 S.Ct. 1028 (1990) (applying *Turner* reasonable standards to substantive due process claim, *Mathews v Eldridge* due process standard to procedural claim).

41 482 U.S. 78, 107 S.Ct. 2254 (1987).

42 Ford v. McGinnis, 352 F.3d 582, 595 n.15 (2d Cir. 2003); Cornwell v. Dahlberg, 963 F.2d 912, 917 (6th Cir. 1990).

43 *Id.* at 89.

44 *Id.* at 89-91.

The inmates in *Turner* won one of their two claims.[45] The Supreme Court has stated that the *Turner* test is "not toothless."[46] Nevertheless, lower courts tend to apply the test in a way that strongly favors the interests of jail and prison officials. If you file a lawsuit challenging a limitation on your civil liberties, you should emphasize three points. First, "reasonableness" under *Turner* requires courts to strike a balance between the interests of officials and the constitutional rights of inmates.[47] Second, while it is appropriate for courts to defer to the well-supported judgments of jail and prison officials, "deference does not mean abdication."[48] A court should not simply swallow whatever line an official feeds it. Third, officials must support their policies with facts, not conjecture or conclusory assertions.[49]

H. CONCLUSION

Remember, this chapter has presented only a summary of your rights as an inmate. If you intend to enforce any right other than the health and safety protections discussed in the following five chapters, you should consult a manual or treatise that explains the right more fully. The Appendix lists additional resources that you can order by mail.

45 The Court ruled that a regulation that prohibited prisoners from marrying violated the Constitution. *Id*. at 97.
46 Thornburgh v. Abbott, 490 U.S. 401, 414, 109 S.Ct. 1874 (1989).
47 Reed v. Faulkner, 842 F.2d 960, 962 (7th Cir. 1988); Salaam v. Lockhart I, 856 F.2d 1120, 1122, 1124 (8th Cir. 1988).
48 Walker v. Sumner, 917 F.2d 382, 385 (9th Cir. 1990).
49 Shimer v. Washington, 100 F.3d 506, 509-10 (7th Cir. 1996) (reversing summary judgment for prison officials who asserted a security rationale for policy, but provided no evidence in support of that rationale); Salaam v. Lockhart, 905 F.2d 1168, 1174 (8th Cir. 1990) (officials may not "pil[e] conjecture upon conjecture" to justify their policies); Walker v. Sumner, 917 F.2d 382, 386-87 (9th Cir. 1990) (prison officials may not obtain summary judgment based on conclusory assertions without explanation or factual support).

Chapter 4

Due Process Rights

The Due Process Clause[1] prohibits the government from depriving a person of liberty or property "without due process of law." Inmates have limited rights when it comes to deprivations of their liberty and property.

A. LIBERTY INTEREST

The purpose of "due process" is generally not to keep the government from doing certain things altogether, but rather to keep it from acting in an arbitrary and unfair manner.[2] When you have a liberty interest protected by the Due Process Clause, jail and prison officials must provide you with fair treatment. In 1995, the United States Supreme Court, in *Sandin v. Conner*,[3] limited the due process protections of prisoners, holding that in-prison restrictions[4] deprive them of "liberty" within the meaning of the Due Process Class only if the restrictions "impose atypical and significant hardship on inmate in relation to the ordinary incidents of prison life."[5]

Under *Sandin*, prisoners' liberty is protected by due process in two situations. One involves deprivations "so severe in kind or degree (or so removed from the original terms of confinement) that they amount to deprivations of liberty," regardless of the terms of state law.[6] The paradigm cases are commitment of a prisoner to a mental institution or the involuntary administration of psychotropic drugs.[7]

The second situation in which *Sandin* recognizes prisoners' liberty includes cases in which the state has – as it may "under certain circumstances" created a liberty interest *and* deprivation of that interest "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[8] After *Sandin*, it is clear that the touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the language of regulations regarding those conditions but the nature of those conditions themselves "in relation to the ordinary incidents

1 The Due Process Clause of the Fifth Amendment applies to federal inmates; the Due Process Clause of the Fourteenth Amendment applies to state and local inmates.
2 *See* Wolff v. McDonnell, 418 U.S. 539, 558, 94 S.Ct. 2963 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government.").
3 515 U.S. 472, 115 S.Ct. 2293 (1995).
4 *Sandin* by its terms applies only to in-prison restrictions. The Court, after noting that the deprivation of statutory good time involved an inmate of "real substance," 515 U.S. at 478, was careful to distinguish the prisoner's placement in segregation from actions that "inevitably affect the duration of his sentence." *Id.* at 487.
5 515 U.S. at 484. *See also* Wilkinson v. Austin, 545 U.S. 209, 125 S.Ct. 2384 (2005).
6 *Sandin*, 515 U.S. at 497 (Breyer, J., dissenting); *see id.* at 472 (majority opinion) (conditions "exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force").
7 Sandin, 515 U.S. at 484 (citing cases).
8 *Id.* at 484.

of prison life."[9] After *Wilkinson v. Austin*, mandatory language and substantive predicates no longer create a liberty interest.[10]

What is an "atypical and significant hardship"? One court has held that it is something significantly worse than "the most restrictive conditions that prison officials, exercising their administrative authority to ensure institutional safety and good order, routinely impose on inmates serving similar sentences."[11] For example, if officials at your prison routinely place inmates in an administrative segregation unit for various reasons, to have a liberty interest you must be subjected to conditions significantly worse than conditions in that prison.[12]

In *Sandin*, the Supreme Court held that because the placement of a Hawaiian inmate in disciplinary segregation for 30 days did not amount to an "atypical and significant hardship," he did not have a liberty interest under the Due Process Clause.[13] As one court put it, after *Sandin* "the right to litigate disciplinary confinements has become vanishingly small,"[14] although some courts have found that lengthy administrative or punitive segregation (*i.e.*, lasting six months or longer) can give rise to a liberty interest.[15] Other forms of restraint, such as strapping an inmate down in four-point restraints, may also give rise to a liberty interest.[16] Transferring an inmate from one prison to another, even to a prison with more restrictive conditions of confinement, does not rise to a liberty interest.[17]

The *Sandin* analysis does not apply to pre-trial detainees in the view of most courts that have actually asked the question.[18] *Sandin*'s analytical starting point is that "*given a valid conviction*, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution.... Confinement in any of the State's institutions is within the normal limits or range of custody which the conviction

9 *Id.*
10 *Wilkinson*, 545 U.S. at 222-23.
11 Hatch v. District of Columbia, 184 F.3d 846, 847 (D.C. Cir. 1999).
12 The various circuits are split on what the baseline ("the ordinary incidents of prison life") should be under *Sandin*. The Fourth and Ninth Circuits look at the conditions in the general prison population. Beverati v. Smith, 120 F.3d 500, 504 (4th Cir. 1997); Keenan v. Hall, 83 F.3d 1083, 1089 (9th Cir. 1996). The Second and Third Circuits look at typical conditions of administrative segregation. Griffin v. Vaughn, 112 F.3d 703, 708 (3d Cir. 1997); Brooks v. DiFasi, 112 F.3d 46, 49 (2d Cir. 1997) (less than 103 days of segregation confinement not *per se* atypical). The Seventh Circuit looks at the conditions of non-disciplinary segregation in a state's most restrictive prison. Wagner v. Hanks, 128 F.3d 1173, 1175 (7th Cir. 1997).
13 *Sandin*, 515 U.S. at 486.
14 *Wagner*, 128 F.3d at 1175.
15 Colon v. Howard, 215 F.3d 227, 231 (2d Cir. 2000) (confinement in normal special housing unit (SHU) for 305 days was "a sufficient departure from the ordinary incidents of prison life to require procedural due process protections under *Sandin*"); Shoats v. Horn, 213 F.3d 140, 144 (3d Cir. 2000) (concluding that "eight years in administrative custody, with no prospect of immediate release in the near future, is 'atypical' in relation to the ordinary incidents of prison life"); Williams v. Fountain, 77 F.3d 372, 374 n.3 (11th Cir. 1996) (assuming that full year of solitary confinement was "atypical and significant hardship" entitling inmate to due process).
16 Williams v. Benjamin, 77 F.3d 756, 769 (4th Cir. 1996) (stating that inmate's confinement in four-point restraints posed atypical and significant hardship and "a major disruption in his environment").
17 Olim v. Wakinekona, 461 U.S. 238, 103 S.Ct. 1741 (1983); Meachum v. Fano, 427 U.S. 215, 96 S.Ct. 2532 (1976).
18 Iqbal v. Hasty, 490 F.3d 143, 162-63 (2d Cir. 2007), *cert. granted sub nom,* Ashcroft v. Iqbal, 2008 WL 336310 (June 16, 2008); Surprenant v. Rivas, 424 F.3d 5, 17 (1st Cir. 2005); Benjamin v. Fraser, 264 F.3d 175, 188-89 (2d Cir. 2001); Mitchell v. Dupnik, 75 F.3d 517, 523-24 (9th Cir. 1995); Zarnes v. Rhodes, 64 F.3d 285, 292 (7th Cir. 1995). *But see* Magluta v. Samples, 375 F.3d 1269, 1278-82 (11th Cir. 2004) (applying *Sandin* in a pre-trial detainee case without asking whether it is appropriate).

has authorized the State to impose."[19] Since *Sandin* is based on "the expected perimeters of the sentence imposed by a court of law," detainees are entitled to a due process hearing before being subjected to punishment.[20] Decisions are in conflict as to whether a prisoner who has been convicted but not yet sentenced is to be considered a detainee or a convict for this purpose.[21]

Under *Sandin* and *Wilkinson*, due process scrutiny is now mostly limited to substantial disciplinary punishments and to similar actions taken for security reasons, such as prolonged periods of administrative segregation.

B. LOSS OF PROPERTY

If a jail or prison official intentionally takes or destroys your property, you can file a federal civil rights claim only if you do not have a "meaningful post-deprivation remedy," such as the opportunity to file a state-law tort action.[22] If you lose your property as a result of an official's negligence (failure to act with reasonable care), you do not have a claim under the Due Process Clause at all, regardless of whether any other meaningful remedies exist.[23] In almost all situations, therefore, inmates must rely on administrative remedies (grievances and appeals) and state-law remedies when they lose their property.

In order to maintain the goals of security, sanitation, fire safety, and good order, jail and prison officials have wide discretion to decide what kinds of property, and how much, inmates can keep in their cells. Officials can even place reasonable limitations on the amount of legal papers and books that an inmate can keep.

C. TRANSFERS

Transfers between prisons can usually be done without due process protections. The Supreme Court has held that a criminal conviction "has sufficiently extinguished the defendant's liberty interest to empower the state to confine him in *any* of its prisons...Confinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the state to impose."[24] This rule applies even if the transfer is to a higher-security institution,

19 Meachum v. Fano, 427 U.S. 215, 224-25, 96 S.Ct. 2532 (1976) (emphasis supplied); *compare* Sandin, 515 U.S. at 478, 483 (*citing Meachum*); *see* Benjamin v. Fraser, 264 F.3d at 189 (relying on *Meachum* and *Sandin*).

20 Iqbal v. Hasty, 490 F.3d at 165 (holding that detainee was entitled to procedural protections based directly upon the Due Process Clause where he was subjected to conditions so harsh as to comprise punishment, as well as under federal regulations that created a liberty interest, regardless of defendants' punitive intent); Surprenant v. Rivas, 424 F.3d 5, 17 (1st Cir. 2005) (holding detainees have a liberty interest in avoiding punishment); Holly v. Woolfolk, 415 F.3d 678, 679-80 (7th Cir. 2005) (noting holdings that "any nontrivial punishment of a person not yet convicted [is] a sufficient deprivation of liberty to entitle him to due process of law"), *cert. denied*, 546 U.S. 1151 (2006); Mitchell v. Dupnik, 75 F.3d 517, 523-24 (9th Cir. 1995); Zarnes v. Rhodes, 64 F.3d 285, 292 (7th Cir. 1995). The First Circuit has held that detainees are denied due process when they are punished as a result of false charges made by staff members with the intent to cause them to be punished. Surprenant v. Rivas, 424 F.3d at 13-14.

21 *See* Tilmon v. Prator, 368 F.3d 521, 524 (5th Cir. 2004) (*per curiam*) (holding convicted but unsentenced prisoner is equivalent to a sentenced prisoner for *Sandin* purposes).

22 Hudson v. Palmer, 468 U.S. 517, 530-34, 104 S.Ct. 3194 (1984).

23 Daniels v. Williams, 474 U.S. 327, 331-32, 106 S.Ct. 662 (1986).

24 Meachum v. Fano, 427 U.S. 215, 224-35, 96 S.Ct. 2532 (1976) (emphasis in original). *See also* Wilkinson v. Austin, 545 U.S. 209, 125 S.Ct. 2384 (2005) (transfers from one prison to another with a more adverse condition of confinement do not affect a recognized

is done in response to alleged misconduct, or causes you to lose program opportunities.[25] Therefore a transfer does not infringe any constitutionally-based liberty interest.

It also applies to transfers between state and federal custody, from one state to another, from county or city jail to state prison, or to a distant location and an alien cultural climate. The same is true of the denial of a transfer and of transfers between housing units in the same prison.[26]

There are a few special transfer situations in which the Constitution creates a liberty interest even if state law does not. If you are transferred and committed to a mental hospital, you are entitled to a commitment hearing.[27]

Pre-trial detainees are entitled to due process protections if they are transferred to state prisons and the result is interference with their Sixth Amendment rights to effective assistance of counsel and to a speedy trial.[28]

D. PROGRAMS, WORK AND CLASSIFICATION

There is generally no constitutional right to be in a particular status or activity in prison, and the federal Constitution does not create a liberty interest requiring due process protections when you are placed in or removed from a particular program, job or classification.[29] However, prison officials' action or inaction with respect to program, job or classification matters also may deprive you of a liberty interest if it affects parole eligibility or good time credits.[30]

State courts may provide a broader scope of judicial review of classification and program decisions than do federal courts.

liberty interest).

25 Higgason v. Farley, 83 F.3d 807, 809 (7th Cir. 1996) (*per curiam*) (due process clause does not protect prisoner's access to educational programs); Bowser v. Vose, 968 F.2d 105, 106 (1st Cir. 1992) (denial of furlough).

26 William v. Faulkner, 837 F.2d 304, 308-09 (7th Cir. 1988), *aff'd on other grounds sub nom.*, Neitzke v. Williams, 490 U.S. 319, 109 S.Ct. 1827 (1989).

27 Vitek v. Jones, 445 U.S. 480, 496-500, 100 S.Ct. 1254 (1980).

28 Cobbs v. Aytch, 643 F.2d 946, 955-56 (3rd Cir. 1981).

29 Moody v. Daggett, 429 U.S. 78, 88 n.9, 97 S.Ct. 274 (1976) (particular program and classification); Newsom v. Norris, 888 F.2d 371, 374 (6th Cir. 1989) (job).

30 *See* Wolfe v. Penn. Dep't of Corr., 334 F.Supp.2d 762, 770-73 (E.D. Pa. 2004) (case allowed to proceed where the right to parole was conditioned on participation in treatment program).

Chapter 5

Equal Protection

The Fourteenth Amendment is limited to state action and prohibits a state to "deny any person within its jurisdiction the equal protection of the laws,"[1] such that "all persons similarly situated should be treated alike."[2] Although the Fourteenth Amendment refers to states, the Fifth Amendment extends the Equal Protection Clause to the federal governments, which requires the federal government to obey the same equal protection standards as the states.[3] Under either constitutional provision, the Supreme Court has required one of three different levels of justification to be applied to an equal protection claim.

A. EQUAL PROTECTION TESTS

The three levels of justification are strict scrutiny, intermediate scrutiny, and the rational basis standard. Under these standards, equal protection does not forbid *all* unequal treatment, just inequality that lacks justification. To deny equal protection, the discrimination must be intentional and impose a disparate impact by itself.[4] In most prisoners' rights cases, the courts will apply the rational basis standard and government officials only need to have a "rational" reason to treat people not similarly situated differently.

This means that in most cases, prison officials need only a "rational" reason to treat prisoners differently. You are unlikely to win an equal protection claim challenging differences in the way prison staff treats inmates in segregation and inmates in general population — or inmate and non-inmates — because there are rational reasons to treat these groups differently.

1. Strict Scrutiny

Outside of prison, strict scrutiny is used when a suspect classification or fundamental right is involved, generally outside of prison. This standard requires government officials to show that their actions or practices are necessary to serve a "compelling state interest by the least restrictive means available."[5] Strict scrutiny is generally not applied in prison cases even if fundamental rights are at stake. However, the Supreme Court has held that strict scrutiny applies to racial discrimination in prison.[6]

1 U.S. Const., Amend. XIV.
2 City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439, 105 S.Ct. 3249 (1985).
3 U.S. Const., Amend. V.
4 Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040 (1976).
5 Bernal v. Fainter, 467 U.S. 216, 219, 104 S.Ct. 2312 (1984) ("Suspect classes" include race, national origin, and alienage (non-citizenship)). Prisoners are not a suspect class. Jackson v. State Bd. of Pardons & Paroles, 331 F.3d 790, 797 (11th Cir. 2003).
6 Johnson v. California, 543 U.S. 499, 509-15, 125 S.Ct. 1141 (2005).

2. Intermediate Scrutiny

Intermediate scrutiny is used when a classification based on gender or legitimacy is involved.[7] This standard requires government officials to show that their actions or practices are "substantially related" to the achievement of "important governmental objectives."[8] This standard has been applied in some prison cases, though the courts are divided about the standard applied to prison gender discrimination.

3. Rational Basis

The rational basis standard is used whenever strict or intermediate scrutiny is not applicable. This standard only requires government officials to show that a difference in treatment bears a "rational relationship" to a legitimate governmental purpose.[9] The courts generally apply the rational basis standard to prisoners' equal protection claims. It is difficult to fail this test, and in most cases, the courts applying it generally uphold prison practices that are claimed to deny equal protection, as well as laws that discriminate against prisoners relative to non-prisoners. For example, the provisions of the Prison Litigation Reform Act, which treat prisoners differently than litigants in federal court, have not been held to deny equal protection.[10]

Some courts have departed from standard equal protection principles and have held that prisoners' equal protection claims are generally governed by the "reasonable relationship" test of *Turner v. Safley*,[11] or have treated the rational basis standard as equivalent to the *Turner* standard in prison cases.[12] This can actually be to prisoners' advantage, since courts applying the *Turner* standard generally expect prison officials to come forward with the reasons for their policies and provide some evidence in support, while the rational basis test is less demanding, as discussed below.[13]

Under the rational basis standard, the courts will only strike down distinctions that do not make any sense at all, but government officials can generally come up with some rational basis for their actions, which the courts must accept even if they don't agree with the rational basis. It doesn't matter if the supposed rationale

7 Clark v. Jeter, 488 U.S. 445, 461, 109 S.Ct. 693 (1989); Pitts v. Thornburgh, 866 F.2d 1450, 1454 (D.C. Cir. 1989).

8 Mississippi University for Women v. Hogan, 458 U.S. 718, 724-25, 102 S.Ct. 331 (1982).

9 Romer v. Evans, 517 U.S. 620, 631, 116 S.Ct. 1620, (1996) ("[I]f a law neither burdens a fundamental right nor targets a suspect class," it does not violate the Equal Protection Clause "so long as it bears a rational relation to some legitimate end."); Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 81, 108 S.Ct. 1645 (1988).

10 *See, e.g.*, Lewis v. Sullivan, 279 F.3d 526 (7th Cir. 2002) (finding that three-strike provision of PLRA does not violate equal protection); Gilmore v. People of State of California, 220 F.3d 987 (9th Cir. 2000) (holding that termination provisions of PLRA does not deny equal protection); Tucker v. Branker, 142 F.3d 1294, 1299-1301 (D.C.Cir. 1998) (PLRA filing fee has rational basis and does not violate equal protection component of due process).

11 *See, e.g.*, Taylor v. Johnson, 257 F.3d 470, 473-74 (5th Cir. 2001); Morrison v. Garraghty, 239 F.3d 648, 654-56 (4th Cir. 2001); DeHart v. Horn, 227 F.3d 47, 61 (3rd Cir. 2000) (*en banc*); Allen v. Cuomo, 100 F.3d 253, 260-61 (2d Cir. 1996) (applying *Turner* standard to equal protection claims).

12 *See, e.g.*, Gwinn v. Awmiller, 354 F.3d 1211, 1228-29 (10th Cir. 2004) (applying reasonable relationship standard), *cert. denied*, 543 U.S. 860 (2004); Prevard v. Fauver, 47 F.Supp.2d 539, 543 (D. N.J. 1999), *aff'd,* 202 F.3d 254 (3rd Cir. 1999) (unpublished).

13 *See* Section G of Chapter 3 for a discussion of the *Turner* standard.

for a distinction is not the real reason for it; under this standard, if there is "any reasonably conceivable state of facts that *could* provide a rational basis for the classification," it must be upheld.[14] For example:

> Decisions about classification and admission to prison programs are generally upheld under the rational basis standard.[15]
>
> It generally does not deny equal protection to give segregation inmates more limited privileges than general population inmates or those in other segregation units,[16] to treat inmates differently based on their criminal or disciplinary history,[17] or sex offender status.[18]
>
> Providing greater protection from invasions of privacy by opposite-sex guards to women than to men was justified by the differences in the number and age of the inmates, their criminal histories, sentence length, and the frequency of security-related incidents.[19]
>
> A District of Columbia good time act that benefited only those prisoners in the D.C. prisons, and not D.C. prisoners who had been transferred to federal prisons, was upheld as rationally related to the goals of reducing crowding in the D.C. prisons and to letting the prison authorities who had custody of the inmate retain control over his good time.[20]
>
> Denial of work credits (a form of good time) to a prisoner who was willing to work but could not be transferred to a prison where work was available did not deny equal protection because prison officials

14 F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 313, 113 S.Ct. 2096 (1993) (emphasis supplied); *accord*, Tuan Anh Nguyen v. I.N.S., 533 U.S. 53, 75, 121 S.Ct. 2053 (2001); Gilmore v. County of Douglas, State of Nebraska, 406 F.3d 935, 939 (8th Cir. 2005).

15 Griffin v. Vaughn,112 F.3d 703, 709 (3d Cir. 1997); Templeman v. Gunter, 16 F.3d 367, 371 (10th Cir. 1994). *But see,* Johnson v. California, 543 U.S. 499, 505, 125 S.Ct. 1141 (2002) (holding that prison classification based upon race "must be analyzed by a reviewing court under strict scrutiny. (citation omitted)").

16 Bass v. Perrin, 170 F.3d 1312, 1319 (11th Cir. 1999) (upholding provision of less outdoor recreation to "close management" prisoners than death row prisoners, since the former have shown themselves to be a threat to internal prison operations); Benzel v. Grammer, 869 F.2d 1105, 1109 (8th Cir. 1989) (telephone privileges); Little v. Terhune, 200 F.Supp.2d 445, 450-54 (D. N.J. 2002) (educational programming); Reutcke v. Dahm, 707 F.Supp. 1121, 1133 (D. Neb. 1988) (radio and television privileges).

17 Gerber v. Hickman, 291 F.3d 617, 623 (9th Cir. 2002) (*en banc*) (holding denial of conjugal visits to persons serving life sentences is rationally related to the greater need for external contacts of prisoners who will be released), *cert. denied,* 537 U.S. 1039 (2002); Conlogue v. Shinbaum, 949 F.2d 378, 380 (11th Cir. 1991) (denying good time based on criminal record is rationally related to avoiding the early release of serious offenders); Thornton v. Hunt, 852 F.2d 526, 527 (11th Cir. 1988) (statute denying good time accumulation to those with sentences longer than ten years was rationally related to the purpose of preventing the early release of serious offenders); Smith v. Coughlin, 748 F.2d 783, 787-88 (2d Cir. 1984) (inmate sentenced to death for murdering a guard could be kept in closer security than others); Morris v. McCotter, 773 F.Supp. 969, 972-73 (E.D. Tex. 1991) (exclusion of convicted murderers from furlough program did not deny equal protection); Russell v. Eaves, 722 F.Supp. 558, 560 (E.D. Mo. 1989) (sex offenders could be required to complete a treatment program before becoming parole eligible); Fuller v. Lane, 686 F.Supp. 686, 689-91 (C.D. Ill. 1988) (exclusion of sex offenders from work release did not deny equal protection); *see also* Faheem-El v. Klincar, 841 F.2d 712, 727-29 (7th Cir. 1988) (*en banc*) (denial of bail to parolees, but not probationers, arrested for new crimes did not deny equal protection).

18 Wirsching v. Colorado, 360 F.3d 1191, 1205 (10th Cir. 2004); Glauner v. Miller, 184 F.3d 1053, 1054 (9th Cir. 1999); Roe v. Marcotte, 193 F.3d 72, 82 (2d Cir. 1999).

19 Timm v. Gunter, 917 F.2d 1093, 1102-03 (8th Cir. 1990); Klinger v. Nebraska Dept. of Correctional Serv., 824 F.Supp. 1374, 1385 (D.Neb.1993) ("If the governmental purpose of treating males and females at NSP and NCW differently is intended to address the 'fact' that such persons are not 'similarly situated' because attributes not solely associated with gender may legitimately permit (if not require) differences in treatment, then different treatment of men and women at NSP and NCW is justified under the Equal Protection Clause, as a general principle, so long as the fact of 'dissimilarity' is true."), *aff'd* 31 F.3d 727 (8th Cir. 1994).

20 Pryor v. Brennan, 914 F.2d 921, 923-27 (7th Cir. 1990); Moss v. Clark, 886 F.2d 686, 690-92 (4th Cir. 1989).

believed that prisoners who actually worked are "better prepared for reintegration into society."[21]

A prisoner does need not need to be a member of a group or class that is discriminated against to state an equal protection claim. The Supreme Court has held that an individual who claims he has been treated differently from others similarly situated, intentionally and without rational basis, states an equal protection claim as a "class of one."[22] The following groups and classes generally give rise to most equal protection claims and will be addressed individually: race, national origin, sexuality, gender, disability, and religion.

B. APPLICATION OF EQUAL PROTECTION STANDARD

1. Race

Government officials need a much stronger reason to treat people differently because of their race. Racial discrimination violates the Constitution unless it is necessary to serve a "compelling state interest by the least restrictive means available." This is a very difficult standard to meet. The Supreme Court has held that jail and prison officials may not segregate inmates by race unless it is necessary to maintain security and discipline.[23]

2. National Origin

Discrimination against aliens is also subjected to "strict scrutiny" in non-prison cases. However, courts have generally applied the rational basis test to alien prisoners' equal protection claims, either because they say that standard generally applies in prison,[24] or because they find that the challenged actions are not really discrimination based on alienage. Thus, one court held that placing Cuban inmates who were subject to deportation in administrative segregation, after other such inmates had been involved in riots in other prisons, was not really based on alienage, but on the plaintiff's "membership in a class of persons who faced potential deportation as a result of the agreement between the United States and Cuba."[25]

21 Kalka v. Vasquez, 867 F.2d 546, 547 (9th Cir. 1989).

22 Village of Willowbrook v. Olech, 528 U.S. 562, 564-65, 120 S.Ct. 1073, 1074-75 (2000). A "class of one" equal protection claim will be evaluated under the rational basis test. Borzych v. Frank, 340 F.Supp.2d 955, 970 (W.D. Wis. 2004), *reconsideration denied on other grounds*, 2004 WL 2491597 (W.D. Wis., Oct. 28, 2004). The plaintiff in such a case will be required to show, not only that he was badly treated, but also that persons similarly situated were not treated that way. Alicea v. Howell, 387 F.Supp.2d 227, 236 (W.D. N.Y. 2005).

23 Lee v. Washington, 390 U.S. 333, 88 S.Ct. 994 (1968); Johnson v. California, 543 U.S. 499, 505, 125 S.Ct. 1141 (2002) (holding that prison classification based upon race "must be analyzed by a reviewing court under strict scrutiny. (citation omitted)").

24 *See* Isaraphanic v. Coughlin, 716 F.Supp. 119, 120-21 (S.D. N.Y. 1989) (holding rational basis or reasonable relationship standard applied to alien prisoner with an immigration detainer who challenged the denial of temporary release and imposition of a higher security classification; upholding this treatment as rationally based on the prisoner's enhanced risk of escape). *Cf.* Delgado v. Federal Bureau of Prisons, 727 F.Supp. 24, 25, 27-28 (D. D.C. 1989) (holding placement of Cuban inmates in a separate unit to serve their "unique [] needs" and expedite immigration paperwork, with no allegation that they were denied rights and privileges of other prisoners, did not deny equal protection), *reconsideration denied*, 1990 WL 20037 (D. D.C., Feb. 9, 1990).

25 Vallina v. Meese, 704 F.Supp. 769, 772 (E.D. Mich. 1989); *see* McLean v. Crabtree, 173 F.3d 1176, 1185-86 (9th Cir. 1999) (holding that exclusion of prisoners with detainers from a sentence reduction program involving community-based drug treatment was not discrimination based on alienage, but discrimination based on detainers, which was rational because such prisoners would present a

3. Sexuality

Gays and lesbians receive only rational-basis review under the Equal Protection Clause. For example, in *Farmer v. Carlson*, 685 F.Supp. 1335, 1344 (M.D. Pa. 1988), placement of transsexual inmate in administrative segregation rather than high-security general population did not deny equal protection. Nevertheless, the Supreme Court has indicated that the government may not discriminate simply out of hostility to a person's sexual orientation. For example, in *Kelley v. Vaughn*, 760 F.Supp. 161, 163-64 (W.D. Mo. 1991), an allegation that the plaintiff was denied equal protection by being fired from his bakery job for his homosexuality was not frivolous.

4. Gender

With gender discrimination, government officials must show an "exceedingly persuasive" justification.[26] They must show that the discrimination "serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." When male and female inmates in the same jail or prison are treated differently, a court will require officials to show an important need for the discrimination.[27] However, when inmates challenge differences at separate men's and women's facilities, courts often reject the challenge on the ground that the two groups are not similarly situated — that it is like comparing "apples and oranges."[28]

The equal protection standard for gender discrimination in prison is unsettled. In cases challenging lack of program opportunities for female prisoners, courts have applied a "heightened" or "intermediate" scrutiny test that calls for "parity of treatment," which requires prison officials "to provide women inmates with treatment facilities that are substantially equivalent to those provided for men–i.e., equivalent in substance, if not in form–unless their actions... nonetheless bear a fair and substantial relationship to achievement of the State's correctional objectives."[29] Gender differences in security policies such as grooming rules have

flight risk in community-based programs); Franklin v. Barry, 909 F.Supp. 21, 27-28 (D. D.C. 1995) (upholding exclusion of persons with detainers from minimum security classification based on same reasoning as *McLean*).

26 United States v. Virginia, 518 U.S. 515, 532-33, 116 S.Ct. 2265 (1996).

27 Pariseau v. Wilkinson, 1997 WL 144218, 1 (6th Cir. 1997) ("Pariseau's gender discrimination claim was properly rejected because the defendant demonstrated that the hair grooming policy was substantially related to the important objectives of security and identification, which were more vital in handling male prisoners.")

28 Klinger v. Department of Corrections, 31 F.3d 721, 732 (8th Cir. 1994) ("using an inter-prison program comparison to analyze equal protection claims improperly assumes that the Constitution requires all prisons to have similar program priorities and to allocate resources similarly."). Treatment of dissimilarly situated persons in a dissimilar manner by the government does not violate the Equal Protection Clause. *see* Barket, Levy & Fine, Inc. v. St. Louis Thermal Energy Corp., 21 F.3d 237, 242 (8th Cir. 1994); Women Prisoners of the Dist. of Columbia Dep't. of Corrections v. District of Columbia, 93 F.3d 910, 924 (D.C. Cir. 1996).

29 Glover v. Johnson, 478 F.Supp. 1075, 1079 (E.D. Mich. 1979) (finding that vocational programs for men were more numerous and more likely to provide marketable skills than those for women); *accord*, Clarkson v. Coughlin, 898 F.Supp. 1019, 1043 (S.D. N.Y. 1995) (holding that provision of a Sensorially Disabled Unit for men but not women denied equal protection); West v. Virginia Dept. of Corrections, 847 F.Supp. 402, 407-09 (W.D. Va. 1994) (holding failure to provide boot camp programs for women as well as men denied equal protection); Casey v. Lewis, 834 F.Supp. 1477, 1550-51 (D. Ariz. 1993) (holding inequalities in mental health treatment denied equal protection); McCoy v. Nevada Dept. of Prisons, 776 F.Supp. 521, 523 (D. Nev. 1991); Glover v. Johnson, 721 F.Supp. 808, 848-49 (E.D. Mich. 1989) (explaining "parity" in more detail), *aff'd in part and rev'd in part on other grounds*, 934 F.2d 703 (6th Cir. 1991); Canterino v. Wilson, 546 F.Supp. 174, 210-12 (W.D. Ky. 1982), *vacated and remanded on other grounds*, 869 F.2d 948 (6th Cir. 1989); Dawson v. Kendrick, 527 F.Supp. 1252, 1317 (S.D. W.Va. 1981); McMurry v. Phelps, 533 F.Supp. 742, 767-68 (W.D. La. 1982); *see also* Smith v. Bingham, 914 F.2d 740, 742 (5th Cir. 1990) (male prisoner working as a writ-writer at women's prison need not be permitted to enroll in women's vocational programs; separation of sexes had a "substantial relationship" to important security objectives).

generally been upheld under the intermediate scrutiny standard.[30]

Some courts have applied the Supreme Court's holding in *Turner v. Safley*, which states that restrictions on prisoners' constitutional rights need only bear a "reasonable relationship" to legitimate penological interests[31] to limit the intermediate scrutiny/parity of treatment approach. One court suggested that intermediate scrutiny applies to prison gender discrimination cases involving "general budgetary and policy choices," but that the rational basis test is applicable to gender discrimination in the daily management of prisons.[32] Another has gone further and held that parity of treatment is satisfied if there is a reasonable relationship under the *Turner* standard.[33] However, the Supreme Court's holding that racial discrimination cannot be justified by meeting the *Turner* standard[34] suggests that it may not be applied to gender discrimination either.

Some more recent decisions have avoided any analysis of unequal program access for women by declaring that women are not "similarly situated" to men–because, for example, the women's prison is smaller than the men's prisons, the length of stay for men is longer, the women's prison has a lower security classification than some of the men's prisons, and women prisoners have "special characteristics distinguishing them from male inmates, ranging from the fact that they are more likely to be single parents with primary responsibility for child rearing to the fact that they are more likely to be sexual or physical abuse victims."[35] Some of these

30 *See* DeBlasio v. Johnson, 128 F.Supp.2d 315, 327-28 (E.D. Va. 2000) (applying intermediate scrutiny; upholding ban on long hair for men but not women based on evidence that women are not as violent as men and not as prone to conceal weapons or escape), *aff'd*, 13 Fed.Appx. 149 (4th Cir. 2001); Ashann-Ra v. Commonwealth of Va., 112 F.Supp.2d 559, 570-72 (W.D. Va. 2000) (similar to *DeBlasio*; holding that "parity of treatment" was satisfied because most grooming rules were the same for men and women, and the hair length difference was justified by men's greater propensities to violence, hiding contraband, and escape); Davie v. Wingard, 958 F.Supp. 1244, 1252-53 (S.D. Ohio 1997) (same). *But see* Ford v. City of Boston, 154 F.Supp.2d 131, 150-51 (D. Mass. 2001) (applying intermediate scrutiny to strike down a practice of sending women arrestees to a jail where they were subjected to strip searches on intake, while male arrestees were sent to facilities which did not require such searches).

31 Turner v. Safley, 482 U.S. 78, 89, 107 S.Ct. 2254 (1987); *see* Section G of Chapter 3 for a more detailed discussion of the *Turner* standard.

32 Pitts v. Thornburgh, 866 F.2d 1450, 1453-55 (D.C. Cir. 1989); *see* Pargo v. Elliott, 49 F.3d 1355, 1357 (8th Cir. 1995) (citing *Pitts* with apparent approval), *on remand*, 894 F.Supp. 1243, 1253-64 (S.D .Iowa 1995) (declining to apply heightened scrutiny absent a facial classification by gender, but examining the record for "invidious" discrimination), *aff'd*, 69 F.3d 80 (8th Cir. 1995) (*per curiam*). The *Pitts* court suggested that distinctions based on gender are more likely to be upheld if they are not based on "traditional stereotyping or archaic notions of 'appropriate' gender roles." *Supra*. at 1459. *Cf*. Dothard v. Rawlinson, 433 U.S. 321, 336-37, 97 S.Ct. 2720 (1977) (Title VII case upholding discrimination against women in hiring for inmate contact positions in extremely violent men's prisons).

33 Glover v. Johnson, 35 F.Supp.2d 1010, 1013-15 (E.D. Mich. 1999) (holding that "parity of treatment" is to be determined by Turner v. Safley reasonable relationship analysis), *aff'd*, 198 F.3d 557 (6th Cir. 1999) (not reaching the question); *see* Glover v. Johnson, 138 F.3d 229, 253 (6th Cir. 1997) (stating in dictum that no federal appeals court ever adopted the parity standard and finding of violation under it is of "dubious validity").

34 Johnson v. California, 543 U.S. 499, 509-14, 125 S.Ct. 1141 (2005).

35 Klinger v. Department of Corrections, 31 F.3d 727, 733 (8th Cir. 1994); *accord*, Women Prisoners of the District of Columbia Dept. of Corrections v. District of Columbia, 93 F.3d 910, 925-27 (D.C. Cir. 1996); Keevan v. Smith, 100 F.3d 644, 647-50 (8th Cir. 1996); Pargo v. Elliott, 894 F.Supp. 1243, 1258-62 (S.D. Iowa 1995), *aff'd*, 69 F.3d 280 (8th Cir. 1993) (*per curiam*); *see* Prince v. Endell, 78 F.3d 397, 398-99 (8th Cir. 1996) (*per curiam*) (holding prison officials were immune because they could have reasonably believed the genders were not similarly situated, since they lived in different types of prisons with different clothing policies and different violence levels, and officials). In *Pargo*, the plaintiffs focused on differences in programs among prisoners of the same types of custody classification and sentence length, but the court still found that they were not similarly situated to men because women of all classifications were contained in a single institution, unlike men; women generally serve less time in prison because they are sentenced for fewer and less serious crimes and are often paroled earlier because they are considered lower risk than men; and "characteristics common to inmates at the women's institution are different from characteristics of inmates at men's institutions." These "rang[e] from the fact that they are more likely to be single parents with primary responsibility for child rearing to the fact that they are more likely to be sexual or physical abuse victims. Male inmates, in contrast, are more likely to be violent and predatory than female inmates." 894 F.Supp. at 1261. In Yates v. Stalder, 217 F.3d 332 (5th Cir. 2000), the appeals court cautioned that lower courts cannot simply assume that prisons

decisions have assumed that once they find that women are not similarly situated to men, *no* standard of scrutiny is required, and prison officials need not justify unequal treatment at all, no matter how extreme it may be.[36] This approach was sharply, and we think correctly, criticized in one dissenting opinion, which stated:

> It is important not to lose sight of basic commonalities that justify similar treatment. All inmates, regardless of gender, are under the custody and control of the state as a result of their criminal behavior; all are subject to the same general departmental regulations and policies; and the incarceration in all cases shares common goals, including the reform and rehabilitation of individual offenders. These common characteristics provide a basis for the Department of Corrections to design a program that gives substantially equal opportunities to women and men for rehabilitative work while confined.[37]

Further, the Supreme Court has indicated that even if the genders are not similarly situated, a court "still must determine whether the statutory classification is rationally related to a permissible state objective."[38] However, as stated above, prison officials almost always win under the rational basis test. Therefore, if you are faced with the "not similarly situated" argument, you should respond that male and female prisoners *are* similarly situated enough that the Equal Protection Clause is applicable, and that the heightened scrutiny standard should apply. The court can allow for differences in the size of prisons, length of stay, security classification and "special characteristics" using heightened scrutiny, since that standard does not require identical treatment, but only "parity of treatment" or "substantially equivalent" treatment.[39]

Courts have also rejected gender discrimination claims on the ground that policies resulting in unequal treatment were not intended to discriminate against women.[40]

5. Disability

Discrimination against disabled prisoners only denies equal protection if it lacks a rational basis.[41] If you believe you have a disability claim, you should file the

housing men and women are dissimilar, but must develop a record and analyze the facts.

36 *See* Keevan v. Smith, 100 F.3d at 649 ("There can be no such meaningful comparison for equal protection purposes between two sets of inmates who are not similarly situated."); Klinger v. Department of Corrections, 31 F.3d at 731 ("Absent a threshold showing that she is similarly situated to those who allegedly receive favorable treatment, the plaintiff does not have a viable equal protection claim.").

37 Keevan v. Smith, 100 F.3d at 652 (Heaney, J., dissenting).

38 Parham v. Hughes, 441 U.S. 347, 357, 99 S.Ct. 1742 (1979); *see* Pargo v. Elliott, 894 F.Supp. at 1262-64 (applying *Parham* holding to prison discrimination case, finding rational basis for disparities).

39 Glover v. Johnson, 478 F.Supp. at 1079; *accord*, Bukhari v. Hutto, 487 F.Supp. 1162, 1172 (E.D. Va. 1980).

40 Keevan v. Smith, 100 F.3d 644, 651 (8th Cir. 1996); Pargo v. Elliott, 894 F.Supp. 1243, 1264, 1290 (S.D. Iowa 1995), *aff'd*, 69 F.3d 280 (8th Cir. 1995) (*per curiam*).

41 *See* More v. Farrier, 984 F.2d 269, 271-72(8th Cir. 1993) (officials could deny cable TV hookups to wheelchair-bound inmates based on the effort required to install it). *Cf.* Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206, 209, 118 S.Ct. 1952 (1998) (holding that text of Title II's prohibition of discrimination by "public entities" against disabled individuals "unmistakably includes State prisons and prisoners within its coverage"); Kiman v. New Hampshire Dept. of Corrections, 301 F.3d 13, 25 (1st Cir. 2002) (inmate did not "state a claim under the Fourteenth Amendment's Equal Protection Clause, on the theory that prison officials' actions towards him were irrational and unmotivated by any legitimate basis for government action").

lawsuit alleging a violation of the American with Disabilities Act[42] and/or the Federal Rehabilitation Act.[43]

6. Religion

Claims of discrimination among different religious sects are addressed in Section D of Chapter 3.

42 Pierce v. County of Orange, 519 F.3d 985, 1019-20 (9th Cir. 2008) (holding no equal protection violation but violation of ADA as to treatment of disable prisoners); Crawford v. Indiana Dept. of Corrections, 115 F.3d 481, 486 (7th Cir. 1997) ("Although the special conditions of the prison setting license a degree of discrimination that would not be tolerated in a free environment, there is no general right of prison officials to discriminate against prisoners on grounds of race, sex, religion, and so forth."). The ADA is discussed in Section B.2. of Chapter 2.

43 The FRA is discussed in section B.2. of Chapter 2.

CHAPTER 6

Deliberate Indifference

If you were to read every court decision dealing with the rights of inmates to healthy and safe conditions of confinement, you would learn two things. First, most inmates lose their lawsuits. Second, more often than not, they lose because they failed to show that the officials whom they are suing acted with *deliberate indifference*.

Like the "malicious and sadistic" intent requirement of excessive force cases, deliberate indifference is an intent or "state of mind" requirement. It exists when an official knows about a serious danger to an inmate and yet is *indifferent* (unconcerned, uncaring) to that danger.

With the exception of excessive force claims (see Chapter 7), inmates must show deliberate indifference any time they challenge dangers to their health and safety. This includes failure-to-protect claims (see Chapter 8), claims challenging inadequate medical care (see Chapter 9), and claims challenging inhumane conditions of confinement (see Chapter 10). Therefore, before you decide to file any of these claims in court, you must understand this requirement. No matter how badly you have been hurt or fear getting hurt in the future, your claim will fail unless the officials you sue had advance notice of the dangers you face.

Deliberate indifference is not necessarily hard to show — provided that you take steps to notify officials of risks to your health or safety *before* those risks cause you harm. Read that last sentence carefully: in most cases, deliberate indifference requires you to tell officials about ongoing risks to your health or safety prior to that risk actually happening. *You do not have a right to be protected from a risk if no official knows about it*.

Deliberate indifference is such an important requirement, it needs its own chapter. You may want to read this chapter again after you read about the rights discussed in Chapters 7, 8, 9, and 10.

A. FARMER V. BRENNAN

The U.S. Supreme Court explained what deliberate indifference means in its 1994 decision *Farmer v. Brennan*.[1] If you can, read this case for yourself — it is one of the most important decisions on inmates' rights today.

In *Farmer* the Supreme Court held that an official acts with deliberate indifference when he or she "knows that inmates face a substantial risk of serious harm and

1 511 U.S. 825, 114 S.Ct. 1970 (1994). This case is important for two reasons: it makes clear that inmates have a constitutional right to be protected from assault by other inmates, and it discusses the standard for deliberate indifference in depth.

disregards that risk by failing to take reasonable measures to abate it."[2] Notice that to be deliberately indifferent, an official must both (1) *know* about a risk to an inmate and (2) *fail to respond reasonably* to that risk. Knowledge of a risk and an unreasonable response are elements of all failure-to-protect, medical care, and conditions claims.

One judge has used the example of a cobra (a very dangerous snake) to explain deliberate indifference. Imagine that jail or prison officials decide to place an inmate in a cell that has a cobra coiled up in the corner, ready to attack. Are these officials violating the Constitution? It depends on *what they know*. If they do not actually know that there is a cobra in the cell, or even that there is a high probability that a cobra will be there, then they are not deliberately indifferent (and have not violated the Constitution). If, on the other hand, "they know that there is a cobra there or at least that there is a high probability of a cobra there, and do nothing, that is deliberate indifference."[3]

Most inmates in America do not have to worry about cobras in their cells. But if, instead of cobras, you think about the other kinds of dangers that an inmate might face — *e.g.*, an armed and dangerous cellmate, an untreated disease, an extremely cold cell — you will understand how deliberate indifference works.[4] Officials who know about such risks must protect inmates from them. If an official does not know about a risk, he has no constitutional duty to act.

B. A SUBJECTIVE REQUIREMENT: ACTUAL KNOWLEDGE

In *Farmer* the Supreme Court emphasized that deliberate indifference is a *subjective*, not an objective, requirement.[5] This means that it is not enough to show that the officials whom you sue "should have known" about a particular risk, or that a "reasonable person" would have known about it.[6] Instead, you must show that the officials in your case *actually knew* about the risk.[7]

Suppose that conditions in your jail were very unsafe: dangerous inmates were not segregated from weaker inmates, jailers did not regularly monitor inmate living areas, etc. Can you sue the local sheriff on the ground that any reasonable

2 *Id*. at 847.
3 Billman v. Indiana Dep't of Corrections, 56 F.3d 785, 788 (7th Cir. 1995).
4 For instance, the "cobra" in *Billman* was a dangerous inmate — a person who had raped other inmates in the past. After the plaintiff was placed in this dangerous inmate's cell, the plaintiff was raped. It was an open question whether the officials who assigned the plaintiff to that cell *actually knew* about the dangerous cellmate's history of raping other inmates. 56 F.3d at 789.
5 Subjective refers to what someone knows or thinks in her own mind; objective refers to what actually exists in the outside world.
6 *See* Pierson v. Hartley, 391 F.3d 898, 902 (7th Cir.2004); Beers-Capitol v. Whetzel, 256 F.3d 120, 131 (3d Cir. 2001) (deliberate indifference to inmate health or safety is based upon what a prison official actually knew rather than what a reasonable official in his or her position should have known).
7 *See* Tafoya v. Salazar, 516 F.3d 912, 916-17 (10th Cir. 2008) ("a jury is permitted to infer that a prison official had actual knowledge of the constitutionally infirm condition based solely on circumstantial evidence, such as the obviousness of the condition."); Pierson, 391 F.3d at 902 (inmate must show that the official received information from which the inference could be drawn that a substantial risk existed, and that the official actually drew the inference); Beers-Capitol v. Whetzel, 256 F.3d at 133 (actual knowledge may be proven by circumstantial evidence if an excessive risk to inmate health or safety was so obvious that an official must have known about it); Jones v. Minnesota Dept. of Corrections, 512 F.3d 478, 482-83 (8th Cir. 2008) (same).

person in the sheriff's position "would" or "should" have known that these conditions exposed inmates in the jail to a substantial risk of serious harm? The answer under *Farmer* is no. You must allege and prove that the sheriff had *actual knowledge* of the risk. You can use the fact that the conditions were "longstanding, pervasive, well-documented, or expressly noted" by officials in the past to prove, by *inference*, that the sheriff actually knew about the risk.[8] But if the sheriff still denies that he actually knew about the risk, and if the judge or jury believes him, you will lose your claim.

Under the *Farmer* test, an official can even argue that even though he knew about a particular problem at your facility (*e.g.*, that it was infested with rats), he still did not know that it had resulted in a substantial risk of serious harm to inmates (*e.g.*, that the rats bit inmates at night and contaminated the food supply). An official is deliberately indifferent only if he makes the connection in his mind between a problem condition and the resulting risk to inmates' health or safety.[9] If an official has a strong suspicion that a risk exists, however, he may not ignore that suspicion or refuse to verify relevant facts. Instead, he must investigate the matter and figure out whether a substantial risk of serious harm really exists.[10] Faced with information that suggests a serious problem, an official may not stick his head in the sand.

C. WHAT DELIBERATE INDIFFERENCE IS NOT

It is important to understand what deliberate indifference is *not*. Deliberate indifference does not require you to show that an official intended to hurt you or make you suffer. However, it requires more than negligence. Let's consider each of these differences in turn.

1. Less Than Intent to Hurt

The deliberate indifference requirement "is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result."[11] An inmate "need not show that a prison official acted or failed to act

8 *Farmer*, 511 U.S. at 842. An inference is a fact that is arrived at by logic and common sense from other facts. If there was no snow on the ground yesterday, and there is snow on the ground this morning, you can infer that it snowed last night. Similarly, if you prove that the dangerous conditions at a jail were obvious to everyone who worked there, a court can (but does not have to) infer that the sheriff actually knew about those dangerous conditions. *See also* Easter v. Powell, 467 F.3d 459, 463 (5th Cir. 2006).

9 This is what the Court meant when it wrote that an official "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." 511 U.S. at 837. Fortunately, in many cases the connection between an inhumane condition and a substantial risk of serious harm to inmates will be so obvious that few officials will succeed in pleading ignorance this way. If a jail is literally teeming with rats, a court will be unlikely to believe a jailer's claim that he did not actually know that this problem would endanger the inmates' health.

10 *Farmer*, 511 U.S. at 842-43 & n.8; Mayoral v. Sheahan, 245 F.3d 934, 940 (7th Cir. 2001) (in jail with pervasive gang presence, guard's testimony that she was not aware of gang activity could be found "incredible and deliberately ignorant." "The *Farmer* standard is not designed to give officials the motivation to 'take refuge' in the zone between ignorance and actual knowledge."); Sanchez v. Taggart, 144 F.3d 1154, 1156 (8th Cir. 1998) (holding that official's failure to "inquire further" into inmate's medical restrictions before forcing him to perform hard labor was "evidence of deliberate indifference"). *Cf.* United States v. Frade, 709 F.2d 1387, 1394 (11th Cir.1983) ("once the [defendants] realized that conduct similar to what they contemplated might be illegal [,] it was incumbent upon them to make further inquiry").

11 *Farmer*, 511 U.S. at 835.

believing that harm would actually befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm."[12]

This is the difference between deliberate indifference and the *malicious and sadistic* intent requirement for excessive force claims. Courts require a greater showing of intent in excessive force cases because in such situations "the decisions of prison officials are typically made 'in haste, under pressure, and frequently without the luxury of a second chance.'"[13] In cases where officials have more time to decide what kind of conditions they will provide to inmates, the easier-to-prove intent standard of deliberate indifference applies.[14]

2. More Than Negligence

Negligence is a common legal term: a person is negligent if he or she fails to take precautions that a "reasonable person" would take. Outside prison, negligence can serve as the basis for a tort lawsuit. For example, a customer who slips and falls on a wet floor in a restaurant can sue its owner for negligence, because a "reasonable person" would have kept the floor dry or at least warned customers that the floor was wet.

Inmates sometimes file federal lawsuits alleging simply that jail or prison officials acted negligently. This is a serious mistake. Negligence is not enough to satisfy the deliberate indifference requirement. The Supreme Court has made clear that deliberate indifference "entails something more than mere negligence."[15] In *Estelle v. Gamble*, the Court held that "deliberate indifference to serious medical needs of prisoners" does not result whenever a doctor negligently diagnoses or treats an inmate.[16] Courts treat negligence claims as "red flags": inmates who allege that officials acted negligently — but do not allege that the officials acted with deliberate indifference — get their lawsuits thrown out.[17]

12 *Id.* at 842; *see also* Tafoya v. Salazar, 516 F.3d 912, 916 (10th Cir. 2008) ("The official's knowledge of the risk need not be knowledge of a substantial risk to a *particular* inmate, or knowledge of the particular manner in which injury might occur." (citation omitted); Gonzales v. Martinez, 403 F.3d 1179, 1187 (10th Cir. 2005) ("It does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of assault for reasons personal to him or because all prisoners in his situation face such a risk."); *Pierson*, 391 F.3d at 902 (inmate must show that the official received information from which the inference could be drawn that a substantial risk existed, and that the official actually drew the inference); Beers-Capitol v. Whetzel, 256 F.3d at 133 (actual knowledge may be proven by circumstantial evidence if an excessive risk to inmate health or safety was so obvious that an official must have known about it).

13 *Farmer*, 511 U.S. at 835. If you can show that prison officials actually intended for you to be harmed — that the official exposed you to dangerous conditions or denied you medical care for the purpose of causing you pain — that greater showing should satisfy the deliberate indifference requirement. *See* Thaddeus-X v. Blatter, 175 F.3d 378, 403 (6th Cir. 1999) (*en banc*) (although official's expressed reasons for subjecting inmate to inhumane conditions contained "an element of maliciousness,... of course [the inmate] need only show deliberate indifference"). However, if deliberate indifference is all that you are required to show, you should be sure to allege and prove that specific level of intent.

14 *See, e.g.*, Johnson v. Lewis, 217 F.3d 726, 734 (9th Cir. 2000) (after officials quelled prison disturbances, they moved inmates to prison yard: "In these circumstances, the inmates presented no further danger to prison staff, the public, or each other, and prison officials were no longer required to make split-second, life-and-death decisions. Once the inmates were thus secured in the yard, the state-of-mind requirement that sufficed to show an Eighth Amendment violation was deliberate indifference."). To be clear, however, any time an official uses force against a convicted inmate — whether in response to a disturbance or not — the inmate must show "malicious and sadistic" intent in order to prove an Eighth Amendment violation. Hudson v. McMillian, 503 U.S. 1, 6-7, 112 S.Ct. 995 (1992).

15 *Farmer*, 511 U.S. at 836. *See also* Board of County Comm'rs of Bryan County v. Brown, 520 U.S. 397, 407, 117 S.Ct. 1382 (1997) ("A showing of simple or even heightened negligence will not suffice"); Daniels v. Williams, 474 U.S. 327, 332, 106 S.Ct. 662 (1986) (holding that negligently leaving a pillow on the stairs does not constitute a violation of Fourteenth Amendment).

16 Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 285 (1976).

17 *See, e.g.*, Tafoya v. Salazar, 516 F.3d at 916 ("An official's failure to alleviate a significant risk of which he was unaware, no matter how obvious the risk or how gross his negligence in failing to perceive it, is not an infliction of punishment and therefore not a constitutional

D. PROVING WHAT OFFICIALS KNEW

How can you prove that a jail or prison official actually knew about a substantial risk of serious harm? Do not count on the official breaking down at trial and confessing, "Yes, I knew about the risk, and I didn't do anything to fix it...!" This sort of thing sometimes happens on TV, but rarely in the real world. It is also unlikely (though not impossible) that you will discover a "smoking gun" of deliberate indifference — a report, memorandum, or other document in which the official admits that he knew about the risk all along.[18]

Fortunately, the law does not require you to produce such a "smoking gun" of deliberate indifference.[19] As with the "malicious and sadistic" intent requirement in excessive force cases, you can prove an official's deliberate indifference with *circumstantial evidence* — facts that indicate what an official was thinking at the time.[20] There are several kinds of circumstantial evidence that you can use to prove an official's deliberate indifference.

The best way to prove that an official knew about a substantial risk of serious harm is to present evidence that you put the official on notice of that risk *yourself*. You can do this by presenting copies of *administrative grievances* and *appeals* describing the risk and requesting action. If there is no system of administrative remedies at your jail or prison, you can present copies of informal notes and letters that you wrote to officials or you can explain in a declaration exactly when and how you told officials about the risk in person. Inmates are now required to exhaust all available administrative remedies before filing a lawsuit in federal court. See Chapter 12. Even before that requirement was enacted, however, the Supreme Court encouraged inmates to take advantage of prison grievance procedures. "When those procedures produce results," the Court explained, "they will typically do so faster than judicial processes can. And even when they do not bring constitutionally required changes, the inmate's task in court will obviously be much easier."[21] This is because officials cannot argue that they did not know about a risk if you *told* them about the risk in a grievance.[22]

violation."). Be aware that the Federal Rules of Civil Procedure allow you to allege claims in the alternative: i.e., alleging in a single complaint negligence for a supplemental state-law claim and deliberate indifference for a federal constitutional claim. *See* Chapter 14.

18 *See, e.g.,* Johnson v. Lewis, 217 F.3d 726, 734 (9th Cir. 2000) (note by deputy warden in post-incident report, "Life was not good for these inmates," was evidence of deliberate indifference).

19 As one court has explained, "the test for deliberate indifference does not require a prison official to affirmatively proclaim..., 'Go right ahead and assault each other because I'm not looking and I don't care.'" Haley v. Gross, 86 F.3d 630, 642 (7th Cir. 1996). *See also* Pavlick v. Mifflin, 90 F.3d 205, 209 (7th Cir. 1996) (under Farmer plaintiffs are not required to produce a "smoking gun" of deliberate indifference). *See also* note 12, *supra*.

20 As the Supreme Court put it, "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Farmer*, 511 U.S. at 842. *See also* Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); Spruce v. Sargent, 149 F.3d 783, 785-86 (8th Cir. 1998).

21 *Farmer*, 511 U.S. at 847.

22 *See, e.g.,* Curry v. Scott, 249 F.3d 493, 508 (6th Cir. 2001) (large number of complaints and grievances put supervisors on notice that guard posed risk to African-American inmates); Delaney v. DeTella, 256 F.3d 679, 686 (7th Cir. 2001) (deliberate indifference established where defendants did nothing after inmate filed grievance and requested medical attention for injuries caused by denial of out-of-cell exercise); Davis v. Delo, 115 F.3d 1388, 1392-93 (8th Cir. 1997) (supervisor exhibited deliberate indifference to a substantial risk of serious harm to the inmates when the supervisor (1) had received numerous letters and other complaints accusing the officer of using excessive force, (2) had not investigated the accusations, and (3) ignored recommendations from other officials that the officer

When you file your grievance (or note or letter), be sure to include all important details about the risk, including how long it has lasted and what you want officials to do. Officials who read your grievance should immediately understand why the problem is serious and requires a quick response. Read Chapter 12 for help on writing effective administrative grievances.

In addition, officials sometimes learn about problems at jails and prisons from reports by outside groups or agencies that conduct regular inspections: *e.g.*, grand juries, fire marshals, health departments. Inspectors typically send reports on their findings to the officials in charge; many of these reports are public documents (available to members of the public, on request).[23] Larger jails and prisons sometimes have their own inspectors, who visit the facilities on a regular basis and record their findings in reports.

Other internal logs and records contain information relevant to officials' overall knowledge of problems. Incident reports, for example, show how often inmates have attacked other inmates, whether weapons were used, how long it took officials to respond to fights, and other important information about security. Medical screening forms and examination records list inmates' health histories and current complaints and symptoms. Jail and prison records may also show how crowded a particular cell or dormitory was at a particular time, how often meals were served, how often sick call was conducted, whether inmates actually received outdoor exercise, how often guards inspected living areas, etc. All of these logs and records exist so that officials can know how well their facilities are operating: are there too many inmates? too many fights? too few guards on duty to keep order? You can also use these records in court to help prove that officials were aware of dangers to your health or safety.

Furthermore, as mentioned above, a court may conclude that an official actually knew about a substantial risk of serious harm from the very fact that the risk was *obvious*.[24] A risk is obvious if it is longstanding, pervasive, well-documented, or apparent to everyone who works at your jail or prison. At one Arkansas prison, for example, inmate rape "was so common and uncontrolled that some potential victims dared not sleep [but] instead... would leave their beds and spend the night clinging to the bars nearest the guards' station."[25] Such evidence of pervasive danger can be enough to prove that an official actually knew about the danger. At the very least, it

be reassigned or discharged).

23 *See, e.g.,* Hope v. Pelzer, 240 F.3d 975, 978-79 (11th Cir. 2001) (report by U.S. Department of Justice criticizing Alabama prison system's punitive use of "hitching post" demonstrated that Alabama officials were aware of substantial risk of serious harm), *rev'd on other grounds*, 536 U.S. 730, 122 S.Ct. 2508 (2002) (holding that prison officials not entitled to qualified immunity, based in part, on Department of Justice report).

24 *Farmer*, 511 U.S. at 842. *See, e.g.,* Simmons v. Cook, 154 F.3d 805, 808 (8th Cir. 1998) (inmates' paraplegic and wheelchair-bound condition was "obvious and apparent to any layperson"; officer was present when inmates were put in cell and knew that they could not reach food slots while in wheelchairs); LaMarca v. Turner, 995 F.2d 1526, 1536-37 (11th Cir. 1993) (evidence of violent conditions "painted a dark picture... that would be apparent to any knowledgeable observer" at prison).

25 Hutto v. Finney, 437 U.S. 678, 681-82 n.3, 98 S.Ct. 2565 (1978), cited in *Farmer*, 511 U.S. at 843-44.

should allow you to get past summary judgment.[26] At trial, the official may argue that even though the problem was obvious, he did not know about it, or that he knew about the problem but (incorrectly) did not believe that it posed a substantial risk of serious harm to inmates.[27] In such a situation, it will ultimately be up to the judge or jury to decide whether the official is telling the truth or not.[28]

Finally, officials will sometimes say things to you or other inmates that show that they actually know that your health or safety is at risk. This evidence can include jokes, taunts, threats, and even offhand remarks.[29] You can testify at trial about what officials said in your presence, so long as it is relevant to your claim.

E. Reasonable Responses

Once an official actually knows about a substantial risk of serious harm, she must *respond reasonably* to it. In deciding whether an official's response was reasonable, a court will most likely ask whether the official made a good-faith effort to investigate the problem and then fix it.[30] It is not enough for an official to say "duly noted" and then do nothing.[31] Courts evaluate the reasonableness of an official's response in light of the information she possessed at the time, the practical limitations of her position, and alternative courses of action that would have been apparent to an official in her position.[32]

Not every problem in a jail or prison has an easy solution. Therefore, if you know of a realistic way of *abating* (getting rid of) a substantial risk of serious harm, suggest that solution to officials in an administrative grievance (or note or letter). No official wants inmates telling them how to run a jail or prison, but sometimes inmates know things that officials do not.

As a general rule, officials may not refuse to respond to a substantial risk of serious harm on the ground that it would be too expensive to fix it. Cost is not a defense to constitutional liability.[33]

26 At summary judgment, a court is required to resolve all inferences in favor of the non-moving party (usually the inmate). If you have presented evidence that a substantial risk of serious harm was obvious, the court should conclude that such evidence is sufficient to establish an official's deliberate indifference at that stage of the proceedings. *See*, e.g., Hamilton v. Leavy, 117 F.3d 742, 747-48 (3d Cir. 1997); Hale v. Tallapoosa County, 50 F.3d 1579, 1583 (11th Cir. 1995). Courts do not always follow this approach, however, so you should present as much evidence about the official's actual knowledge as you can in your summary judgment response. *See* Chapter 17.

27 *Farmer*, 511 U.S. at 844.

28 *Id.* at 842-43.

29 Palmer v. Johnson, 193 F.3d 346, 353 (5th Cir. 1999) (threat by warden to keep inmates outdoors a second night to "freeze again" if they refused to work showed his deliberate indifference); Thaddeus-X v. Blatter, 175 F.3d 378, 403 (6th Cir. 1999) (*en banc*) (guards told inmate "now see how well you can concentrate on your legal work with all the shit and noise down here" after placing him in unit with disruptive mentally ill inmates); Dixon v. Godinez, 114 F.3d 640, 645 (7th Cir. 1997) ("sarcastic responses" of prison officials to inmate's complaints about cold "help raise a dispute about both [the officials'] knowledge of the condition, and their refusal to take steps to prevent it"); Robinson v. Prunty, 249 F.3d 862, 867 (9th Cir. 2001) (guards made jokes to plaintiff before releasing into exercise yard inmate who attacked him); Johnson v. Lewis, 217 F.3d 726, 734 (9th Cir. 2000) (factfinder could find deliberate indifference from evidence that guards said "Let's hurt them" when placing inmates in prison yard without basic necessities).

30 Vance v. Peters, 97 F.3d 987, 993 (7th Cir. 1996).

31 Reed v. McBride, 178 F.3d 849, 855 (7th Cir. 1999). *See also* Dixon v. Godinez, 114 F.3d 640, 644-45 (7th Cir. 1997) (officials acted with deliberate indifference by telling inmates in protective custody unit — because of risk of gang retribution — to return to general population if they did not like extreme cold); Simmons v. Cook, 154 F.3d 805, 808 (8th Cir. 1998) (officers never ensured that paraplegic inmates received food trays or could use toilet; their "corrective inaction" amounted to deliberate indifference).

32 Gregoire v. Class, 236 F.3d 413, 418 (2d Cir. 2000).

33 Watson v. City of Memphis, 373 U.S. 526, 537, 83 S.Ct. 1314 (1963) ("[I]t is obvious that vindication of conceded constitutional rights

The next three chapters of this manual will discuss how the deliberate indifference requirement applies when inmates make failure-to-protect, medical care, and conditions-of-confinement claims.

cannot be made dependent upon any theory that it is less expensive to deny than to afford them."); Jones v. Johnson, 781 F.2d 769, 771 (9th Cir. 1986) ("Budgetary constraints... do not justify cruel and unusual punishment."); Harris v. Thigpen, 941 F.2d 1495, 1509 (11th Cir. 1991) (rejecting contention that "a state's comparative wealth" might affect a prisoner's right to constitutionally adequate medical care); Ancata v. Prison Health Servs., Inc., 769 F.2d 700, 705 (11th Cir. 1985) (lack of funds for facilities cannot justify unconstitutional lack of competent medical care and treatment for inmates); Hale v. Tallapoosa County, 50 F.3d 1579, 1584 (11th Cir. 1995) (rejecting defendants' argument that it is planning or working towards construction of a new jail to remedy the unconstitutional conditions at the current facility, based on failure to implement interim measures to alleviate these conditions demonstrates deliberate indifference).

CHAPTER 7

Excessive Force and Other Abuse by Jail and Prison Officials

This chapter addresses acts of abuse by guards and other jail and prison officials. The most common kind of abuse involves *excessive force*: either the use of force that is clearly greater than what is justified in the circumstances (*e.g.*, a guard continuing to beat inmates after breaking up their fistfight), or the use of force that is not justified at all (e.g., a guard beating an inmate who "looked funny" at him). This chapter also discusses three other kinds of abuse: the improper use of restraints, sexual assault and harassment, and corporal punishment.

A. EXCESSIVE FORCE

The U.S. Constitution protects all Americans from the use of excessive force by government officials. However, different provisions of the Constitution apply depending on when the excessive force occurs. Although the legal standards for these provisions are similar in some ways, there are important differences. Be sure to cite the correct constitutional provision in your complaint and apply the correct standard throughout your lawsuit.

1. Excessive Force During Arrest

The Fourth Amendment to the Constitution applies to claims of excessive force occurring during arrests and investigatory stops by police and other law enforcement officials. The use of force during an arrest violates the Fourth Amendment if it is "objectively unreasonable" in light of the facts and circumstances confronting the police.[1] In determining what is objectively unreasonable, courts look at the seriousness of the suspected crime, whether the suspect posed an immediate threat to the safety of the police or others, and whether the suspect was actively resisting arrest or attempting to evade arrest by running away.[2]

This manual focuses on the treatment of people *after* they have been arrested. If you believe that you were subjected to excessive force during arrest, you should consult a treatise on police brutality.[3]

1 Graham v. Connor, 490 U.S. 386, 397, 109 S.Ct. 1865 (1989).
2 *Id.* at 396.
3 Unfortunately, it is not always clear when a person's Fourth Amendment right against excessive force ends and his Fifth Amendment (Federal) or Fourteenth Amendment (State) Due Process Clause right against excessive force begins. The Second, Sixth, and Ninth

2. Excessive Force Against Pretrial Detainees

The Due Process Clauses of the Fifth and Fourteenth Amendments prohibit excessive force against *pretrial detainees* (people who are held in jail awaiting trial on criminal charges).[4] Here things get a little complicated. Courts in the Second, Third, Fourth, and Fifth Circuits apply the same "malicious and sadistic" standard to claims filed by pretrial detainees as they do to claims filed by convicted inmates.[5] This standard is discussed in § 3, below. The Eighth Circuit, by contrast, applies to pretrial detainees the "objectively unreasonable" standard used in police brutality cases.[6] In other circuits, the standard for pretrial detainees' excessive force claims is unclear.[7] If your circuit has not yet resolved this issue, do your best to show that the force you are challenging was both objectively unreasonable and a malicious and sadistic act.

3. Excessive Force Against Convicted Inmates

The Eighth Amendment, not the Due Process Clause, applies to excessive force claims filed by convicted inmates. Under the Eighth Amendment standard, the key question is whether the force was applied in a good-faith effort to maintain and restore discipline, or *maliciously and sadistically* to cause harm.[8] The term "malicious and sadistic" is defined as evil, mean, vicious, or wanting to hurt you. A "sadist" is someone who inflicts pain on others for his own pleasure.[9] If a convicted inmate fails to prove that the official who used force against him acted maliciously and sadistically, he will lose his claim.

You may ask, how can I show what was in another person's mind? While you cannot look into his mind, you can show his intent indirectly by pointing to two things: what he says and what he does.

An official might reveal his malicious and sadistic intent by saying certain things when he uses force: he might, for example, taunt you or say something that indicates he is enjoying what he is doing.[10] He might also say something that

Circuits have held that the Fourth Amendment applies so long as a person has not been arraigned or formally charged and remains in the custody of the arresting officer. *See* Powell v. Gardner, 891 F.2d 1039, 1044 (2d Cir. 1989); McDowell v. Rogers, 863 F.2d 1302, 1306 (6th Cir. 1988); Pierce v. Multnomah County, 76 F.3d 1032, 1043 (9th Cir.). On the other hand, the Fourth, Fifth, Seventh, and Eleventh Circuits have held that the Due Process Clause applies so long as a person is in custody of any kind, even if still held by the police. *See* Riley v. Dorton, 115 F.3d 1159, 1164 (4th Cir.) (*en banc*); Brothers v. Klevenhagen, 28 F.3d 452, 456 (5th Cir. 1994); Wilkins v. May, 872 F.2d 190, 192 (7th Cir. 1989); Cottrell v. Caldwell, 85 F.3d 1480, 1490 (11th Cir. 1996). If you are unsure about the law in your circuit or about your status as an arrestee or detainee when you were subjected to excessive force, you should plead claims under both the Fourth Amendment and the Due Process Clause in your lawsuit.

4 The Due Process Clause of the Fifth Amendment applies to federal pretrial detainees; the Due Process Clause of the Fourteenth Amendment applies to state and local pretrial detainees.

5 *See* United States v. Walsh, 194 F.3d 37, 48 (2d Cir. 1999); Fuentes v. Wagner, 206 F.3d 335, 347-48 (3d Cir. 2000); Grayson v. Peed, 195 F.3d 692, 696 (4th Cir. 1999); Taylor v. McDuffie, 155 F.3d 479, 483 (4th Cir. 1998); Valencia v. Wiggins, 981 F.2d 1440, 1446 (5th Cir.).

6 Andrews v. Neer, 253 F.3d 1052, 1060 (8th Cir. 2001) (citing Johnson-El v. Schoemehl, 878 F.2d 1043, 1048-49 (8th Cir. 1989)).

7 In a case involving an unprovoked attack, the Seventh Circuit approved an "objectively unreasonable" standard that also applied the Eighth Amendment factors listed in § 3, *supra*, the court also suggested that a straightforward Eighth Amendment standard might apply when officials use force against pretrial detainees "in the context of a jail disturbance." Wilson v. Williams, 83 F.3d 870, 876-77 (7th Cir. 1996).

8 Hudson v. McMillian, 503 U.S. 1, 6-7, 112 S.Ct. 995 (1992), citing Whitley v. Albers, 475 U.S. 312, 320-21, 106 S.Ct. 1078 (1986).

9 *See* Parkus v. Delo, 135 F.3d 1232, 1234 (8th Cir.); Douglas v. Owens, 50 F.3d 1226, 1232-33 n.13 (3d Cir. 1995).

10 *See, e.g.*, Estate of Davis v. Delo, 115 F.3d 1388, 1392, 1394 (8th Cir. 1997) (evidence of taunting and threatening of inmate the day

reveals an improper reason for his use of force (*e.g.*, "This will teach you to file a grievance against me!").

Officials usually do not make such revealing statements when they act. For this reason, you must point to an official's *actions* to show what he was *thinking*.[11] The following five factors are important in deciding whether an official used force maliciously and sadistically:[12]

> The need for force,
>
> The relationship between the need and the amount of force that was used,
>
> The extent of injury suffered by the inmate,
>
> The extent of the threat to the safety of staff and inmates, and
>
> Any efforts made to temper the severity of a forceful response.[13]
>
> These factors are discussed in more detail below. When arguing an excessive force claim, you should cite each item of evidence that makes your claim stronger under these factors.

a. The Need for Force

The strongest excessive force claim is one where no force was justified at all. If you do nothing wrong, officials will normally have no need to use force against you. An official violates the Constitution when he uses force without any "legitimate penological purpose."[14] A good example of unjustified force is an official's sexual assault of an inmate: this conduct has no legitimate purpose and necessarily involves the use of force maliciously and sadistically for the very purpose of causing harm.[15] Similarly, it violates the Constitution for officials to place handcuffs on an inmate too tightly because he has filed lawsuits against them,[16] to forcibly cut an inmate's hair with knives,[17] to spray pepper spray into the face of a compliant inmate,[18] or to strike an inmate who asked someone else for legal information.[19]

after official beat him about head and face — official pointed, laughed, and said "Keep your chin up. Next time it will be your teeth." — showed official's malicious and sadistic intent).

11 *See* Valencia v. Wiggins, 981 F.2d 1440, 1446 (5th Cir. 1993) ("Often, of course, there will be no evidence of the detention facility official's subjective intent, and the trier of fact must base its determination on objective factors suggestive of intent.").

12 These factors are usually included in a jury instruction.

13 *Whitley*, 475 U.S. at 321.

14 Boddie v. Schnieder, 105 F.3d 857, 861 (2d Cir. 1997); Giron v. Corrections Corp. of Am., 191 F.3d 1281, 1290 (10th Cir. 1999).

15 *See* § D, of this chapter.

16 Davidson v. Flynn, 32 F.3d 27, 29-30 (2d Cir. 1994).

17 Pelfrey v. Chambers, 43 F.3d 1034, 1035, 1037 (6th Cir. 1995) ("[I]t would certainly appear that defendants' actions... were designed to frighten and degrade [the inmate] by reinforcing the fact that his continued well-being was entirely dependent on the good humor of his armed guards. To us, given the closed nature of the prison environment, this constitutes a totally unwarranted, malicious and sadistic use of force to cause harm.").

18 Foulk v. Charrier, 262 F.3d 687, 701-02 (8th Cir. 2001).

19 Green v. Branson, 108 F.3d 1296, 1301 (10th Cir. 1997) ("The record contains ample evidence that, if believed by the trier of fact, would show that [inmate] did not provoke the use of force.").

Officials may occasionally be justified in using force to respond to a problem occurring near you, even if you have done nothing wrong yourself. For example, if inmates around you are rioting, or if a fire evacuation is underway, officials may use a reasonable amount of force to restore security or otherwise control the situation.

Force is more likely to be justified when you misbehave. The more serious your misbehavior, the greater the justification for force will be and the less sympathetic the trier of facts will be when it hears your excessive force claim. Not all kinds of misbehavior, however, justify force. An official cannot use force simply because she found contraband in your cell, or because you got into a fistfight a day earlier. In these examples, there is no immediate need to restore or maintain order. As § B explains *infra*, jail and prison officials may not use force simply to punish inmates.

Order and discipline are the key ideas here. Jail and prison officials may use force to restore or maintain order, but not to hurt or frighten inmates they dislike. Sometimes the need for force is obvious, such as with inmate riots. In other cases, the need for force is less clear. What should a guard do if an inmate refuses to come out of his cell or swears at a guard? While neither situation involves a direct act of violence, officials may argue that because each situation presents a threat to order and discipline, *some* use of force is justified. In such situations, courts often give officials the benefit of the doubt.[20]

b. Was the Right Amount of Force Used?

Just because *some* amount of force is justified does not mean that an official may use whatever force she wants. The Constitution prohibits officials from using *excessive* force: force that is greater, in amount or in kind, than what is needed to restore or maintain order.

Here are some examples where courts ruled that the force used by officials was greater than what was needed to restore or maintain order:

> after a shackled inmate went over the time limit on a phone call, officers beat, choked, threatened, and slammed him against the wall;[21]
>
> officials refused to let an inmate wash burning mace off his face during the eight-hour period he was kept in restraints;[22]

20 The conservative Fourth Circuit has explained that it defers to officials' judgment in excessive force cases because "officials must not be forced to walk a tightrope and face the prospect of a lawsuit no matter which way they turn": if they fail to restrain an inmate who is agitated, the officials could be subject to another lawsuit if that inmate ends up hurting another person or even himself. *See* Grayson v. Peed, 195 F.3d 692, 696-97 (4th Cir. 1999). If you file an excessive force lawsuit, you should be ready to explain why the defendants did not in fact have a duty to use force against you. Chapter 8 discusses officials' constitutional duty to protect inmates from assault by other inmates.

21 Brooks v. Kyler, 204 F.3d 102, 104, 106 (3d Cir. 2000) (reversing summary judgment for officials: "If [inmate] is believed, while the application of some force may have been needed to reign in [inmate's] apparently overtime telephone call, he was shackled at the time so that the extent of his threat to staff would not have been great.").

22 Williams v. Benjamin, 77 F.3d 756, 765 (4th Cir. 1996) ("Although great deference should be afforded prison officials, it is difficult to

after an inmate made excessive noise, a guard entered the cell, grabbed the inmate by the hair, bashed his head repeatedly against the cell bars, then applied a chokehold that left him unconscious;[23]

as nine other guards held an inmate down at a hospital so that a lab technician could draw blood, the guard hit him with his fist and said, "Shut up";[24]

after an inmate turned slowly in response to an order to "cuff up," the official repeatedly struck him about the head and face and smashed his chin against the concrete floor;[25]

after an inmate disrupted a disciplinary hearing, guards wrapped a towel around his neck and choked him until he was nearly unconscious;[26]

after an inmate vandalized the interior of a police car, jailers and marshals slammed him against a brick wall, and threatened and beat him;[27]

after an inmate first refused an order to "lock up" and then attempted to comply with the order, a guard fired a shotgun loaded with bird shot at him;[28]

during a cell extraction, guards administered a severe beating to an inmate who had been incapacitated by a shock of electronic shield.[29]

There are many more examples of courts ruling that the force used was appropriate in light of the need for it.[30] Jail and prison officials are entitled to

conceive of a legitimate purpose for refusing to allow [the inmate] to wash and denying him medical attention, particularly when his confinement in restraints lasted for such an extended period of time. After the guards had imposed the restraints on the [inmate], the immediacy of the disturbance was at an end. In such a circumstance, the unnecessary infliction of continued pain throughout a prolonged time period clearly supports an inference that the guards were acting to punish, rather than to quell the disturbance."). Restraints may be used to control a violent or self-hurting inmate, but not for the purpose of punishment or inflicting pain. *See* § C of this chapter.

23 Valencia v. Wiggins, 981 F.2d 1440, 1447 (5th Cir. 1993).

24 Thomas v. Statler, 20 F.3d 298, 302 (7th Cir. 1994) ("The apparent lack of reason for the blow, the fact that [the guard] used a clenched fist, and the fact that [the guard] then said 'shut up' can be interpreted reasonably as establishing that [the guard's] action was not a 'good-faith effort to maintain or restore discipline,' but rather was done 'maliciously and sadistically to cause harm.'").

25 Estate of Davis v. Delo, 115 F.3d 1388, 1391-92, 1394 (8th Cir. 1997) ("[T]he court's finding that the physical force expended to control [inmate] vastly exceeded the amount of force required supports its conclusion that [official] used force maliciously and sadistically for the purpose of causing [inmate] harm.").

26 Burgess v. Moore, 39 F.3d 216, 217-18 (8th Cir. 1994) ("[W]e believe a jury could reasonably find the corrections officers went beyond a good faith attempt to restore order and acted with a malicious and sadistic desire to inflict harm. A choking that produces virtual unconsciousness and great pain is not trifling for Eighth Amendment purposes.").

27 Munz v. Michael, 28 F.3d 795, 799 (8th Cir. 1994).

28 Robins v. Meecham, 60 F.3d 1436, 1438 (9th Cir. 1995). The court ruled that it did not matter which inmate the guard aimed his shotgun at: "Whom the prison officials shot, Robins or Echavarria, is not relevant — what is relevant is that they fired a shotgun blast at an inmate. It is this conduct that the Eighth Amendment is designed to restrain." *Id.* at 1440.

29 Skrtich v. Thornton, 280 F.3d 1295, 1302 (11th Cir. 2002).

30 *See, e.g.*, Grayson v. Peed, 195 F.3d 692, 696 (4th Cir. 1999) ("[An inmate's] attempt to force his way out of the cell after being strip searched necessitated the use of pepper spray."); Baldwin v. Stadler, 137 F.3d 836, 840-41 (5th Cir. 1998) (official fired burst of pepper mace down middle of bus on which some inmates were causing a disturbance and then refused to allow inmates to wash mace off); Lunsford v. Bennett, 17 F.3d 1574, 1582 (7th Cir. 1994) (inmate resisted effort to put him back in shackles; "The officers did not strike or beat [the inmate], using only the amount of force necessary to reshackle him."); Campbell v. Sikes, 169 F.3d 1353, 1377 (11th Cir. 1999) ("[L]esser restraints were ineffective in curbing Plaintiffs' dangerous behavior.").

"wide-ranging deference" in deciding what kind and amount of force to use in response to dangerous situations that require "quick and decisive" action.[31] Courts have also found that officials' compliance with their own policies shows that they acted in good faith when using force.[32]

c. The Extent of Injury/"De Minimis" Uses of Force

In *Hudson v. McMillian*, the Supreme Court ruled that an inmate does not have to show a serious, permanent, or even "significant" injury to win an excessive force lawsuit.[33] "When prison officials maliciously and sadistically use force to cause harm," the Court wrote, "contemporary standards of decency [*i.e.*, the Eighth Amendment] *always* are violated."[34] While a court may consider an inmate's lack of a serious injury as a factor when deciding whether an official acted "maliciously and sadistically," the inmate should not automatically lose on that ground.[35]

In *Hudson*, officials had punched and kicked a shackled inmate in the mouth, eyes, chest, and stomach. As a result, his teeth were loosened, a partial dental plate was cracked, and he suffered minor bruises and swelling on his face and mouth.[36] Although the inmate did not need medical attention, and a lower court had described his injuries as "minor," the Supreme Court ruled that the officials violated the inmate's constitutional rights.[37]

In this respect (but only in this respect), this requirement for excessive force claims is less demanding than the extent-of-injury requirement for medical care claims (which require a showing of "serious medical need"[38]) or claims challenging conditions of confinement (which require an "extreme deprivation"[39]).

Two points make this factor more complicated, however. First, the Supreme Court in *Hudson* added that uses of force that are (1) "de minimis" and (2) not "repugnant to the conscience of mankind" do not violate the Constitution.[40] What this means is not altogether clear. *De minimis* means something that is very small or trifling. The conservative Fourth Circuit has ruled that uses of

31 Whitley v. Albers, 475 U.S. at 321-22. The Fifth Circuit has described this principle as "so well known that no authority need be cited." Baldwin v. Stadler, 137 F.3d at 840.

32 Campbell v. Sikes, 169 F.3d at 1377 ("Also evidencing the officials' good faith is their compliance with prison procedures for using restraints."); Sims v. Mashburn, 25 F.3d 980, 985-86 (11th Cir. 1994) (officials' compliance with established policy "that reflects a well-developed and planned procedure" was evidence of their good faith in "stripping" inmate's cell); *see also* Williams v. Benjamin, 77 F.3d at 766 (while compliance with policy would not automatically show that officials acted constitutionally, it would provide "powerful evidence that the application of force was tempered and that the officers acted in good faith"). If you file an excessive force lawsuit, try to get a copy of your jail's or prison's written policy on the use of force, so that you can tell whether officials complied with this policy or not.

33 Hudson v. McMillian, 503 U.S. 1, 8-10, 112 S.Ct. 995 (1992).

34 *Id.* at 9 (emphasis added).

35 *Id.* at 7.

36 *Id.* at 4.

37 *Id.* at 5, 10. *See also* Griffin v. Crippen, 193 F.3d 89, 91 (2d Cir. 1999) (beating of handcuffed inmate, who suffered bruised shin and swelling over knee, stated claim for violation of Eighth Amendment: "the fact that he suffered only minor injuries does not warrant dismissal").

38 Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 285 (1976). *See* Chapter 9, for a discussion of medical care.

39 Rhodes v. Chapman, 452 U.S. 337, 347. 101 S.Ct. 2392 (1981). *See* Chapter 10, for a discussion of conditions of confinement.

40 *Hudson*, 503 U.S. at 9-10.

force that produce "de minimis injuries" do not violate the Constitution "absent the most extraordinary circumstances"[41]; this ruling, however, does not appear consistent with the Supreme Court's ruling in *Hudson*, which addressed *de minimis* force.[42] Other courts, observing that "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights,"[43] have concluded that some uses of force are simply too insignificant to violate the Constitution — regardless of whether they were justified or not.[44] There is much uncertainty in this area of the law. If you file an excessive force lawsuit, you should show (to the extent you can) that both (1) the force used against you and (2) the injury you suffered were substantial.

Second, a part of the 1996 Prison Litigation Reform Act — 42 U.S.C. § 1997e(e) — states that no inmate can file a lawsuit for "mental or emotional injury" without first showing "physical injury." Courts have applied § 1997e(e) in different ways. Some have held that the statute requires inmates to show more than "*de minimis* physical injury" in all kinds of cases.[45] These courts have effectively ruled that inmates may not file damages lawsuits for acts of *psychological torture*: acts designed to inflict severe mental pain without leaving physical marks.[46] Other

41 *See, e.g.*, Taylor v. McDuffie, 155 F.3d 479, 484 (4th Cir. 1998) (officers' jabbing of kubaton into inmate's mouth to retrieve license resulted in *de minimis* injury — slight swelling in jaw and irritation of mucous membranes in mouth — and therefore did not violate Due Process Clause); Riley v. Dorton, 115 F.3d 1159 (4th Cir. 1997) (*en banc*) (welt on face and depression and nightmares resulting from officer's threat to rip inmate's nose open rejected as *de minimis* injury). *See also* Gomez v. Chandler, 163 F.3d 921, 924 (5th Cir. 1999) ("[T]he law of this Circuit is that to support an Eighth Amendment excessive force claim a prisoner must have suffered from the excessive force a more than *de minimis* physical injury, but there is no categorical requirement that the physical injury be significant, serious, or more than minor.").

42 As one Fourth Circuit judge explained in dissent, the Supreme Court in *Hudson* made clear that while the extent of an inmate's injury is relevant to whether he suffered excessive force, the lack of a serious injury "does not end" the inquiry. Taylor v. McDuffie, 155 F.3d at 486 (Murnaghan, J., dissenting) (quoting *Hudson*, 503 U.S. at 7). This judge also observed that it is "certainly not difficult to imagine circumstances where the excessive use of force might result in no serious, visible injury to the plaintiff. For example, imagine an inmate who, although thrown from a prison balcony, is fortunate to incur only minor scrapes and bruises." *Id*. The Third Circuit has criticized the Fourth Circuit on this point: "[T]he absence of significant resulting injury is not a *per se* reason for dismissing a claim based on alleged wanton and unnecessary use of force against a prisoner. Although the extent of an injury provides a means of assessing the legitimacy and scope of the force, the focus always remains on the force used (the blows)." Brooks v. Kyler, 204 F.3d 102, 108 (3d Cir. 2000). *See also* Davidson v. Flynn, 32 F.3d 27, 29-30 & n.1 (2d Cir. 1994); Moore v. Holbrook, 2 F.3d 697, 700 (6th Cir. 1993); Howard v. Barnett, 21 F.3d 868, 872-73 (8th Cir. 1994); U.S. v. Miller, 477 F.3d 644, 647-648 (8th Cir. 2007).

43 Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973). Put slightly differently: not "every malevolent touch by a prison guard gives rise to a federal cause of action." Hudson, 503 U.S. at 9.

44 In the following cases, courts held that the challenged uses of force were *de minimis*: Boddie v. Schnieder, 105 F.3d 857, 862 (2d Cir. 1997) (bumping, grabbing, elbowing, and pushing that did not cause inmate any pain or injury); Siglar v. Hightower, 112 F.3d 191, 193 (5th Cir. 1997) (officer twisted inmate's arm behind back and twisted inmate's ear; inmate's ear was bruised and sore for three days, but he did not seek or receive medical care); Jackson v. Culbertson, 984 F.2d 699, 700 (5th Cir. 1993) (spraying of inmate with fire extinguisher); DeWalt v. Carter, 224 F.3d 607, 619-20 (7th Cir. 1999) (guard shoved inmate into door frame, "unaccompanied by further uses of force"); Lunsford v. Bennett, 17 F.3d 1574, 1582 (7th Cir. 1994) (official poured bucket of water on inmate and caused bucket to hit him in head); Jones v. Shields, 207 F.3d 491, 495-96 (8th Cir. 2000) ("capstun," pepper-based chemical spray with effects lasting no longer than 45 minutes, sprayed into inmate's face); Samuels v. Hawkins, 157 F.3d 557, 558 (8th Cir. 1998) (guard threw a cup of liquid into inmate's cell). In the following cases, courts held that the challenged uses of force were not *de minimis*: Liner v. Goord, 196 F.3d 132, 135 (2d Cir. 1999) ("Certainly, the alleged sexual assaults would constitute more than de minimis injury if they occurred."); Gomez v. Chandler, 163 F.3d 921, 924-25 (5th Cir. 1999) ("cuts, scrapes, contusions to the face, head, and body" suffered after guards allegedly knocked to floor, punched, and kicked inmate); Thomas v. Stalter, 20 F.3d 298, 301-02 (7th Cir. 1994) (inmate punched while held down by other officers); Aldape v. Lambert, 34 F.3d 619, 624 (8th Cir. 1994) (guards handcuffed inmate from behind in violation of medical order); Harris v. Chapman, 97 F.3d 499, 505-06 (11th Cir. 1996) (inmate had head snapped back with towel and was kicked, beaten, slapped twice in face, and harassed with racial epithets and other taunts); Chandler v. District of Columbia Dep't of Corrections, 145 F.3d 1355, 1359-61 (D.C. Cir. 1998) ("psychological damage" and nightmares after guard allegedly threatened to have inmate killed).

45 *See, e.g.*, Siglar v. Hightower, 112 F.3d 191, 193 (5th Cir. 1997) ("[T]he injury must be more than de minimis, but need not be significant.").

46 Before the PLRA was enacted, it was clear that inmates had a right to sue for malicious and sadistic inflictions of psychological injury. In his concurring opinion in *Hudson v. McMillian*, Justice Blackmun observed that "[i]t is not hard to imagine inflictions of psychological

courts have suggested that § 1997e(e) does not bar constitutional claims, such as those discussed in this manual. Section A.4.a.iii of Chapter 13 discusses this "physical injury" requirement in more detail. Again, in an excessive force case, you should allege and present as much evidence as you can to show that the officials' use of force harmed you physically.

d. The Extent of the Threat to the Safety of Staff and Inmates

This factor is related to factor (a), the need for force. It emphasizes the point of view of a jail or prison official who is concerned about the dangers posed to herself, other officials, and other inmates. Courts applying this factor consider the facts that an official *knew at the time*, not other facts that the officer learned later that might make the use of force seem less justified in hindsight.[47] This means, for example, that if you are making an excessive force claim, you should not simply argue that force was unjustified because you were "not going to hurt anyone." The court will ask: how were the officials supposed to know what you were thinking? To make your claim stronger, point to objective facts that show that the officials *knew at the time* that you were not going to hurt anyone.

e. Efforts Made to Temper the Severity of a Forceful Response

"Severity" means seriousness; "temper" means limit or control. Like factor (b), this factor involves the relationship between the need for force and the amount of force actually used. This factor asks whether officials considered using a lesser amount or kind of force in order to achieve their goal. Some prison experts talk about a "use of force continuum": the range of ways that officials can respond to problems (*e.g.*, talking to inmates, warning inmates, making a show of force, using mace, using a baton, using deadly force).[48] If you can show that officials could have maintained or restored discipline with a lesser use of force, but made no effort to do so, you will be better able to prove that the force was excessive. On the other hand, if officials show that they tried to tailor their force to the particular circumstances of the disturbance, the court will be more likely to conclude that the use of force was a good-faith effort to restore or maintain discipline.

4. Failure to Stop Other Officials' Excessive Force

So far this chapter has discussed the duty of officials not to use excessive force

harm — without corresponding physical harm — that might prove to be cruel and unusual punishment." 503 U.S. at 16 (Blackmun, J., concurring). *See also* Hudspeth v. Figgins, 584 F.2d 1345, 1348 (4th Cir. 1978) (inmate who filed lawsuit against prison was threatened with death and transferred from unsupervised detail to work detail supervised by armed guards); Northington v. Jackson, 973 F.2d 1518, 1522 (10th Cir. 1992) (parole officer held gun to inmate's head while threatening to kill him); Chandler v. District of Columbia Dep't of Corrections, 145 F.3d at 1361 (guard threatened to have inmate killed and officials failed to respond to inmate's resulting administrative complaints; no discussion of § 1997e(e)).

47 In one case, for example, a court recognized a need for some force after inmates had been throwing water at guards; the court described this need as "more evident" when it considered the facts from the viewpoint of the guards, who "perceived that they were targets of foul-smelling liquids.... [T]he guards' perception that the inmates were throwing 'foul' liquids was reasonable, and they could reasonably perceive such conduct as posing a more significant threat." Williams v. Benjamin, 77 F.3d 756, 763 (4th Cir. 1996).

48 *See, e.g.*, Williams v. Benjamin, 77 F.3d at 764 ("[I]mposition of [four-point] restraints is seemingly a not uncommon 'next' step, if verbal commands, show of force, and mace, are ineffective in controlling prisoners.").

themselves. In most excessive force lawsuits, inmates sue the officials who beat, maced, shocked, or otherwise abused them. Two other groups of officials, however, may also be liable for acts of excessive force.

First, officials who watch excessive force take place have a duty to *intervene* and stop the excessive force from continuing.[49] If they fail to do this, they are liable for the injuries that result. In such cases, courts have held that the lesser standard of *deliberate indifference* (see Chapter 6), not "malicious and sadistic" intent, applies.[50]

Second, higher-ranking officials who *supervise* officials who they know regularly use excessive force may also be held liable for those violations. *Supervisory liability* is discussed in § A.3.c of Chapter 13. In short, an official is not liable for a constitutional violation simply because she is the supervisor of the officials who caused the violation. She can be held liable if she was personally involved in the violation, established a policy that led to the violation, or was deliberately indifferent to the risk that the officials she supervises would commit such a violation.[51]

If guards routinely use excessive force at your jail or prison, you may be able to file a claim for *injunctive relief* against the officials in charge (and, if you are at a city or county facility, against the municipal government itself). Injunctive relief is discussed in § A.4.b of Chapter 13. Municipal liability is discussed in § A.3.d of Chapter 13.

5. Corporal Punishment

Inmates can be punished for violating the rules of their jail or prison. Confinement in punitive segregation and the loss of *privileges* (benefits that inmates do not have a right to) are two common kinds of punishment. If your punishment involves a very lengthy term of segregation, such that it imposes an atypical and significant hardship, or unusually harsh living conditions, you may have certain protections under the Due Process Clause. These due process protections are summarized in § A and § B of Chapter 4.

49 Durham v. Nu'Man, 97 F.3d 862, 867 (6th Cir. 1996) (clearly established that "correctional officer who observes an unlawful beating may, nevertheless, be held liable under § 1983 without actively participating in the beating"); Del Raine v. Williford, 32 F.3d 1024, 1038 (7th Cir. 1994) ("A failure of prison officials to act in such circumstances suggests that the officials actually wanted the prisoner to suffer the harm."); Burgess v. Moore, 39 F.3d 216, 218 (8th Cir. 1994) (assistant superintendent at prison could be found deliberately indifferent for failing to intervene when guards held inmate down and began choking him); Robins v. Meecham, 60 F.3d 1436, 1442 (9th Cir. 1995) (officers could be held liable for failing to stop another officer from firing round of bird shot at inmates); Skrtich v. Thornton, 267 F.3d 1295, 1302 (11th Cir. 2002) (any member of cell extraction team who failed to take reasonable steps to prevent others' use of excessive force could be held liable).

50 Estate of Davis v. Delo, 115 F.3d 1388, 1395 (8th Cir. 1997); Buckner v. Hollins, 983 F.2d 119, 122-23 (8th Cir. 1993) ("[The official's] failure to intervene in order to stop Buckner's beating, particularly when Buckner was naked, handcuffed, and defenseless, would provide an ample basis for a jury to conclude that Veltrop acted with deliberate indifference and therefore violated Buckner's Eighth Amendment right.").

51 Blyden v. Mancusi, 186 F.3d 252, 264 (2d Cir. 1999) ("Just as prison officials may be liable for their deliberate indifference to protecting inmates from violence at the hands of fellow inmates, they may also be liable for their deliberate indifference to violence by subordinates."); Burgess v. Moore, 39 F.3d at 218; Vaughan v. Ricketts, 859 F.2d 736, 741 (9th Cir. 1988), *overruled on other grounds* by Koch v. Ricketts, 68 F.3d 1191 (9th Cir. 1995).

Corporal punishment involves the intentional infliction of physical pain. Paddling, whipping, and spanking are examples of corporal punishment. As a general rule, the Constitution prohibits corporal punishment in jails and prisons. Officials may not use force against inmates to punish them for earlier misconduct, because such after-the-fact force is not "applied in a good-faith effort to maintain or restore discipline."[52] Thus, courts have held that it violates the Constitution for officials to chain or handcuff inmates to fences, cell bars, or "hitching posts" for the purpose of punishment.[53] Similarly, officials may not punish inmates by lashing them with a "strap" or otherwise beating them.[54]

6. Restraints

A related issue is the use of *restraints*: physical devices that keep inmates from moving parts of their bodies. Restraints are an important tool for police, jail, and prison officials. Nearly everyone gets placed in handcuffs (and often leg and belly chains) upon arrest, or when they are transferred from one facility to another. This limited use of restraints is constitutional.

As for more restrictive restraint devices (*e.g.*, restraint chairs, four-point restraints), their constitutionality depends on the circumstances in which they are used. They can have serious physical effects, such as the loss of blood circulation, cramping, and the loss of oxygen.[55] Furthermore, the inability to move around can, over time, injure a person psychologically. For these reasons, officials may apply restrictive restraints only in extraordinary circumstances, such as when an inmate is out of control and poses an immediate danger to himself or others.[56] If, for example, an inmate is trying to kill or hurt himself, the Constitution allows officials to restrain the inmate temporarily, for his own protection. The officials must remove the restraints once the threat passes.[57] Officials may not place

52 Hudson v. McMillian, 503 U.S. at 7; *see also* Skrtich v. Thornton, 280 F.3d at 1302 ("It is not constitutionally permissible for officers to administer a beating as punishment for a prisoner's past misconduct."); Ort v. White, 813 F.2d 318, 324 (11th Cir. 1987) ("The use of force in retaliation for a provocative act by an inmate occurring some time earlier is 'more likely to be not an effort to restore order but instead either a motive for "maliciously" striking the [inmate] "for the purpose of causing harm" or else summary, informal, unofficial and unsanctioned corporal punishment.'").

53 Hope v. Pelzer, 536 U.S.730,745, 122 S.Ct. 2508 (2002) (Finding an Eighth Amendment violation when, "Hope was treated in a way antithetical to human dignity-he was hitched to a post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous."); Gates v. Collier, 501 F.2d 1291, 1306 (5th Cir. 1974) (handcuffing inmates to fence and cells for long periods; "We have no difficulty in reaching the conclusion that these forms of corporal punishment run afoul of the Eighth Amendment, offend contemporary concepts of decency, human dignity, and precepts of civilization which we profess to possess."); *see also* Fountain v. Talley, 104 F. Supp.2d 1345, 1350-52 (M.D. Ala. 2000) (nine hours on hitching post violated Eighth Amendment); In re Birdsong, 39 F. 599 (S.D. Ga. 1889) (unconstitutional to chain jail inmate by neck to grating of cell for several hours).

54 United States v. Jones, 207 F.2d 785, 787 (5th Cir. 1953) (Constitution violated by prison guard's "beating, bruising, battering, and injuring [prisoner] with a rubber hose for an infraction of prison rules"); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) (prohibiting use of strap as disciplinary measure in Arkansas prisons).

55 Washington v. Harper, 494 U.S. 210, 226-27, 110 S.Ct. 1028 (1990). Additional risks exist when inmates with injuries or special medical conditions are shackled. For example, an epileptic inmate may vomit and suffocate if restrained without supervision. Stewart v. Rhodes, 473 F. Supp. 1185, 1192 (S.D. Ohio 1979).

56 Williams v. Benjamin, 77 F.3d 756, 763 (4th Cir. 1996) ("In our civilized society, we would like to believe that chaining a human being to a metal bed frame in a spread-eagled position would never be necessary. Unfortunately, it sometimes is. Courts have thus approved the limited use of four-point restraints, as a last resort, when other forms of prison discipline have failed."); H.C. by Hewitt v. Jarrard, 786 F.2d 1080 (11th Cir. 1986) (authorizing compensatory and punitive damages for nonviolent juvenile detainee who was shackled to bed in isolation cell for several hours).

57 Williams v. Benjamin, 77 F3d at 764-65 (although the initial imposition of four-point restraints on inmate who was hollering and

inmates in restraints for the purpose of punishment or to inflict pain.[58]

Inmates should rarely, if ever, be kept in restrictive restraints for more than a few hours. If they are, they should be constantly supervised by a doctor or other medical personnel. While restrained, inmates should receive necessary medical care and be allowed to use toilet facilities and perform basic hygiene.[59]

7. Sexual Assault and Harassment

Forcible sexual assault by a jail or prison official is excessive force. There is no "good-faith effort to restore or maintain discipline" involved.[60]

Officials who have sexual contact with inmates sometimes argue that it was *consensual*: *i.e.*, that the inmate agreed to the sex, and that no force was involved. Courts usually reject this argument. Guards and other officials have too much power over inmates' lives for such sex to be truly consensual. In fact, many states have laws that make it a crime for guards to have sex with inmates.

If you are the victim of any kind of sexual assault while in jail or prison, you should request both immediate medical treatment and mental health counseling.

It is also improper for officials to *sexually harass* inmates: to touch them improperly or make vulgar or sexually explicit comments. Courts, however, generally do not treat *verbal* (spoken) harassment, by itself, as a constitutional violation.[61] Courts grant relief only when verbal harassment occurs in combination with a sexual assault or another kind of physical abuse.[62]

throwing liquids was constitutional, there was no justification for keeping inmate in restraints for eight hours and denying him medical attention and permission to wash mace off his face).

58 Stewart v. Rhodes, 473 F. Supp. at 1193 ("[T]he use of restraints as punishment for 'acting out' or misbehaving is simply too extreme a response.").

59 *Id.*

60 Liner v. Goord, 196 F.3d 132, 135-36 (2d Cir. 1999) (allegations of sexual assault state Eighth Amendment claim); Boddie v. Schnieder, 105 F.3d 857, 861 (2nd Cir. 1997); Giron v. Corrections Corp. of Am., 191 F.3d 1281, 1290 (10th Cir. 1999) (official's sexual abuse or rape itself "constitutes sufficient evidence that force was used 'maliciously and sadistically for the very purpose of causing harm'"); Thomas v. District of Columbia, 887 F. Supp. 1, 4 (D. D.C. 1995).

61 *See* Boddie v. Schneider, 105 F.3d 857, 861-62 (2d Cir. 1997) (while "severe and repetitive sexual abuse of an inmate by a prison officer" can violate Eighth Amendment, isolated episodes of harassment and touching alleged by inmate did not amount to violation); Adkins v. Rodriguez, 59 F.3d 1034, 1037 (10th Cir. 1995).

62 Barney v. Pulsipher, 143 F.3d 1299, 1310 n.11 (10th Cir. 1998); Women Prisoners v. District of Columbia, 877 F. Supp. 634, 665 (D.D.C. 1994), *vacated in part, modified in part*, 899 F. Supp. 659 (D.D.C. 1995), *vacated in part and remanded*, 93 F.3d 910 (D.C. Cir. 1996).

CHAPTER 8

Protection from Assault by Other Inmates

Jails and prisons can be dangerous places to live. Inmates are subject to potential abuse by guards and other officials, as well as attack by other inmates. Films, television shows, and novels about prison commonly feature instances of inmates beating or raping other inmates. Though popular culture has the misconception that such violence is an accepted aspect of prison life, the Supreme Court has said "Being violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'"[1]

The Constitution imposes on prison and jail officials a *duty to protect*: to "take reasonable measures to guarantee the safety of inmates" and to protect them from "violence at the hands of other prisoners."[2] Inmates may file a *failure-to-protect* claim to enforce their constitutional right to be protected.

Keep in mind how this right differs from the right not to be subjected to excessive force by jail and prison officials (discussed in Chapter 7). Here, we are concerned not with an official's act of abuse, but rather an official's failure to protect you from assault by other inmates. Here, the applicable state of mind requirement is not "malicious and sadistic" intent, but rather "deliberate indifference."[3] As Chapter 6 explained, while deliberate indifference can be difficult to prove, it is easier to prove than "malicious and sadistic" intent.

This chapter will discuss the constitutional basis for the right to be protected. It will then explain the following four elements of a failure-to-protect claim:

1. Substantial risk of serious harm
2. Official's *subjective* knowledge of risk

1 Farmer v. Brennan, 511 U.S. 825, 834; 114 S. Ct. 1970 (1994) (To prove a violation of a prison official's constitutional duty to protect inmates from violence at the hands of other inmates, a plaintiff must establish that he is incarcerated under conditions posing a substantial risk of serious harm and that the defendants were deliberately indifferent to his need for protection.). "To establish a cognizable Eighth Amendment claim for failure to protect, the plaintiff 'must show that he is incarcerated under conditions posing a substantial risk of serious harm,' the objective component, and that the prison official was deliberately indifferent to his safety, the subjective component." Verdecia v. Adams, 327 F.3d 1171, 1175 (10th Cir. 2003) (quoting *Benefield v. McDowall*, 241 F.3d 1267, 1271 (10th Cir. 2001).

2 *Farmer*, at 832-33 (quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27, 101 S. Ct. 3194 (1990)); Penilla v. City of Huntington Park, 115 F.3d 707, 709 (9th Cir. 1997) ("when a state officer's conduct places a person in peril in deliberate indifference to their safety, that conduct creates a constitutional claim.".

3 Deliberate indifference in this context requires a showing that the prison or jail official was *subjectively* aware of the substantial risk of serious harm to an inmate. *Farmer*, 511 U.S. at 828-29. A showing of subjective awareness requires more than merely proving that anyone in the official's position would have been aware of the substantial risk of serious harm. Subjective awareness requires proof that the particular official in question was aware of the risk. *See* Chapter 6 of this manual.

3. Official's failure to respond reasonably

4. Causation and injury

This chapter will conclude by discussing typical kinds of failure-to-protect claims.

A. THE RIGHT TO BE PROTECTED

In the 1994 case *Farmer v. Brennan*, the Supreme Court held that the United States Constitution gives inmates a right to be protected from assault by other inmates.[4] For inmates incarcerated within the Federal Bureau of Prisons system, this right is based on the Cruel and Unusual Punishments Clause of the Eighth Amendment. For federal pretrial detainees, the right is based on the Due Process Clause of the Fifth Amendment. For inmates incarcerated in a state penal system, and for local pretrial detainees, the right is based on the Due Process Clause of the Fourteenth Amendment.[5]

The reason for the Supreme Court's holding in *Farmer* is simple: because inmates are placed into dangerous environments and "stripped... of virtually every means of self-protection and... access to outside aid, the government and its officials are not free to let the state of nature take its course."[6] A "state of nature" is a condition where everyone runs wild, with no one in control. Jail and prison officials have a duty to maintain control – not only to keep inmates from escaping or harming guards, but also to keep them from harming each other.

This does not mean, however, that the Constitution is violated every time one inmate attacks another. A jail or prison official can only be held liable under the Constitution for an inmate-on-inmate assault if she had a reasonable opportunity to prevent it from happening in the first place. If the official had no reason to expect that the assault would happen, she is not liable under the Constitution. Here is the rule:

> To win a failure-to-protect claim, you must prove that the officials whom you are suing *had actual knowledge* that a *substantial risk of serious harm existed*, and yet failed to *respond reasonably*.[7]

The next section will break this rule down into four *elements*: things you must prove to win a failure-to-protect claim.[8]

4 511 U.S. 825114 S. Ct. 1970 (1994). This is the same case that held that deliberate indifference requires an official's actual knowledge of a substantial risk of serious harm. *See* Chapter 6.

5 The Bill of Rights (the first ten Amendments to the United States Constitution) applies only to the actions of the Federal government. The Due Process Clause of the Fourteenth Amendment incorporates most of these protections (including the Eighth Amendment's prohibition against cruel and unusual punishment) to actions undertaken by the states (or state entities) themselves.

6 *Farmer*, 511 U.S. at 833 (citing *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 199-200, 109 S. Ct. 998 (1989)).

7 *Farmer*, 511 U.S. at 834.

8 It is necessary to understand the different levels of importance the courts assign to *factors* and *elements*. Factors are things a court may consider in making a decision in each case. Though each factor is important; some factors are more important than others. Also, it is not necessary to prove each factor to win your claim. A factor that strongly helps your claim can make up for a factor that helps you little or

B. ELEMENTS OF A FAILURE-TO-PROTECT CLAIM

1. Substantial Risk of Serious Harm

The first thing you must prove is that you have been exposed to a *substantial risk of serious harm*. Note that actually getting assaulted is not required. If you have been exposed to a substantial risk of assault, but have not yet been assaulted, you may file a lawsuit for *injunctive relief* (changes at your jail or prison to prevent an assault from occurring in the future).[9] On the other hand, if you want to win *money damages*, you will likely have to show that you were injured as the result of an assault. Section B.4, below, discusses this injury requirement in more detail.

There are two tricky words in the phrase "substantial risk of serious harm": "substantial" and "serious." The Supreme Court has held that to qualify as "serious," the harm must involve a denial of "the minimal civilized measure of life's necessities."[10] In failure-to-protect cases, there is no bright line that separates serious assaults from non-serious assaults. Sexual assaults, prolonged beatings, labeling an inmate as a snitch,[11] and stabbings are examples of serious harms. A brief fist fight that results in no injuries is probably not.

Similarly, there is no easy way to tell whether a risk is "substantial" or not. There are no perfectly safe jails or prisons; a certain amount of risk is to be expected. To prove a failure-to-protect claim, you must show that a risk was "excessive" or unusually high. One court has held that the risk has to be a "strong likelihood, rather than mere possibility."[12]

A substantial risk of serious harm can arise from a single factor (*e.g.*, a very dangerous inmate placed in your cell) or a combination of factors (*e.g.*, inadequate monitoring by jailers, the ready availability of weapons, and inadequate classification policies).[13] Many different people can be exposed to the same risk: you do not have to show that the risk applies to you alone or even to a group of inmates just like you.[14] Thus, at a prison where inmate-on-inmate violence is "common and uncontrolled," officials may be held liable for an assault even if they "could not guess beforehand precisely who would attack whom."[15]

not at all. By contrast, an element is like a necessary part of an engine: the engine will not run without each necessary part, no matter what condition the other parts are in. If the Supreme Court (or in some cases, the lower courts) have established a series of elements (often referred to as a "test") that must be satisfied, you will not win unless you prove each one.

9 *Farmer*, 511 U.S. at 845; Helling v. McKinney, 509 U.S. 25, 33; 113 S.Ct. 2475 (1993). Injunctive relief is discussed in § A.4.b of Chapter 13.

10 *Farmer*, 511 U.S. at 834 (quoting *Rhodes v. Chapman*, 452 U.S. at 347).

11 Benefield v. McDowall, 241 F.3d 1267, 1271 (10th Cir. 2001) ("[L]abeling an inmate a snitch satisfies the *Farmer* standard, and constitutes deliberate indifference to the safety of that inmate .").

12 Brown v. Hughes, 894 F.2d 1533, 1537 (11th Cir. 1990). The Supreme Court in *Farmer* refused to say "[a]t what point a risk of inmate assault becomes sufficiently substantial for Eighth Amendment purposes." 511 U.S. at 834 n.3.

13 *Farmer*, 511 U.S. at 843 ("[I]t does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk."); Marsh v. Butler County, 268 F.3d 1014, 1029 (11th Cir. 2001) (*en banc*) (listing multiple conditions of confinement that could give rise to substantial risk of serious harm to jail inmates).

14 *Farmer* at 843; *Street v. Corrections Corp. of America*, 102 F.3d 810, 815 (6th Cir. 1996); *Mayoral v. Sheahan*, 245 F.3d 934, 939 (7th Cir. 2001).

15 *Farmer*, 511 U.S. at 843-44.

Section C, below, discusses typical kinds of failure-to-protect claims. If you have suffered an assault, read § C to see if your case fits into one or more of these fact patterns.

2. Official's Knowledge of Risk

Failure-to-protect claims require a showing of deliberate indifference. You must show that the officials whom you are suing *actually knew* about the substantial risk of serious harm to which you were exposed, and *failed to respond reasonably*.[16] See Chapter 6 for a general explanation of deliberate indifference.

Actual knowledge can be hard to prove in a failure-to-protect case. In a lawsuit seeking *injunctive relief*, you should raise your concerns about safety in an administrative grievance and appeal (or in an informal note or letter, if your jail or prison does not have a system of administrative remedies) *before* you file suit. Under the Prison Litigation Reform Act (PLRA), exhaustion of administrative remedies is a requirement for federal inmate lawsuits.[17] See Chapter 12.

Ideally, even in a lawsuit seeking money damages for an attack that has already taken place, you will have raised your concerns about safety in a grievance *before* that injury occurred. Timing is critical. Remember that an official violates the Constitution when she knows that inmates are at risk and fails to respond reasonably – not when the inmate is actually assaulted. Filing a grievance *after* you are assaulted does nothing to show that an official was deliberately indifferent at the time that you were assaulted.[18]

It is especially important to inform officials about specific threats to your safety. For example, an official may not know that another inmate has threatened your life, or that your new cellmate is a member of a rival gang, unless you tell the official personally. There may be other reasons why you are likely to be attacked that are not obvious to officials. You should always communicate your well-founded fears, and the reasons for your fears, to the officials who are responsible for your safety.

You may also suffer an assault as a result of a more general risk at your jail or

16 Keep in mind that in a single incident different officials can be guilty of deliberate indifference in several ways. For example: Inmate A runs past two prison guards with a knife in his hand and stabs Inmate B; the two guards do nothing to stop the attack. The guards may (or may not, depending on the circumstances) be liable for failing to intervene, since they clearly knew that the victim at that moment faced a substantial risk of serious harm. The warden and other top-ranking officials may also be liable for knowingly allowing violent conditions to exist within the prison generally. In this situation, the warden and other officials would not be liable for failing to intervene in the fight (they were not even present when the fight occurred). As this example shows, you must build an independent case – one that includes each of the elements discussed in this section – against each official you sue.

17 Woodford v. Ngo, 548 U.S. 81, 126 S.Ct. 2378 (2006) (A lawsuit filed in Federal District Court by an inmate requires that the inmate has exhausted all available administrative remedies, even where the relief sought, monetary damages, cannot be obtained through the administrative process.). *See also* Jones v. Bock, 549 U.S. 199, 127 S.Ct. 910 (2007) (exhaustion is affirmative defense; total exhaustion not required).

18 You should still file a grievance after you are assaulted: to prevent more assaults from happening in the future, and to satisfy the administrative exhaustion requirement. Understand, however, that such an after-the-fact grievance does not help to prove an official's deliberate indifference as to the assault occurring prior to the filing of the grievance.

prison. There may not have been enough guards to supervise the inmates. The guards on duty may have failed to make regular inspections ("rounds") of inmate living areas. Inmates may have exercised too much control over other inmates, or been allowed to keep weapons in their cells. Officials may have failed generally to separate weak, vulnerable inmates from inmates who are stronger and more violent. Overcrowding may have contributed to the high level of inmate-on-inmate violence. Such system-wide problems are discussed in § C, below.

In addition to grievances, notes, and letters, you can use the following kinds of evidence to prove officials' actual knowledge of a substantial risk to inmate safety:

copies of grievances and administrative appeals filed by other inmates complaining about unsafe conditions;

prior lawsuits addressing violence at your jail or prison;

complaints made by your friends or relatives to officials about the problem;

incident reports, disciplinary reports, medical reports, and newspaper stories about inmate-on-inmate violence at your facility;

inspection reports by outside groups and agencies criticizing inadequate security procedures or inmate safety at your facility;

correspondence to or from officials acknowledging the problem[19]

You can also argue that because certain problems at your jail or prison were serious, longstanding, and obvious, the officials had to know that inmates' safety was at risk. Remember that a judge or jury may – but does not necessarily have to – conclude "that a prison official knew of a substantial risk from the very fact that the risk was obvious."[20]

3. Official's Failure to Respond Reasonably

To be held liable for failing to protect an inmate, an official must not only know about a substantial risk of serious harm, but also fail to *respond reasonably*. Deliberate indifference is the failure to take reasonable protective measures in response to a known risk of assault.

It is not always clear what the term "reasonable" means here. Some courts have ruled that officials must eliminate a risk of harm once they learn about it. Other courts have held that a good-faith effort to address the risk of harm – even if it fails to eliminate the risk – is reasonable: all that matters is that the officials tried.

If you file a failure-to-protect lawsuit, you should think carefully about the

19 *See, e.g., Marsh* 268 F.3d at1029 (listing multiple sources that put sheriff on notice of dangerous conditions at county jail).
20 *Farmer*, 511 U.S. at 842.

protective measures, if any, officials will say they took. You will need to be able to explain to the court why these measures were unreasonable, and what additional measures the officials should have taken to eliminate the risk of harm.

This element can be a problem for inmates who challenge the failure of guards to intervene in ongoing assaults. See § C.5, below. It is not necessarily unreasonable for a guard to refuse to break up a fight between inmates, if doing so would endanger the guard's own safety. As one court has observed, the Constitution requires of guards and prison staff "human decency, not superhuman courage."[21]

4. Causation and Injury

As a general rule, inmates who file civil rights lawsuits must show that the constitutional violation that they are complaining about has caused them, or is likely to cause, an injury. The general requirement of *causation* in § 1983 and *Bivens* lawsuits is discussed in §§ A.3 and A.4 of Chapter 13. In failure-to-protect cases, this requirement depends on the kind of relief that you want.

If you are exposed to an ongoing substantial risk of serious harm, you can seek *injunctive relief* against the jail or prison officials who are deliberately indifferent to that risk (*i.e.*, they know about it but, so far, have not responded reasonably). In other words, you can ask the court to order the officials to respond to the serious risks that you face.

Importantly, you do not have to suffer an assault in order to obtain injunctive relief. The Supreme Court has made clear that an inmate seeking a remedy for unsafe conditions does not have to "await a tragic event such as an actual assault before obtaining relief."[22] The purpose of injunctive relief is to keep injuries from occurring in the first place. Thus, if you are exposed to very unsafe conditions of confinement, and your grievances and complaints to the responsible officials have not led to any significant improvement, you may file a lawsuit for injunctive relief.

On the other hand, some courts have held that inmates cannot obtain *money damages* simply because they have been exposed to a substantial risk of serious harm. For example, being confined with a dangerous cellmate may not give you a right to monetary compensation if no assault occurs.[23]

Of course, if you or other inmates *have* suffered assaults at your facility, you may

21 Stubbs v. Dudley, 849 F.2d 83, 87 (2d Cir. 1988); *see also* Winfield v. Bass, 106 F.3d 525, 531 (4th Cir. 1997) ("heroic measures are not constitutionally required").

22 *Farmer*, 511 U.S. at 845 (quoting *Helling v. McKinney*, 509 U.S. 25, 33-34, 113 S.Ct. 2475 (1993)). *See also* Smith v. Arkansas Dep't of Corrections, 103 F.3d 637, 644 (8th Cir. 1996) (Danger to inmates living in an open barracks was undisputed, as "the thievery, assaults, and hand-crafted weapons that are common in the unsupervised environment of the open barracks illustrate its inherent danger" and thus the plaintiff-inmate successfully demonstrated he suffered from the threat of imminent harm.").

23 *See, e.g.,* Babcock v. White, 102 F.3d 267, 270-73 (7th Cir. 1996). Courts have also rejected such claims on the grounds that they do not satisfy the "physical injury" requirement of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(e). *See* Chapter 13, § A.4.a.iii. *But see* Benefield v. McDowall, 241 F.3d 1267, 1272 (10th Cir. 2001) (plaintiff-inmate's claim for damages under Eighth Amendment that he suffered psychological injury resulting from guard's labeling of him as a "snitch," survived defendant-guards motion to dismiss for qualified immunity even though inmate was not in fact assaulted).

use reports, witness accounts, any relevant grievances you filed, and other items as evidence of the officials' deliberate indifference: a high frequency of inmate assaults at a facility tends to put officials on notice of the risk that more assaults will occur in the future. As a practical matter, courts are more likely to award injunctive relief when inmates present evidence of past assaults.

Further, if you actually suffer an assault, you may be able to recover *money damages* for your injuries. To win, you will have to show causation: a link between your injuries and the deliberate indifference of the officials whom you are suing.[24]

The requirement of causation is particularly important when the risk of harm is broad: affecting a large group of inmates or the entire jail or prison population. If, for example, you believe that you were assaulted as a result of overcrowding and understaffing at your jail, you will have to prove both that jail officials were aware of these problems and that these problems were the cause, at least in part, of the injuries you suffered.

C. TYPICAL FAILURE-TO-PROTECT CLAIMS

While no two cases involve the same facts, lawyers pay close attention to decisions that involved facts similar to theirs, to see how courts have ruled. You will find it helpful to do this also. It will help you to better understand the law that applies to failure-to-protect claims and the kind of facts that courts find most important. In addition, if you are seeking money damages for an injury you suffered, you may also need to cite cases with similar facts in order to get around the defense of *qualified immunity*. See Chapter 13, § A.4.a.iv.

This section lists several kinds of failure-to-protect claims. The footnotes list case citations for each. Keep in mind that because no two cases are alike, your case may involve a combination of the facts described below or none at all.

1. Victim is Unusually Vulnerable

Some inmates are obvious targets or "prey" for assaults by others: known informants (people who cooperate with police or prison officials, sometimes

24 To understand the importance of causation, consider this example: Suppose you are put into a cell with inmate Chris Johnson, who has a long record of threatening and assaulting his cell-mates. All the guards know about Johnson's record. You report Johnson's threats to the guards and ask to be moved to another cell, but they ignore your pleas and tell you to "take care of yourself" – they are not "baby-sitters." Then, one day, while you are exercising in the yard, you are attacked by a *different* inmate whom you do not know and who has no prior history of violence. In this example, the guards were deliberately indifferent to the substantial risk that Johnson would attack you in your cell. But there is no link, no causation, between the guards' deliberate indifference and the injuries that you actually suffered in the exercise yard at the hands of the other inmate. You do not have a good failure-to-protect claim with respect to that assault.

called "snitches");[25] the mentally ill;[26] inmates with slight or youthful physical builds;[27] some gay or transsexual inmates;[28] and others.[29] Jail and prison officials must take reasonable measures to protect such inmates. If you think you belong to a target group, it is important to tell officials that you are concerned about your safety. Courts may not find officials deliberately indifferent unless you personally put them on notice of your vulnerability and ask for protection.

Officials may respond to your request by placing you in protective custody. As a general matter, officials have a duty to *classify* inmates based on the likelihood that they will commit violence or be the victim of violence in the future. The complexity of a proper classification system varies depending on the size of the jail or prison: a small, rural county jail should not use the same kind of classification policy as a large urban jail or a state penitentiary. The complete failure of a jail or prison to carry out a system of classification may violate the Constitution.

2. Attacker is Unusually Dangerous

Just as some inmates are "prey," other inmates are "predators": people with a violent background who are likely to assault their fellow inmates. There tend to be a lot of dangerous people in jail and prison; officials do not have to isolate every inmate who has the capacity for violence. On the other hand, officials may not ignore an inmate's history of violence behind bars. They may not place a known "predator" in a position where he can continue to prey on other inmates.[30]

25 Bellamy v. McMickens, 692 F. Supp. 205, 211 (S.D.N.Y. 1988) (denying summary judgment to guard who failed to protect inmate who had "contract" out on his life because he had agreed to cooperate in prosecution of suspected cop-killer); Hamilton v. Leavy, 117 F.3d 742, 746-48 (3d Cir. 1997) (reversing summary judgment ruling as material issues of fact existed as to whether prison officials acted with deliberate indifference to safety of inmate who was considered "snitcher" on inmates and guards by refusing to place him in protective custody); Blizzard v. Quillen, 579 F. Supp. 1446, 1449-50 (D. Del. 1984) (affirming judgment that prison official violated inmate's civil rights by authorizing plaintiff's transfer to general population despite official's knowledge that plaintiff had been involved in task force investigating corruption at prison and thus had reputation as "snitch"); Gullatte v. Potts, 654 F.2d 1007, 1013 (5th Cir. 1981) (reversing dismissal of lawsuit brought by wife of deceased inmate, known as a "snitch," who was murdered upon transfer to prison; plaintiff could prevail against classification officer if he knew of danger to inmate and still proceeded with transfer without taking proper precautions to protect him); *Benefield*, 241 F.3d at 1271-72 (clearly established under Eighth Amendment that labeling inmate a "snitch" constitutes deliberate indifference to inmate's safety). *But see* Davis v. Scott, 94 F.3d 444, 446-47 (8th Cir. 1996) (officials did not violate duty to take reasonable measures to protect inmate who was informant when they returned him to general population; inmate could not identify any known enemies at classification hearing and stated only "vague and unsubstantiated" fear of attack in general population).

26 Cortes-Quinones v. Jiminez-Nettleship, 842 F.2d 556, 559-60 (1st Cir. 1988) (affirming judgment for mother of psychologically disturbed inmate whom officials failed to segregate and instead placed in "chaotic and violent" general jail population).

27 Stokes v. Delcambre, 710 F.2d 1120, 1125-29 (5th Cir. 1983) (affirming jury verdict for 21-year-old college student who was beaten and raped after being jailed with older, larger inmates charged with more violent offenses); Roland v. Johnson, 856 F.2d 764, 770 (6th Cir. 1988) (reversing summary judgment for administrative assistant to warden where plaintiff's mother warned him of threats by other inmates and showed picture of plaintiff – a "male with 'youthful features' and a slight build" – suggesting that he "fit the known profile of prison rape victims").

28 *Farmer*, 511 U.S. at 848-49 (Supreme Court remands for determination whether prison officials were deliberately indifferent in failing to protect plaintiff – a young, "non-violent" transsexual with "feminine appearance" – from sexual assault in general population area of high-security federal penitentiary).

29 Giroux v. Somerset County, 178 F.3d 28, 32-34 (1st Cir. 1999) (sufficient dispute of facts existed as to whether jail shift supervisor violated duty to plaintiff confined under status which could indicate protective custody, and thus vulnerability to assault, by placing him in holding cell with inmate who assaulted him); Taylor v. Michigan Dep't of Corrections, 69 F.3d 76 (6th Cir. 1995) (reversing summary judgment where fact issues existed regarding warden's efforts to protect mildly mentally retarded inmate with youthful features, limited defenses and coping skills from assault); Spruce v. Sargent, 149 F.3d 783, 785-86 (8th Cir. 1998) (reversing judgment as matter of law for unit warden where plaintiff presented sufficient evidence showing that warden was deliberately indifferent to excessive risk of sexual assault, including evidence that inmate suffered numerous sexual attacks in past).

30 Frett v. Government of Virgin Islands, 839 F.2d 968, 978-79 (3d Cir. 1988) (upholding $200,000 verdict where prison officials knew that inmate "posed a serious danger to guards and inmates" but "nevertheless returned him to the general prison population, where

If you have been attacked, you may be able to discover information about your attacker's history of violence, in both prison and the outside world, and then argue that this information put officials on notice of the substantial risk of serious harm that you faced. If you believe that a certain inmate may attack you in the future, tell officials about your fear as soon as possible. Do not count on another person's violent nature being obvious to officials.[31] In response, officials may decide to isolate either you or the inmate you are afraid of. If the officials do nothing, they may be found deliberately indifferent.[32]

Again, every jail or prison should have a classification system that separates dangerous inmates from the rest and allows for the special confinement of obvious "predators."[33] If the protective measures that officials take in response to your complaint are insufficient, be sure to file a grievance asking for more protection.

perfectly foreseeable harm occurred") *overruled in part on other grounds* by Ngiraingas v. Sanchez 495 U.S. 182, 110 S.Ct. 1737 (1990); Roland, 856 F.2d at 770 (reversing summary judgment for Director of Job Classifications where jury could find that he was informed of threat posed by two "sexual predators" and yet refused to reclassify them from their "brakemen" positions which allowed them to open other inmates' cells); Newman v. Holmes, 122 F.3d 650 (8th Cir. 1997) (affirming jury verdict for two inmates against officer who opened door to cell of "presumptively dangerous" inmate in isolated confinement, thereby creating excessive risk of harm to inmates in general population); Wade v. Haynes, 663 F.2d 778, 780-82 (8th Cir. 1981) (affirming $25,000 jury verdict for plaintiff who was beaten and raped after being placed in administrative segregation cell with inmate who had been placed in segregation for protection of other inmates), *aff'd on other grounds*, Smith v. Wade, 461 U.S. 30, 103 S.Ct. 1625 (1983); Harris v. Roberts, 719 F. Supp. 879, 880 (N.D. Cal. 1989) (denying summary judgment where officials knew that one of plaintiff's cellmates "had a history of assaulting inmates and prison officers"); Saunders v. Chatham County Bd. of Comm'rs, 728 F.2d 1367, 1368 (11th Cir. 1984) (affirming $10,000 verdict for plaintiff where jail officials failed to segregate his attacker, who had exhibited "a violent pattern of behavior"). *But see* Webb v. Lawrence County, 144 F.3d 1131, 1135 (8th Cir. 1998) (affirming summary judgment where there was no evidence that inmate rape was common occurrence in jail or that plaintiff's cellmate, a sexual offender, had assaulted any other inmates or caused any problems while incarcerated).

31 *See* Perkins v. Grimes, 161 F.3d 1127, 1130 (8th Cir. 1998) (though officials knew that cellmate was disruptive, plaintiff did not effectively alert them that cellmate posed threat of serious injury).

32 Haley v. Gross, 86 F.3d 630, 642-43 (7th Cir. 1996) (affirming jury verdict of $1.65 million for plaintiff who was severely burned when cellmate set cell on fire; after observing intense quarrel and hearing threat by cellmate, one official responded, "Well, go ahead, you nigger, burn your black assess"; other officials simply ignored risk of harm); Billman v. Indiana Dep't of Corrections, 56 F.3d 785, 788-89 (7th Cir. 1995) (reversing dismissal where officials allegedly failed to protect plaintiff from rape by HIV-positive cellmate with known propensity to rape other prisoners). *But see* Luttrel v. Nickel, 129 F.3d 933, 935-36 (7th Cir. 1997) (affirming summary judgment where official was not deliberately indifferent in failing to transfer plaintiff out of psychologically disturbed inmate's cell; official had no reason to believe that cellmate was particularly dangerous if he was taking medication; plaintiff failed to follow official's advice to raise concern with higher-ranking officials with authority to move inmates to different cells).

33 Fisher v. Koehler, 692 F. Supp. 1519, 1562 (S.D. N.Y. 1988) (failure to classify inmates was one of several conditions that exacerbated violence at city prison and constituted deliberate indifference; injunctive relief ordered); Ryan v. Burlington County, 889 F.2d 1286 (3d Cir. 1989) (affirming denial of summary judgment for officials at overcrowded jail which did not have classification system that separated pretrial detainee/traffic offender from known dangerous, convicted inmates); Dawson v. Kendrick, 527 F. Supp. 1252, 1294 (S.D. W.Va. 1981) (ordering jail to implement system of classification "to assure that a prisoner's propensity for violence as well as an inmate's emotional and physical health be accounted for so as to minimize the risk of harm from fellow inmates"); Jones v. Diamond, 636 F.2d 1364, 1374 (5th Cir. 1981) (acknowledging approval for a system classifying inmates based upon the threat of danger they pose to other inmates after prison officials failed to control or separate dangerous prisoners, an act resulting in a level of violence so high that exposure to it would constitute cruel and unusual punishment.") *overruled on other grounds* by Int'l Woodworkers of Am., AFL-CIO and its Local No.5-376 v. Champion Int'l Corp., 790 F.2d 1174 (5th Cir. 1986); Gilland v. Owens, 718 F. Supp. 665, 686-89 (W.D. Tenn. 1989) (finding unconstitutional "high level of violence at the Shelby County Jail and a pervasive and constant threat of personal harm to inmates from attacks by other inmates"; while lack of classification system may not in itself violate Constitution, court may order relief relating to classification system if it contributes "to an unconstitutional level of violence in the institution"); Walsh v. Mellas, 837 F.2d 789, 798 (7th Cir. 1988) (affirming judgment for prisoner injured by gang member placed in cell; "We firmly believe that the failure of prison authorities to even review an inmate's file to determine his or her proclivity for violence and/or whether they are a gang-target in the face of gang-related threats and violence manifest utter disregard for the value of human life."); Vosburg v. Solem, 845 F.2d 763, 766 (8th Cir. 1988) (affirming jury verdict for inmate who, along with other inmates, had been raped repeatedly at penitentiary; "[T]he prison authorities did not screen violent offenders from the less violent and non-violent when making cell assignments. Inmates were not segregated based upon the nature of the crime for which they were convicted, and no policy existed to segregate inmates who were the likely targets of sexual assaults."); Nicholson v. Choctaw County, Ala., 498 F. Supp. 295, 314 (S.D. Ala. 1980) (ordering county jail to implement classification system to separate juveniles, females, pretrial and mental detainees; misdemeanants from felons; and "violent prone" inmates from others). *But see* Langston v. Peters, 100 F.3d 1235, 1238-39 (7th Cir. 1996) (officials did not violate Eighth Amendment by placing him in cell with inmate who allegedly then raped him; failure of officials' Offender Tracking System to include information about attacker's prior assault did not amount to deliberate indifference).

3. Attacker Threatened Victim

If a jail or prison official learns that an inmate or group of inmates has threatened to harm someone else, the official must take reasonable measures to protect the threatened inmate. If the official ignores the reported threat, he is deliberately indifferent.[34]

To win a failure-to-protect claim on this ground, you should present specific facts (including names, dates, related incidents of violence, and other items indicating the threat's seriousness and urgency) about how you (or a friend or family member) made officials aware of the threat against you and requested protection.[35] The best way to do this is to file a grievance, request form, or other written document, keeping a copy for your own use later.

If a court concludes that an official actually knew about a threat against you, it will examine the reasonableness of his response. So long as his overall response is reasonable, an official need not take the specific protective measures that you want. For example, if you refuse an official's offer of protective custody and instead demand a transfer to another prison, and an assault subsequently occurs, a court will likely reject your failure-to-protect claim on the ground that the offer of protective custody was a reasonable response to your situation.

4. Official Encouraged Attack

The most extreme failure-to-protect claim is when jail or prison officials use inmates to do their "dirty work," by intentionally "setting up" an inmate to be

34 Flint v. Kentucky Dep't of Corrections, 270 F.3d 340, 353-54 (6th Cir. 2001) (officials put on notice of threat by attacker's letters, investigative report, and requests for protection by victim's father and state representative); Roland v. Johnson, 856 F.2d at770 (6th Cir. 1988) (reversing summary judgment for Administrative Assistant to Warden where plaintiff's mother had notified him that plaintiff had been pressured by other inmates for sex; official's response – that her son need not worry if he was not homosexual – "was effectively a failure to act and therefore manifested a deliberate indifference to the plaintiff's security needs"); Pope v. Shafer, 86 F.3d 90 (7th Cir. 1996) (affirming jury verdict of $75,000 for inmate as evidence supported finding that officer was subjectively aware of risk when he failed to transfer plaintiff who had been threatened by three other inmates); Anderson v. Gutschenritter, 836 F.2d 346, 347-49 (7th Cir. 1988) (reversing summary judgment to jail officials who refused plaintiff's plea to be placed in protective custody because "he had heard rumors that someone was out to get him"; other evidence in case supported conclusion that officials knew of risk to plaintiff); Watts v. Laurent, 774 F.2d 168, 171-74 (7th Cir. 1985) (affirming judgment against four counselors at youth center who each overhead gang leader threaten plaintiff prior; evidence was sufficient to demonstrate that counselors knew there was strong likelihood of assault); West v. Rowe, 448 F. Supp. 58, 59-60 (N.D. Ill. 1978) (denying motion to dismiss where plaintiff was allegedly stabbed after officials ignored his repeated letters notifying them that his life was in danger; "when successive letters are sent to numerous supervisory officials by an inmate in an effort to enlist their assistance in protecting him from a life endangering situation, thereby placing them on notice of such situation, administrative negligence can rise to the level of deliberate indifference to or reckless disregard for that prisoner's safety."); Berg v. Kincheloe, 794 F.2d 457, 460-61 (9th Cir. 1986) (reversing summary judgment for sergeant who ignored plaintiff's plea that his life would be in danger if forced to report to particular job assignment in protective custody unit); Harris by and through Harris v. Maynard, 843 F.2d 414, 417 (10th Cir. 1988) (affirming denial of summary judgment to officials where evidence showed that mother of deceased inmate had warned several officials of son's need for protection from other inmates). *But see* Newton v. Black, 133 F.3d 301, 308 (5th Cir. 1998) (reversing judgment for plaintiff where lieutenant did not suspect that cellmate's threat to plaintiff was substantial; cellmate "calmed down" after discussing matter with lieutenant); Prater v. Dahm, 89 F.3d 538, 541-42 (8th Cir. 1996) (affirming qualified immunity for officials where alleged facts were insufficient to establish deliberate indifference; "Although Prater's pleadings allege that he was threatened by [another inmate], threats between inmates are common and do not, under all circumstances, serve to impute actual knowledge of substantial risk of harm."; officials responded reasonably to threats by consulting two inmates and receiving assurances that there would be no more problems between them).

35 *See* Brown v. Hughes, 894 F.2d 1533, 1537 (11th Cir. 1990) (plaintiff's warning that there was a "racial problem" at jail was not sufficiently clear or specific to put guard on notice of strong likelihood that inmate would be assaulted; "Brown did not say that he had been threatened, or that a fight was imminent, or that he feared an attack, nor is there evidence that racial tensions in the jail frequently resulted in violence.").

attacked by other inmates.[36]

In this kind of claim, the officials effectively act with the "malicious and sadistic" intent that is required for excessive force claims – even though deliberate indifference is all you need to show for a failure-to-protect claim. To make your claim believable to a judge or jury, you will need to explain why these officials would want to hurt you. In other words, even though it is not a required element of the claim, you should be able to provide the court with a *motive* for the officials' actions. Did they want to punish you for something you did? Are the officials and the inmates who attacked you involved in some illegal activity? Or are the officials just mean and sadistic?

You will also need to provide hard evidence of collaboration between the officials and your attackers. How do you know that the officials encouraged the attack? Did an official say something to you beforehand that indicated he knew the attack would occur? Did your attackers say something to you indicating that an official approved or encouraged the attack? Were the attackers only lightly punished, or not at all, after you reported their assault? Is there any evidence that these officials have used inmates in this manner before? Courts do not presume that jail or prison officials have acted maliciously and sadistically; you need more than rumors and guesses to win such a lawsuit.

5. Guards Witness Attack, But Fail to Stop It

If you are being attacked by other inmates in the presence of guards, what duty do the guards have to intervene and stop the fight? The guards are clearly aware that you face a substantial risk of serious harm. The critical question is, what must the guards do to protect you?

Guards and other officials do not have to expose themselves to unreasonable risks.[37] On the other hand, maintaining security and order in the prison is their

36 Irving v. Dormire, 519 F.3d 441 (8th Cir. 2008) (reversing summary judgment for prison guard, as plaintiff-inmate's allegations that guard had opened cell doors allowing attack, had made several threats to kill the inmate, to have the inmate killed, or have him beaten were sufficient to support failure to protect claim); Robinson v. Prunty, 249 F.3d 862 (9th Cir. 2001) (prison officials allegedly inserted members of different gangs and races in exercise yard for purpose of staging gladiator-like fights); Snider v. Dylag, 188 F.3d 51 (2d Cir. 1999) (reversing dismissal of claim alleging that after officer told other inmates that it was "open season" on plaintiff, inmates assaulted plaintiff; "this is a situation where a prison official allegedly decided that [plaintiff], for whatever reason, was not 'worthy' of the official's protection, and, worse still, the official allegedly conveyed this sentiment to other inmates, to ensure that whoever wanted to abuse [plaintiff] would know that he could proceed unimpeded"); Fischl v. Armitage, 128 F.3d 50 (2d Cir. 1997) (reversing summary judgment for plaintiff who alleged that officers participated in or encouraged assault by six other inmates; plaintiff had previously angered officers and other inmates by flooding toilet in cell; during assault, one attacking inmate said, "The sergeant said we got ten minutes. No steel."; officer allegedly visited plaintiff in hospital afterwards and stated, "That's only the first step of the treatment."); Northington v. Marin, 102 F.3d 1564 (10th Cir. 1996) (affirming $5000 award and attorney's fees for inmate who claimed deputy caused other inmates to assault him by spreading rumor that he was a "snitch").

37 Arnold v. Jones, 891 F.2d 1370, 1372-74 (8th Cir. 1989) (granting qualified immunity to unarmed guards who refused to physically intervene in prison fight which might have caused them serious injury, where guards ordered attacker to stop and where intervention might have worsened situation); Williams v. Willits, 853 F.2d 586, 591 (8th Cir. 1988) (upholding dismissal of complaint of inmate who engaged in ten-minute fight with another inmate while guards looked on; "The record demonstrates that the prison staff attempted to intervene and made the perfectly reasonable decision that further intervention would threaten the health and safety of all concerned. In any event, the guards were suddenly outnumbered by inmates which made breaking up the fight physically impossible."); Prosser v. Ross, 70 F.3d 1005, 1007-08 (8th Cir. 1995) (granting official qualified immunity; "prison guards have no constitutional duty to intervene in the armed assault of one inmate upon another when intervention would place the guards in danger of physical harm"; attacking inmate's weapon "was formidable enough to inflict permanent injuries").

job, and they cannot simply refuse to do their job because some risk is involved.[38] The more guards there are watching an assault take place, the less reasonable it will be for them to argue later that intervention was too risky.

Even if a guard does not intervene in an ongoing assault, he may argue that he took other measures to respond to the situation. For example, he may have ordered the attackers to stop, called for backup from other guards, or gone to get protective gear so that he could intervene safely.[39] You will need to explain to the court why such measures were unreasonable in your case.

Your claim will be stronger if you can present evidence showing that the guards were not sincerely interested in stopping the assault. For instance, if a guard watched the fight without saying anything, you can point out that the guard could have at least ordered the attacker to stop. If a guard says something inappropriate during or after the assault (*e.g.*, "he really kicked your ass"), that comment may show that the guard was not really concerned about your safety. Furthermore, if guards at your jail or prison routinely let assaults happen without attempting to stop them, you should allege this fact in your complaint and present as much evidence about past assaults as you can. You may also be able to sue your warden or other top-ranking officials for their failure to train guards properly.

6. Inmates Run the Place

At jails and prisons in the South, there used to be a tradition of allowing inmate *trusties* to perform many of the functions properly handled by professional jailers or prison guards. At some prisons, trusties even carried shotguns, which they were authorized to use against other inmates who attempted to escape or otherwise misbehaved. Officials used inmates to perform important security functions because they did not have enough money to hire professional guards.

These days, this should never happen. Officials should never allow inmates to use force against other inmates, carry weapons, carry keys to inmate cells or other living

38 Ayala Serrano v. Lebron Gonzales, 909 F.2d 8, 14 (1st Cir. 1990) (upholding judgment against guard who witnessed ambush and stabbing of inmate but did nothing to stop it; "Clearly, Lebron [the guard] could have intervened either to stop the assault, or to have summoned the help of other guards. Under the circumstances, Lebron's failure to act was clearly unreasonable."); Stubbs v. Dudley, 849 F.2d 83, 86-87 (2d Cir. 1988) (upholding jury verdict against guard who saw, but failed to open door for, inmate being chased down hall by 20 other inmates; inmate was subsequently severely beaten; "The evidence supports the conclusion that Dudley had adequate time to assess the serious threat facing Stubbs and a fair opportunity to afford him protection at no risk to himself or the security of the prison but nevertheless callously refused to permit Stubbs to pass with him to safety behind the administration door."); Davis v. Zahradnick, 600 F.2d 458 (4th Cir. 1979) (reversing summary judgment for (1) official who allegedly watched knifing attack without acting to protect plaintiff, and (2) warden who allegedly caused injuries by failing to supervise and control guards); Stokes v. Delcambre, 710 F.2d 1120, 1125 (5th Cir. 1983) (affirming verdict for plaintiff; jury could have concluded that jailer refused to investigate plaintiff's screams for help; "The indifference to, indeed the acceptance of, fighting in the jail strengthened the hold of the violent prisoners as did the failure to separate Stokes from his assailants or discipline them for their actions when... [jail officials] learned of the assaults."); Walker v. Norris, 917 F.2d 1449 (6th Cir. 1990) (affirming judgment against guards who witnessed assault but failed on four opportunities to intervene to prevent stabbing death of inmate); Morales v. New York State Dep't of Corrections, 842 F.2d 27, 30 (7th Cir. 1988) (reversing dismissal of complaint against guard who allegedly improperly permitted attacker into inmate's dormitory and then "stood and watched" assault continue for some time without doing anything to stop it); Mendez-Suarez v. Veles, 698 F. Supp. 905 (N.D. Ga. 1988) (denying summary judgment to official who allegedly failed to respond to plaintiff's pleas for help during assault and stabbing, and also locked inmate's cell door during attack, thus allowing attack to continue).

39 *See, e.g.*, Winfield v. Bass, 106 F.3d 525, 531 (4th Cir. 1997) (summary judgment for two unarmed officials who failed to immediately intervene in armed altercation, but instead radioed for assistance, called out warning, and ran to obtain batons to help stop attack).

areas, or handle other inmates' medication. Furthermore, officials should never rely on inmates to monitor inmate living areas or relay inmate requests, emergency or otherwise, to officials.[40]

If any of these practices occurs at your jail or prison, you probably have a good failure-to-protect claim (for injunctive relief, at least). The delegation of security related duties to inmates endangers everyone's safety.

7. Failure to Control Tools and Weapons

While almost anything in jail or prison can become a weapon, it is particularly dangerous for inmates to have unsupervised access to tools or similar items that can be easily converted into weapons. Officials must take reasonable measures to prevent this from happening. Some courts have held that the failure of officials to implement a *tool control policy* constitutes deliberate indifference to the safety of inmates.[41] If officials know that certain inmates have "shanks" or other weapons but fail to take those weapons away, the officials are deliberately indifferent to the risk that those weapons will be used to assault other inmates.[42]

8. Overcrowding and Understaffing

As § C.11 of Chapter 10 will explain, overcrowding is not, by itself, a constitutional violation. Only when overcrowding leads to the deprivation of a basic human need does it violate the Constitution. Protection from assault by other inmates, however, is a basic human need. You may therefore challenge overcrowding at your jail or prison if you can show that it has caused an excessive risk of violence.[43]

40 *Stokes*, 710 F.2d at 1125 (affirming judgment for plaintiff assaulted in jail where "self-appointed prison 'leaders' exercised their sovereignty by assigning prisoners to cells"); Gates v. Collier, 349 F. Supp. 881, 894 (N.D. Miss. 1972) ("When the trusty system is used to place in the hands of inmates weapons or other form of control over the inmate population, and prison officials either cannot or fail to prevent the arbitrary infliction by the trusties of physical and economic injury upon their fellow inmates, the system must be condemned as unconstitutional."), *aff'd*, 501 F.2d 1291 (5th Cir. 1974); Mayoral v. Sheahan, 245 F.3d 934, 940-41 (7th Cir. 2001) (guard who told gang member to control "his guys" before releasing inmates from lockdown seemed "to have deliberately abdicated his responsibility and put the fate of the inmates in the hands of another inmate"); Nicholson v. Choctaw County, Ala., 498 F. Supp. 295, 309 (S.D. Ala. 1980) ("Failure to provide adequate personnel to insure security at the jail and the continued use of inmate trusties to carry out sensitive tasks such as carrying the keys and distributing drugs violates the Eighth Amendment.").

41 Tillery v. Owens, 719 F. Supp. 1256, 1276 (W.D. Pa. 1989) ("The failure to insure that inmates leaving the prison industries building are thoroughly searched has resulted in a prison industries area that is a virtual clandestine weapons manufacturing plant. Weapons may be found throughout [the prison]; inmates hide them in their cells without fear of detection because there are not enough corrections officers to search cells thoroughly. The available weapons are dangerous – guns, axes, spikes, razor blades, spears and tools."), *aff'd*, 907 F.2d 418 (3d Cir. 1990); Shrader v. White, 761 F.2d 975 (4th Cir. 1985) (remanding for determination whether prison's control of scrap metal used in metal shop created excessive risk to inmate safety from use of metal as weapons); Goka v. Bobbitt, 862 F.2d 646 (7th Cir. 1988) (fact issues existed as to whether officials were deliberately indifferent in failing to enforce tool control policy, where plaintiff was struck with broom handle that attacking inmate was allowed to keep in cell); Berry v. City of Muskogee, 900 F.2d 1489, 1496-99 (10th Cir. 1990) (jail's deficient contraband control policy, which allowed inmate to fashion murder weapon from wire broom, could support finding of deliberate indifference); Marsh v. Butler County, 268 F.3d 1014, 1029 (11th Cir. 2001) (*en banc*) (unsafe conditions established, in part, by fact that "homemade weapons were readily available by fashioning weapons from material torn from the dilapidated structure of the Jail").

42 Smith v. Arkansas Dep't of Corrections, 103 F.3d 637, 644 (8th Cir. 1996) (affirming injunctive relief for inmate who demonstrated that he suffered from threat of imminent harm as result of "thievery, assaults, and hand-crafted weapons that are common in the unsupervised environment of the open barracks").

43 Cortes-Quinones v. Jiminez-Nettleship, 842 F.2d 556, 560 (1st Cir. 1988) ("common sense suggests that including schizophrenics or possible psychopaths, along with others, in a dormitory where each prisoner has space equivalent to 30 by 74 inches (15.5 square feet) is a recipe for explosion, which, given the other known conditions, could easily lead to someone's death"); Roland v. Johnson, 856 F.2d 764, 770 (6th Cir. 1988) (reversing summary judgment for warden and corrections director where jury could find they failed to adopt

A related problem is understaffing. Jails and prisons do not always employ enough guards to provide adequate safety to inmates held there. As a result, there are too many inmates for guards to supervise and control. When inmates go unsupervised, there is a greater risk that some inmates will attack others.[44]

Remember that in a lawsuit you will need to explain how each problem contributed to the substantial risk of serious harm that you faced. For example, an inmate might show that due to a prison's severely low staffing, her dormitory went unsupervised for hours at a time, allowing violent inmates to attack her with impunity. Another inmate might argue that tensions among inmates were heightened because of the extreme overcrowding and lack of exercise. Courts are more likely to view overcrowding or understaffing as *partial* causes: problems that, together with other conditions at your jail or prison, create an excessive risk of violence.

policies that would eliminate or control high level of violence and sexual assaults at prison); Smith v. Arkansas Dep't of Corrections, 103 F.3d 637, 644-45 (8th Cir. 1996) (affirming injunctive relief where inmates were "subjected to the perils of the crowded, unsupervised open barracks"); Toussaint v. Yockey, 722 F.2d 1490, 1492 (9th Cir. 1984) (affirming injunctive relief ordered where double-celling in 48 square-foot cells "engenders violence, tension and psychiatric problems"); Morgan v. District of Columbia, 824 F.2d 1049, 1061-63 (D.C. Cir. 1987) (affirming jury verdict for jail inmate injured in fight; "A jury might reasonably infer from the record that the overcrowding... had severely increased tension and hostilities among the inmates and prompted violent outbursts... . [A] reasonable person could conclude that overcrowding in prisons is a substantial factor in bringing about fighting among inmates.").

44 Smith v. Arkansas Dep't of Corrections, 103 F.3d 637, 644-45 (8th Cir. 1996) (finding it "painfully obvious that [the plaintiff's] own misdeeds and the violence of other inmates thrive in the open barracks due to the lack of supervision... . [T]he prison officials were aware of this objectively intolerable risk of harm and subjectively disregarded it."); Lopez v. LeMaster, 172 F.3d 756, 762-64 (10th Cir. 1999) (reversing summary judgment where plaintiff made sufficient showing that "the county maintains an unconstitutional policy of understaffing its jail and of failing to monitor inmates"; jail inspection report and history of prior assaults supported claim that sheriff was deliberately indifferent); Saunders v. Chatham County Bd. of Comm'rs, 728 F.2d 1367, 1368 (11th Cir. 1984) (affirming verdict for inmate; noting "evidence that the jail facilities were understaffed and with inadequate personnel to monitor inmate activity, and that the particular pod of the jail in which plaintiff was lodged was understaffed on the occasion when he was injured").

CHAPTER 9

Medical Care

The denial of medical care can endanger inmates' lives, cause them unnecessary pain, and make it very difficult for them to do basic things like eat or sleep. If untreated, one inmate's medical condition might also endanger the health of other inmates, guards, and even the population at large. Because there is little that inmates can do to get medical treatment on their own, the Constitution requires jail and prison officials to provide treatment to inmates with serious medical needs.

Think about medical care, for a moment, from the viewpoint of the people who run jails and prisons. Providing medical care to inmates is a big problem. Many inmates come from poorer backgrounds and, as a result, tend to have more medical problems than other Americans. Medical care can be expensive, and few qualified doctors and nurses want to work in jails or prisons. Thus, even the best-intentioned officials get frustrated when it comes to taking care of inmates' medical needs.

Because providing medical care can be so difficult, courts give officials a lot of leeway when it comes to enforcing inmates' constitutional rights to medical care. Officials are only responsible for medical needs that are *serious*. Officials violate the Constitution only when they act with deliberate indifference: *i.e.*, when they *actually know* about an inmate's serious medical need but *fail to respond reasonably* by providing adequate treatment. Negligent medical treatment does not violate the Constitution,[1] and inmates do not have the right to insist on a different course of treatment if the treatment actually given is medically appropriate.[2]

This chapter will explain all of these points in more detail. It will begin by explaining why the Eighth and Fourteenth Amendments give inmates a right to medical care. It will then describe the four elements of a medical care claim:

Serious medical need

Official's knowledge of need

Official's failure to provide treatment

Causation and Injury

1 If you cannot meet the standard for bringing a lawsuit alleging a constitutional violation for a medical claim, you need to check your state law to determine if you can file a state action for denial of medical care. This is usually called "medical malpractice," and each state may have different procedures in regards to filing such a lawsuit.

2 *See, e.g.*, Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir.1989) (difference of opinion regarding the proper treatment of inmate's injuries and headaches does not constitute an Eighth Amendment violation); Jones v. Natesha, 233 F.Supp.2d 1022 (N.D. Ill. 2002) (same).

It will then discuss a number of specific medical problems that inmates often have. It will conclude by looking at system-wide problems in the delivery of medical care at jails and prisons.

A. THE RIGHT TO MEDICAL CARE

The Eighth Amendment to the U.S. Constitution gives convicted inmates the right to adequate medical care. The Due Process Clause of the Fifth Amendment for federal inmates, or the Fourteenth Amendment for state and local inmates, gives this same right to pretrial detainees. Courts generally treat medical care claims the same whether they are brought by convicted inmates or pretrial detainees.[3]

Why do inmates have a constitutional right to medical care, when people in the outside world do not? The reason is simple. When you are in jail or prison, you cannot visit a doctor, medical clinic, or hospital on your own. You cannot go to the drugstore and buy the medicine you need. You cannot do everything you should do (*e.g.*, eat well, exercise often) to avoid getting sick in the first place. Because you lose your ability to obtain medical care when you are imprisoned, officials have a duty to provide care to you.[4]

The Supreme Court first recognized that inmates have a right to medical care in 1976, in *Estelle v. Gamble*.[5] In that case the Court wrote that the "denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose."[6] This means that jail and prison officials may not deny you medical care as a means of saving money or for punishment. Furthermore, they may not deny you medical care on the ground that it makes their jail or prison safer or more secure. In fact, untreated communicable diseases can spread quickly through a facility, and untreated mental illnesses can lead to outbreaks of violence, making conditions *less* safe and secure.

B. ELEMENTS OF MEDICAL CARE CLAIM

Like the right of inmates to be protected from assault by other inmates, *deliberate indifference* is a critical part of any medical care claim. Here is the rule:

3 *See* Estate of Owensby v. City of Cincinnati, 414 F.3d 596, 602-03 (6th Cir. 2005), *cert. denied sub nom,* Jorg v. Estate of Owens, 126 S.C.t 2023 (2006); Miller v. Calhoun County, 408 F.3d 803, 812 (6th Cir. 2005); Brown v. Harris, 240 F.3d 383, 388 & n.6 (4th Cir. 2001); Chavez v. Cady, 207 F.3d 901, 904 (7th Cir. 2000); Barrie v. Grand County, Utah, 119 F.3d 862, 868-69 (10th Cir. 1997). A few courts purport to apply different legal theories to claims brought by pretrial detainees, but in the end they generally apply the same deliberate indifference test as they do to claims brought by convicted inmates. *See, e.g.*, Gibson v. County of Washoe, Nev., 290 F.3d 1175, 1188 n.10 (9th Cir. 2002) ("It is quite possible, therefore, that the protections provided pretrial detainees by the Fourteenth Amendment in some instances exceed those provided convicted prisoners by the Eighth Amendment."); Collignon v. Milwaukee County, 163 F.3d 982, 988-89 (7th Cir. 1998) (stating that "professional judgment standard" for pretrial detainee claims "requires essentially the same analysis as the Eighth Amendment standard"); Hare v. City of Corinth, 74 F.3d 633, 643 (5th Cir. 1996) (*en banc*) (in "episodic act or omission" cases, applying reasonable-relationship test that is "functionally equivalent to" deliberate indifference test).

4 *See* DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 199-200, 109 S.Ct. 998 (1989); Estelle v. Gamble, 429 U.S. 97, 104, 97 S.Ct. 285 (1976) ("It is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself." (citation omitted)).

5 429 U.S. 97, 97 S.Ct. 285 (1976).

6 *Id.* at 103.

Jail and prison officials violate the Constitution when they act with deliberate indifference to an inmate's serious medical needs.[7]

This rule can be broken down into four elements, things you must prove in order to win a medical care claim. You must first show (1) a serious medical need. The next two elements involve the deliberate indifference of each official you are suing: you must show (2) the official's actual knowledge of your serious medical need and (3) that official's failure to respond reasonably by providing you adequate treatment. Lastly, you must show (4) that the official's deliberate indifference caused you an injury or is likely to injure you in the future.[8] Let's examine each of these elements:

1. Serious Medical Need

The Constitution gives inmates a right to treatment only for medical needs that are "serious." Many medical conditions endanger a person's life and are clearly serious: *e.g.*, HIV/AIDS, hepatitis-B, hepatitis-C, tuberculosis, cancer, broken bones, and open wounds. It is clear, however, that a medical condition does not have to be life-threatening to be considered serious.[9] While the Supreme Court has not yet addressed this question,[10] lower courts have defined "serious" in two different ways. The first definition states that a medical need is serious when it "has been diagnosed by a physician as mandating treatment or ... is so obvious that even a lay person would easily recognize the necessity for a doctor's attention."[11] The second definition states that a serious medical need exists when "the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain."[12]

Unfortunately, the definitions that courts use sometimes make things less clear, not more. You need to be familiar with the definition used by courts in your circuit. However, in trying to understand this requirement in your own mind, think about

7 *Id.* at 104. Courts have held that gross negligence does not violate the Eighth Amendment. *See, e.g.*, McGhee v. Foltz, 852 F.2d 876, 881 (6th Cir. 1988) (claim of "gross negligence" does not violate Eighth Amendment); Franklin v. Zain, 152 F.3d 783, 786 (8th Cir. 1998) (showing of even gross negligence is not enough to establish deliberate indifference to serious medical needs (citation omitted)).

8 Goebert v. Lee County, 510 F.3d 1312, 1326 (11th Cir. 2007) (detailing the elements involved in proving a claim of deliberately indifferent; elements two and three listed above are actually encompassed in the second element listed in this case). Even though we will discuss four elements, most courts require an inmate to prove only the following two elements: (1) the plaintiff had a serious medical need and (2) the defendant was aware of this need and was deliberately indifferent to it. *See, e.g.*, Blackmore v. Kalamazoo County, 390 F.3d 890, 895 (6th Cir. 2004).

9 Edwards v. Snyder, 478 F.3d 827, 831-32 (7th Cir. 2007) (delays in treating dislocated finger stated claim); Gutierrez v. Peters, 111 F.3d 1364, 1370 (7th Cir. 1997); Ellis v. Butler, 890 F.2d 1001, 1003 & n.1 (8th Cir. 1989).

10 In Estelle v. Gamble, the Court never questioned that an inmate's painful back injury, suffered while unloading a truck, was a serious medical need. *See* 429 U.S. at 107.

11 Mahan v. Plymouth County House of Corrections, 64 F.3d 14, 18 (1st Cir. 1995); Kosilek v. Maloney, 221 F.Supp.2d 156, 181 (D.Mass. 2002); Monmouth County Correctional Institution Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987); Gutierrez v. Peters, 111 F.3d at 1373; Sheldon v. Pezley, 49 F.3d 1312, 1316 (8th Cir. 1995); Sealock v. Colorado, 218 F.3d 1205, 1209 (10th Cir. 2000); Hill v. Dekalb Regional Youth Detention Ctr., 40 F.3d 1176, 1187 (11th Cir. 1994). A "lay person" is someone from ordinary life on the street who lacks medical training, such as the postman, the banker, or the waitress.

12 Harrison v. Barkley, 219 F.3d 132, 136 (2d Cir. 2000); Gutierrez v. Peters, 111 F.3d at 1373; McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992). Courts consider the following factors, among others, in applying this test: "[t]he existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of a chronic and substantial pain." *See, e.g.*, Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998); McGuckin v. Smith, 974 F.2d at 1059-60.

the reason why it exists in the first place. Courts do not believe that inmates have a right of "unqualified access to health care."[13] Have you ever heard the expression, "Don't make a federal case out it!"? Some medical problems are simply too minor to be the basis of a federal lawsuit. As one judge has explained, "A prison's medical staff that refuses to dispense bromides for the sniffles or minor aches and pains or a tiny scratch or a mild headache or minor fatigue — the sorts of ailments for which many people who are not in prison do not seek medical attention — does not by its refusal violate the Constitution."[14]

There are few medical conditions that a court can say are *never* serious. Consider, for example, the common cold. Everyone gets the cold once in a while; it is unpleasant, and some of us take medicine for its symptoms. In most situations, the common cold does not cause significant injury, does not require a doctor's attention, and eventually goes away. For these reasons, one court has ruled that the common cold does not normally present a "serious medical need."[15] But this ruling would not apply to someone who has limited resistance to disease because of HIV/AIDS. For such a person, a case of the common cold might severely affect her health and would likely amount to a serious medical need.[16]

The point is that medical problems vary in seriousness from person to person. Whether you have a constitutional right to medical care depends on the exact kind of problem that you have. It is therefore very important that you describe your problem — to guards, to nurses and doctors, and to a court, if necessary — in as much detail as possible. Simply writing on a request form "I have a toothache" may not be enough to get you the care you need. Of course, what you write will depend on what your problem is, but the following is a helpful example of how to write this information when reporting it to prison officials:

> *I have a very painful toothache in the upper left part of my mouth. I have had this pain for three days now, and it has gotten worse every day. Every time I close my mouth all the way, the pain shoots up into my head. I cannot chew food at all. My cellmate took a look in my mouth and saw pus around my tooth. I think it may be infected. It's very hard for me to even sleep with this pain. On a level of pain 1 — 10, and 10 being severe*

13 Hudson v. McMillian, 503 U.S. 1, 9, 112 S.Ct. 995 (1992).

14 Cooper v. Casey, 97 F.3d 914, 916 (7th Cir. 1996). As the same judge observed in a different case: "Medical 'need' runs the gamut from a need for an immediate intervention to save the patient's life to the desire for medical treatment of trivial discomforts and cosmetic imperfections that most people ignore. At the top of the range a deliberate refusal to treat is an obvious violation of the Eighth Amendment, and at the bottom of the range a deliberate refusal to treat is obviously not a violation. Where to draw the line between the end points is a question of judgment that does not lend itself to mechanical resolution." Ralston v. McGovern, 167 F.3d 1160, 1161-62 (7th Cir. 1999).

15 Gutierrez v. Peters, 111 F.3d at 1372 (failure to treat a common cold did not constitute deliberate indifference to a serious medical need) (citation omitted); *see also* Snipes v. DeTella, 95 F.3d 586, 591 n. 1 (7th Cir. 1996) (a toe whose toenail had been removed did not constitute a serious medical need, although, no doubt, painful); Oliver v. Deen, 77 F.3d 156 (7th Cir. 1996) (a panel concluded that a mild case of asthma (which was allegedly exacerbated by second-hand tobacco smoke) did not rise to the level of seriousness sufficient to support a claim for relief).

16 Here is a different example: "A prisoner who nicks himself shaving obviously does not have a constitutional right to cosmetic surgery. But if prison officials deliberately ignore the fact that a prisoner has a five-inch gash on his cheek that is becoming infected, the failure to provide appropriate treatment might well violate the Eighth Amendment." Chance v. Armstrong, 143 F.3d 698, 702 (2d Cir. 1998).

pain, I have at least an 8 in pain. Please let me see a doctor or dentist about it!

Giving officials specific information about your medical condition makes you more likely to receive the care that you need. Tell officials as much as you can about the following:

Your symptoms: the signs or effects of your condition (*e.g.*, vomiting, passing out, fever, blurred vision, dull or throbbing pain), regardless of whether they can be observed by others;

How long your condition has lasted;

How your condition has affected your ability to do basic things (*e.g.*, sleep, walk, sit, eat, work);

Any previous medical advice or treatment you have received about this condition;

If you have suffered from the condition before, the kind of medical attention or treatment that you believe you need.

Keep a copy of your request form or other document listing this information.[17] If you are denied care, you will be better able to prove in court that the officials to whom you complained knew of your medical needs and acted deliberately indifferent to that need.

Section C, *infra*, discusses a number of specific diseases, disabilities, and other medical needs that raise special concerns for inmates. Here are some additional examples of medical needs that courts have ruled are serious:

Degenerative hip condition, which caused inmate great pain and difficulty walking;[18]

Painfully swollen, obviously broken arm;[19]

Stomach pain and abdominal distress, caused by bleeding ulcer;[20]

Appendix that is inflamed or on the verge of rupturing;[21]

17 Medical request forms often get "lost or misplaced." *See, e.g.*, Vance v. Peters, 97 F.3d 987, 994 (7th Cir. 1996) (ruling against inmate who claimed to have written officials about her broken arm; inmate "had no copy of a letter and no letter was produced from any other source"); Moore v. Jackson, 123 F.3d 1082, 1086 (8th Cir. 1997). If you cannot keep a copy of your grievance or request form, write down this information in a written journal, together with the names of the people you complained to and relevant dates and times. If you are told that the grievance was lost and to refile, you must do that. *Cf.* Jernigan v. Stuchell, 304 F.3d 1030 (10th Cir.2002) (finding that where a grievance submitted to a warden was allegedly lost or misfiled and inmate did not refile with the warden as instructed by the director, the inmate had not exhausted his remedies and was not entitled to file in federal court).

18 Hathaway v. Coughlin, 37 F.3d 63, 67 (2d Cir. 1994).

19 Loe v. Armistead, 582 F.2d 1291, 1296 (4th Cir. 1978); *see also* Murphy v. Walker, 51 F.3d 714, 720 (7th Cir. 1995) (broken hand); Bryan v. Endell, 141 F.3d 1290, 1291 (8th Cir. 1998) (broken hand); Brown v. Hughes, 894 F.2d 1533, 1538 (11th Cir. 1990) (broken foot).

20 Westlake v. Lucas, 537 F.2d 857, 860-61 (6th Cir. 1976).

21 Sherrod v. Lingle, 223 F.3d 605, 610-11 (7th Cir. 2000); *see also* Chavez v. Cady, 207 F.3d 901, 904-06 (7th Cir. 2000).

Shoulder dislocation;[22]

Painful blisters in mouth and throat caused by cancer treatment;[23]

Pain, purulent draining infection, and fever in excess of 100 degrees, caused by infected cyst;[24]

Cuts, severe muscular pain, and burning sensation in eyes and skin, caused by being maced by guards;[25]

Head injury;[26]

Substantial back pain and a painful fungal skin infection;[27]

Broken jaw with inmate's mouth wired shut for months;[28]

Severe chest pain which inmate (correctly) believed was caused by heart attack.[29]

Here are some examples of medical needs that were found not serious:

Sliver of glass in inmate's palm that did not require stitches or painkiller;[30]

Pain inmate experienced when doctor removed partially torn-off toenail without anesthetic;[31]

Nausea, shakes, headache, and depressed appetite caused by family situational stress;[32]

"Pseudofolliculitis barbae" or "shaving bumps."[33]

Keep in mind that this manual deals with the law as it *is*, not what it should be. If you have a medical problem that is causing you pain or difficulty, there is no reason not to seek treatment for it. Even if a court might not consider your problem serious, you may still be able to receive treatment at your jail or prison. You might also learn, from talking to a doctor or other medical personnel, how to avoid contracting such a condition in the future. Do whatever you can to maintain your health.

22 Higgins v. Correctional Med. Servs., 178 F.3d 508, 511 (7th Cir. 1999).
23 Ralston v. McGovern, 167 F.3d 1160, 1162 (7th Cir. 1999).
24 Gutierrez v. Peters, 111 F.3d 1364, 1373-74 (7th Cir. 1997).
25 Cooper v. Casey, 97 F.3d 914, 916 (7th Cir. 1996).
26 Murphy v. Walker, 51 F.3d 714, 719 (7th Cir. 1995) ("Any injury to the head unless obviously superficial should ordinarily be considered serious and merits attention until properly diagnosed as to severity.").
27 Logan v. Clarke, 119 F.3d 647, 649 (8th Cir. 1997).
28 Lopez v. Smith, 203 F.3d 1122, 1131-32 (9th Cir. 2000) (*en banc*). In this case, a liquid diet had been prescribed for the inmate.
29 Sealock v. Colorado, 218 F.3d 1205, 1210 (10th Cir. 2000).
30 Martin v. Gentile, 849 F.2d 863, 871 (4th Cir. 1988).
31 Snipes v. DeTella, 95 F.3d 586, 591-92 (7th Cir. 1996).
32 Doty v. County of Lassen, 37 F.3d 540, 546 (9th Cir. 1994).
33 Shabazz v. Barnauskas, 790 F.2d 1536, 1538 (11th Cir. 1986) (*per curiam*).

2. Official's Knowledge of Need

If you become sick or injured, you need to do everything you can to tell officials about your problem. *You have no right to medical treatment, nor a lawsuit, if no one knows about your problem.*[34]

There are a number of ways you can inform officials about your problem. You can fill out a request form, grievance form, sick call slip, or write a letter describing your problem to officials.[35] You can also tell officials about your problem verbally.[36] Make sure that you communicate with the proper officials: the guards who can contact a doctor on your behalf, the medical officials who will examine you and prescribe treatment, and the officials who will provide that treatment to you. It may not be good enough to write only the sheriff who runs your jail or the medical director of your prison system if that official is not directly responsible for your medical care.[37] Keep track of the names of the officials you communicate with, what you told them, and what each official's response was. If possible, make a copy of your letter (even if you have to write it again) and have another inmate witness you placing the letter into the prison mailbox.

A medical official is also responsible for information he gets during his examination of an inmate;[38] information he gets from a review of the inmate's medical records;[39] or from conversations with guards,[40] other doctors,[41] or an inmate's family members.[42] If you file a medical care lawsuit, you should consider

34 One court made this point in rejecting the medical care claim of an inmate who died in a Virginia jail: "Collins did have an enlarged heart and had previously been diagnosed with congestive heart failure. But the only person on the scene who knew this information was Collins himself. Collins did not inform Officer Royer or any other officer involved of this prior medical history. The law cannot demand that officers be mind readers...." Grayson v. Peed, 195 F.3d 692, 695 (4th Cir. 1999). *See also* Durham v. Nu'man, 97 F.3d 862, 869 (6th Cir. 1996) (while inmate's broken arm was clearly a "serious medical need," prison doctors were not deliberately indifferent because break was not readily apparent).

35 Jett v. Penner, 439 F.3de 1091, 1098 (9th Cir. 2006) (letters from inmate about his medical conditions put warden and doctor on notice); Reed v. McBride, 178 F.3d 849, 854 (7th Cir. 1999) (inmate's three letters of complaint put officials on notice of his medical problem).

36 Wynn v. Southward, 251 F.3d 588, 594 (7th Cir. 2001) (in addition to making written requests, inmate repeatedly told prison officials that he needed his heart medication "immediately"); Chavez v. Cady, 207 F.3d 901, 903, 906 (7th Cir. 2000) (inmate complained to guards about his severe stomach pain, vomiting, sweating, and chills; inmate "did his part to let the officers know he was suffering").

37 *See* Farmer v. Moritsugu, 163 F.3d 610, 615-16 (D.C. Cir. 1998) (inmate's pleas to medical director of federal Bureau of Prisons were "plainly misguided. The appropriate recourse was, first and foremost, through the local medical personnel who were responsible for [the inmate's] treatment decisions."). However, if you believe that there are system-wide problems at your jail or prison that have prevented you from receiving adequate medical treatment, you should write to such higher-level officials in addition to the guards, nurses, and doctors who deal with you directly. *See* § D, below.

38 Green v. Branson, 108 F.3d 1296, 1303 (10th Cir. 1997) (prison doctor was responsible for "clear injuries, clear swelling, clear bleeding, clear indications of possible internal injuries, etc." allegedly observed during examination of inmate); McElligott v. Foley, 182 F.3d 1248, 1256 (11th Cir. 1999) (inmate's "nearly constant complaints about the pain he was having," deterioration and weight loss, along with doctor's examination, were sufficient to put doctor and nurse on notice of substantial risk of serious harm).

39 Tlamka v. Serrell, 244 F.3d 628, 633 (8th Cir. 2001) ("the obvious and serious nature" of inmate's heart attack put officials on notice of his serious medical need); Coleman v. Rahija, 114 F.3d 778, 786 (8th Cir. 1997) (nurse had actual knowledge of inmate's previous difficult pregnancies and premature deliveries that were "well-documented and expressly noted by prison officials in [inmate's] medical records").

40 Lancaster v. Monroe County, 116 F.3d 1419, 1427 (11th Cir. 1997) (jailer was warned by another jailer during shift change that inmate might have seizures during night).

41 Greason v. Kemp, 891 F.2d 829, 831-32 (11th Cir. 1990) (prior therapist sent letter to prison doctor describing inmate's current mental status and history of mental illness, and prior psychiatrist sent letter reporting that inmate continued to have suicidal thoughts and needed to stay on medication).

42 Lancaster v. Monroe County, 116 F.3d at 1426-27 (wife warned jailers about inmate's chronic alcoholism and propensity for life-threatening seizures during withdrawal); Greason v. Kemp, 891 F.2d at 832-33 (parents reported to psychiatrist's assistant that inmate had suicidal thoughts).

each of these sources of information as possible proof of deliberate indifference. But remember: the best way to put officials on notice of your medical problem — and the best way to get the treatment you need — is to tell them yourself: in person, in writing, or both. *You should do this even if you think it will not help*![43]

3. Failure to Provide Treatment

Once officials know about your serious medical need, they must respond reasonably. What kind of response does the Constitution require? Ideally, you should be promptly examined by qualified medical personnel, prescribed or ordered the necessary treatment, given that treatment properly, and then provided follow-up attention as needed. As you know, however, life in jail or prison is sometimes far from ideal. According to the Supreme Court, prison officials violate the Constitution when they intentionally *deny* or *delay* access to medical care, provide *grossly inadequate* treatment, or intentionally *interfere with prescribed treatment*.[44] Let's consider some examples of denial of treatment.

a. You are Denied Medical Attention

Here is the strongest kind of medical care claim: an inmate with a serious problem repeatedly asks for medical care, receives none, and then suffers a serious injury.[45] After learning about an inmate's serious medical need, officials may not simply do nothing.[46] Officials may not deny needed medical care simply because the care is expensive, or because you cannot pay for it.[47] They may not

43 *See* Mitchell v. Maynard, 80 F.3d 1433, 1444 (10th Cir. 1996) (inmate did not file medical request slip because he believed he would not receive care; his "failure to alert prison officials to this condition" prevented a finding of deliberate indifference).

44 The Supreme Court wrote that the Constitution prohibits officials from "intentionally denying or delaying access to medical care *or* intentionally interfering with the treatment once prescribed." Estelle v. Gamble, 429 U.S. at 104-05 (emphasis added).

45 Hudson v. McHugh, 148 F.3d 859, 864 (7th Cir. 1998) (officials knew that inmate was not getting his medicine for epilepsy: "this is the prototypical case of deliberate indifference"); Lancaster v. Monroe County, 116 F.3d at 1425 (clearly established that "an official acts with deliberate indifference when he knows that an inmate is in serious need of medical care, but he fails or refuses to obtain medical treatment for the inmate").

46 Kersh v. Derozier, 851 F.2d 1509, 1510 (5th Cir. 1988) (inmate went blind after officials refused to allow him to wash object out of his eye); Murphy v. Walker, 51 F.3d 714, 719 (7th Cir. 1995) (rather than having inmate with head injury treated by doctor, guards told him to "stop being a baby" and live with the pain); Hughes v. Joliet Correctional Ctr., 931 F.2d 425, 428 (7th Cir. 1991) (inmate with spinal injury told by medical staff that he was "full of bullshit"); Matzker v. Herr, 748 F.2d 1142, 1147-48 (7th Cir. 1984) (jail officials held inmate for three months but refused to provide him medical attention for injured eye or broken teeth); Estate of Rosenberg by Rosenberg v. Crandell, 56 F.3d 35, 37 (8th Cir. 1995) (rather than arranging visit to doctor, physician's assistants required seriously ill inmate to work and walk to mess hall and refused to give him liquid food); Sealock v. Colorado, 218 F.3d 1205, 1208 (10th Cir. 2000) (after being informed that inmate might be having heart attack, sergeant refused to drive inmate to hospital and said, "Just don't die on my shift. It's too much paper work."); H.C. by Hewitt v. Jarrard, 786 F.2d 1080, 1087 (11th Cir. 1986) (guard deliberately isolated inmate in attempt to prevent him from receiving medical care); Ancata v. Prison Health Servs., Inc., 769 F.2d 700, 702 (11th Cir. 1985) (inmate died of leukemia four months after complaining of various serious medical problems; jail officials made no arrangements for doctor's examination until forced to by two court orders).

47 Chance v. Armstrong, 143 F.3d 698, 704 (doctors acted with deliberate indifference if they recommended extraction of teeth and rejected less invasive course of treatment "because of monetary incentives"); Monmouth County Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987) (officials may not "condition provision of needed medical services on [an] inmate's ability or willingness to pay"); Barron v. Keohane, 216 F.3d 692, 693 (8th Cir. 2000) (observing that "denial of [an organ] transplant to an inmate who needs — but cannot pay for — a transplant may raise constitutional concerns"); Harris v. Coweta County, 21 F.3d 388, 394 (11th Cir. 1994) (holding unconstitutional jail officials' delaying prescribed treatment indefinitely pending inmate's transfer to state prison system); Ancata v. Prison Health Servs., Inc., 769 F.2d at 704 (unconstitutional for officials to refuse to send seriously ill inmate to specialist unless he agreed to pay for evaluation). *But see* Roberson v. Bradshaw, 198 F.3d 645, 647 (8th Cir. 1999) ("Roberson's primary complaint against the County is its policy of requiring inmates to pay for their own medications if they can afford to do so. That is not a federal constitutional violation."). However, courts have held that it is not unconstitutional for jails and prisons to require inmates who have adequate resources to bear a small portion of the cost of their medical care. *See, e.g.*, Reynolds v. Wagner, 128 F.3d 166, 174-75 (3d Cir. 1997); Breakiron v. Neal, 166 F.Supp.2d 1110, 1115-16 (N.D. Tex. 2001) (health care deductions from inmate trust account not

deny you medical care in order to punish you.[48] Nor may officials effectively deny you care by making you do something unreasonable, or unwanted, first.[49]

Sometimes guards and other non-doctors play the role of "gatekeeper" in deciding which inmates receive medical attention and which do not. This should not happen; untrained officials are not qualified to make medical decisions.[50] Similarly, a medical official without specialized training should not make decisions about conditions that require a specialist's attention.[51]

b. Official's Delay In Getting You Medical Attention

An officials' delay in providing needed medical care may also violate the Constitution.[52] In assessing the constitutionality of a particular delay, courts will consider both the reason for the delay and the nature of the medical need.[53] If the medical need is urgent, even a short delay can result in extreme pain or death and can, therefore, amount to deliberate indifference.[54] As a general rule, a delay

deliberate indifference). As a general rule, jails and prisons should not charge inmates fees for treatment for chronic conditions (lifelong illnesses, like cancer or AIDS, emergency conditions, or communicable diseases (because a failure to treat a disease like tuberculosis endangers the health of many others, *see Reynolds*, at 179 n.6. Inmates who are indigent (completely broke) should not have to pay even a small co-payment before receiving medical attention. *See* Reynolds v. Wagner, 128 F.3d 166, 173-74 (3d Cir. 1997) (constitutional to charge inmates a small fee for health care where indigent inmates are guaranteed service regardless of ability to pay).

48 Archer v. Dutcher, 733 F.2d 14, 17 (2d Cir. 1984); Flowers v. Bennett, 123 F.Supp.2d 595, 600-01 (N.D. Ala. 2000).

49 Harrison v. Barkley, 219 F.3d 132, 136-38 (2d Cir. 2000) (holding unconstitutional prison officials' requiring inmate to consent to unwanted extraction of one diseased tooth before receiving treatment for cavity in another); Reed v. McBride, 178 F.3d 849, 851 (7th Cir. 1999) (prison officials denying inmate "doctor-prescribed life sustaining medication and food for three to five days at a time to punish or harm him"); Beck v. Skon, 253 F.3d 330, 334 (8th Cir. 2001) ("prison officials conditioning a necessary medical procedure on [inmate's] release of liability could establish a deliberate indifference to [inmate's] Eighth Amendment rights to basic medical care.").

50 Mitchell v. Alusi, 872 F.2d 577, 581 (4th Cir. 1989) (alleged practice of having untrained staff screen inmates for medical problems stated constitutional violation); Williams v. Edwards, 547 F.2d 1206, 1216-18 (5th Cir. 1977) (unconstitutional for unlicensed doctors, untrained inmates, and untrained pharmacist to administer medical care system); Boswell v. Sherburne County, 849 F.2d 1117, 1123 (8th Cir. 1988) (evidence that "inadequately trained jailers were directed to use their own judgment about the seriousness of prisoners' medical needs, rather than being directed to consult trained medical personnel" supported claim of deliberate indifference). In deciding whether an official was deliberately indifferent, courts do consider whether that official had medical training. This is because a nurse or doctor should be able to identify certain serious medical needs that a typical prison guard cannot: "what might not be obvious to a lay person might be obvious to a [medical] professional acting within her area of expertise." Collignon v. Milwaukee County, 163 F.3d 982, 989 (7th Cir. 1998).

51 Hemmings v. Gorczyk, 134 F.3d 104, 109 (2d Cir. 1998) (holding that denial of inmates' repeated requests for referral to orthopedic specialist could constitute deliberate indifference where inmate had "classic" symptoms of ruptured Achilles tendon); LeMarbe v. Wisneski, 266 F.3d 429, 437-39 (6th Cir. 2001) (holding that general surgeon showed deliberate indifference by failing to refer inmate with bile leak in abdomen to a specialist); Jones v. Simek, 193 F.3d 485, 490 (7th Cir. 1999) (holding that prison doctor who knew inmate may have suffered nerve damage and failed to arrange for inmate to be examined by a neurologist for six months would amount to deliberate indifference); Oxendine v. Kaplan, 241 F.3d 1272, 1278-79 (10th Cir. 2001) (holding that prison doctor showed deliberate indifference with delay in seeking specialized treatment after botched attempt to reattach inmate's finger); Howell v. Evans, 922 F.2d 712, 723 (11th Cir.) (failure to give inmate access to respiratory therapist could be deliberately indifferent), *vacated as settled*, 931 F.2d 711 (11th Cir.), *reinstated by unpublished order as to Defendant Burden* (11th Cir. June 24, 1991); *after remand, rev'd sub nom* Howell v. Burden, 12 F.3d 190 (11th Cir. 1994) (deliberate indifference was a jury question); Waldrop v. Evans, 871 F.2d 1030, 1036 (11th Cir. 1989) (holding that officials must "inform competent authorities" of inmate's medical needs; non-psychiatrist was not competent to evaluate suicide risk posed by inmate).

52 Estelle v. Gamble, 429 U.S. at 105-06; Hunt v. Uphoff, 199 F.3d 1220, 1224 (10th Cir. 1999); Lancaster v. Monroe County, 116 F.3d at 1425 ("[A]n official acts with deliberate indifference when he intentionally delays providing an inmate with access to medical treatment, knowing that the inmate has a life-threatening condition or an urgent medical condition that would be exacerbated by delay.").

53 McElligott v. Foley, 182 F.3d 1248, 1255 (11th Cir. 1999).

54 Liscio v. Warren, 901 F.2d 274, 276-77 (2d Cir. 1990) (failure to examine inmate going through "life-threatening" and "fast-degenerating" condition for three days could constitute deliberate indifference); Cooper v. Dyke, 814 F.2d 941, 944-46 (4th Cir. 1987) (holding that delay in treating gunshot wound caused shock and extensive internal bleeding); Loe v. Armistead, 582 F.2d 1291, 1296 (4th Cir. 1978) (holding that an 11-hour delay in examining inmate's painfully swollen and obviously broken arm amounted to deliberate indifference); Van Cleave v. United States, 854 F.2d 82, 84 (5th Cir. 1988) (24-hour delay in treating injuries that occurred during arrest); Cooper v. Casey, 97 F.3d 914, 917 (7th Cir. 1996) (discussing whether inmates were in sufficient pain to entitle them to pain medication for first 48 hours after beating was issue for jury); Lewis v. Wallenstein, 769 F.2d 1173, 1183 (7th Cir. 1985) (holding that ten- to fifteen-minute delay in responding to inmate having heart attack showed deliberate indifference); Tlamka v. Serrell, 244 F.3d 628, 633-34

violates the Constitution if it is (1) medically unjustified and (2) clearly likely to make the inmate's medical problem worse or result in a lifelong handicap or a permanent loss.[55] Several circuits require inmates to prove that they suffered pain or decreased health as a result of a delay in treatment.[56]

c. The Medical Treatment You Receive Is Inadequate

An official may also be deliberately indifferent if the medical care provided is "so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness."[57] However, this can be difficult to prove. Inmates do not have the right to choose a specific form of medical treatment.[58] Courts will rarely second-guess the choices that doctors, nurses, and other medical officials make in treating inmates — even if the choices they make violate

(8th Cir. 2001) (holding that failing to approach or provide CPR to inmate having heart attack for ten minutes constituted deliberate indifference); Brown v. Hughes, 894 F.2d 1533, 1538 (11th Cir. 1990) (holding that "a deliberate delay on the order of hours in providing care for a serious and painful broken foot is sufficient to state a constitutional claim"); Washington v. Dugger, 860 F.2d 1018, 1021 (11th Cir. 1988) (delay in providing treatments that "eliminated pain and suffering at least temporarily" could violate Constitution); Thomas v. Town of Davie, 847 F.2d 771, 772-73 (11th Cir. 1988) (automobile accident victim with deteriorating condition could sue police for delay in obtaining necessary medical care). *But see* Murphy v. Walker, 51 F.3d 714, 717 (7th Cir. 1995) ("[T]wo hours does not seem like an unreasonably long wait to x-ray, examine, and possibly cast a fractured extremity, and [inmate] does not allege that the injury required immediate attention."); Adams v. Poag, 61 F.3d 1537, 1547 (11th Cir.1995) (a doctor's "failure to administer stronger medication ... pending the arrival of [an] ambulance ... [was] a medical judgment and, therefore, an inappropriate basis for imposing liability under section 1983.").

55 Goebert v. Lee County, 510 F.3d 1312, 1329 (11th Cir. 2007) (one day delay that resulted in loss of child is a jury question as to whether staff was deliberately indifferent); Moore v. Jackson, 123 F.3d 1082, 1087 n.3 (8th Cir. 1997) (holding that a three-month delay in treatment of inmate's tooth required its extraction, whereas immediate treatment could have saved it); Estate of Rosenberg by Rosenberg, 56 F.3d at 37 (8th Cir. 1995) (physician's assistants' alleged failure to refer inmate unable to eat any food to internal-medicine specialist for two months was "classic case of deliberate indifference"); Boyd v. Knox, 47 F.3d 966, 969 (8th Cir. 1995) (prison dentist delayed referring inmate's impacted and infected wisdom tooth to oral surgeon; "A three-week delay in dental care, coupled with knowledge of the inmate-patient's suffering, can support a finding of an Eighth Amendment violation...."); McBride v. Deer, 240 F.3d 1287, 1289-90 (10th Cir. 2001) (inmate stated Eighth Amendment claim by alleging loss of full function in leg after experiencing pain for seven weeks after surgery for gunshot wound, without follow-up treatment); Hinson v. Edmond, 192 F.3d 1342, 1348-49 (11th Cir. 1999) (jury could find that jail medical director's failure for 74 days to arrange for hospital treatment for inmate with injured leg was "highly unreasonable" response); McElligott v. Foley, 182 F.3d at 1258 n.6 (holding that while inmate's needs were not so serious that a delay of a day or so would have been constitutionally intolerable, a jury could find that week-long delays endured by inmate were product of deliberate indifference); H.C. by Hewett v. Jarrard, 786 F.2d 1080, 1086-87 (11th Cir. 1986) (three-day delay of treatment of inmate's shoulder injury was a "reckless disregard" of inmate's medical needs); *Harris*, 21 F.3d at 394 (11th Cir. 1994) (official's six-week delay in providing nerve conduction diagnostic test and possible surgery recommended by jail doctor could constitute deliberately indifferent). *But see* Kane v. Hargis, 987 F.2d 1005, 1009 (4th Cir. 1993) (four-hour delay in providing medical attention to inmate's cracked teeth, cut nose, and bruised face was not deliberate indifference because there was "no indication these injuries required immediate medical treatment"); Gutierrez v. Peters, 111 F.3d 1364, 1374-75 (7th Cir. 1997) (six-day wait to see doctor was not "unreasonably long delay" for treatment of inmate's cyst, where doctor had seen inmate "for the exact same complaint only one week earlier"; "these occasional delays were simply isolated instances of neglect, which taken alone or collectively cannot support a finding of deliberate indifference"); Jolly v. Badgett, 144 F.3d 573, 573 (8th Cir. 1998) (no violation where officials prevented inmate from taking anti-seizure medication for two hours; no evidence "that any of the defendants knew that a mere two-hour delay in [inmate's] taking his medicine would have any adverse effect"); Hill v. Dekalb Regional Youth Detention Ctr., 40 F.3d 1176, 1189-90 (11th Cir. 1994) (not deliberate indifference for official to delay in taking inmate to hospital for four hours after official learned that inmate had blood in his underwear).

56 Laughlin v. Schriro, 430 F.3d 927, 929 (8th Cir. 2005) (when inmate alleges that delay in treatment rises to level of Eighth Amendment violation, objective seriousness of deprivation should be measured by reference to effect of delay, and to establish this effect inmate must place verifying medical evidence in record), *cert. denied*, 127 S.Ct. 297 (2006); Gaudreault v. Municipality of Salem, 923 F.2d 203, 208 (1st Cir. 1990) (holding that inmate showed nothing in his medical records that suggested his injuries were worsened by the delay in the provision of medical care); Napier v. Madison County, 238 F.3d 739, 742 (6th Cir. 2001) ("an inmate who complains that delay in medical treatment rose to a constitutional violation must place verifying medical evidence in the record to establish the detrimental effect of the delay in medical treatment to succeed.").

57 Rogers v. Evans, 792 F.2d 1052, 1058 (11th Cir. 1986). This is just another way to say that prison staff was deliberately indifferent to your medical needs. *See* Goebert v. Lee County, 510 F.3d at 1326-27 (describing deliberate indifference standard).

58 Norton v. Dimazana, 122 F.3d 286, 292 (5th Cir. 1997) (allegation that medical personnel should have attempted different methods of treatment does not state medical claim); Forbes v. Edgar, 112 F.3d 262, 267 (7th Cir. 1997) (holding that "under the Eighth Amendment, [an inmate] is not entitled to demand specific care. She is not entitled to the best care possible. She is entitled to reasonable measures to meet a substantial risk of serious harm to her."); Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996) (holding that inmate must show that medical personnel's choice of a treatment option different from what he desired was medically unacceptable under the circumstances).

the standards of their professions.[59]

Remember that deliberate indifference is not satisfied by a showing of *negligence*[60] or *gross negligence*.[61] This means that "the mere malpractice of medicine in prison" does not violate the Constitution; something more must be shown.[62] It is not enough to show a missed diagnosis or bad result,[63] although a doctor's willful disregard for an obvious medical problem may be deliberately indifferent.[64] It is not enough to show that another doctor might have ordered a different course of treatment.[65]

On the other hand, if the care that an official provides is *grossly* inadequate (glaringly, inexcusably bad), or if she intentionally decides to take an easier or cheaper but much less effective course of treatment, she may be deliberately indifferent.[66] Deliberate indifference may also exist if the official continues with a

59 Taylor v. Adams, 221 F.3d 1254, 1259 (11th Cir. 2000). One court has held that "deliberate indifference may be inferred… only when the medical professional's decision is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment." Estate of Cole v. Fromm, 94 F.3d 254, 261-62 (7th Cir. 1996).

60 Farmer v. Brennan, 511 U.S. 825, 835, 114 S.Ct. 1970 (1994) (distinguishing "deliberate indifference to serious medical needs of prisoners from negligen[ce] in diagnosing or treating a medical condition;" only the former violates Eighth Amendment); Estelle v. Gamble, 429 U.S. at 105-06. Some courts have held that repeated acts of negligence may constitute deliberate indifference, *compare* Kelly v. McGinnis, 899 F.2d 612, 616-17 (7th Cir. 1990) (three years of ineffective treatment), *with* Brooks v. Deleste, 39 F.3d 125, 129 (6th Cir. 1994) (repeated acts of negligence does not raise to deliberate indifference).

61 *See* Pietrafeso v. Lawrence County, S.D., 452 F.3d 978, 983 (8th Cir. 2006) ("However, '[a] showing of deliberate indifference is greater than gross negligence and requires more than mere disagreement with treatment decisions.' (citation omitted)"); Goebert v. Lee County, 510 F.3d at 1327 (to meet deliberate indifference standard inmate must allege more than gross negligence).

62 Smith v. Clark, 458 F.3d 720, 723 (8th Cir. 2006) (medical malpractice is not actionable under the Eighth Amendment); Harrison v. Barkley, 219 F.3d 132 139 (2d Cir. 2000); *see also* Hall v. Thomas, 190 F.3d 693, 697-98 (5th Cir. 1999); Dunigan by Nyman v. Winnebago County, 165 F.3d 587, 592 (7th Cir. 1999); Lopez v. Smith, 203 F.3d 1122, 1131 (9th Cir. 2000) (*en banc*); Hinson v. Edmond, 192 F.3d 1342, 1345 (11th Cir. 1999).

63 Self v. Crum, 439 F.3d 1227, 1234 (10th Cir. 2006) ("But a misdiagnosis, even if rising to the level of medical malpractice, is simply insufficient under our case law to satisfy the subjective component of a deliberate indifference claim. Where a doctor faces symptoms that could suggest either indigestion or stomach cancer, and the doctor mistakenly treats indigestion, the doctor's culpable state of mind is not established even if the doctor's medical judgment may have been objectively unreasonable."); Johnson v. Quinones, 145 F.3d 164, 168 (4th Cir. 1998) (holding that prison doctors were not liable for failing to diagnose pituitary tumor, which later caused inmate to go blind); Higgins v. Correctional Medical Servs., 178 F.3d 508, 513 (7th Cir. 1999) ("An error in judgment does not imply a deliberate act."); Jolly v. Knudsen, 205 F.3d 1094, 1097 (8th Cir. 2000) (claim of negligent misdiagnosis or negligent reliance on earlier diagnosis does not state Eighth Amendment claim).

64 Mata v. Saiz, 427 F.3d 745 758 (10th Cir. 2005) (noting that defendant did not simply misdiagnose inmate but rather completely refused to diagnose inmate); Hemmings v. Gorczyk, 134 F.3d 104, 109 (2d Cir. 1998) (dismissal improper where inmate alleged that medical officials at prison "willfully disregarded his condition, which was easily observable, and which he complained about for almost two months before being referred to a specialist, who allegedly described his symptoms as 'classic' and expressed shock at the prison medical staff's failure to diagnose and treat the injury"). As another court explained: "If the symptoms plainly called for a particular medical treatment — the leg is broken, so it must be set; the person is not breathing, so CPR must be administered — a doctor's deliberate decision not to furnish the treatment might be actionable…." Steele v. Choi, 82 F.3d 175, 179 (7th Cir. 1996).

65 Collignon v. Milwaukee County, 163 F.3d 982, 990 (7th Cir. 1998) ("disagreement about which of many professionally acceptable treatment plans" should be implemented for mentally ill inmate did not support substantive due process claim); White v. Napoleon, 897 F.2d 103, 110 (3d Cir. 1990) (holding that "no claim is stated when a *doctor* disagrees with the professional judgment of another doctor").

66 McElligott v. Foley, 182 F.3d 1248, 1255 (11th Cir. 1999) (deliberate indifference may be established by a showing of grossly inadequate care as well as by a decision to take an easier but less efficacious course of treatment). *See also* Williams v. Vincent, 508 F.2d 541, 544 (2d Cir. 1974) (alleged decision by prison doctors simply to close wound caused by severing of ear rather than attempting to reattach ear could constitute deliberate indifference); Sherrod v. Lingle, 223 F.3d 605, 611-12 (7th Cir. 2000) ("If knowing that a patient faces a serious risk of appendicitis, the prison official gives the patient an aspirin and an enema and sends him back to his cell, a jury could find deliberate indifference…"); Hughes v. Joliet Correctional Ctr., 931 F.2d 425, 428 (7th Cir. 1991) (prison medical staff treated inmate "not as a patient, but as a nuisance" and did not "take even minimal steps to guard against the possibility that [his] injury was severe"); Dulany v. Carnahan, 132 F.3d 1234, 1240-41 (8th Cir. 1997) ("Grossly incompetent or inadequate care can constitute deliberate indifference in violation of the Eighth Amendment where the treatment is so inappropriate as to evidence intentional maltreatment or a refusal to provide essential care."); Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996) (inmate "must show that the course of treatment the doctors chose was medically unacceptable under the circumstances"); Wood v. Sunn, 865 F.2d 982 (9th Cir. 1988) (upholding judgment for inmate with severe urinary and testicular problems, after prison medical director and nurse dismissed his

course of treatment "in the face of resultant pain and risk of permanent injury."[67] Finally, treatment that is "so cursory as to amount to no treatment at all" may violate the Constitution.[68]

Although it may not seem fair, courts sometimes count the number of things that officials did in response to an inmate's medical complaint — regardless of whether these responses were effective or medically appropriate. Thus, you may be less likely to win a medical care claim if you saw a doctor on multiple occasions.[69] Other courts have recognized that multiple visits to the doctor do not necessarily result in constitutionally adequate treatment.[70]

d. Officials Interfere With Your Prescribed Treatment

Jail and prison officials may not interfere with or fail to carry out treatment that a doctor or other medical official has prescribed or ordered for you.[71] Such conduct amounts to deliberate indifference.[72] Officials may not substitute their judgment for a medical professional's prescription or order.[73] Similarly, a medical official

medical needs as purely psychological).

67 Edwards v. Snyder, 478 F.3d 827, 831 (7th Cir. 2007) (dispensing a modicum of treatment automatically precludes a deliberate indifference claim if a finder of fact could infer that the care provided was so inadequate as to constitute intentional mistreatment); McElligott v. Foley, 182 F.3d 1248, 1257 (11th Cir. 1999) ("A jury could infer deliberate indifference from the fact that Dr. Foley knew the extent of [the inmate's] pain, knew that the course of treatment was largely ineffective, and declined to do anything more to attempt to improve [the inmate's] condition").

68 "Cursory" means something that is done quickly, but not well. Terrance v. Northville Reg'l Psychiatric Hosp., 286 F.3d 834, 843 (6th Cir. 2001) ("[w]hen the need for treatment is obvious, medical care which is so cursory as to amount to no treatment at all may amount to deliberate indifference." (internal quotation marks omitted)); McElligott v. Foley, 182 F.3d at 1257 (jury could find that treatment of Tylenol, Pepto-Bismol, and anti-gas medication provided to inmate suffering from severe stomach pains, and later diagnosed as having colon cancer, was "so cursory as to amount to no care at all").

69 Norton v. Dimazana, 122 F.3d 286, 291 (5th Cir. 1997) (concluding that officials were not deliberately indifferent, noting "extensive evidence in the record that prison officials afforded [inmate] a great deal of care and attention"); Dunigan by Nyman v. Winnebago County, 165 F.3d at 592 (7th Cir. 1999) (prison officials who closely observed and arranged for repeated examinations of inmate were "continually solicitous" of his medical needs, not deliberately indifferent); Campbell v. Sikes, 169 F.3d 1353, 1368 (11th Cir. 1999) (no deliberate indifference where prison psychiatrist "spent a great deal of time and effort working with Plaintiff").

70 Hathaway v. Coughlin, 37 F.3d 63, 68 (2d Cir. 1994) ("Nor does the fact that [prison doctor] frequently examined Hathaway necessarily vindicate [the doctor].... A jury could infer deliberate indifference from the fact that [doctor] knew the extent of Hathaway's pain, knew that the course of treatment was largely ineffective, and declined to do anything more to attempt to improve Hathaway's condition."); Murrell v. Bennett, 615 F.2d 306, 310 n.4 (5th Cir. 1980) (deliberate indifference standard "does not necessarily excuse one episode of gross misconduct merely because the overall pattern reflects general attentiveness"); Reed v. McBride, 178 F.3d 849, 855-56 (7th Cir. 1999) (case involved more than isolated examples of neglect over time; even where a plaintiff has previously received good care, "mistreatment for a short time" might amount to deliberate indifference); Hunt v. Uphoff, 199 F.3d 1220, 1224 (10th Cir. 1999) (fact that inmate "has seen numerous doctors" does not necessarily mean "that he received treatment for serious medical needs, i.e., that treatment was prescribed at all or that prescribed treatment was provided").

71 Estelle v. Gamble, 429 U.S. at 104-05.

72 Board v. Farnham, 394 F.3d 469, 484 (7th Cir. 2005) (asthma inhaler); Johnson v. Lockhart, 941 F.2d 705, 706-07 (8th Cir. 1991) (10-month delay in surgery that doctor recommended be done within days); Gill v. Mooney, 824 F.2d 192, 195-96 (2d Cir. 1987) (holding that officials' denying inmate time in gymnasium prescribed as rehabilitation therapy was sufficient to state a colorable claim of deliberate indifference); Martinez v. Mancusi, 443 F.2d 921, 923-24 (2d Cir. 1970) (guards forced inmate to walk after leg surgery in violation of surgeon's orders); White v. Napoleon, 897 F.2d 103, 106-10 (3d Cir. 1990) (prison doctor ignored instructions of inmate's prior physician regarding treatment of chronic ear infection); Boretti v. Wiscomb, 930 F.2d 1150 (6th Cir. 1991) (refusal to treat wound for five days or provide fresh dressings or pain medication as prescribed stated Eighth Amendment violation); Murphy v. Walker, 51 F.3d 714, 720 (7th Cir. 1995) (alleged failure to take inmate to follow-up examination, as instructed by doctor, and to administer prescribed Tylenol for pain, troubling to court); Johnson v. Hay, 931 F.2d 456, 458, 463 (8th Cir. 1991) (prison pharmacist "intentionally, not inadvertently, refused to fill [inmate's] prescriptions, and...this conduct amounts to intentional interference with the treatment prescribed by...attending physicians"); Hamilton v. Endell, 981 F.2d 1062, 1066-67 (9th Cir. 1992) (holding that prison officials' decision to force inmate to fly to Oklahoma could have constituted deliberate indifference to his medical needs; officials ignored doctor's orders that inmate should not fly because of chronic ear problem); Washington v. Dugger, 860 F.2d 1018, 1021 (11th Cir. 1988) (deliberate indifference could be shown by unavailability of prescribed medication and failure of officials to follow hospital instructions to provide inmate soaks to relieve leg inflammation).

73 Chavez v. Cady, 207 F.3d 901, 906 (7th Cir. 2000) (guard using own judgment and substituting mineral oil for prescribed laxative); Hartman v. Correctional Medical Services, Inc., 960 F.Supp. 1577, 1582-83 (M.D. Fla. 1996) (medical provider could be found

who has also only general knowledge about a particular field of medicine may not substitute her judgment for that of a specialist.[74] In all of these situations, you must show that the officials knew that a substantial risk of serious harm would result from their failure to carry out your treatment properly.[75]

e. Treatment After Release

Officials clearly have a duty to provide you medical care during your confinement in jail or prison. Courts have further held that officials have a duty to provide you with care *after* you are released, at least until you can obtain care on your own. Remember that the Constitution gives inmates a right to medical care because they have been stripped of their ability to care for themselves. You do not regain this ability immediately upon release.[76] For this reason, the Ninth Circuit has held that officials "must provide an outgoing prisoner who is receiving and continues to require medication with a supply sufficient to ensure that he has that medication available during the period of time reasonably necessary to permit him to consult a doctor and obtain a new supply."[77] This ruling is especially important for inmates who are receiving treatment for chronic conditions such as HIV/AIDS, where it is critical that the patient take his prescribed medicine every day.[78]

4. Causation and Injury

Finally, to win a medical care claim, you must show that the officials' deliberate indifference caused you, or is likely to cause you, an injury. This element is generally straightforward in medical care cases. If you claim that you were denied medical care for a serious medical need, you must show how that denial injured you: *i.e.*, by causing you pain, making your condition worse, causing new medical problems, or a combination of these injuries.[79] As § B.3.b discussed *supra*, if you

deliberately indifferent for permitting a person with only a master's degree and no professional licenses to have authority over mental health referrals and suicide precautions); Casey v. Lewis, 834 F.Supp. 1477, 1545 (D.Ariz. 1993).

74 Jones v. Simek, 193 F.3d 485, 491 (7th Cir. 1999) (prison doctor's refusal to follow advice of neurology specialists who were treating inmate could amount to deliberate indifference).

75 Mahan v. Plymouth County House of Corrections, 64 F.3d 14, 18 (1st Cir. 1995) (failure to administer prescription medication did not constitute deliberate indifference absent evidence that prison officials knew that inmate would suffer serious medical consequences without medication); Zentmyer v. Kendall County, 220 F.3d 805, 811 (7th Cir. 2000) (holding that deputies did not violate Due Process Clause in giving inmate only 97 of 130 doses of prescribed medication; "there is no evidence that any deputy thought missing doses of medication for an ear infection would cause a serious injury or loss of hearing"); Williams v. Kelso, 201 F.3d 1060, 1065 (8th Cir. 2000) (officials' failure to check inmate's vital signs every four to six hours at most amounted to negligence, not deliberate indifference).

76 On a related point, an official may not avoid a duty to someone else simply by abandoning that person in a position of danger. *See, e.g.*, Davis v. Brady, 143 F.3d 1021, 1024-26 (6th Cir. 1998) (denying qualified immunity for police officers who allegedly abandoned intoxicated arrestee on dark, unfamiliar highway).

77 Wakefield v. Thompson, 177 F.3d 1160, 1164 (9th Cir. 1999); *see also* Lugo v. Senkowski, 114 F. Supp.2d 111, 115 (N.D.N.Y. 2000) ("The State has a duty to provide medical services for an outgoing prisoner who is receiving continuing treatment at the time of his release for the period of time reasonably necessary for him to obtain treatment 'on his own behalf.' (citation omitted)").

78 The inmate in Wakefield was taking a psychotropic medication for Organic Delusional Disorder. Wakefield v. Thompson, 177 F.3d at 1162. *But see* Collignon v. Milwaukee County, 163 F.3d 982, 991 (7th Cir. 1998) (rejecting claim that jail should have established treatment plan for mentally ill inmate: "once [the inmate] was released, the County's duty was cut off").

79 *See, e.g.*, Lopez v. Smith, 203 F.3d 1122, 1132 (9th Cir. 2000) (*en banc*) (failure to give inmate prescribed inmate diet allegedly resulted in loss of 9 to 22 pounds and slowed healing of broken jaw; evidence is "enough to create a factual dispute as to whether [inmate] was harmed"); Sealock v. Colo., 218 F.3d 1205, 1210 n.5 (10th Cir. 2000) ("[T]here is factual evidence from which a jury could conclude that the delay occasioned by ... inaction unnecessarily prolonged appellant's pain and suffering."). *See also* Lewis v. Wallenstein, 769 F.2d 1173, 1183 (7th Cir. 1985), which provides an example of the kind of evidence that can demonstrate causation in a delayed treatment

claim that officials improperly delayed treatment, many courts will require you to show that the delay caused you pain or decreased health.[80]

If you need treatment for an ongoing medical condition, and officials refuse to provide that treatment, you can file a lawsuit for injunctive relief (see § A.4.b of Chapter 13), along with a *motion for preliminary injunction* (see § C, of Chapter 14) to get the treatment you need. You can also ask for injunctive relief if there are system-wide problems at your jail and prison that prevent inmates from receiving needed medical care.[81] Examples of such systemic problems are listed in § D of this Chapter. Be sure, however, that you can explain how these systemic problems endanger your own health; a completely healthy inmate does not have a right to seek injunctive relief "simply on the ground that the prison medical facilities [are] inadequate."[82]

If you have already been harmed as a result of officials' deliberate indifference, you can sue for *money damages*. Damages are discussed in § A.4.a of Chapter 13. A provision of the Prison Litigation Reform Act (PLRA) requires inmates to show some sort of "physical injury" in order to obtain compensatory damages for mental or emotional anguish. [83] Mental or emotional injury, by itself, is not enough, without a physical injury. This "physical injury" requirement is discussed in § A.4.a.iii of Chapter 13.

C. SPECIAL MEDICAL NEEDS

This section discusses a number of special medical problems of interest to inmates. It provides general information only — *not* medical advice. Only a qualified doctor can give you medical advice.

1. Infectious Diseases

Several *infectious diseases* (diseases that can be spread from one person to another) are common in jails and prisons in the United States. Inmates with such

case.

80 *See* Sealock v. Colo., 218 F.3d 1205, 1210 (10th Cir. 2000) (delayed "medical care only constitutes an Eight Amendment violation where the plaintiff can show that the delay resulted in substantial harm."); Oxendine v. Kaplan, 241 F.3d 1272, 1278 (10th Cir. 2001) ("[T]he delay ... caused substantial harm due to the fact that ... Oxendine experienced considerable pain."); Lewis v. Wallenstein, 769 F.2d 1173, 1183 (7th Cir. 1985) ("[C]ausal connection existed between" doctor's fifteen minute delay in attending to inmate and inmate's death from cardiac arrest.").

81 The amount of discovery that will be required to prove a system-wide medical care case is almost impossible for a *pro se* inmate to obtain. In such a case, you need to seek appointment of counsel, *see* § D of Chapter 14.

82 Lewis v. Casey, 518 U.S. 343, 350, 116 S.Ct. 2174 (1996) (holding that inmate must show he has been grieved in some way by the inadequate services while imprisoned). This "actual harm" standard can be established by showing "that the threatening injury is sufficiently likely to occur," in other words, you need not wait until you are actually harmed to sue. Armstrong v. Davis, 275 F.3d 849, 860-61 (9th Cir. 2001); *see also* Lehn v. Holmes, 364 F.3d 862 (7th Cir. 2004) (transfer of inmate to different facility did not moot lawsuit when challenging state-wide policy to house smoking and non-smoking inmates together); Stevens v. Harper, 213 F.R.D. 358, 366 (E.D. Cal. 2002) ("[I]n order to satisfy the constitutional requirements for standing, the plaintiff must demonstrate a credible threat of future injury which is sufficiently concrete and particularized to meet the "case or controversy" requirement of Article III.").

83 42 U.S.C. § 1997e(e). Most courts have held that without a "physical injury" the inmate cannot obtain compensatory damages but can obtain nominal and punitive damages. *Compare* Thompson v. Carter, 248 F.3d 411, 417 (2d Cir. 2002) (PLRA allows recovery of nominal and punitive damages without physical injury), *with* Davis v. District of Columbia, 158 F.3d 1342, 1348, 1349 (D.C. Cir. 1998) (holding that PLRA could constitutionally bar recovering punitive damages for privacy rights violations but reserving the question whether it bars nominal damages).

diseases have a right to treatment, and officials have a duty to take reasonable measures to prevent the diseases from spreading.[84]

a. HIV/AIDS

HIV (human immunodeficiency virus) is the virus that causes *AIDS* (acquired immunodeficiency syndrome), a fatal disease. The virus gradually destroys T-cells, critical parts of the body's immune system. The loss of T-cells exposes a person to opportunistic infections, such as pneumonia, esophageal candidiasis, salmonella, and wasting syndrome. A person who develops one or more of these opportunistic infections, or who has a T-cell count under 200, is said to have AIDS. In the United States, inmates are infected with HIV (are "HIV-positive") at a greater rate than the population at large.

HIV is transmitted through blood, semen, vaginal fluid, and breast milk. Today, the virus is most often transmitted during (1) unprotected sexual intercourse,[85] or (2) the use of infected needles (*e.g.*, the sharing of syringes during intravenous drug use). You cannot get HIV/AIDS from casual contact with another person (*e.g.*, shaking hands, using the same toilet, drinking from the same glass); food prepared by another person; another person's sneezing, coughing, saliva, or sweat; or insect or animal bites.[86]

While there is still no cure for AIDS, medical treatment for the disease has improved in recent years. People with HIV/AIDS are living longer, better lives. Scientists have developed a number of "antiretroviral" (anti-HIV) drugs. Among these new medications are "protease inhibitors," drugs that can block the harmful effect of HIV on the immune system, reduce the amount of the virus in the body, and increase the number of T-cells. Doctors often prescribe protease inhibitors with other antiretroviral drugs, such as AZT or 3TC; people sometimes refer to such combinations of drugs as "the AIDS cocktail." There are also treatments that can prevent and cure some of the opportunistic infections associated with AIDS.

The science of HIV treatment is rapidly changing, and only a doctor can properly advise you on the proper treatment for your condition. If you are receiving treatment for HIV, it is extremely important to follow your doctor's instructions to the letter. Missing even a single dose of your prescribed medication can hurt you. For this reason, if you are being transferred from one jail or prison to another, you need to make sure that officials at *both* facilities are aware of your

84 *See* Helling v. McKinney, 509 U.S. 25, 33, 113 S.Ct. 2475 (1993) (observing that in Hutto v. Finney "inmates in punitive isolation were crowded into cells and that some of them had infectious maladies such as hepatitis and venereal disease [and the Supreme Court held that this] was one of the prison conditions for which the Eighth Amendment required a remedy").

85 The risk of transmitting the virus during sex can be reduced — but not eliminated — through the use of condoms, dental dams, and spermicide.

86 *See* Doe v. County of Centre, PA, 242 F.3d 437, 442 (3d Cir. 2001); Harris v. Thigpen, 941 F.2d 1495, 1503 (11th Cir. 1991) ("virtually no evidence exists that HIV is spread through casual (even intimate) non-sexual contact; ... food; inanimate objects, e.g. toilet seats, drinking fountains or eating utensils; insects; skin; vaccines; or water").

need for uninterrupted treatment.[87] If you are about to be released, you must make sure that you have enough medication to last until you can contact a doctor and arrange for continued treatment.[88]

While some courts have held that inmates with HIV do not have a constitutional right to receive treatment by protease inhibitors,[89] the medical science has advanced to such a degree that future courts are likely to rule that this treatment is constitutionally required.

The courts are divided as to whether HIV-positive inmates have a constitutional right to have their medical condition kept private.[90] Some courts have allowed officials to deny HIV-positive inmates certain jobs and the opportunity to participate in certain programs.[91] Officials may not, however, humiliate HIV-positive inmates or unnecessarily reveal their condition to other inmates who are likely to attack them.[92] HIV-positive inmates should not be denied outdoor exercise or such basic services as haircuts.[93]

b. Hepatitis

Hepatitis is a contagious disease caused by certain viruses that attack the liver. There are five types of hepatitis: A through E. Hepatitis D affects only those who also have hepatitis B, and hepatitis E is extremely rare in the United States. People with hepatitis sometimes experience such symptoms as fever, fatigue, loss of appetite, nausea, abdominal discomfort, dark urine, and jaundice (yellowing of the skin and eyes). Many people with hepatitis, however, have no symptoms at all and feel quite healthy.

Hepatitis A is contracted through anal-oral contact, by contact with the feces of an

87 McNally v. Prison Health Services, 46 F.Supp.2d 49 (D. Maine 1999) (holding,that where an HIV-positive detainee repeatedly informed prison medical personnel that he was following a strict regimen of HIV medication and was deprived of that medication for three days, a jury could find the defendant was deliberately indifferent to the plaintiff's medical needs.).

88 *See* § B.3.e, above.

89 Perkins v. Kansas Dep't of Corrections, 165 F.3d 803, 811 (10th Cir. 1999) (rejecting claim brought by inmate who was receiving AZT and 3TC, but no protease inhibitors, on ground that disagreement about his treatment did not give rise to deliberate indifference). *But see* Farmer v. Kavanagh, 494 F.Supp.2d 345, 362 (D. Md. 2007) (holding that cause of action stated when medical staff interferes with HIV treatment); Taylor v. Rice, 2005 WL 913221, *4 (D.D.C. 2005) ("introduction of a new class of antiretroviral medications called protease inhibitors, combined with other drugs, proved able to suppress HIV and prevent deteriorating compromise of patients' immune systems.").

90 It is now clearly established that an inmate has a right of confidentiality as to his medical records. *See, e.g.*, Doe v. Delie, 257 F.3d 309, 318-19 (3d Cir. 2001) (granting qualified immunity but holding that inmate had due process right to confidentiality of his medical condition); Powell v. Schriver, 175 F.3d 107, 112-13 (2d Cir. 1999) (recognizing constitutional right of inmates to confidentiality in HIV status and transsexualism); Doe v. Delie, 257 F.3d 309, 317 (3d Cir. 2001) (holding that HIV-positive inmates have right to privacy in medical information, subject to legitimate penological needs of jail and prison officials).

91 Gates v. Rowland, 39 F.3d 1439, 1447 (9th Cir. 1994) (holding that prison policy of denying HIV-positive inmates food service jobs did not violate Rehabilitation Act: although the risks of an inmate acquiring HIV through food service was "slight," court took note of "perception problems" and difficulty of educating people about "the methods of transmission of a mysterious virus about which much is, as yet, unknown"); Onishea v. Hopper, 171 F.3d 1289 (11th Cir. 1999) (*en banc*) (upholding under Rehabilitation Act Alabama prison system's exclusion of HIV-positive inmates from recreational, religious, and educational programs available to HIV-negative inmates in general population).

92 Anderson v. Romero, 72 F.3d at 523 (Eighth Amendment would prohibit officials from disseminating "humiliating but penologically irrelevant details of a prisoner's medical history," or "branding or tattooing HIV-positive inmates... or making them wear a sign around their neck that read 'I AM AN AIDS CARRIER!'"); Perkins v. KS Dept. of Corrections, 165 F.3d at 811 (10th Cir. 1999) (reversing dismissal of claim alleging that inmate was forced to wear face mask intended to brand him as HIV carrier and humiliate him whenever he left cell).

93 Anderson v. Romero, 72 F.3d at 526.

infected person, or by eating or drinking contaminated food or water. It spreads more easily in poor sanitary conditions. Hepatitis A can make someone ill for as long as six months, but is rarely life-threatening.

Hepatitis B and C, on the other hand, are very serious conditions. More than a million people in the United States are infected with *hepatitis B*, and inmates are considered a "high-risk" group for the disease. Hepatitis B is transmitted through direct contact with the blood or body fluids of an infected person (*e.g.*, by having sex or sharing needles). It is not spread through food or water or by casual contact.

Hepatitis C is usually transmitted by infected blood (*e.g.*, through shared drug needles, contaminated razors, tattoo and body-piercing equipment), but can also be transmitted during sex. Millions of Americans are believed to be infected with hepatitis C, which can lie dormant (without symptoms developing) for ten years or longer.

Both hepatitis B and C can cause cirrhosis (scarring of the liver), liver cancer, and death if not treated. Hepatitis C now kills about 10,000 people per year in the United States. If you believe that you have been exposed to any type of hepatitis, you should ask for immediate testing and treatment by a doctor. All types of hepatitis can be diagnosed with a blood test. While there are vaccines (drugs to prevent a person from contracting the disease) for hepatitis A and B, there is no vaccine for hepatitis C.

c. Tuberculosis

Tuberculosis ("TB") is a disease that attacks the lungs, throat, brain, and spine. Once the leading cause of death in the United States, TB began to disappear in the late 1940s. Unfortunately, the disease has made a comeback in recent years, particularly in jails and prisons.

TB is spread by bacteria that are put into the air when a person with *active* TB coughs or sneezes. People nearby breathe in these bacteria and become infected.

People with *latent* TB are infected with TB, but do not have obvious symptoms and are not normally contagious. Latent TB can be detected through a "PPD" skin test. People with latent TB can be treated so that their risk of developing active TB is greatly reduced. TB bacteria become active if a person's immune system cannot stop them from growing. A person is more likely to develop active TB if his immune system has been weakened due to HIV infection or another condition.

People with *active* TB may experience such symptoms as bad coughing, chest pain, weakness or fatigue, loss of appetite, fever, and sweating at night. If you or another inmate you know has such symptoms, ask for an immediate medical examination. Any inmate suspected of having active TB should be housed in a

cell or facility designed to prevent the air from flowing into other living areas.

d. Sexually Transmitted Diseases

Sexually transmitted diseases (STDs) are among the most common diseases in the United States. They can have very serious effects, including cancer, infertility, and long-term pain, so it is important to ask for medical attention if you believe you have one.

Chlamydia is a very common STD. Unfortunately, because approximately 75% of women and 50% of men have no symptoms, most people infected with Chlamydia are not aware of their infections and do not seek medical care. Chlamydia can be easily treated and cured with antibiotics. Left untreated, it can cause serious long-term problems, including pelvic inflammatory disease (PID) in women, which may in turn lead to infertility.

Gonorrhea is spread through vaginal, oral, or anal sex. Men who have gonorrhea sometimes experience a burning sensation when they urinate, a yellow-white discharge from the penis, and painful or swollen testicles. Women with gonorrhea may experience a painful or burning sensation when urinating and a vaginal discharge that is yellow or bloody. However, many women with gonorrhea have only mild symptoms or none at all. Uncomplicated cases of gonorrhea can be successfully treated with antibiotics, but serious and permanent problems may result if the disease is left untreated.

Scabies is an infestation of the skin by a mite, a very small animal. It causes pimple-like irritations, burrows, or rashes; intense itching; and sores caused by scratching which sometimes become infected. Scabies is spread by direct, prolonged, skin-to-skin contact. A quick handshake or hug will not spread scabies, but sexual contact can. Several lotions are available to treat scabies.

Syphilis is a serious disease that is increasingly common in the Southern United States and among African-Americans. It is spread through direct contact with a syphilis sore during vaginal, oral, or anal sex. A person who contracts syphilis first has a single painless sore (a chancre), which lasts for one to five weeks. The person then has one or more areas of the skin break out in a rash, which lasts for two to six weeks; he or she may also experience fever, swollen lymph glands, sore throat, patchy hair loss, headaches, weight loss, muscle aches, and tiredness. After these symptoms go away, the syphilis bacterium remains in the body and begins to do damage to the internal organs. Over time, if untreated, syphilis can cause death. Syphilis can be treated with the antibiotic penicillin. The earlier the treatment, the better.

Trichomoniasis affects both women and men, but symptoms are more common in women. Women with trichomoniasis may experience a frothy, yellow-green vaginal discharge with a strong odor, discomfort during intercourse and urination, and itching. Trichomoniasis is spread through sexual activity. It can

usually be cured with antibiotics.

Also, *bacterial vaginosis* (BV) is a common vaginal infection in women. The condition is often accompanied by vaginal discharge, odor, pain, itching, or burning. It is not clear how BV is spread, although women who have had multiple sex partners are more likely to develop BV. BV can be treated with antimicrobial medicines. Women with BV, especially pregnant women, should receive treatment in order to avoid health complications.

e. Staph Infection (Staphylococcus Aureus)

Staphylococcus is group of bacteria, familiarly known as staph (pronounced "staff"), that can cause a multitude of diseases as a result of infection of various tissues of the body. Staph bacteria can cause illness not only directly by infection (such as in the skin), but also indirectly by producing toxins responsible for food poisoning and toxic shock syndrome. Staph-related illness can range from mild (requiring no treatment) to severe (potentially fatal).

Over 30 different types of Staphylococci can infect humans, but most infections are caused by *Staphylococcus aureus*. Staphylococci can be found normally in the nose and on the skin (and less commonly in other locations) of 20%-30% of healthy adults. In the majority of cases, the bacteria do not cause disease. However, damage to the skin or other injury may allow the bacteria to overcome the natural protective mechanisms of the body, leading to infection.

Anyone can develop a staph infection, although certain groups of people are at greater risk, including breastfeeding women, and people with chronic conditions such as diabetes, cancer, vascular disease, and lung disease. Injecting drug users, those with skin injuries or disorders, intravenous catheters, surgical incisions, and those with a weakened immune system all have an increased risk of developing staph infections. Staph infections can arise by sharing contaminated items, having active skin diseases, and living in crowded settings.[94] Thus, inmates are at greater risk of contracting staph infections when present simply based on their close quarters and living conditions.[95]

Additionally, inmates are becoming increasingly affected by what is known as methicillin-resistant Staphylococcus aureus, or MSRA.[96] This strain of staph bacteria has become resistant to most types of antibiotic treatment, which has posed big problems for prison officials. The transmission of MRSA is largely from people with active MRSA skin infections. MRSA is almost always spread by

94 Medicinenet.com, MRSA Infection Index, www.medicinenet.com/mrsa_infection/index.htm (last visited Mar. 28, 2008).

95 Staph infections are endemic to prison facilities and other community settings. In 2000, the Center for Disease Control issued a press release regarding the risk of drug-resistant staph infections in correctional facilities. *See* www.cdc.gov/od/media/mmwrnews/n011026.htm; *see also* www.cdc.gov/ncidod/dhqp/ar-mrsa-ca public.html# 7 (providing that prisoners are at a greater risk for community-associated staph infections). *See also* Dixon v. Arpaio, 2007 WL 1577911 (D. Ariz. 2007) (since 2004, over 1000 cases filed against Maricopa County jail system, most alleging contracting staph infections).

96 Merrill v. Vicari, 2006 WL 758297, *3 n. 2 (D.N.J. 2006).

direct physical contact and not through the air. Spread may also occur through indirect contact by touching objects (such as towels, sheets, wound dressings, clothes, workout areas, sports equipment) contaminated by the infected skin of a person with MRSA.[97] Thus, jail or prison officials are required to take steps to prevent the spread of MRSA.[98]

Staphylococcal disease of the skin usually results in a localized collection of pus, known as a boil or abscess. The affected area may be red, swollen, and painful. Drainage or pus is common. In cases of minor skin infections, staph infections are usually diagnosed by their appearance without the need for laboratory testing. More serious staph infections such as infection of the bloodstream, pneumonia, and endocarditis require culturing of samples of blood or infected fluids. The laboratory establishes the diagnosis and performs special tests to determine which antibiotics are effective against the bacteria.

Minor skin infections are usually treated with an antibiotic ointment such as a nonprescription triple-antibiotic mixture. In some cases, oral antibiotics may be given for skin infections.[99] Additionally, if abscesses are present, they are surgically drained. More serious and life-threatening infections are treated with intravenous antibiotics. The choice of antibiotic depends on the susceptibility of the particular staphylococcal strain as determined by culture results in the laboratory.[100]

2. Chronic Diseases and Conditions

A medical condition is *chronic* if it affects a person's health for a long period of time (six months or longer) and requires ongoing medical attention. HIV, TB, hepatitis-B, and hepatitis-C are examples of chronic conditions. Other chronic conditions include the following:

People affected by *asthma* have difficulty breathing when their airways become inflamed. They are sensitive to a variety of "triggers" for breathing problems, including dust, tobacco smoke, cockroaches, and some chemicals. Chronic asthma is a serious medical need.[101] Inmates with asthma need ongoing medical monitoring and treatment (including the use of an inhaler during asthma attacks)

97 Medicinenet.com, MRSA Infection Index, www.medicinenet.com/mrsa_infection/index.htm (last visited Mar. 28, 2008).

98 *See*, Kimble v. Tennis, 2006 WL 154950 (M.D. Pa. 2006) (allegations that prisoner with MRSA infection and open sores was released into general population sufficient to state claim for deliberate indifference to health of other inmates); Gary v. Brewington, 2007 WL 2579393 (D. S.C. 2007) (stating claim where plaintiff was confined in cell with an inmate with staph infection which led to his contracting the infections).

99 Turner v. Correctional Medical Services, 479 F.Supp.2d 453, 466 (D. Del. 2007) (inmate failed to state claim for denial of medical care when medical staff provided him treatment even though he disagreed with the treatment provided); Williamson v. Wilson, 238 F.3d 426 (6th Cir. 2000) (affirming summary dismissal of action against prison doctor and dentist where tooth extraction resulted in staph infection and permanent scarring).

100 Web MD, Understanding MRSA, www.webmd.com/skin-problems-and-treatments/understanding-mrsa-methicillin-resistant-staphylococcus-aureus (last visited Mar. 29, 2008).

101 Adams v. Poag, 61 F.3d 1537, 1543 (11th Cir. 1995); *see also* Garvin v. Armstrong, 236 F.3d 896, 898 (7th Cir. 2001) ("Asthma, depending on its degree, can be a serious medical condition."). *But see* Oliver v. Deen, 77 F.3d 156, 159-61 (7th Cir. 1996) (holding that mild case of asthma allegedly made worse by secondhand smoke was not serious medical need).

and protection from asthma triggers.

Diabetes involves a sugar build-up in the body, resulting from the failure of the pancreas to produce enough of a hormone called *insulin*. People with diabetes may or may not experience such symptoms as frequent urination, unexplained weight loss, extreme thirst or hunger, sudden vision changes, numbness in the hands or feet, tiredness, and dry skin. Diabetes can cause very serious health problems, including heart disease, kidney failure, and blindness. It is a serious medical need.[102] Diabetes requires long-term management by medical personnel: treatment should involve diet planning, frequent tests and examinations, exercise, and (in many cases) insulin injections.

Epilepsy is a general term for a variety of seizure disorders. A seizure happens when abnormal electrical activity in the brain causes an involuntary change in body movement or function, sensation, awareness, or behavior. Epilepsy is one of the more common chronic conditions in jails and prisons today. Inmates with epilepsy have a right to be treated for their condition ("anti-epileptic therapy").[103] They should be assigned lower bunks to avoid falls during nighttime seizures. An unpadded jail cell may be inadequate for an epileptic inmate who is subject to frequent seizures.[104]

Hypertension involves high blood pressure. Blood pressure is the force that blood exerts against the wall of the arteries, which carry blood away from the heart. Blood pressure must be maintained at a certain level so that nutrients and oxygen in the blood can reach vital organs. Everyone should have their blood pressure checked at least once a year. Inmates who have hypertension should receive appropriate medication and take steps to lower their blood pressure (by losing weight, reducing salt content, exercising regularly, and quitting smoking).

Other chronic conditions include Alzheimer's disease, arthritis, cancer, heart disease, chronic obstructive lung disease, iron overload, and osteoporosis. If you have been diagnosed with any of these conditions, you should ask for appropriate care at your jail or prison.

3. Disabled Inmates

Jail and prison officials may not act with deliberate indifference to the needs of inmates who have serious handicaps or disabilities.

Living conditions that are fine for non-disabled inmates may be constitutionally inadequate for disabled inmates. Inmates who cannot move around easily must

102 Roberson v. Bradshaw, 198 F.3d 645, 648 (8th Cir. 1999) (holding that symptoms described by diabetic inmate would have been obvious to a layman; thus, reversing summary judgment for official who allegedly denied inmate diabetes medication and a special diet and intentionally delayed inmate's access to doctor).

103 Hudson v. McHugh, 148 F.3d 859, 863 (7th Cir. 1998).

104 Blankenship v. Kerr County, Texas, 878 F.2d 893, 895-96 (5th Cir. 1989) (deliberate indifference to place intoxicated arrestee, who informed staff that he was epileptic and might have a seizure, in unpadded drunk tank where he suffered severe injuries when his head banged repeatedly against hard floor during grand mal seizure).

be assisted and/or provided the means to use the toilet, take baths or showers, eat meals, and perform personal hygiene.[105] An inmate may also be entitled to a wheelchair or prosthetic device if he needs one to move around.[106]

Inmates who are *hearing-impaired* (partly or wholly deaf) or *vision-impaired* (partly or wholly blind) have a right to aids or assistance for their disabilities.[107] You should explain to officials, and to a court if necessary, exactly why the aid or assistance is needed. A hearing impairment, for example, may prevent you from responding to guards' orders. A vision impairment may place you at added risk of assault by others, or make it impossible to use books in the law library.

Under the Constitution, officials may not require an inmate to perform work that is beyond his strength, dangerous to his health, or unusually painful.[108] In assigning an inmate work duties, an official must take into account any medical restrictions that the official knows about.[109]

In addition to the Constitution, disabled inmates have rights under the *Americans with Disabilities Act* (ADA).[110] The Supreme Court has held that this federal statute applies to jails and prisons.[111] The ADA prohibits officials from discriminating against inmates with disabilities. Officials must give disabled inmates an equal opportunity to benefit from all services, programs, and activities.[112] Officials

105 LaFaut v. Smith, 834 F.2d 389, 392-94 (4th Cir. 1987) (prisoner confined to wheelchair was forced to endure extreme and dangerous difficulties as a result of being placed in facility without adequate toilets or access provisions); Bradley v. Puckett, 157 F.3d 1022, 1025-26 (5th Cir. 1998) (inmate stated Eighth Amendment claim by alleging that he was unable to take shower because of leg brace and had to clean himself with toilet water, resulting in fungal infection); Leach v. Shelby County Sheriff, 891 F.2d 1241, 1243 (6th Cir. 1989) (sheriff liable for failing to provide paraplegic inmate with adequate bedding, toiletries and cleanliness); Parrish v. Johnson, 800 F.2d 600, 605 (6th Cir. 1986) (holding that it is a violation of Eighth Amendment to force paraplegic inmate to sit in his own feces, assault him with a knife, extort food from him, and verbally abuse him); Simmons v. Cook, 154 F.3d 805, 808 (8th Cir. 1998) (officials violated paraplegic inmates' Eighth Amendment rights by confining them to maximum security cells where they could not eat meals or use toilet); Cummings v. Roberts, 628 F.2d 1065, 1068 (8th Cir. 1980) (alleged refusal of prison officials to clean inmate or provide wheelchair when he was bedridden with back injury, forcing him to crawl across floor, stated Eighth Amendment claim); Frost v. Agnos, 152 F.3d 1124, 1129 (9th Cir. 1998) (alleged confinement of inmate on crutches in unit with slippery floors and inadequate shower facilities would violate Constitution). *But see* Shakka v. Smith, 71 F.3d 162, 167 (4th Cir. 1995) (one-day removal of inmate's wheelchair, after inmate vandalized plumbing in cell, was not deliberate indifference).

106 Young v. Harris, 509 F. Supp. 1111, 1113-14 (S.D.N.Y. 1981) (no summary judgment where inmate alleged that officials refused to obtain leg brace, without which inmate experienced pain and difficulty trying to walk); Johnson v. Hardin County, 908 F.2d 1280, 1284 (6th Cir. 1990); Cummings, 628 F.2d at 1068 (8th Cir. 1980) (inmate with back injury who was denied wheelchair stated Eighth Amendment claim).

107 Koehl v. Dalsheim, 85 F.3d 86, 88 (2d Cir. 1996) (serious medical need suffered by inmate who, having been denied prescription eyeglasses, suffered headaches, deteriorating vision, and impairment of daily activities); Ruiz v. Estelle, 503 F. Supp. 1265, 1340 (S.D. Tex. 1980) (sight and hearing aids constitutionally required), *aff'd in part, vacated in part on other grounds,* 679 F.2d 1115 (5th Cir. 1982); Williams v. ICC Committee, 812 F. Supp. 1029, 1032 (N.D. Cal. 1992) (alleged denial of eyeglasses to legally blind inmate was deliberately indifferent).

108 Sanchez v. Taggart, 144 F.3d 1154, 1156 (8th Cir. 1998).

109 Williams v. Norris, 148 F.3d 983, 987 (8th Cir. 1998) (officials violated Eighth Amendment by failing to take any action to rescue inmate with medical restrictions from "work that was dangerous to his health and that in fact resulted in damage to him"); Sanchez, 144 F.3d at 1156 (forcing inmate with previous back injury and light-duty status to load sandbags into truck would violate Eighth Amendment).

110 42 U.S.C. §§ 12101 et seq.

111 Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206, 118 S.Ct. 1952 (1998).

112 To state a prima facie claim under the ADA, a plaintiff must show: (1) he is a person with a disability as defined by the statute; (2) he is otherwise qualified for the benefit in question; and (3) he was excluded from the benefit due to discrimination. 42 U.S.C. §12131 et seq.; Chisolm v. McManimon, 275 F.3d 315, 328-30 (3d Cir. 2000) (denying summary judgment for county officials where hearing-impaired inmate was denied sign-language interpreter, TDD machine, and closed captioning on TV during four-day stay in detention center); Randolph v. Rodgers, 170 F.3d 850, 858 (8th Cir. 1999) (hearing-impaired inmate who was denied assistance of sign-language interpreter stated prima facie claim against prison system). The ADA defines disability as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual." 28 C.F.R. § 35.104. As an affirmative defense, a defendant may demonstrate that the plaintiff's requested accommodation would constitute an "undue burden." *Randolph*, 170 F.3d at 858-59.

must make "reasonable modifications" where necessary to avoid discrimination, unless doing so would fundamentally change the service, program, or activity being provided. Specific architectural standards must be followed in the new construction and alteration of jail and prison buildings. Furthermore, officials must provide inmates with hearing-, vision-, and speech-impairments with aids to ensure that they can communicate effectively with others.

You can file a lawsuit in federal court to enforce your rights under the ADA. You can also file complaints with the U.S. Department of Justice, which has the responsibility to investigate alleged ADA violations by state and local governments.[113]

4. Medical Diets

As § C.10 of Chapter 10 explains, inmates generally have a right only to food that is sufficient in amount and nutritional quality to preserve their health. Several medical conditions, however, require inmates to consume or avoid certain kinds of food. Also, some inmates must, for medical reasons, eat more food than is normally sufficient. If medical personnel order a special diet for an inmate, jail and prison officials must carry out the order.[114]

5. Drug and Alcohol Withdrawal

Many people are addicted to drugs or alcohol when they arrive at jail. Getting suddenly cut off — being forced to go "cold turkey" — can have serious, painful medical effects, such as *delirium tremens* ("DT's"). Inmates have a right to be treated for the serious effects of drug and alcohol withdrawal.[115] The Constitution does not, however, require jails and prisons to provide rehabilitation programs for inmates recovering from drug and alcohol dependency.[116]

113 You can send your complaint to the Disability Rights Section, NYA, Civil Rights Division, U.S. Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530. Complaints must be filed with the DOJ within 180 days of the alleged discrimination.

114 Riddick v. Bass, 586 F. Supp. 881, 883 (E.D. Va. 1984) (no summary judgment where inmate presented evidence that prison officials did not provide him low sodium diet prescribed for his high blood pressure); Westlake v. Lucas, 537 F.2d 857, 859 (6th Cir. 1976) (inmate stated claim for deliberate indifference by alleging that prison officials refused to provide special diet and medication for an ulcer, that had been provided to him at another facility; refusal caused inmate intense discomfort and vomiting of blood); Lopez v. Smith, 203 F.3d 1122, 1131-32 (9th Cir. 2000) (*en banc*); Balla v. Idaho State Bd. of Corrections, 595 F. Supp. 1558, 1574-75 (D. Idaho 1984) ("As a matter of law, the evolving standards of decency that mark the progress of a maturing society require prison officials to afford inmates special diets if prescribed for them. Regardless of the cost involved, there is simply no penological justification for depriving inmates with serious medical problems of their duly prescribed diets."); Kyle v. Allen, 732 0F. Supp. 1157, 1159 (S.D. Fla. 1990) (alleged denial of special diet for inmate's ulcer was evidence of deliberate indifference).

115 Liscio v. Warren, 901 F.2d 274, 276 (2d Cir. 1990) (observing that failure to provide treatment for alcohol withdrawal could constitute deliberate indifference because of condition's high mortality rate: "Indeed, before modern alcohol withdrawal treatment, the mortality rate for delirium tremens was 10-20%."); United States ex rel. Walker v. Fayette County, 599 F.2d 573, 575-76 (3d Cir. 1979) (inmate stated claim by alleging that he suffered painful withdrawal symptoms for 10 days while his requests for treatment were denied); Thompson v. Upshur County, 245 F.3d 447, 457 (5th Cir. 2001) (delirium tremens is a serious medical need); Pedraza v. Meyer, 919 F.2d 317, 318-19 (5th Cir. 1990) (refusal to provide treatment for drug withdrawal for four days; "...the claim does not appear to be without basis in law or in fact and is certainly not 'beyond credulity.'"); Fielder v. Bosshard, 590 F.2d 105, 107-08 (5th Cir. 1979) (holding that "there was sufficient evidence in the record to support the jury's decision that Fielder was a victim of cruel and unusual punishment" when prison officials did not acknowledge symptoms of delirium tremens); Lancaster v. Monroe County, 116 F.3d 1419, 1425-26 (11th Cir. 1997) (acute alcohol withdrawal syndrome suffered by chronic alcoholic is serious medical need); Morrison v. Washington County, 700 F.2d 678, 686 (11th Cir. 1983) (holding that there could exist a relationship between delirium tremens and cardiac arrest suffered by inmate).

116 Norris v. Frame, 585 F.2d 1183, 1188-89 (3d Cir. 1978) (no constitutional right to methadone, but prison's refusal to continue inmate's methadone treatment triggered due process concerns); Fredericks v. Huggins, 711 F.2d 31, 33-34 (4th Cir. 1983) (holding that "absent

6. Pregnancy, Childbirth, and Abortion

Pregnancy and childbirth are complicated medical matters. A number of serious medical needs can arise when a female inmate is pregnant, ranging from prenatal care, to the need for an abortion, to the need for medical assistance during delivery.[117]

Prenatal care is treatment provided to a woman who is pregnant. Prenatal care should include regular visits to health care personnel trained in obstetrical care: monthly visits at the start of the pregnancy, weekly visits at the end, with all appropriate tests, examinations, and counseling. Because a woman typically needs to gain 25 to 40 pounds during her pregnancy, jails and prisons should provide pregnant inmates with extra food and vitamins (particularly iron and calcium).

If you think you might be pregnant, ask for a pregnancy test immediately. If you know you are pregnant, inform the responsible officials at your jail or prison. If you do not receive adequate prenatal care, consider seeking a preliminary injunction in court — you have an urgent medical need.

An inmate who is in *labor* (in the process of giving birth) obviously requires medical assistance. You should notify officials immediately if you experience signs of labor. Delivery should take place in a quiet, private area, and you should not be shackled. Very few jails and prisons allow inmates to keep their babies with them, but officials should help you to transfer guardianship of your baby to a loved one. You should also receive mental health counseling to deal with the emotional effects of your delivery.

A woman has a constitutional right to terminate her pregnancy in its early stages, by having an *abortion*. It is unconstitutional for officials to deny an inmate appropriate abortion services.[118] A woman's constitutional right to an abortion depends on whether her fetus is *viable* (able to live on its own). The government may not place undue burdens on the ability of a woman to obtain an abortion before the fetus becomes viable. After viability, the government may regulate or even prevent a woman from having an abortion, unless the procedure is necessary to preserve the woman's life or health.[119]

clear statutory or regulatory language to the contrary, an individual's "right" to detoxification is foregone once he is incarcerated in a penal institution that is unable to provide it."); Smith v. Schneckloth, 414 F.2d 680 (9th Cir. 1969).

117 Archer v. Dutcher, 733 F.2d 14, 16-17 (2d Cir. 1984) (no summary judgment where inmate alleged that spontaneous abortion and unnecessary pain were caused by intentional delay or denial of medical care over period of several days); Coleman v. Rahija, 114 F.3d 778, 784-85 (8th Cir. 1997) (holding that while pregnancy is generally not, by itself, a serious medical need, officials must respond to evidence of pre-term labor: vaginal discharge, contractions, and abdominal pain); Bowell v. Sherburne County, 849 F.2d 1117, 1121-22 (8th Cir. 1988) (no summary judgment where inmate lost baby allegedly as result of failure to obtain treatment for her in timely manner; several guards, jailer and sheriff knew that inmate was six months pregnant, had a problem pregnancy, and had problems with bleeding and cramping).

118 Monmouth County Correctional Inst. Inmates v. Lanzaro, 834 F.2d 326, 346-49 (3d Cir. 1987) (upholding preliminary injunction requiring county to make abortion medical services available to pregnant inmates choosing abortion; refusal to provide such care constitutes deliberate indifference in violation of Eighth Amendment).

119 Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 879, 112 S.Ct. 2791 (1992). *See* Bryant v. Maffuci, 923 F.2d 979 (2d Cir. 1991) (refusal to perform abortion on inmate after 24th week of pregnancy did not violate Constitution); Gibson v. Matthews, 926 F.2d 532, 536-37 (6th Cir. 1991) (refusal to perform abortion on inmate after 22nd week of pregnancy did not violate Constitution).

Abortion is a controversial subject, and officials at your jail or prison may be morally opposed to the procedure. If you want to learn more about your right to abortion and medical options, contact Planned Parenthood, a nonprofit organization.[120]

7. Dental Care

Jail and prison officials may not act with deliberate indifference to serious medical needs involving your teeth.[121] Although you have a right to such basic dental hygiene items as a toothbrush and toothpaste, you probably do not have a right to demand preventative dental care, such as teeth cleaning by a dental hygienist.[122] However, a tooth cavity that becomes diseased or very painful, or makes you unable to perform normal activities, is a serious medical need.[123] As one court explained: "Although a tooth cavity is not ordinarily deemed a serious medical condition, that is because the condition is readily treatable. Unless the cavity is treated, however, the tooth will degenerate, probably cause severe pain, and eventually require extraction and perhaps further extraordinary invasive treatment."[124] Inmates also have a right to be treated for teeth that are broken[125] or the loss of necessary dentures.[126]

8. Mental Health

Deliberate indifference to the serious mental health needs of inmates violates the Constitution.[127] In determining whether a mental health need is "serious" or not, courts apply the same standards discussed in § B.1, above.

120 Planned Parenthood's headquarters are located at 434 West 33rd St., New York, NY 10001.

121 Ramos v. Lamm, 639 F.2d 559, 576 (10th Cir. 1980) ("Prisoners generally have more extensive dental problems than the average citizen. Consequently dental care is one of the most important medical needs of inmates.").

122 Dean v. Coughlin, 623 F. Supp. 392, 404 (S.D.N.Y. 1985) ("[A] prisoner is entitled to treatment only for conditions that cause pain, discomfort, or threat to good health, not treatment to ward off such conditions. Although preventative dentistry would probably save the clinic time in the long run, the Constitution does not require wise dentistry, only dentistry which responds to inmates' pain and discomfort.").

123 Chance v. Armstrong, 143 F.3d 698, 703 (2d Cir. 1998) (as a result of officials' alleged failure to treat cavity, inmate "suffered extreme pain, his teeth deteriorated, and he has been unable to eat properly"); Moore v. Jackson, 123 F.3d 1082, 1086 (8th Cir. 1997) ("[I]t took from April 1994 until December 1994 for [inmate] to receive adequate treatment for a toothache. The tooth became infected and ultimately required extraction. Something appears wrong with the dental care system."); Boyd v. Knox, 47 F.3d 966, 969 (8th Cir. 1995) (officials failed to send referral for dental care for three weeks after observing inmate's swollen, infected, and painful mouth; "a three-week delay in dental care, coupled with knowledge of the inmate-patient's suffering, can support a finding of an Eighth Amendment violation...."); Patterson v. Pearson, 19 F.3d 439, 440 (8th Cir. 1994) (holding that one-month delay in treatment of infected tooth and swollen jaw could be a violation of prisoner's civil rights); Fields v. Gander, 734 F.2d 1313, 1314-15 (8th Cir. 1984) (inmate had "severe pain" due to infected tooth; dental care delayed for three weeks could support a finding of an Eighth Amendment violation).

124 Harrison v. Barkley, 219 F.3d 132, 136 (2d Cir. 2000). (holding that "the refusal to treat an inmate's tooth cavity unless the inmate consents to extraction of another diseased tooth constitutes a violation of the Eighth Amendment."). *See also* Fields, 734 F.2d at 1315 (delay of three weeks in treating infected tooth stated constitutional claim); Fambro v. Fulton County, 713 F. Supp. 1426, 1429 (N.D. Ga. 1989) (criticizing jail's delay of three weeks for acute dental needs and more than a month for less acute dental needs).

125 Matzker v. Herr, 748 F.2d 1142, 1148 (7th Cir. 1984) (inmate who was denied care for three broken teeth stated Eighth Amendment claim, in light of potential for infection from injury).

126 Wynn v. Southward, 251 F.3d 588, 593 (7th Cir. 2001) (denial of dentures, resulting in eating difficulty, bleeding, headaches, and disfigurement, was serious medical need); Hunt v. Dental Dep't, 865 F.2d 198, 201 (9th Cir. 1989) (claim stated where inmate alleged that loss of dentures caused severe pain, bleeding gums, and breaking teeth, yet officials took no action to provide pain relief or prescribe soft-food diet and delayed three months in obtaining replacement dentures).

127 Langley v. Coughlin, 888 F.2d 252, 254 (2d Cir. 1989) ("We think it plain that from the legal standpoint psychiatric or mental health care is an integral part of medical care."); Wellman v. Faulkner, 715 F.2d 269, 272-73 (7th Cir. 1983) ("Treatment of the mental disorders of mentally disturbed inmates is a 'serious medical need.'").

Mental health conditions can be very complex. Many require treatment by a psychologist or psychiatrist, doctors who specialize in treating the mentally ill. A number of issues frequently arise in mental health cases:

Suicide and *self-mutilation* are serious medical problems. Jail and prison officials must respond reasonably when they learn of a substantial risk that an inmate will attempt to kill himself.[128] However, while an inmate's violent, strange or bizarre behavior is not enough to trigger an official's duty to act,[129] reports of "suicidal tendencies," past suicide attempts, or suicide threats may be.[130] Once an official learns of a suicide risk, she must take reasonable measures to prevent the suicide from occurring.[131] These principles also apply to inmates who attempt to hurt or mutilate their bodies.[132]

People who are *transsexual* believe that they are "cruelly imprisoned within a body incompatible with their real gender identity."[133] Courts have held that jails and prisons do not have to provide hormone therapy or surgery to transsexual inmates.[134] While transsexual inmates do not have an automatic right to psychotherapy either,[135] an inmate is entitled to mental health treatment if the factors in her case demonstrate a substantial risk of serious harm.[136] Transsexual

128 Estate of Cole v. Fromm, 94 F.3d 254, 259 (7th Cir. 1996) (prison officials "may be liable for [an inmate's] suicide if they were deliberately indifferent to a substantial suicide risk"); Gregoire v. Class, 236 F.3d 413, 417 (8th Cir. 2000) (well established "that a risk of suicide by an inmate is a serious medical need").

129 Estate of Novack v. County of Wood, 226 F.3d 525, 530 (7th Cir. 2000); Collignon v. Milwaukee County, 163 F.3d 982, 990 (7th Cir. 1998) ("Of course a medical professional need not be certain that an individual is about to commit suicide before a constitutional obligation to act is triggered, but the obligation to take some action is not triggered absent a 'substantial risk' of suicide.").

130 Sanville v. McCaughtry, 266 F.3d 724, 737-38 (7th Cir. 2001) (if inmate told guards he was suicidal, "that alone should have been enough to 'impute awareness of a substantial risk of serious harm'"); Hall v. Ryan, 957 F.2d 402, 403 (7th Cir. 1992) (detainee was excited and belligerent, urinated on floor and swore, and officials knew that he had attempted suicide several times in past); Dolihite v. Maughon, 74 F.3d 1027, 1042-43 (11th Cir. 1996) (if social worker who knew of inmate's suicide threats and mental illness also knew about his recent self-injurious behavior, her decision to take him off close observation would have been deliberately indifferent); Greason v. Kemp, 891 F.2d 829, 831-32, 835 (11th Cir. 1990) (inmate had contemplated suicide, continued to have suicidal tendencies, and was taking antidepressants).

131 Jacobs v. West Feliciana Sheriff's Dep't, 228 F.3d 388, 395-96 (5th Cir. 2000) (sheriff and senior deputy failed to respond reasonably by placing clearly suicidal detainee in cell with tie-off points, blanket, towel, and blind spot); Sanville v. McCaughtry, 266 F.3d at 739 (failure to check a suicidal inmate for five hours "could easily be considered egregious enough to rise to the level of deliberate indifference"); Greason v. Kemp, 891 F.2d at 837-39 (jury could conclude that prison doctor acted with deliberate indifference by failing to ensure that competent officials took steps to protect suicidal inmate). *But see* Williams v. Mehra, 186 F.3d 685, 692 (6th Cir. 1999) (*en banc*) (no evidence that prison doctors acted with deliberate indifference in giving inmate his antidepressant medicine in pill form, rather than liquid form to prevent hoarding). Section C of Chapter 7 explained that officials may restrain inmates when necessary to prevent the inmate from hurting himself or others. One court has observed that an inmate's right to be free from restraint ends at the point at which there is a substantial risk that he will seriously injure or kill himself. Estate of Cole, 94 F.3d at 262. In such circumstances, however, restraints can be applied only under a doctor's close supervision. *See* Burks v. Teasdale, 492 F. Supp. 650, 679 (W.D. Mo. 1980) ("Insofar as the use of seclusion and/or restraints for mentally disturbed inmates can only be used for medical purposes without running afoul of due process guarantees, this Court holds that custody personnel [guards] are unqualified to make such determinations on a non-emergency basis.").

132 Sibley v. Lemaire, 184 F.3d 481, 489-90 (5th Cir. 1999) ("Although [inmate's] actions seem to have become increasingly erratic, nothing he did so clearly indicated an intent to harm himself that the deputies caring for him could have only concluded that he posed a serious risk of harm to himself.").

133 Farmer v. Moritsugu, 163 F.3d 610, 611 (D.C. Cir. 1998). This condition, also called gender dysphoria, "is commonly accompanied by a desire to change one's anatomic sexual features to conform physically with one's perception of self. To relieve this gender discomfort, transsexuals may pursue some combination of hormone therapy, surgery, and psychological counseling. They may also choose to live in their preferred gender role by dressing, naming, and conducting themselves in conformity with that gender." *Id. See also* Maggert v. Hanks, 131 F.3d 670, 671 (7th Cir. 1997) (describing gender dysphoria as "a profound psychiatric disorder").

134 Farmer v. Mortisugu, 163 F.3d at 615; Maggert v. Hanks, 131 F.3d at 671-72; White v. Farrier, 849 F.2d 322, 327-28 (8th Cir. 1988); Brown v. Zavaras, 63 F.3d 967, 970 (10th Cir. 1995).

135 Farmer v. Mortisugu, 163 F.3d at 615 ("[M]erely because someone is a transsexual, it does not inexorably follow that he or she needs psychotherapy.").

136 Brown v. Zavaras, 63 F.3d at 970 (prison officials must provide treatment to address needs of transsexual inmate, but law does not

inmates have a right to be protected from assault and harassment by other inmates.[137]

Some inmates are *civilly committed*: even though they have completed their criminal sentence (or were never convicted in the first place), these inmates remain confined because the government believes that, as the result of a medical condition, they present a continuing danger to society.[138] The Due Process Clause of the Fourteenth Amendment requires states to provide civilly committed persons with access to mental health treatment that gives them a realistic opportunity to be cured and released.[139] Because the purpose of this confinement is not punitive, the government must also provide civilly committed persons with "more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish."[140]

9. Administration of Medication Without Your Consent

Under the Due Process Clause, you have a "right to bodily integrity:" a general right not to have government officials interfere with your body without good reason.[141] Officials may not force you to take a drug that is not medically appropriate (*e.g.*, use you to test an experimental drug without your consent).[142] The Supreme Court has held, however, that a prison may forcibly treat a seriously mentally ill inmate with antipsychotic drugs "if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest."[143] The Fifth Circuit has held that the forcible treatment of inmates who previously tested positive for tuberculosis does not violate the Due Process Clause.[144]

D. SYSTEMIC PROBLEMS

So far this chapter has focused on the ways in which individual officials can be deliberately indifferent to the serious medical needs of inmates. Most inmate medical care lawsuits involve claims of wrongdoing by low-level (or "line") officials: guards, doctors, and nurses failing to provide care, delaying care,

require them to provide any particular treatment).

137 As one court explained, an inmate with gender dysphoria "is entitled to be protected, by assignment to protective custody or otherwise, from harassment by prisoners who wish to use him as a sexual plaything, provided that the danger is both acute and known to the authorities." Maggert v. Hanks, 131 F.3d at 672. *See also* Farmer v. Brennan, 511 U.S. 825, 114 S.Ct. 1970 (1994) (failure-to-protect claim brought by transsexual inmate); Powell v. Schriver, 175 F.3d 107, 113 (2nd Cir. 1999) ("It is harder to think of circumstances in which the disclosure of an inmate's transsexualism... serves legitimate penological interests, especially given that, in the sexually charged atmosphere of most prison settings, such disclosure might lead to inmate-on-inmate violence.").

138 The Supreme Court upheld the constitutionality of civil commitment for sexually violent offenders in Kansas v. Hendricks, 521 U.S. 346, 367-69, 117 S.Ct. 2072 (1997).

139 Sharp v. Weston, 233 F.3d 1166, 1172 (9th Cir. 2000).

140 Youngberg v. Romeo, 457 U.S. 307, 322 102 S.Ct. 2452 (1982).

141 Albright v. Oliver, 510 U.S. 266, 272, 114 S.Ct. 807 (1994).

142 Johnson v. Meltzer, 134 F.3d 1393, 1397-98 (9th Cir. 1998) (reversing summary judgment for officials who administered experimental drug to unconscious inmate, allegedly for research purposes).

143 Washington v. Harper, 494 U.S. 210, 227, 110 S.Ct. 1028 (1990). *But see* Riggins v. Nevada, 504 U.S. 127, 135, 112 S.Ct. 1810 (1992) (forced administration of antipsychotic medication to criminal defendant during trial violated Due Process Clause where state failed to show an "overriding justification and a determination of medical appropriateness").

144 McCormick v. Stalder, 105 F.3d 1059, 1062 (5th Cir. 1997).

providing grossly inadequate care, or interfering with prescribed treatment.

Low-level officials, however, are not the only ones responsible for protecting your right to medical care. Supervising officials (e.g., lieutenants, wardens, sheriffs, chief jailers, head doctors) and municipal governments (*e.g.*, towns, cities, counties) may also be held liable in civil rights lawsuits. Supervisory liability is discussed in § A.3.c of Chapter 13, and municipal liability is discussed in § A.3.d of Chapter 13. As a general rule, you can win relief against a supervisor or a municipality if you prove that it established or tolerated a deliberately indifferent *policy* or *custom* that resulted in the violation of your constitutional rights.

There are particular *systemic problems* in jails and prisons that cause inmates to receive inadequate medical care. While there is not enough space in this manual to discuss each kind of systemic problem in detail, you should think carefully about the following issues if you decide to file a medical care lawsuit:

Staffing is frequently an issue in medical care cases. Jail and prisons must provide an adequate number of staff to receive inmates' medical requests, transport inmates to medical personnel, examine and treat inmates, provide treatment as prescribed, and handle medical emergencies. Each staff member must be adequately trained and qualified to perform his assigned tasks. The Constitution does not allow guards to make medical decisions, or general practitioners to handle matters that require the attention of a specialist.

New inmates at a jail or prison should undergo *medical screening*. The purpose of screening is to identify inmates with both immediate and long-term medical needs. It is particularly important to identify inmates who have infectious diseases such as tuberculosis or hepatitis. Also, many new inmates, particularly those who have just been arrested, are recovering from wounds or other injuries, experiencing drug or alcohol withdrawal, or are taking a prescribed medical regimen for chronic conditions such as HIV. Officials must find this information out, obtain important medical records, and respond appropriately.

Once admitted to a jail or prison, inmates must be able to *communicate* their medical concerns and requests to qualified medical personnel. There must be a regular and reliable *sick call* procedure for inmates in both general population and segregation. It is unconstitutional for guards and other untrained staff to decide which inmates get to see a doctor and which do not.

Each jail or prison must have adequate *facilities* for medical examinations and treatment. Similarly, it must have an organized system of *medical records*. Each inmate should have a medical file that includes screening forms, sick call requests, examination notes, treatment records, and other important medical documents.

Finally, given the high rates of infectious diseases in jails and prisons, each jail

or prison should have a *disease control policy*.[145] Such a policy should provide for the effective and continuous treatment of inmates with infectious diseases, the identification and isolation of inmates with active tuberculosis, and measures to prevent the spread of other infectious diseases, including appropriate educational programs for both inmates and officials.

145 *See* Butler v. Fletcher, 465 F.3d 340, 342 (8th Cir. 2006) (holding that in a prison setting, an inmate diagnosed with active TB should be segregated from the general population for treatment until the inmate is no longer infectious); Helling v. McKinney, 509 U.S. 25, 33, 113 S.Ct. 2475 (1993) (holding that the Eighth Amendment requires a remedy for placement of inmates in punitive isolation under conditions where infectious diseases could spread easily).

CHAPTER 10

Conditions of Confinement

Many inmates complain about their *conditions of confinement*. Jails and prisons can be awful places to live: dirty, overcrowded, unsafe, and understaffed. Such inhumane conditions should not exist in modern America. On the other hand, as politicians and judges love to say, jails and prisons are not meant to be "Holiday Inns."[1] Under the Constitution, conditions may be "restrictive and even harsh"; they do not have to be "comfortable."[2]

As this chapter will explain, the Constitution prohibits only conditions that deprive inmates of "basic human needs." The previous two chapters of this manual discussed two specific kinds of conditions issues: (1) safety from assault by other inmates, and (2) medical care. This chapter examines conditions of confinement more generally in terms of what the Constitution requires with respect to the physical place in which you live.

This chapter will begin by discussing the constitutional basis for the right to humane conditions of confinement for pretrial detainees and convicted inmates. It will then discuss the four required elements of a conditions claim. As you will see, these elements are similar to the elements of failure-to-protect and medical care claims:

1. Deprivation of a basic human need
2. Official's knowledge of the deprivation
3. Official's failure to respond reasonably
4. Causation and injury

The chapter will conclude by listing basic human needs that are protected by the Constitution, with citations to cases that explain the law in more detail.

First, a word of caution: It is difficult for unrepresented inmates to bring claims challenging unconstitutional conditions in jails and prisons. Conditions claims that seek *injunctive relief* (future changes) are often brought as *class actions*: lawsuits filed on behalf of groups of inmates. Courts seldom agree to certify a case as a class action unless a lawyer is available to represent all of the inmates' interests fairly. Conditions cases often require the help of an *expert witness* (a

1 As one court has observed: "Prisons, of course, are not Hilton hotels. And disciplinary segregation units within prisons are not like rooms at a Motel 6. But even nasty prisoners cannot be knowingly housed in ghastly conditions reminiscent of the Black Hole of Calcutta." Isby v. Clark, 100 F.3d 502, 505 (7th Cir. 1996).

2 Rhodes v. Chapman, 452 U.S. 337, 347-49, 101 S.Ct. 2392 (1981); Farmer v. Brennan, 511 U.S. 825, 832, 114 S.Ct. 1970 (1994).

person who has experience running jails or prisons and can testify about the failures of the officials running your facility), whom only a lawyer can effectively hire and work with. These cases also often involve complicated discovery tasks and settlement negotiations. Furthermore, the 1996 Prison Litigation Reform Act has made it more difficult for inmates to win relief in conditions cases. For all of these reasons, you should try to get the help of a lawyer before you file a conditions lawsuit on your own.

A. THE CONSTITUTIONAL RIGHT TO HUMANE CONDITIONS

The U.S. Supreme Court has dealt with inmates' conditions of confinement in a number of cases. These cases establish that for convicted inmates, the Cruel and Unusual Punishments Clause of the Eighth Amendment imposes a duty on prison officials to provide "humane conditions of confinement;" officials must "ensure that inmates receive adequate food, clothing, shelter and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.'"[3]

For pretrial detainees, the Due Process Clause (of the Fourteenth Amendment for local and state detainees, of the Fifth Amendment for federal detainees) provides at least as much protection as the Eighth Amendment.[4] This means that if you, as a pretrial detainee, can prove what it takes to win an Eighth Amendment conditions claim — *i.e.*, that officials have been deliberately indifferent to a substantial risk of serious harm, you should be able to win a conditions claim under the Due Process Clause.[5]

Therefore, pretrial detainees have the right to be treated at least as well as convicted inmates. In a 1979 case, *Bell v. Wolfish*, the Supreme Court held that while officials at jails or detention facilities may impose restrictions that are "reasonably related to a legitimate government objective," they may not impose conditions that amount to "punishment."[6] A few courts still apply the "punishment" test in conditions lawsuits filed by pretrial detainees.[7] This test, however, is difficult to apply. Most courts no longer apply *Bell v Wolfish*. Instead, courts require all inmates, convicted or not, to prove officials' deliberate indifference to a substantial risk of serious harm.[8]

3 Farmer v. Brennan, 511 U.S. at 832 (quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27, 104 S.Ct. 3194 (1984)).
4 City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244, 103 S.Ct. 2979 (1983).
5 *See* County of Sacramento v. Lewis, 523 U.S. 833, 849-50, 118 S.Ct. 1708 (1998).
6 Bell v. Wolfish, 441 U.S. 520, 538-39, 99 S.Ct. 1861 (1979). The Court reasoned that because pretrial detainees have not yet been convicted of the crime with which they are charged, they have a due process right not to be punished for that crime. *Id*. at 535 n.16.
7 *See* Fuentes v. Wagner, 206 F.3d 335, 341-42 (3rd Cir. 2000); Ferguson v. Cape Girardeau County, 88 F.3d 647, 650 (8th Cir. 1996); Wilson v. Blankenship, 163 F.3d 1284, 1291-92 (11th Cir. 1998).
8 *See, e.g.,* Brown v. Budz, 398 F.3d 904, 910 (7th Cir. 2005) (citing *Henderson v. Sheahan*, 196 F.3d 839, 844 n.2 (7th Cir. 1999) ("Whether Henderson's present injury claim is analyzed under the Eighth or Fourteenth Amendment ultimately makes no practical difference ... because we already have held that [civil rights] claims brought under the Fourteenth Amendment are to be analyzed under the Eighth Amendment test.")); Craig v. Eberly, 164 F.3d 490, 495 (10th Cir. 1998) ("Although the Due Process Clause governs a pretrial detainee's claim of unconstitutional conditions of confinement, the Eighth Amendment standard provides the benchmark for such claims.").

B. ELEMENTS OF A CONDITIONS CLAIM

1. Deprivation of a Basic Human Need

When you think about conditions of confinement, focus on the *effect* that a condition has on your health and safety, not the condition itself. The Constitution does not require officials to manage jails and prisons in any particular way. You cannot file a lawsuit, for example, complaining in the abstract about your facility's poor classification or medical care system. You can challenge such problems only if they have the effect of posing a *substantial risk of serious harm* to your health or safety.[9]

The "serious harm" in conditions cases is a *deprivation* (denial) *of a basic human need*. Protection from assault and medical care are two basic human needs. Other basic human needs include shelter, exercise, food, clothing, and sanitation.[10] Section C, below, discusses these and other basic human needs in detail.

The deprivation of a basic human need can result from a number of different conditions, even if none of those conditions would violate the Constitution on its own. For example, the Supreme Court has observed that a low cell temperature and failure to issue blankets can have a "mutually enforcing effect" of depriving inmates of necessary warmth.[11] As you read the cases cited in §C, you will see that many involve multiple conditions that combine to make life at a jail or prison unhealthy or dangerous.[12]

To win a conditions claim, you must show that the deprivation to which you have been exposed is "sufficiently serious."[13] The deprivation should be "extreme,"[14] something that would cause an outside observer to react with surprise or horror. "Routine discomfort" is not enough since it is considered "part of the penalty

9 For example, there is no constitutional "right to a prison hospital"; prison officials are free to use a different kind of medical care delivery system, so long as it provides adequate treatment to inmates with serious medical needs. *See* Lewis v. Casey, 518 U.S. 343, 350, 116 S.Ct. 2174 (1996). A healthy inmate who is not in danger of suffering a "deprivation of needed medical treatment" may not file a medical-care lawsuit "simply on the ground that the prison medical facilities were inadequate." *Id*.

10 Farmer v. Brennan, 511 U.S. at 832; Wilson v. Seiter, 501 U.S. 294, 304, 111 S.Ct. 2321 (1991); Helling v. McKinney, 509 U.S. 25, 32, 113 S.Ct. 2475 (1993); *see also* Rhodes v. Chapman, 452 U.S. at 347 (stating that Eighth Amendment prohibits conditions that "deprive inmates of the minimal civilized measure of life's necessities"); Johnson v. Lewis, 217 F.3d 726, 731 (9th Cir. 2000).

11 Wilson v. Seiter, 501 U.S. at 304. *See also* McCray v. Burrell, 516 F.2d 357, 365-68 (4th Cir. 1975) (finding Eighth Amendment violation where inmate was held in solitary confinement for 46 hours in a cold cell with no clothing or blankets, no running water or personal hygiene items, and an excrement-crusted hole in the floor for a toilet); Palmer v. Johnson, 193 F.3d 346, 353 (5th Cir. 1999) ("We find that the totality of the specific circumstances presented by Palmer's claim — his overnight outdoor confinement with no shelter, jacket, blanket, or source of heat as the temperature dropped and the wind blew along with the total lack of bathroom facilities for forty-nine inmates sharing a small bounded area — constituted a denial of 'the minimal civilized measure of life's necessities.'"); Dixon v. Godinez, 114 F.3d 640, 643 (7th Cir. 1997) (observing that "most successful Eighth Amendment claims often involve allegations of cold in conjunction with other serious problems.").

12 You may not, however, simply claim that the "overall" or "totality of conditions" at your facility violate the Constitution. You must always be able to connect the problems at your facility, whether alone or in combination, to the deprivation of at least one basic human need. Wilson v. Seiter, 501 U.S. at 305 ("Nothing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists."). *See, e.g.*, Lunsford v. Bennett, 17 F.3d 1574, 1580-81 (7th Cir. 1994) ("Perhaps realizing that their individual complaints about food, noise, and hygiene do not implicate the Eighth Amendment, they assert that we must view this case in the totality rather than as separate claims... . Here the cumulative effect of plaintiffs' complaints do not add up to the deprivation of a single human need.").

13 Farmer v. Brennan, 511 U.S. at 834. This is sometimes referred to as the "objective" component of a Eighth Amendment conditions claim. Deliberate indifference is the "subjective" component.

14 Hudson v. McMillian, 503 U.S. 1, 9, 112 S.Ct. 995 (1992); Rhodes, 452 U.S. at 347.

that criminal offenders pay for their offenses against society."[15] In fact, as a matter of strategy, you should avoid using the words "discomfort" or "uncomfortable" in any grievance or court document you file. Instead, you should explain that particular conditions endanger your health or safety.

In assessing the seriousness of a deprivation, a court will consider its *duration*: how long the deprivation has lasted.[16] Courts often conclude that conditions that might otherwise violate the Constitution are acceptable because they lasted for only a short period of time. As the Supreme Court has explained, "A filthy, overcrowded cell and a diet of 'gruel' might be tolerable for a few days and intolerably cruel for weeks or months."[17] However, a very serious deprivation of a basic human need may violate the Constitution even if it does not last long.[18] Conversely, a condition that might not normally violate the Constitution may do so if it persists over a long period of time.[19]

No bright line separates constitutional from unconstitutional conditions. Different courts often reach different results when deciding these questions. Section C of this chapter explains how courts have ruled on a number of conditions issues. Reading the cited cases will give you a better feel for where the law stands on a particular issue. In the end, your best chance of getting relief will be to persuade the court that conditions at your jail or prison have brought unnecessary danger, sickness, and misery to the human beings who live there.

2. Official's Knowledge of Deprivation

Like failure-to-protect and medical-care claims, inmates who file a lawsuit challenging their conditions of confinement must show that the defendants acted with deliberate indifference. As this manual has already explained, deliberate indifference involves two requirements: first, an official must *actually know* about a substantial risk of serious harm; and second, that official must *fail to respond reasonably*.

15 Rhodes v. Chapman, 452 U.S. at 347.

16 Tesch v. County of Green Lake, 157 F.3d 465, 476 (7th Cir. 1998); Craig v. Eberly, 164 F.3d at 495-96.

17 Hutto v. Finney, 437 U.S. 678, 686-87, 98 S.Ct. 2565 (1978). *See also* Davis v. Scott, 157 F.3d 1003, 1006 (5th Cir. 1998) (three-day confinement in "crisis management cell" with blood on walls and excrement on floor was not sufficiently "extreme" deprivation); Green v. Ferrell, 801 F.2d 765, 770-71 (5th Cir. 1986) (finding that provision of only two nutritionally adequate meals daily does not violate the Eighth Amendment); Tesch v. County of Green Lake, 157 F.3d at 476 (7th Cir. 1998) (failure by jail officials for 40 hours to help wheelchair-bound inmate put on pants, get drinking water, and get into bed did not violate Constitution); Antonelli v. Sheahan, 81 F.3d 1422, 1430 (7th Cir. 1996) (sleeping on floor without mattress for one night was not impermissible punishment of detainees); Whitnack v. Douglas County, 16 F.3d 954, 958 (8th Cir. 1994) (cell containing excrement and vomit did not violate Constitution because conditions lasted only for 24 hours); White v. Nix, 7 F.3d 120, 121 (8th Cir. 1993) (11-day stay in unsanitary cell not unconstitutional because of shortness of duration and availability of cleaning supplies); Craig v. Eberly, 164 F.3d at 496 ("The difference between enduring certain harsh conditions for seven weeks versus six months may be constitutionally significant."). The Ninth Circuit has held that relatively "modest" deprivations of basic human needs can violate the Constitution only if such deprivations are lengthy or ongoing; however, deprivations of "shelter, food, drinking water, and sanitation," can violate the Constitution even if they last for only a short period of time. Johnson v. Lewis, 217 F.3d 726, 732 (9th Cir. 2000). *See* Hoptowit v. Ray, 682 F.2d 1237, 1259 (9th Cir. 1982) ("The more basic the particular need, the shorter the time it can be withheld.").

18 *See, e.g.*, Gordon v. Faber, 973 F.2d 686, 687-88 (8th Cir. 1992) (official violated Eighth Amendment by keeping inmates outdoors in bitterly cold weather without hats and gloves for one to two hours).

19 Dixon v. Godinez, 114 F.3d at 643 (citing *Antonelli v. Sheahan*, 81 F.3d at 1433).

The first requirement, that an official must have *actual knowledge* will be considered first. It may be a little easier to prove officials' knowledge in conditions cases than in failure-to-protect or medical-care cases. An official may not know about a specific risk of assault that you face, or a serious medical need, unless you tell him about it. However, if your jail or prison is too cold, or infested by rats, or very overcrowded, the officials who work there every day probably know about the problem. As this manual explained in Chapter 4, a judge or jury may conclude, but does not necessarily have to conclude, that an official actually knew about a substantial risk of serious harm from the very fact that the risk was obvious.[20]

Nevertheless, you will *always* be better off if you bring inhumane conditions to the attention of the officials who are responsible for them. After all, even if you believe that a problem at your facility is obvious, an official may still deny that he actually knew about it, or that he knew that the problem endangered your health and safety, and the judge or jury may believe him. Furthermore, even if the guards who work at your facility know about a particular problem, the higher-level officials who have the power to fix the problem (*e.g.*, wardens, sheriffs) may not. Remember that you have to prove the deliberate indifference of *each* official you sue.

For all of these reasons, it is important to report inhumane conditions to responsible officials by filing request forms, grievances, and appeals, writing letters, and telling the officials in person. Make sure that you describe the inhumane conditions in detail: what they are, how long they have lasted, and how they affect you and other inmates. If you believe that a particular condition may harm you or other inmates in the future, explain why you believe you are at risk. If you know how the problem can be fixed, suggest that remedy in your form, grievance, or letter. Taking such steps is the best way to make sure that the officials who run your jail or prison know about inhumane conditions of confinement there, so that you can (1) get relief right away, and (2) prove the officials' deliberate indifference if you have to file a lawsuit.[21]

There are several additional ways to prove an official's knowledge of a substantial risk of serious harm. Other inmates may have filed grievances and appeals about the same problem in the past. Earlier lawsuits may have been filed.[22] Officials

20 Farmer v. Brennan, 511 U.S. at 842. *See also* Wilson v. Seiter, 501 U.S. at 300-01 ("The long duration of a cruel prison condition may make it easier to establish knowledge and hence some form of intent… .").

21 *See, e.g.*, Bradley v. Puckett, 157 F.3d 1022, 1026 (5th Cir. 1998) (inmate "provided documentation regarding the numerous complaints" he made about unhygienic conditions); Brown v. Bargery, 207 F.3d 863, 865-68 (6th Cir. 2000) ("[W]e must assume — based on Brown's allegations concerning his repeated attempts to notify prison officials about the conditions in this cell — that the warden knew about and deliberately disregarded the risk to Brown's health and safety."); Frost v. Agnos, 152 F.3d 1124, 1129 (9th Cir. 1998) ("[A]lthough [inmate] submitted several grievance forms to advise jail officials of the risk he faced, and although a prison doctor stated that he should be placed in the handicapped unit, prison officials declined to accommodate him."); Perkins v. Kansas Dep't of Corrections, 165 F.3d 803, 810 (10th Cir. 1999) (inmate's grievances put officials on notice of continuing denial of outdoor exercise). *Contrast* Tesch v. County of Green Lake, 157 F.3d at 476 (no deliberate indifference where inmate with limited access to toilet and sink and no access to shower "did not raise these problems to the attention of his jailers").

22 Officials are responsible for information that they learn during a lawsuit. *See* Farmer v. Brennan, 511 U.S. at 846 n.9 ("If… the evidence before a district court establishes that an inmate faces an objectively intolerable risk of serious injury, the defendants could not plausibly

may have observed problems on their own and recorded their observations in internal records, reports, or correspondence, or in the minutes (meeting notes) of local government bodies.[23] There may be stories in the local newspaper about your facility, sometimes with quotes by officials acknowledging the problems you are challenging. Furthermore, in some states grand juries are required to inspect jails once or twice each year. Various government agencies — *e.g.*, fire marshals, health departments, correctional departments — may also conduct regular inspections of jails and prisons. These groups and agencies often issue public reports on their findings.[24]

All of these documents can help to show an official's knowledge of a particular condition at your jail or prison. Some of these documents are public records and can be obtained simply by asking. Others you can get during discovery. You will present a better case in court if you are able to present more evidence showing an official's awareness of inhumane conditions at your jail or prison.

3. Failure to Respond Reasonably

At well-run jails and prisons, officials review the grievances and request forms that inmates file, investigate the inmates' grievances, and take all necessary measures to respond to grievances that are well-founded. Officials who make good-faith efforts to fix inhumane conditions are not deliberately indifferent.[25] Officials who ignore inhumane conditions are generally considered deliberately indifferent.[26] As one court explained, "once prison officials become aware of a problem with prison conditions, they cannot simply ignore the problem, but should take corrective action when warranted."[27] Also, officials may not deny an inmate his right to humane conditions by forcing him to choose between humane conditions and another constitutional right.[28]

persist in claiming lack of awareness...."); Harris v. Angelina County, 31 F.3d 331, 335 (5th Cir. 1994) ("evidence brought to the attention of the County through this ongoing litigation itself" helped to establish officials' deliberate indifference); Delaney v. DeTella, 256 F.3d 679, 685-86 (7th Cir. 2001) (risk of harm caused by denial of exercise was acknowledged by state medical director in earlier lawsuit); Coleman v. Wilson, 912 F. Supp. 1282, 1317 (E.D. Cal. 1995) ("After vigorously litigating these issues for almost five years, defendants cannot plausibly claim that they lack knowledge of the gross deficiencies in the delivery of mental health care to class members.").

23 Bradley v. Puckett, 157 F.3d at 1026 (prison records revealed that inmate was not provided with regular bathing schedule for two months); Harris v. Angelina County, 31 F.3d at 335 (various incident reports helped to establish officials' deliberate indifference).

24 Harris v. Angelina County, 31 F.3d at 335 (reports of Texas Commission on Jail Standards to county officials helped to establish their deliberate indifference).

25 Scott v. District of Columbia, 139 F.3d 940, 944 (D.C. Cir. 1998) (no deliberate indifference found where "[s]teps were taken to improve ventilation in problem areas about which the prisoners complained. Grievances and requests from inmates and prison physicians regarding exposure to tobacco smoke were answered and acted upon.").

26 Dixon v. Godinez, 114 F.3d at 644 (deliberate indifference established where inmate "told defendants about the extreme cold, as did other prisoners in the same unit, and defendants responded variously by ignoring him, suggesting he file a lawsuit, and telling him there were no extra blankets or space heaters"); Weaver v. Clarke, 45 F.3d 1253, 1256 (8th Cir. 1995) ("[T]he complaint portrays the prison officials as consistently unwilling to enforce the smoking ban in Weaver's room and repeatedly unresponsive to any of Weaver's requests and protests."). *See also* Jones v. City & County of San Francisco, 976 F. Supp. 896, 908 (N.D. Cal. 1997) ("[T]he continued presence of serious inadequacies suggests that defendants' response has been something less than reasonable. The Court does not intend to minimize defendants' efforts, but by failing to install door assemblies or additional sprinklers, defendants have continued to abdicate their constitutional responsibility to provide plaintiffs with reasonable safety from fire."); Coleman v. Wilson, 912 F. Supp. 1282, 1319 (E.D. Cal. 1995) ("[P]atently ineffective gestures purportedly directed towards remedying objectively unconstitutional conditions do not prove a lack of deliberate indifference, they demonstrate it.").

27 Williams v. Griffin, 952 F.2d 820, 826 (4th Cir. 1991).

28 Jolly v. Coughlin, 76 F.3d 468, 481 (2d Cir. 1996) ("[T]he defendants placed the plaintiff in the position of choosing to follow his religious beliefs or to improve his conditions of confinement; that choice is not meaningful, much less constitutional."); Allen v. City &

It is no defense for officials to argue that providing humane conditions is inconvenient or difficult to do.[29] Your case will be stronger, however, if you can point to specific measures that officials could have taken, but refused to take, to fix a particular problem.[30]

A lengthy delay in responding to a problem may itself amount to deliberate indifference, even if the problem is ultimately corrected.[31] On the other hand, except in clear emergencies, courts do not expect officials to respond immediately to every request inmates make.[32]

4. Causation and Injury

The final element of a conditions claim relates to a basic requirement of all civil rights lawsuits. In §1983 and *Bivens* lawsuits, you must show that the violation of your rights has caused your injury, or is likely to cause you an injury. This general *causation* requirement is discussed in § B.4 of Chapter 8 and § B.4 of Chapter 9.

You cannot complain about conditions in the abstract. Instead, you must show causation by showing a link between the condition that you are complaining about and an injury that you have suffered or are likely to suffer in the future. The link between condition and injury is often obvious. For example, unsanitary conditions cause general misery and the spread of disease, cold temperatures make inmates sick, and unsafe working conditions lead to accidents.

Carefully examine how the conditions affect you. Some causes may not always be obvious. For example, excessive dust and lint particles in the air may injure an inmate with asthma, but jail and prison officials may not know about this medical condition unless the inmate tells them. It is not always easy for judges and juries to imagine what life is like for inmates, so you need to explain to them how particular conditions affect the way you live.

If conditions at your jail or prison pose a substantial risk of serious harm to your health or safety, you can file a lawsuit asking for *injunctive relief*: an order

County of Honolulu, 39 F.3d 936, 939-40 (9th Cir. 1994) ("An inmate should not have to forego outdoor recreation to which he would otherwise be entitled simply because he exercises his clearly established constitutional right of access to the courts... . [A]n inmate cannot be forced to sacrifice one constitutionally protected right solely because another is respected.").

29 Harris v. Angelina County, 31 F.3d at 335-36 (practical difficulties involved in remedying overcrowding did not establish as matter of law that officials were not deliberately indifferent, where other alternatives of addressing problem existed); Allen v. Sakai, 48 F.3d 1082, 1088 (9th Cir. 1995) ("[W]e cannot accept the defendants' vague reference to logistical problems as necessarily justifying, as a matter of law at the summary judgment stage, the deprivation that took place here. A rational factfinder after hearing the evidence might determine that the defendants acted with at least deliberate indifference to Smith's basic human needs... by placing inconsequential logistical concerns above Smith's need for exercise.").

30 *See* Frost v. Agnos, 152 F.3d at 1129 (disabled inmate contended that officials could have given him a chair, handicapped bar, or assistance so that he could take a shower; "The fact that such basic steps could have guaranteed [the inmate's] safety provides evidence that Defendants were deliberately indifferent in failing to provide any accommodations whatsoever.").

31 Bradley v. Puckett, 157 F.3d at 1026 (deliberate indifference shown where prison officials did not respond to inmate's request for bathing schedule for at least one month). *See also* Jensen v. Clarke, 94 F.3d 1191, 1200 (8th Cir. 1996) (affirming injunction when, after district court announced its finding of a constitutional violation, prison officials chose to take premature appeal "[r]ather than immediately remedying that violation").

32 Tesch v. County of Green Lake, 157 F.3d at 476 ("[I]t is not unreasonable for a pretrial detainee to expect to experience a short-term imposition on a basic human necessity.").

requiring officials to make improvements. Injunctive relief is discussed in § A.4.b of Chapter 13.

If you have already suffered an injury as a result of an unconstitutional condition, you can sue for *money damages*. Damages are discussed in § A.4.a of Chapter 13. Keep two things in mind when you think about damages. First, you must show that the officials whom you are suing were deliberately indifferent *before* your injury occurred. Second, under the "physical injury" requirement of the Prison Litigation Reform Act (PLRA),[33] you must show that the condition harmed you physically. Mental or emotional injury, without an additional physical injury, is not enough. The PLRA's "physical injury" requirement is discussed in § A.4.a.iii of Chapter 13.

C. BASIC HUMAN NEEDS

1. Sanitation and Hygiene

A severe or prolonged lack of sanitation can violate the Constitution.[34] Inmates have a right to a basic level of sanitation where they live[35] and work.[36] This does not mean that inmates are entitled to the kind of cleanliness they might expect in the outside world. Inmates have to do their part; if a court believes that the inmate has partially caused the unsanitary conditions, it will be less likely to rule in his favor.[37] Courts may also deny relief if an inmate was given sufficient supplies to clean up the unsanitary conditions, but refused to do the cleaning.[38]

33 42 U.S.C. § 1997e(e).

34 Anderson v. County of Kern, 45 F.3d 1310, 1314 (9th Cir. 1995).

35 Diagre v. Maggio, 719 F.2d 1310, 1312 (5th Cir. 1983) ("deprivation of facilities for elementary sanitation" violates Constitution); Wells v. Franzen, 777 F.2d 1258, 1263-64 (7th Cir. 1985) (no summary judgment where inmate was denied access to toilet for nine days and "forced to eat with his fingers while sitting next to his own two-day old urine, which was held in urinal pitcher"); Howard v. Adkison, 887 F.2d 134, 137 (8th Cir. 1989) (conditions ruled inhumane where inmate was "placed in a cell covered with filth and human waste[,]... requests for remedial measures went unheeded, and he was denied access to proper cleaning supplies"); Hoptowit v. Spellman, 753 F.2d at 783 (standing water, flooded toilets and sinks, vermin infestation, and dank air violated Eighth Amendment); McBride v. Deer, 240 F.3d 1287, 1291-92 (10th Cir. 2001) (alleged three-day confinement in feces-covered cell, without access to cleaning supplies, stated Eighth Amendment claim); Gee v. Estes, 829 F.2d 1005, 1006 (10th Cir. 1987) (inmate was placed naked in lice-infested cell and left with his head in excrement while having a seizure); Ramos v. Lamm, 639 F.2d 559, 569 (10th Cir. 1980) ("Trash, decayed food, and other material routinely litter the cells and corridors of the cellhouses."); Chandler v. Baird, 926 F.2d 1057, 1065-66 (11th Cir. 1991) (recognizing well-established right of inmate not to be confined "in conditions lacking basic sanitation").

36 Fruit v. Norris, 905 F.2d 1147, 1150-51 (8th Cir. 1990) (Eighth Amendment prohibits prison officials from "forcing inmates to work in a shower of human excrement without protective clothing and equipment"; "'common sense' suggests that [the officials] should have had knowledge that unprotected contact with human waste could cause disease"); Burton v. Armontrout, 975 F.2d 543, 545-46 (8th Cir. 1992) (ordering prison officials to provide protective gear and to warn inmates of dangers of working with AIDS-contaminated waste). *But see* Rish v. Johnson, 131 F.3d 1092, 1099-101 (4th Cir. 1997) (holding that failure of prison officials to provide inmate working as orderlies in prison hospital and mental seclusion unit with protective gear was not deliberately indifferent).

37 Isby v. Clark, 100 F.3d at 505 ("If feces were on the wall — but Isby put it there — the claim on this point that the defendants violated the Eighth Amendment would lose a lot of its steam.... [A]n inmate who causes filthy conditions to exist may not have a cruel and unusual leg to stand on."); Smith v. Copeland, 87 F.3d 265, 268 (8th Cir. 1996) (denying relief for inmate who was subjected to raw sewage as a result of his decision not to flush his toilet or clean mess up). *But see* Blake v. Hall, 668 F.2d 52, 59 (1st Cir. 1981) (prison officials must ensure that unsanitary conditions do not continue unabated even when conditions were first caused by inmates themselves).

38 Shakka v. Smith, 71 F.3d 162, 167-68 (4th Cir. 1995) (no Eighth Amendment injury where inmate was given water and cleaning supplies, but denied a shower for three days after having excrement thrown on him); Davis v. Scott, 157 F.3d 1003, 1006 (5th Cir. 1998) (denying relief where "cleaning supplies were made available" to inmate in cell covered with blood and excrement, "mitigating any intolerable circumstances"); Whitnack v. Douglas County, 16 F.3d 954, 958 (8th Cir. 1994) ("intolerable conditions lasted not more than 24 hours before the availability of adequate cleaning supplies could make them tolerable"). Compare Inmates of Occoquan v. Barry, 717 F. Supp. 854, 866-67 (D.D.C. 1989) ("Defendants would have the Court believe that the conditions of the bathroom were due to the failure of the inmates to apply 'elbow grease.' The Court is unconvinced. The evidence shows that neither proper cleaning supplies nor cleaning tools have been provided.").

A basic level of sanitation involves several things. Inmates are entitled to:

adequate toilet facilities,[39] including a working toilet in each cell in which an inmate is confined[40]

regular access to working showers[41]

basic hygiene items (*i.e.*, toothbrush, toothpaste, shaving supplies, sanitary napkins, soap, towel, running water)[42]

sanitary food preparation and service[43]

working plumbing[44]

39 LaFaut v. Smith, 834 F.2d 389, 392-94 (4th Cir. 1987) (failure of prison officials to ensure that mobility-impaired inmates had accessible toilet facilities resulted in violation of inmates' constitutional rights); Palmer v. Johnson, 193 F.3d 346, 352 (5th Cir. 1999) (complete denial of toilet access to inmate work squad, requiring them to urinate and defecate in small confined space during 17-hour period, amounted to a "deprivation of basic elements of hygiene"); Simmons v. Cook, 154 F.3d 805, 808 (8th Cir. 1998) (denial of necessary supplies and assistant to paraplegic inmates prevented them from having bowel movement during 32-hour period and violated Eighth Amendment); Johnson v. Lewis, 217 F.3d 726, 732-33 (9th Cir. 2000) (four-day denial of "adequate access to toilets to avoid soiling themselves," where inmates "were not allowed to clean themselves thereafter," could amount to deprivation of basic human need; "although we have no doubt that toilets can be unavailable for some period of time without violating the Eighth Amendment, the plaintiffs in this case testify that the state imposed conditions inescapably resulting in prisoners wetting each other with urine. This evidence, if believed, would allow a fact-finder to conclude that the plaintiffs suffered a sufficiently serious deprivation to violate the Eighth Amendment.").

40 LaReau v. MacDougall, 473 F.2d 974, 978 (2d Cir. 1972) (Eighth Amendment violated by "Chinese toilet," a hole in cell corner covered by grate for use as toilet: "Causing a man to live, eat and perhaps sleep in close confines with his own human waste is too debasing and degrading to be permitted."); Kirby v. Blackledge, 530 F.2d 583, 586-87 (4th Cir. 1976) (describing alleged "Chinese cell" — containing no bedding, no light, and no toilet other than a hole in floor — as "reminiscent of the Black Hole of Calcutta" and unconstitutional); Kimbrough v. O'Neil, 523 F.2d 1057, 1058-59 (7th Cir. 1975) (inmate stated claim in alleging that he was placed in cell for three days without toilet, water, bedding, or personal hygiene items).

41 Tillery v. Owens, 719 F. Supp. 1256, 1272 (W.D. Pa. 1989) *aff'd*, 907 F.2d 418 (3d Cir. 1990) (shortage of working showers, often limiting inmates to fewer than three showers per week, "deprives the inmates of basic hygiene and threatens their physical and mental well-being"); Bradley v. Puckett, 157 F.3d at 1025-26 (inmate stated Eighth Amendment claim by alleging that he had been denied ability to bathe for several months, had to clean himself using toilet water, and contracted fungal infection as result); Walker v. Mintzes, 771 F.2d 920, 928-29 (6th Cir. 1985) (upholding lower court order requiring inmates in administrative segregation to be allowed to shower at least once per week, and inmates in general population to be allowed to shower at least three times per week). *But see* Shakka v. Smith, 71 F.3d at 168 (refusal to allow inmate to shower for three days after human excrement was thrown on him was not unconstitutional where inmate was provided with water and cleaning materials with which to clean himself and his cell).

42 "The failure to regularly provide prisoners with clean bedding, towels, clothing and sanitary mattresses, as well as toilet articles including soap, razors, combs, toothpaste, toilet paper, access to a mirror and sanitary napkins for female prisoners constitutes a denial of personal hygiene and sanitary living conditions." Dawson v. Kendrick, 527 F. Supp. 1252, 1288-89 (S.D. W.Va. 1981). *See also* Kimbrough v. O'Neil, 523 F.2d 1057, 1058-59 (7th Cir. 1975) (claim for relief stated where inmate alleged that he was placed in cell with no toilet, water, bedding, toilet paper, soap, or towel); Myers v. Hundley, 101 F.3d 542, 544 (8th Cir. 1996) (long-term deprivation of basic hygiene supplies violates inmate's constitutional rights); Keenan v. Hall, 83 F.3d 1083, 1090 (9th Cir. 1996) (summary judgment improper where inmate alleged that officials gave him personal hygiene items only when he could pay for them, and he therefore had to choose between hygiene items and legal supplies); Penrod v. Zavaras, 94 F.3d 1399, 1406 (10th Cir. 1996) (summary judgment improper where inmate presented evidence that officials retaliated against him by denying him free toothpaste and razors for two months, causing "his gums to bleed and recede and tooth decay that eventually had to be treated by a dentist"). *But see* Lunsford v. Bennett, 17 F.3d 1574, 1580 (7th Cir. 1994) (24-hour delay in providing inmates hygiene and cleaning supplies; "This temporary discomfort affecting only a few prisoners hardly violates common notions of decency.").

43 Grubbs v. Bradley, 552 F. Supp. 1052, 1128 (M.D. Tenn. 1982) ("[C]onditions in the kitchens, food storage and food service areas are appalling. Worse, inmates who are forced to eat the food prepared and served under those conditions face a constant risk of contracting any number of food-borne diseases.... The current situation simply cannot be tolerated in any civilized institution, and procedures for ensuring that basic sanitary practices are consistently followed must be developed and implemented."); French v. Owens, 777 F.2d 1250, 1255 (7th Cir. 1985) (upholding order to maintain safe and sanitary conditions in dilapidated prison kitchen while $2 million in state-ordered renovations are implemented); Ramos v. Lamm, 639 F.2d at 570-72 (prison must provide "nutritionally adequate food that is prepared and served under conditions which do not present an immediate danger to the health and well being of the inmates who consume it"; holding unconstitutional kitchen equipment in disrepair, leaking dishwasher, standing pools of water in kitchen, and food service area that was "soiled with dirt and rodent droppings").

44 "Functioning sinks, toilets and showers are basic necessities of modern life, particularly within the confines of a wholly self-contained environment such as a jail. Plumbing which is so inadequate and in such a state of disrepair as to constitute a serious threat to the physical and mental well-being of prisoners has therefore been condemned as violative of the Eighth Amendment in a variety of contests." Dawson v. Kendrick, 527 F. Supp. at 1287-88. *See also* Hoptowit v. Spellman, 753 F.2d at 783 (Eighth Amendment violated by prison plumbing in such disrepair as to deprive inmates of basic elements of hygiene and to threaten their physical and mental well-being); Ramos v. Lamm, 639 F.2d at 569-70 (among prison's unconstitutional conditions: "Leaking pipes and defective plumbing

protection from infestation by rats, roaches, and other vermin[45]

Although the Constitution is not necessarily violated when local and state health codes are violated, evidence of longstanding code violations may support a claim of deliberate indifference. You should request copies of agency inspection reports if you are considering a challenge to your facility's level of sanitation.

Sanitation can be a serious problem in units occupied by mentally ill inmates. Unfortunately, there are many mentally ill people imprisoned in America. As § C.8 of Chapter 9 explained, these inmates have a right to be treated for their illnesses. Too often, however, mentally ill inmates receive little or no treatment and as a result they "act out." Their behavior may include screaming, banging, and throwing human waste and urine. Other inmates (and possibly the mentally ill inmates themselves) have a right to be protected from such unsanitary conditions.[46]

2. Clothing and Bedding

The denial of basic clothing or bedding may, in some circumstances, violate the Constitution.[47] As §3 will discuss, inmates should receive sufficient clothing to keep them warm in cold temperatures. However, you may not reject clothing just because you dislike it or does not fit well. Inmates should be allowed to clean or exchange their clothes and bed sheets regularly.[48]

cause sewage to accumulate in cells and service areas or to drain into adjacent or lower cells, resulting in innumerable health and safety problems which, when combined with the temperature control and ventilation problems, make the main living areas particularly unfit for human habitation."); Inmates of Occoquan v. Barry, 717 F. Supp. at 866 ("No human being should be required to frequent bathrooms with slime oozing down the walls, stalactites hanging from the ceiling, thick soap scum on the walls and floors, and sewer water dripping into the toilets.... The ventilation in most of the bathrooms is nonexistent and pipes are leaking almost everywhere.").

45 Palmigiano v. Garrahy, 443 F. Supp. 956, 961 (D.R.I. 1977) ("The entire structure is massively infested with cockroaches, rodents, mice, and rats, each of which carries diseases throughout the prison."); Foulds v. Corley, 833 F.2d 52, 54 (5th Cir. 1987) ("Foulds further alleges that his solitary confinement cell was extremely cold and that he was forced to sleep on the floor where rats crawled over him. If proven, such conditions of confinement would contravene the Eighth Amendment."); Gillespie v. Crawford, 833 F.2d 47, 50 (5th Cir. 1987) (Eighth Amendment claim stated by alleged insect infestation, combined with overcrowding, inadequate ventilation and lighting); Antonelli v. Sheahan, 81 F.3d at 1431 ("Two pest-control sprayings in sixteen months... may have been seriously insufficient to deal with the condition that Mr. Antonelli alleges: cockroaches that were 'everywhere,' 'crawling on his body' (along with mice) and 'constantly awaken[ing]' him, and 'causing the environment to be unsanitary.' Although the sprayings indicate some concern for Mr. Anonelli's right to be free from such conditions, they do not necessarily show that the defendants were less than deliberately indifferent to this right."); Ramos v. Lamm, 639 F.2d at 569 (condemning "extensive problem with rodent and insect infestation in the cellhouses"); Hoptowit v. Spellman, 753 F.2d at 783 (vermin infestation was inconsistent with level of sanitation required by Eighth Amendment).

46 Langley v. Coughlin, 709 F. Supp. 482, 483, 485 (S.D.N.Y. 1988) (practice of housing assaultive, disruptive, mentally disordered women with other inmates in "solitary" unit violated Eighth Amendment); Tillery v. Owens, 719 F. Supp. 1256, 1303-04 (W.D. Pa. 1989), *aff'd*, 907 F.2d 418 (3d Cir. 1990); Harpers v. Showers, 174 F.3d 716, 717, 720 (5th Cir. 1999) (inmate stated Eighth Amendment claim by alleging that he was continually placed "in cells next to psychiatric patients who scream, beat on metal toilets, short out the power, flood the cells, throw feces, and light fires, resulting in his loss of sleep for days at a time"); Thaddeus-X v. Blatter, 175 F.3d 378, 403 (6th Cir. 1999) (*en banc*) (inmate stated Eighth Amendment claim by alleging that he was intentionally placed in floor of administrative segregation, where mentally ill inmates threw feces and urine, flooded gallery with water, and banged footlockers so loudly inmate could not sleep); DeMallory v. Cullen, 855 F.2d 442, 444-46 (7th Cir. 1988); Bracewell v. Lobmiller, 938 F. Supp. 1571, 1578-79 (M.D. Ala. 1996) *aff'd*, 116 F.3d 1493 (11th Cir. 1997) (conditions in prison segregation unit violated objective component of Eighth Amendment where mentally ill inmate regularly screamed, banged, and threw liquids, unclean sanitary napkins, and feces); Inmates of Occoquan v. Barry, 717 F. Supp. 854, 864-68 (D.D.C. 1989).

47 Wells v. Franzen, 777 F.2d 1258, 1264 (7th Cir. 1985) (no summary judgment where inmate was denied all clothing except underwear for nine days); Maxwell v. Mason, 668 F.2d 361, 365 (8th Cir. 1981) ("[I]t is clearly the law in this Circuit that clothing is a 'basic necessity of human existence' which cannot be deprived in the same manner as a privilege an inmate may enjoy.").

48 Howard v. Adkison, 887 F.2d at 137 (upholding jury verdict for inmate who was denied, among other things, access to laundry services for five months despite repeated requests); Reece v. Gragg, 650 F. Supp. 1297, 1305 (D. Kan. 1986) (laundering of uniforms once a week and blankets once every three months insufficient to satisfy constitutional standards); Toussaint v. McCarthy, 597 F. Supp. 1388, 1411 (N.D. Cal.) *aff'd in part and vacated in part on other grounds*, 722 F.2d 1490 (9th Cir. 1984) ("Defendants are under an obligation to ensure

You do not have a right to a comfortable mattress, so long as the one you have does not cause serious back problems.[49] Some courts have ruled that forcing inmates to sleep on the floor, or on mattresses placed directly on the floor, violates the Constitution.[50]

Officials sometimes place inmates in "strip cells," which are cells containing no mattress, no furniture, nor any other items. At times the inmate may be stripped naked. When this practice is intended to punish an inmate, courts usually find it unconstitutional.[51] When done in response to an inmate's threat of suicide or self-mutilation, courts are more likely to rule in prison officials' favor.[52] The longer an inmate is kept in such extreme conditions, the more likely a court will find a constitutional violation.

3. Protection From Extreme Temperature

The Constitution does not require jails or prisons to be maintained at a comfortable temperature level.[53] However, if there is extreme heat or cold, inmates' constitutional rights are affected. Extreme heat can violate the Constitution.[54]

that this clothing is adequate and that it is adequately laundered on a regular basis.... Reasonably clean, sanitary bedding is likewise required by the Eighth Amendment.").

49 Peterkin v. Jeffes, 855 F.2d 1021, 1027 (3d Cir. 1988).

50 Lyons v. Powell, 838 F.2d 28, 31 (1st Cir. 1988) ("We are persuaded by the rulings of our sister circuits that subjecting pretrial detainees to the use of a floor mattress for anything other than brief emergency circumstances may constitute an impermissible imposition of punishment, thereby violating the due process rights of such detainees."); LaReau v. Manson, 651 F.2d 96, 107-08 (2d Cir. 1981) ("With respect to the specific practices of confining inmates in the fishtank, forcing men to sleep on mattresses on the floors and placing healthy or non-disruptive inmates in the medical or isolation cells– sometimes double-bunked with ill cell mates and confined for 23 hours a day, we have no trouble upholding the district court's conclusion that these measures do not provide minimum decent housing under any circumstances for any period of time."); Union City Jail Inmates v. DiBuono, 713 F.2d 984, 996 (3d Cir. 1983) (holding that elimination of "unsanitary and humiliating" practice of forcing detainees to sleep on floor mattresses was essential for jail to comply with Constitution); Thompson v. City of Los Angeles, 885 F.2d 1439, 1448 (9th Cir. 1989) (claim that inmate was denied bed or mattress for two of the nights he spent in jail "constitutes a cognizable Fourteenth Amendment claim"). *But see* Mann v. Smith, 796 F.2d 79, 85-86 (5th Cir. 1986) (pretrial detainee had no right to elevated bed); Antonelli v. Sheahan, 81 F.3d 1422, 1430 (7th Cir. 1996) (inmate having to sleep on the floor for one night because of overcrowded conditions did not violate prevailing constitutional standards); Hamm v. DeKalb County, 774 F.2d 1567, 1575 (11th Cir. 1985) ("The fact that Hamm temporarily had to sleep upon a mattress on the floor or on a table is not necessarily a constitutional violation.").

51 Blissett v. Coughlin, 66 F.3d 531, 537 (2d Cir. 1995) (affirming $75,000 jury award for inmate who was placed naked for several days in dark, stuffy, feces-smeared mental observation cell, following violent assault by correctional officers); McCray v. Burrell, 516 F.2d 357, 366-69 (4th Cir. 1975) (confinement of naked inmate in barren isolation cell with excrement-covered pit toilet and no personal articles for 48 hours); Gates v. Collier, 501 F.2d 1291, 1305 (5th Cir. 1974) (punishment of inmate by confinement in small, dirty cell without light, hygienic materials, adequate food, or heat); Maxwell v. Mason, 668 F.2d 361, 365 (8th Cir. 1981) (officials' decision to take away clothing and bedding from inmate as a punitive measure violated Constitution); Mitchell v. Maynard, 80 F.3d 1433, 1439-40 (10th Cir. 1996) (Eighth Amendment claim stated by inmate who, following prison riot, was allegedly stripped of all clothing and placed in cell with a nighttime temperature in low-50's and no mattress, bedding, out-of-cell exercise, ventilation, or hot water); Gregory v. Wyse, 512 F.2d 378, 381-82 (10th Cir. 1975) (cruel and unusual punishment to keep inmate for 12 days in cell that had been stripped of bedding; did not have adequate heating, ventilation, lighting or furnishing; and was seldom cleaned). *But see* Seltzer-Bey v. Delo, 66 F.3d 961, 964 (8th Cir. 1995) (did not violate Eighth Amendment to place inmate in strip cell for two days without clothing, bedding, or running water, with a concrete slab for a bed); Sims v. Mashburn, 25 F.3d 980, 984 (11th Cir. 1994) (not deliberate indifference to place inmate clothed in undershorts in "concrete box" for 29 hours).

52 McMahon v. Beard, 583 F.2d 172, 175 (5th Cir. 1978) (after suicidal inmate attempted to hang himself with bedsheet, Constitution permitted officials to withhold clothing and bedding from inmate for three months); Green v. Baron, 879 F.2d 305, 310 (8th Cir. 1989) (although prison officials have general constitutional duty to provide inmates clothing and bedding, withholding of clothing and bedding to troublesome mental patient which was "medically supervised, limited in degree and restricted in duration" could meet constitutional standards); Anderson v. County of Kern, 45 F.3d at 1314 (placement of inmates in "safety cells" with paper clothing, pit toilets, and no sinks or beds — "admittedly a very severe environment" — was appropriate response to serious safety concerns).

53 Lopez v. Robinson, 914 F.2d 486, 492-93 (4th Cir. 1990) (summary judgment against inmates granted where officials proved that prison temperature never varied more than a few degrees from 75º F, and inmates presented no evidence of harm suffered as result of cold); Woods v. Edwards, 51 F.3d 577, 581 (5th Cir. 1995) (claim that inmate's cell was uncomfortably hot did not state constitutional claim); Smith v. Sullivan, 553 F.2d 373, 381 (5th Cir. 1977) (reversing lower court order that temperature be maintained within particular range, where there was no evidence that temperatures outside that range might endanger inmates' health).

54 Brock v. Warren County, 713 F. Supp. 238 (E.D. Tenn. 1989) (jail officials violated Constitution by subjecting inmate in cell with virtually

Extreme cold also violates the Constitution.[55] Even brief exposure to very cold temperatures can violate the Constitution, particularly when inmates are not given blankets or winter clothing to keep warm.[56] Just because an inmate is forced to bundle up at night, however, does not mean that his constitutional rights are violated.[57] In reviewing challenges to low cell temperatures, courts consider the seriousness of the cold, its duration, whether the inmate has alternative ways of keeping warm (*e.g.*, blankets), and other inhumane conditions that the inmate must endure.[58]

4. Clean Air

Anyone who regularly spends time in jails and prisons understands that the air quality can become very bad. Exposure to stale, stagnant air does not generally rise to the level of a constitutional violation.[59] However, if your facility's ventilation (air flow) is so poor that it undermines sanitation, you may have a good constitutional claim.[60] Also, excessive dust and lint particles in the air

nonexistent ventilation and extremely high temperature and humidity; inmate died from heat prostration; court awarded compensatory damages of $100,000 and punitive damages of $10,000); Madison County Jail Inmates v. Thompson, 773 F.2d 834, 838-39 (7th Cir. 1985) (failure to protect inmates from extreme heat contributed to overall unconstitutional conditions); Hamilton v. Love, 328 F. Supp. 1182, 1190 (E.D. Ark. 1971) (combination of sealed windows, inadequate ventilation, and crowded cells caused cells to become "like ovens").

55 Gaston v. Coughlin, 249 F.3d 156, 165 (2d Cir. 2001) (Eighth Amendment claim stated where inmate alleged that he was exposed to freezing temperatures due to unrepaired broken windows in cell block); Corselli v. Coughlin, 842 F.2d 23, 27 (2d Cir. 1988) (allegation that officials deliberately exposed inmate to bitter cold for three months in solitary confinement stated Eighth Amendment claim); Beck v. Lynaugh, 842 F.2d 759, 761 (5th Cir. 1988) (exposure to raw wind, rain, and cold, as a result of unrepaired broken windows, during winter months); Bienvenu v. Beauregard Parish Police Jury, 705 F.2d 1457, 1460 (5th Cir. 1983) (plaintiff stated claim by alleging that official "intentionally subjected him to a cold, rainy, roach-infested facility"); Antonelli v. Sheahan, 81 F.3d at 1433 (no blankets to combat cold); Murphy v. Walker, 51 F.3d 714, 720-21 (7th Cir. 1995) (inmate denied clothes, bed, and bedclothing during week in mid-November); Henderson v. DeRobertis, 940 F.2d 1055, 1057-60 (7th Cir. 1991) (inmates not issued extra blankets, winter coats, or additional shirts during four-day period when temperature went below zero and prison heating system malfunctioned); Lewis v. Lane, 816 F.2d 1165, 1171 (7th Cir. 1987) (claim of inadequate heating — temperature fell to 52 to 54 degrees during December and January — stated an Eighth Amendment violation); Chandler v. Baird, 926 F.2d 1057, 1065-66 (11th Cir. 1991) (recognizing well-established "right of a prisoner not to be confined in a cell at so low a temperature as to cause severe discomfort").

56 Palmer v. Johnson, 193 F.3d 346, 352 (5th Cir. 1999) (inmates were forced to withstand strong winds and cold for 17 hours without jackets or blankets, while guards warned themselves with jackets, a fire, and car heaters; exposure to cold may have risen to level of constitutional deprivation); Dixon v. Godinez, 114 F.3d at 644 (inmate in protective custody wing was unable to write or sleep because of extreme cold; ice regularly formed on walls of cell; "We are dubious of defendants' insistence that a single blanket is sufficient to combat such cold persisting for weeks on end.... Cold temperatures need not imminently threaten inmates' health to violate the Eighth Amendment."); Del Raine v. Williford, 32 F.3d 1024, 1031 (7th Cir. 1994) (inmate forced to strip search in brutal cold, with broken window and -40 degree windchill); Gordon v. Faber, 973 F.2d 686, 687 (8th Cir. 1992) (officials required inmates to remain outdoors in subfreezing temperatures for less than two hours, even though inmates were provided with hip-length, lined denim coats and allowed to move freely); Johnson v. Lewis, 217 F.3d at 732 (summary judgment improper where evidence showed that some inmates who were exposed to subfreezing temperatures overnight did not have winter clothing, and where blankets were not distributed to inmates for five to nine hours).

57 Dixon v. Godinez, 114 F.3d 640, 644 (7th Cir. 1997).

58 *Id. See, e.g.*, Foulds v. Corley, 833 F.2d 52, 54 (5th Cir. 1987) ("Foulds further alleges that his solitary confinement cell was extremely cold and that he was forced to sleep on the floor where rats crawled over him. If proven, such conditions of confinement would contravene the eighth amendment."); Gee v. Estes, 829 F.2d at 1006 (Eighth Amendment claim established by allegations that inmate was placed naked in lice-infested cell with no blankets in below-40º temperature, denied food or served dirty food, and left with his head in excrement while having a seizure).

59 Peterkin v. Jeffes, 855 F.2d 1021, 1026 (3d Cir. 1988) (ventilation system not unconstitutional where "although there was a lack of significant airflow in the cells..., there was no manifestation of the development and spread of infectious respiratory disease or any other risk to inmate health"); Dixon v. Godinez, 114 F.3d at 645 (claim of "stagnant and fetid" summer air did not state constitutional violation where inmate's cell had window that opened and small "chuckhole" in door that created cross-ventilation).

60 Gillespie v. Crawford, 833 F.2d 47, 50 (5th Cir. 1987) (allegation of inadequate ventilation, combined with overcrowding, inadequate lighting and sanitation, stated Eighth Amendment claim); French v. Owens, 777 F.2d 1250, 1252-53 (7th Cir. 1985) (inadequate ventilation combined with other unconstitutional conditions); Williams v. White, 897 F.2d 942, 944-45 (8th Cir. 1990); Keenan v. Hall, 83 F.3d 1083, 1090 (9th Cir. 1996) ("If the air was in fact saturated with the fumes of feces, urine, and vomit, it could undermine health and sanitation."); Kelley v. Borg, 60 F.3d 664, 666-67 (9th Cir. 1995) (no qualified immunity where guards failed to remove inmate from cell after he complained about fumes; inmate soon became unconscious and had to be taken to infirmary); Hoptowit v. Spellman, 753

endanger the health of inmates with special medical conditions like asthma.[61]

One frequent problem in jails and prisons is second-hand or *environmental tobacco smoke* (ETS). In its 1993 decision *Helling v. McKinney*,[62] the Supreme Court ruled that an inmate had properly stated an Eighth Amendment claim by alleging that officials forced him to share a cell with another inmate who smoked five packs of cigarettes a day. Officials act with deliberate indifference if they knowingly expose an inmate to levels of second-hand tobacco smoke "that pose an unreasonable risk of serious damage to his future health."[63]

A related problem is *friable asbestos*. Asbestos is a substance that was once used to insulate pipes and buildings; it is now recognized as a human *carcinogen* (a product that causes cancer). Asbestos that is friable (easily crumbled) poses a substantial risk to inmates' health "because airborne particles can become lodged in lungs and in the respiratory tract and over time can lead to asbestosis, mesothelioma and lung cancer."[64] The Constitution prohibits officials from knowingly exposing inmates to friable asbestos.[65]

5. Clean Water

Inmates may not be denied an adequate amount of clean drinking water.[66] If you have good reason to believe that your water supply is contaminated, you may ask a court for *injunctive relief* even if you have not yet suffered a serious injury, such as an attack of dysentery.[67]

6. Lighting

Anyone who has been deprived of light for a long period of time knows that it is

F.2d at 784 (inadequate ventilation undermines health of inmates and sanitation of penitentiary, in violation of Eighth Amendment); Ramos v. Lamm, 639 F.2d at 568-70 ("Inadequate ventilation, especially in the cells and shower areas, results in excessive odors, heat, and humidity with the effect of creating stagnant air as well as excessive mold and fungus growth, thereby facilitating personal discomfort along with health and sanitation problems.").

61 Gibbs v. Cross, 160 F.3d 962, 965-66 (3d Cir. 1998) (inmate stated Eighth Amendment claim by alleging that as result of breathing unidentified particles in air, he suffered severe headaches, mucus full of dust and lint, watery eyes, and change in voice).

62 509 U.S. 25, 113 S.Ct. 2475 (1993).

63 *Id.* at 35. *See also* Warren v. Keane, 196 F.3d 330, 333 (2d Cir. 1999); Whitley v. Hunt, 158 F.3d 882, 887-88 (5th Cir. 1998) (abrogated by Booth v. Churner, 532 U.S. 731, 121 S.Ct. 1819 (2001) on a failure to exhaust issue, but still good law for the clean air issue); Rochon v. City of Angola, 122 F.3d 319, 320 (5th Cir. 1997); Alvarado v. Litscher, 267 F.3d 648, 651-53 (7th Cir. 2001) (no qualified immunity where inmate was exposed to levels of ETS that aggravated his chronic asthma); Weaver v. Clarke, 45 F.3d 1253, 1256 (8th Cir. 1995) (heavy smoking of cellmate caused inmate severe headaches, dizziness, nausea, vomiting, and breathing difficulty). *But see* Richardson v. Spurlock, 260 F.3d 495, 498 (5th Cir. 2001) ("sporadic and fleeting exposure" to ETS that caused inmate only discomfort did not violate Constitution); Henderson v. Sheahan, 196 F.3d 839, 846 (7th Cir. 1999) (holding that Helling did not hold that exposure to ETS always qualifies as objectively serious injury, and that inmate's claim failed because did not show "a significant medical condition or ailment at all resulting from his exposure to ETS"); Scott v. District of Columbia, 139 F.3d 940. 942-43 (D.C. Cir. 1998) ("Helling did not read the Eighth Amendment as mandating smoke-free prisons;" inmates failed to show that they "were exposed to such an unreasonable level of tobacco smoke that it posed a serious risk to their future health").

64 LaBounty v. Coughlin, 137 F.3d 68, 74 n.5 (2d Cir. 1998).

65 *Id.* at 72-74 (inmate who alleged exposure to friable asbestos stated Eighth Amendment claim; no qualified immunity for prison officials); Powell v. Lemon, 914 F.2d 1459, 1463-64 (11th Cir. 1990) (denying qualified immunity where inmate alleged that even though friable asbestos particles were in air of prison dormitory, officials refused to move him to different sleeping area).

66 Walker v. Shansky, 28 F.3d 666, 673 (7th Cir. 1994) (Eighth Amendment claim stated where inmate alleged, among other things, that he was "sometimes denied water for up to a week" in segregation); Johnson v. Lewis, 217 F.3d 726, 732 (9th Cir. 2000) (four-day deprivation of adequate drinking water would violate Eighth Amendment).

67 Helling v. McKinney, 509 U.S. 25, 113 S.Ct. 2475 (1993). *See also* Keenan v. Hall, 83 F.3d 1083, 1091 (9th Cir. 1996) (summary judgment improper where inmate presented evidence that water was "blue/green in color and foul tasting").

a basic human need. Lighting that is too dim can prevent inmates from moving around their cells or reading, and over time, it can contribute to depression and other mental illnesses. Some countries deny inmates light as a means of torture. Courts in this country have ruled that inadequate lighting violates the Constitution when it endangers inmates' physical or mental health.[68] Lighting can also be too bright: *i.e.,* when lights shine into cells 24 hours per day, disallowing inmates to sleep or recognize night from day.[69]

7. Protection From Excessive Noise

Jails and prisons can be noisy places. Constant noise rises to the level of a constitutional violation if it prevents inmates from sleeping over long periods of time.[70]

8. Accident Prevention

Inmates have a right to safe living and working conditions: officials must take measures to prevent serious accidents from happening.[71] Not every risk of an accident, however, violates the Constitution.[72] The degree of risk is of key importance. For example, even though a slippery floor may not by itself violate the Constitution,[73] such a condition, if longstanding and uncorrected, may pose a substantial risk of serious harm to an inmate who uses crutches to get around.[74]

68 "Like ventilation, adequate lighting is one of the fundamental attributes of 'adequate shelter' required by the Eighth Amendment." Tillery v. Owens, 719 F. Supp. 1256, 1271 (W.D. Pa. 1989), *aff'd*, 907 F.2d 418 (3d Cir. 1990). *See also* Gillespie v. Crawford, 833 F.2d 47, 50 (5th Cir. 1987) (allegation of inadequate lighting, combined with other conditions, stated Eighth Amendment claim); Bono v. Saxbe, 620 F.2d 609, 617 (7th Cir. 1980) (inadequate lighting is particularly a problem where reading was one of only a few activities available to inmates); Hoptowit v. Spellman, 753 F.2d at 783 (lighting at prison violated Eighth Amendment where it was inadequate for reading, caused eyestrain and fatigue, and hindered attempts to ensure that basic sanitation was maintained); Toussaint v. McCarthy, 597 F. Supp. 1388, 1409 (N.D. Cal. 1984) ("Lighting is an indispensable aspect of adequate shelter and is required by the Eighth Amendment.... [I]n the context of this case, the Court concludes that each inmate must be afforded sufficient light to permit him to read comfortably while seated or lying on his bunk."), *aff'd in part, rev'd in part on other grounds*, 926 F.2d 800 (9th Cir. 1990). *But see* Peterkin v. Jeffes, 855 F.2d 1021, 1026-27 (3d Cir. 1988) (upholding lower court finding that "while more light might be preferable, the lighting in the cells is more than adequate and had not been the cause of any eye damage").

69 Keenan v. Hall, 83 F.3d 1083, 1091 (9th Cir. 1996) (observing that there is "no legitimate penological justification for requiring [inmates] to suffer physical and psychological harm by living in constant illumination"); LeMaire v. Maass, 745 F. Supp. 623, 636 (D. Ore. 1990), overruled on other grounds by LeMaire v. Maass, 12 F.3d 1444 (9th Cir. 1993) (constant lighting in "quiet cell" which prevented inmate from sleeping was unconstitutional).

70 Harpers v. Showers, 174 F.3d 716, 720 (5th Cir. 1999) (inmate alleged that he was continually placed next to screaming, beating psychiatric patients; "[S]leep undoubtedly counts as one of life's basic needs. Conditions designed to prevent sleep, then, might violate the Eighth Amendment."); Antonelli v. Sheahan, 81 F.3d 1422, 1433 (7th Cir. 1996) (allegation of noise occurring every night, often all night, interrupting or preventing inmate's sleep, stated constitution claim); William v. Boles, 841 F.2d 181, 183 (7th Cir. 1988) (infliction of incessant noise, even if it causes only agony and not enduring injury, may violate Due Process Clause); Keenan v. Hall, 83 F.3d 1083, 1090 (9th Cir. 1996) (summary judgment improper where inmate presented evidence that at all times of day and night inmates were "screaming, wailing, crying, singing, and yelling" and there was a "constant, loud banging"). Compare Lunsford v. Bennett, 17 F.3d 1574, 1580 (7th Cir. 1994) ("Subjecting a prisoner to a few hours of periodic loud noises that merely annoy, rather than injure the prisoner does not demonstrate a disregard for the prisoner's welfare.").

71 Hoptowit v. Spellman, 753 F.2d 779, 784 (9th Cir. 1985).

72 Morissette v. Peters, 45 F.3d 1119, 1123 (7th Cir. 1995) (electrical wiring hazard in cell, which shocked inmate twice in nine days, was "a minor hazard that was easily avoided... an unpleasant inconvenience"); Tunstall v. Rowe, 478 F. Supp. 87, 89 (N.D. Ill. 1979) (greasy staircase, which caused inmate to slip and fall, did not violate Eighth Amendment); Osolinski v. Kane, 92 F.3d 934, 939 (9th Cir. 1996) (granting qualified immunity to officials who allegedly failed to repair oven, the door of which fell off and burned inmate's arm).

73 Jackson v. Arizona, 885 F.2d 639, 641 (9th Cir. 1989), *overturned on other grounds by the PLRA*, as recognized in Lopez v. Smith, 203 F.3d 1122 (9th Cir. 2000).

74 Frost v. Agnos, 152 F.3d 1124, 1129 (9th Cir. 1998). *See also* Gill v. Mooney, 824 F.2d 192, 195 (2d Cir. 1987) (official who allegedly ordered inmate to continue working on ladder that official knew was unsafe violated Eighth Amendment); Brown v. Bargery, 207 F.3d 863, 865-68 (6th Cir. 2000) (constitutional claim stated where allegedly improperly installed bunks caused inmates to slide off and land on the concrete cell floor).

Officials may not require an inmate to perform work that is dangerous to his health.[75] They may not, for example, expose inmate workers to asbestos without providing them protective clothing and gear.[76] However, workplace accidents that occur due to an official's negligence do not rise to the level of a constitutional violation.[77]

Officials must take steps to prevent jails and prisons from becoming "fire traps." If officials do not take necessary precautions, an otherwise controllable fire can become deadly. Known, unreasonable fire safety risks endanger the safety of inmates and therefore violate the Constitution.[78] Although violations of local and state fire codes do not necessarily violate the Constitution, courts may consider longstanding code violations as evidence of unsafe conditions and officials' deliberate indifference.[79]

9. Exercise

Exercise is a basic human need.[80] A long-term denial of any opportunity for exercise outside an inmate's cell violates the Constitution.[81] Most courts have

75 Williams v. Norris, 148 F.3d 983, 986-87 (8th Cir. 1998); Sanchez v. Taggart, 144 F.3d 1154, 1156 (8th Cir. 1998).

76 Wallis v. Baldwin, 70 F.3d 1074, 1076-77 (9th Cir. 1995).

77 Stephens v. Johnson, 83 F.3d 198, 200-01 (8th Cir. 1996) (administrator of prison work program was at most negligent in failing to provide inmate workers with such safety equipment as hard hats, protective eyewear, back braces, and steel-toed boots); Warren v. Missouri, 995 F.2d 130 (8th Cir. 1993) (failure to add safety device to saw did not amount to deliberate indifference, despite officials' knowledge of past accidents); Bibbs v. Armontrout, 943 F.2d 26 (8th Cir. 1991), (inmate's fingers became entangled in gears of inker in license plate factory; guards' alleged failure to repair machine was only negligence, not Eighth Amendment violation).

78 One court summarized, "[t]he Eighth Amendment ensures that prisoners will be provided with adequate fire protection during confinement. Accordingly, prisoners have a right to be free from an unreasonable risk of death by fire. The failure to provide adequate safety equipment places inmates in constant danger of losing their lives if a fire were to occur in the prison." Tillery v. Owens, 719 F. Supp. 1256, 1279 (W.D. Pa. 1989), *aff'd*, 907 F.2d 418 (3d Cir. 1990). The prison in Tillery had a high concentration of combustible items, but lacked such fire protection devices as stand pipes, fire alarms, sprinkler systems, an effective exhaust system, and a master unlocking system. *Id*. at 1277-80. The court ordered officials to correct these unsafe conditions immediately. *See also* Carty v. Farrelly, 957 F. Supp. 727, 737 (D.V.I. 1997) (failure "to provide functional fire safety systems subjects prisoners to life-threatening conditions" and violates Eighth Amendment); White v. Cooper, 55 F. Supp.2d 848, 858 (N.D. Ill. 1999) (no qualified immunity for prison officials who allegedly disregarded non-operational fire safety and prevention system and failed to free inmate from his burning prison cell); Leeds v. Watson, 630 F.2d 674, 675-76 (9th Cir. 1980) (hearing required to determine whether officials had remedied serious fire hazards); Rogers v. Etowah County, 717 F. Supp. 778, 779, 781 (N.D. Ala. 1989) (use of chains and padlocks on cell doors, which had to be opened by hand in case of fire, violated fire code and endangered inmates' safety).

79 Miles v. Bell, 621 F. Supp. 51, 65 (D. Conn. 1985) (single, isolated violation of fire code does not amount to constitutional violation; fire safety regulations, "although instructive, do not establish constitutional minima"); Dawson v. Kendrick, 527 F. Supp. 1252, 1294 (S.D. W.Va. 1981) (local fire codes are valuable indicators for what public considers minimum for human habitation); French v. Owens, 777 F.2d 1250, 1257 (7th Cir. 1985) ("The eighth amendment does not constitutionalize the Indiana Fire Code."; federal courts must order officials to correct fire safety problems, not to comply with local fire codes); Nicholson v. Choctaw County, 498 F. Supp. 295, 308 (S.D. Ala. 1980) (failure to correct fire safety violations as ordered by state fire marshal violated jail inmates' constitutional rights).

80 Sometimes inmates talk about their constitutional right to "recreation." In a lawsuit, it is important to state your claims in terms of exercise. Although recreation may be more commonly used in prison, exercise relates to a basic human need and is the right judges are more willing to recognize. In contrast, recreation may lead judges to think about board games or other recreational activities that do not relate directly to a basic human need.

81 Jolly v. Coughlin, 76 F.3d 468, 480 (2d Cir. 1996) (confining inmate in medical keeplock cell for three-and-a-half years, with only ten-minute shower each week and no exercise, clearly violates Eighth Amendment); Anderson v. Coughlin, 757 F.2d 33, 35 (2d Cir. 1985) ("Courts have recognized that some opportunity for exercise must be afforded to prisoners."); Ruiz v. Estelle, 679 F.2d 1115, 1152 (5th Cir.), *amended in part, vacated in part*, 688 F.2d 266 (5th Cir. 1982); Patterson v. Mintzes, 717 F.2d 284, 289 (6th Cir. 1983) (no summary judgment where inmate in segregation was denied exercise for 46 days; "It is generally recognized that a total or near-total deprivation of exercise or recreational opportunity, without penological justification, violates Eighth Amendment guarantees."); Antonelli v. Sheahan, 81 F.3d at 1432 (Eighth Amendment claim stated where 38 inmates were housed in area "about the size of a small house trailer" and denied opportunity to exercise for seven weeks at a time); French v. Owens, 777 F.2d at 1255 (lack of exercise violates Constitution "where movement is denied and muscles are allowed to atrophy [and] the health of the individual is threatened"); Lopez v. Smith, 203 F.3d at 1133 (Eighth Amendment claim stated where inmate alleged that he was denied all access to outdoor exercise for six-and-one-half weeks following jaw injury); Keenan v. Hall, 83 F.3d at 1089 ("Deprivation of outdoor exercise violates the Eighth Amendment rights of inmates confined to continuous and long-term segregation."); Perkins v. Kansas Dep't of Corrections, 165 F.3d 803, 810 (10th Cir. 1999) (inmate stated Eighth Amendment claim by alleging that he had been denied all outdoor exercise for more

held that inmates must receive some form of regular outdoor exercise,[82] or, at the very least, regular out-of-cell time.[83] It may not be unconstitutional, however, for officials to deny inmates exercise for brief periods of time.[84] In determining what amount of exercise is constitutionally required, courts consider how much space an inmate has in his cell, how long he is confined there every day, conditions such as sanitation and ventilation, the overall duration of the inmate's confinement, officials' reasons for denying exercise, and, most importantly, the effect that the denial of exercise has on the inmate's physical and mental health.[85] If you file a lawsuit claiming that you have been denied exercise, you should clearly explain what harm you have suffered as a result.[86]

10. Food

The Constitution requires that inmates receive well-balanced meals, containing sufficient nutritional value to preserve their health.[87] Food that is inadequate in

than nine months); Housley v. Dodson, 41 F.3d 597, 599 (10th Cir. 1994) abrogated on other grounds by Lewis v. Casey, 518 U.S. 343, 116 S.Ct. 2174 (1996) ("[T]here can be no doubt that total denial of exercise for an extended period of time would constitute cruel and unusual punishment prohibited by the Eighth Amendment.").

82 Williams v. Greifinger, 97 F.3d 699, 703-05 (2d Cir. 1996); Allen v. Sakai, 48 F.3d 1082, 1088 (9th Cir. 1994) (inmate who was allegedly allowed only 45 minutes of outdoor exercise per week for six-week period suffered deprivation of basic human need); Toussaint v. Yockey, 722 F.2d 1490, 1492-93 (9th Cir. 1984) (upholding preliminary injunction requiring outdoor exercise); Bailey v. Shillinger, 828 F.2d 651, 653 (10th Cir. 1987) ("[S]ome form of regular outdoor exercise is extremely important to the psychological and physical well being of inmates.").

83 Peterkin v. Jeffes, 855 F.2d 1021, 1031-32 (3d Cir. 1988) (requiring inmate to exercise in enclosed area does not necessarily violate Eighth Amendment); Mitchell v. Rice, 954 F.2d 187, 191 (4th Cir. 1992) ("Generally a prisoner should be permitted some regular out-of-cell exercise."); Delaney v. DeTella, 256 F.3d 679, 683-84 (7th Cir. 2001) (describing exercise as "a necessary requirement for physical and mental well-being" and holding that denial of out-of-cell exercise for six months violated Eighth Amendment); Hosna v. Groose, 80 F.3d 298, 306 (8th Cir. 1996) (qualified immunity for officials who allegedly limited inmate to three hours of exercise per week in enclosed outdoor area; inmate also "refused to make use of the exercise opportunities that have been provided to him"); Wilson v. Blankenship, 163 F.3d 1284, 1293 (11th Cir. 1998) (inmate not entitled to outdoor exercise where he "presented no documented reason that he could not have engaged in indoor exercise" while he was at jail). In one case, filed by two inmates who had repeatedly attempted escape and committed numerous violent acts in prison, the Eleventh Circuit ruled that the complete denial of outdoor exercise did not violate the Eighth Amendment. Bass v. Perrin, 170 F.3d 1312, 1317 (11th Cir. 1999). The court observed that the prison officials were "very concerned about the potential harm to inmates... and took a variety of steps to ensure that the plaintiffs were not harmed as a result of their continuous confinement." *Id. Compare* Williams v. Greifinger, 97 F.3d at 704-05 (stating that "the fact that an inmate is violent may justify segregating him or her from the general prison population, but does not necessarily justify a prison's failure to make 'other exercise arrangements'").

84 Thomas v. Ramos, 130 F.3d 754, 764 (7th Cir. 1997) (no violation where inmate housed in segregation for 70 days was able "to engage in exercise in his cell such as push-ups, sit-ups, jogging in place, and step-ups"); Knight v. Armontrout, 878 F.2d 1093, 1095-96 (8th Cir. 1989) (denial of exercise for 13 days did not violate Eighth Amendment); Frost v. Agnos, 152 F.3d at 1130 ("This one-time, accidental denial of recreation cannot support a constitutional claim."); May v. Baldwin, 109 F.3d 557, 565 (9th Cir. 1997) ("a temporary [22-day] denial of outdoor exercise with no medical effects is not a substantial deprivation"); Wilson v. Blankenship, 163 F.3d at 1292 (not clearly established that Constitution required inmate to have "immediate access to outdoor exercise" at jail, where no such facilities existed at jail and inmate's confinement there was brief).

85 Housley v. Dodson, 41 F.3d at 599; *see also* Patterson v. Mintzes, 717 F.2d 284, 289 (6th Cir. 1983); Antonelli v. Sheahan, 81 F.3d at 1432 (stating that lack of exercise "may rise to a constitutional violation in extreme and prolonged situations where movement is denied to the point that the inmate's health is threatened").

86 *See* Delaney v. DeTella, 256 F.3d at 685 (alleged "physical and mental injuries including migraines, heartburn, stomach cramps, neck pains, constipation, lethargy, and depression" were sufficiently serious to support Eighth Amendment claim); Lopez v. Smith, 203 F.3d at 1133 n.15 (holding that "temporary denials of outdoor exercise must have adverse medical effects to meet the Eighth Amendment test, while long-term deprivations are substantial regardless of effects").

87 Green v. Ferrell, 801 F.2d 765, 770 (5th Cir. 1986).

amount,[88] spoiled,[89]or otherwise unhealthy[90] violates the Constitution. However, the occasional denial of a meal does not.[91] In addition, it is not unconstitutional to give inmates only two meals per day, provided that they receive enough nutrition and calories to maintain their health.[92] Also, you do not have a constitutional right to food that tastes good or is served hot.[93]

Think carefully before you file a lawsuit about your food since courts generally do not like them.[94] Your lawsuit will succeed only if you can prove that your jail or prison is not giving you food adequate to keep you in decent health.

11. Living Space/Overcrowding

Overcrowding is a tricky legal issue. Most jails and prisons in this country have a *rated* or *design capacity*: the maximum number of inmates that the facility was designed to hold.[95] Because more and more people are being imprisoned, there is not always enough space to house the new inmates. As a result, jails and prisons frequently exceed their rated capacities.

However, any jail or prison that holds more people than it is supposed to *does not necessarily* violate the Constitution. In a 1981 case, *Rhodes v. Chapman*, the Supreme Court held that it did not violate the Constitution for a prison to hold 38% more inmates than its design capacity, or to "double-cell" inmates in 63-square-foot cells that were originally intended just for single inmates.[96] The Court observed that the prison in that case was a modern, "top-flight, first-class facility," and that the cells were equipped with working sinks, toilets, and heating and ventilation systems.[97] The crowding of inmates did not result in any

88 Cooper v. Sheriff, Lubbock County, 929 F.2d 1078, 1083 (5th Cir. 1991) (alleged refusal of officials to feed inmate for 12 consecutive days violated Constitution); Simmons v. Cook, 154 F.3d 805, 808 (8th Cir. 1998) (denial of four consecutive meals to paraplegic inmates during 32-hour period violated Eighth Amendment); Hazen v. Pasley, 768 F.2d 226, 228 n.2 (8th Cir. 1985) (weight loss and mildly diminished health showed that food was not nutritionally adequate for Eighth Amendment purposes); Johnson v. Lewis, 217 F.3d 726, 732 (9th Cir. 2000) (four-day deprivation of "adequate edible food" would violate Eighth Amendment); Ramos v. Lamm, 639 F.2d 559, 571 (10th Cir. 1980) (prison must provide "nutritionally adequate food that is prepared and served under conditions which do not present an immediate danger to the health and well-being of inmates who consume it").

89 Antonelli v. Sheahan, 81 F.3d at 1432 (inmate stated constitutional claim by alleging "rancid food" and "nutritionally deficient" diet); Keenan v. Hall, 83 F.3d at 1091.

90 Nicholson v. Choctaw County, 498 F. Supp. 295, 313 (S.D. Ala. 1980) (prohibiting jail from serving inmates "road kill").

91 Palmer v. Johnson, 193 F.3d at 352 ("That Palmer may have missed one meal… does not rise to the level of a cognizable constitutional injury."); Berry v. Brady, 192 F.3d 504, 507-08 (5th Cir. 1999) (no Eighth Amendment violation where inmate missed eight meals over seven-month period; inmate did not claim any adverse physical effects or risk to his health); Talib v. Gilley, 138 F.3d 211, 214 n.3 (5th Cir. 1998) ("Missing a mere one out of every nine meals is hardly more than that missed by many working citizens over the same period").

92 Green v. Ferrell, 801 F.2d at 770-71 (finding that provision of only two nutritionally adequate meals daily does not violate the Eighth Amendment). *But see* Cunningham v. Jones, 567 F.2d 653, 657-60 (6th Cir. 1977) (where inmate was given only one meal per day, jail had burden of proving that the meal provided adequate daily nutrition).

93 Hamm v. DeKalb County, 774 F.2d 1567, 1575 (11th Cir. 1985) ("The fact that food occasionally contains foreign objects or sometimes is served cold, while unpleasant, does not amount to a constitutional deprivation.").

94 *See, e.g.*, Brock v. Angelone, 105 F.3d 952, 954 (4th Cir. 1997) (describing lawsuit challenging "poisonous" pancake syrup as "obviously frivolous").

95 These rated capacities are often out-of-date. Many older jails were designed to hold inmates for only a few days at a time. Now that pretrial detainees are frequently held for months and even years, the rated capacity for older jails should be lower to account for these longer terms of confinement. Experts use professional standards, state and local laws, and information about the inmates and a facility's physical structure and layout to figure out what its rated capacity should be.

96 452 U.S. 337, 347-48, 101 S.Ct. 2392 (1981).

97 *Id.* at 340-41 & n.2.

deprivation of basic human needs:

> The double-celling made necessary by the unanticipated increase in prison population did not lead to deprivations of essential food, medical care, or sanitation. Nor did it increase violence among inmates or create other conditions intolerable for prison confinement. Although job and educational opportunities diminished marginally as a result of double-celling, limited work hours and delay before receiving education do not inflict pain, much less unnecessary and wanton pain; deprivations of this kind simply are not punishments.[98]

Even though correctional experts recommend that each inmate have at least 50 to 55 square feet of living space, the Court concluded that such professional recommendations are only "helpful" guides, not rules to be automatically followed by courts interpreting the Constitution.[99]

The lesson to be learned from *Rhodes* is that overcrowding violates the Constitution only when it causes, by itself or in combination with other conditions, the deprivation of a basic human need.[100] As this manual has already discussed, several such deprivations may occur in very overcrowded jails and prisons. The risk of inmate-on-inmate violence may increase. See Chapter 8, § C.8. The system of delivering medical care may fail, with too few doctors and nurses to treat all the inmates who have serious medical needs. See Chapter 9, § D. Overcrowding may prevent inmates from moving around their cells, a problem that may harm their health if they are also denied regular exercise. See § C.9, above. Also, there may not be enough clothing, bedding, hygiene supplies, and sink and toilet access for all the inmates who need them.

It is not always easy to prove a connection between overcrowding and the deprivation of a basic human need. For this reason, lawsuits that challenge overcrowding at facilities are best handled by lawyers who know the law well

98 *Id.* at 348.

99 *Id.* at 348 & n.13.

100 *See also* Bell v. Wolfish, 441 U.S. 520, 542, 99 S.Ct. 1861 (1979) (jail overcrowding must cause "genuine privations and hardship over an extended period of time" to violate Due Process Clause). Here are some examples of courts ruling that overcrowded conditions violate the Constitution: Nami v. Fauver, 82 F.3d 63, 67 (3d Cir. 1996) (double-celling at youth correctional facility would violate Eighth Amendment if it resulted in substantial risk of sexual assault); Tillery v. Owens, 907 F.2d at 427-28 (double-celling unconstitutional where inmates had limited opportunity for exercise outside their cells and where "the inadequate screening before double-celling of inmates resulted in 'fatal pairings,' in which 'violent, delusional and predatory inmates are often paired' with inmates who are unable to protect themselves"); Harris v. Angelina County, 31 F.3d 331, 334-36 (5th Cir. 1994) (affirming judgment that housing more inmates in jail than design capacity violated Due Process Clause, where overcrowding resulted in inmates sleeping on day room floors, increased violence and intimidation among inmates, and prevented proper classification of inmates; "The district court correctly noted that design capacity is not always equivalent to constitutional capacity, but that design capacity is relevant to the constitutional inquiry."); Ruiz v. Estelle, 679 F.2d 1115, 1152 (5th Cir.), *amended in part, vacated in part*, 688 F.2d 266 (5th Cir. 1982) ("Overcrowding, combined with the relatively small number of security guards, results in a 'constant threat to the inmates' personal safety.'"); French v. Owens, 777 F.2d 1250, 1252-53 (7th Cir. 1985) (upholding order against double-celling that took place in environment of severe overcrowding accompanied by "pernicious evils" like unhealthy food, lack of space and furnishings, inadequate medical care, and continuous threats to inmates' safety); Wellman v. Faulkner, 715 F.2d 269, 274 (7th Cir. 1983) (overcrowding in 100-year-old facility combined with limited recreation time, long in-cell time, and inadequate medical care); Hall v. Dalton, 34 F.3d 648, 650 (8th Cir. 1994) (reaffirming earlier ruling that 24-hour per day confinement of four inmates in two-person cell, with 14 square feet of space per person and little or no opportunity for exercise, violated Due Process Clause); Morgan v. District of Columbia, 824 F.2d 1049, 1063 (D.C. Cir. 1987) ("As a general proposition, we have no difficulty finding that a reasonable person could conclude that overcrowding in prisons is a substantial factor in bringing about fighting among inmates.").

and have the resources to hire expert witnesses. However, you may be able to challenge extreme crowding within a single cell or room. Some officials have been known to punish inmates by cramming them into "holes" or "sweat cells," which are crowded cells that are extremely hot and unventilated. Such conditions unquestionably violate the Constitution.

PART II

CHAPTER 11

Overview of the Legal System

Let's now turn from substantive law to *procedural law*: the law that allows you to enforce the rights discussed in Chapters 3 through 10. This chapter provides basic information about the American legal system. It begins by describing federal courts, state courts, and the differences between the two. It then explains how to read and write *citations*, which lawyers and judges use to refer to legal materials. Next, it concludes by discussing legal writing.

Many people are intimidated by the law. You often see lawyers on TV, speaking with complete confidence about the latest trial or scandal in the news. They sit in front of framed diplomas and shelves full of law books. This is for show: lawyers want you to believe that they are uniquely qualified to understand and apply the law. Don't believe it. True, lawyers have training and experience that other people do not have. But the law is not a box that you need a magic key to open. All you need is access to legal resources, a basic understanding of how those resources are organized and how the courts work, and the patience and determination to learn. Reading this manual is a good start.

A. FEDERAL AND STATE COURTS

Some countries have one unified system of courts. The United States does not. There are independent court systems in each of the 50 states and the District of Columbia. There is also a system of federal courts for the entire United States. This section compares federal and state courts.

1. Federal Courts

Federal courts are established by Article III of the U.S. Constitution. They are courts of *limited jurisdiction*, which means that they only have authority to decide categories of cases specified in federal statutes and the Constitution.

Although the subject of federal-court jurisdiction can get complicated, what you need to know is simple. Three statutes give federal courts jurisdiction to hear civil rights claims filed by inmates. 28 U.S.C. § 1331 provides jurisdiction for "federal questions," including claims alleging violations of the U.S. Constitution and federal statutes. 28 U.S.C. § 1343(a)(3) provides jurisdiction for alleged violations of the U.S. Constitution and federal statutes providing for the "equal rights" of all persons. Finally, 28 U.S.C. § 1367(a) provides jurisdiction for supplemental state-law claims (see § A.3, below). You need to cite the correct statutes in the "Jurisdiction" section of your complaint. Section B.2 of Chapter 14 explains how to do this.

In addition to jurisdiction, you need a *cause of action* to file a federal lawsuit. You can think of jurisdiction as a playing field, and a cause of action as the game you play on that field, like football or soccer. In civil rights lawsuits, inmates use one of two federal causes of action. 42 U.S.C. § 1983 allows inmates to seek a remedy for constitutional and statutory violations committed by state or local government officials. The *Bivens* cause of action[1] allows inmates to seek a remedy for constitutional violations committed by federal officials. Section A of Chapter 13 explains how these causes of action work.

There are now more than 1,100 federal judges in the United States. Once they have been nominated by the President and confirmed by the Senate, federal judges have *life tenure*: they can keep their jobs as long as they want to, and Congress may not lower their salaries. There are three levels in the federal court system: district courts, courts of appeals, and the Supreme Court. Let's take a look at each.

a. District Courts

District courts are the trial courts in the federal court system. There are federal district courts in every state and the District of Columbia. Many states have more than one district court. Alabama, for example, is divided into the Northern, Middle, and Southern Districts. You must file a federal lawsuit in the district where your rights were violated, or in a district where a defendant resides (provided that all defendants reside in the same state).[2] The Appendix lists each federal district court, its mailing address, and the counties or parishes that it contains.

Each new lawsuit is assigned, usually at random, to a *district judge*: a federal judge who hears cases at the district court level. District judges are often assisted by *magistrate judges*: judges appointed for eight-year terms, not for life. Unless you have consented, a magistrate judge may not issue a *dispositive* ruling in your case (*i.e.*, a ruling that decides a motion for injunctive relief, a motion to dismiss, a motion for summary judgment, or a trial). However, even without your consent a magistrate judge may decide discovery, scheduling, and other non-dispositive matters[3]; conduct evidentiary hearings; and submit *proposed findings of fact and recommendations* for the district judge's disposition.[4]

Early in your case, the district court clerk may inform you of the opportunity to consent to a magistrate judge handling all matters pertaining to your lawsuit,

1 *Bivens* is an "implied cause of action," because there is no federal statute that expressly authorizes people to seek a remedy for constitutional violations committed by federal officials. Its name comes from a decision of the U.S. Supreme Court: Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999 (1971).

2 28 U.S.C. § 1391(b). If neither of these two categories applies, you may file in a district "in which any defendant may be found." *Id.*

3 A district judge will reverse such a non-dispositive ruling only if it is "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A). You have 10 days to serve and file objections after you have been served with a copy of the magistrate judge's order. Fed. R. Civ. P. 72(a).

4 28 U.S.C. § 636(b)(1)(B). You have 10 days to serve and file "specific, written objections" after you have been served with a copy of a magistrate judge's recommended disposition. Fed. R. Civ. P. 72(b). A district judge shall then make a de novo (entirely new) determination "upon the record, or after additional evidence." *Id.*

including the dispositive issues.[5] If both you and your opponents consent, the magistrate judge will act just like a district judge in your case and issue a final, dispositive ruling, which you or your opponents may then appeal like any other final judgment. Before you decide whether to consent to a magistrate judge, you should find out as much as you can about both the magistrate judge and your assigned district judge: Which judge knows more about the rights of inmates? Who has the busier schedule? Who is more willing to help *pro se* litigants? How has each judge ruled in past civil rights cases? Although you are entitled to have your case decided by a life-tenured district judge, in some cases you will be better off consenting to a magistrate judge.

District courts apply the *Federal Rules of Civil Procedure* (abbreviated "Fed. R. Civ. P." or "F.R.C.P.") and their own *local rules* to civil lawsuits. Also, the *Federal Rules of Evidence* apply to all proceedings, civil or criminal, in federal court. All of these rules are very important. A court will expect you to follow them closely. The last five chapters of this manual discuss some particularly important procedural rules.

District judges and magistrate judges sometimes publish their decisions in the Federal Supplement reporter (abbreviated "F. Supp.2d" or "F. Supp."). You will find it helpful to read any decisions that your assigned judge has published on the subject of inmates' rights.

b. Courts of Appeals

The federal *courts of appeals* hear appeals of final judgments from the district courts. There are 12 circuit courts of appeals that handle inmate lawsuits: the circuits numbered First through Eleventh, and the District of Columbia Circuit.[6] Each of the numbered circuits covers several states. If you file an appeal from a final dispositive of your lawsuit, you need to file in the court of appeals which covers your particular state. The Appendix contains a list of each Court of Appeals and the states they cover.

Because the U.S. Supreme Court decides only a small number of cases every year, each court of appeals has a great deal of power to decide the law within its circuit. Sometimes the rulings of one circuit conflict with the rulings of another. When it comes to the rights of inmates, the circuits located in the South — the Fourth, Fifth, and Eleventh Circuits — tend to be more sympathetic than the rest to jail and prison officials. This is only a generalization, of course: there is a wide range of views among the judges on every circuit court, and you can never predict with certainty how a court will rule in a particular case. Nevertheless, in researching your rights, you must pay close attention to the decisions of not only the Supreme Court, but also the court of appeals of the circuit in which you live.

5 28 U.S.C. § 636(c); Fed. R. Civ. P. 73.
6 A thirteenth circuit, the Federal Circuit, has jurisdiction to hear patent, international trade, and government contract claims.

Courts of appeals apply the *Federal Rules of Appellate Procedure* (abbreviated "F.R.A.P.") and their own circuit rules. Unlike district courts, where only one district judge normally rules on a particular case, three-judge panels hear and decide appeals. At least two of the three judges must agree on a ruling. Occasionally, the judges on a court of appeals will vote to *rehear en banc* (before the full court[7]) a case that was previously decided by a three-judge panel. En banc rehearing is ordered only when the panel's ruling conflicts with the ruling of another panel or the Supreme Court, or when the case involves a very important legal issue.

Federal courts of appeals publish their decisions in the Federal Reporter (abbreviated "F.3d", "F.2d" and "F.").[8] After the decisions of the Supreme Court, these published decisions are most important in defining what your federal rights are.

c. U.S. Supreme Court

The U.S. Supreme Court is the highest court in the land. The Court[9] has the final word on what the U.S. Constitution and federal statutes mean. Lower federal courts, state courts, and government officials are bound by its rulings on federal law. Most cases heard by the Court involve an appeal from the highest court in a state or a federal court of appeals. The Court does not have the authority to decide issues of state law.

There are nine *justices* on the Supreme Court. Cases are decided by a *majority* of these justices (five or more, if all nine judges are sitting). Justices who disagree with the ruling of the majority are said to *dissent*. The Court's decisions are published in the United States Reporter (abbreviated "U.S."), the Supreme Court Reporter ("S. Ct."), and the Lawyer's Edition Reporter ("L.Ed.2d" or "L.Ed.").

Many people say that they will fight their cases "all the way to the Supreme Court." They do not always understand how difficult it is to get the Court to review a case. While thousands of people petition the Court for review, the Court agrees to hear less than 100 cases each year. The Court usually hears only cases that involve a conflict between two or more lower courts or a very important question of federal law. It will not review a case simply because the lower court appeared to make a mistake.

2. State Courts

Each state in this country, along with the District of Columbia, has its own system of courts. Most of these systems resemble the federal court system. States typically have trial courts located in each county or parish (sometimes called

7 In the Ninth Circuit, the largest in the country, cases are reheard *en banc* by panels of eleven judges.

8 Other court of appeals rulings can be found on the electronic databases Westlaw and Lexis. In most circuits, such "unpublished decisions" may not be cited as binding law.

9 When referring in any document to the Supreme Court, you should use a capital "C".

"district," "circuit," or "superior" courts), which hear newly filed criminal and civil cases. There are also appellate courts: usually an intermediate-level court of appeals and a state supreme court. The state supreme court[10] has the final word on what that state's constitution and statutes mean.

Each state system has its own rules for civil procedure, criminal procedure, evidence, and appellate procedure. If you decide to file a lawsuit in state court, you must read its rules on civil procedure carefully before proceeding.

3. Deciding Between State and Federal Court

This manual deals mainly with federal procedure, partly because it would be too complicated to describe each state's procedural rules, and partly because most inmates choose to file their lawsuits in federal court. Nevertheless, if you intend to file a lawsuit, you should seriously consider filing in state court.

There are certain advantages to filing in federal court. Because federal judges are appointed for life, they may be more willing to make unpopular rulings (*i.e.*, rulings favoring inmates) than state judges, many of whom are elected. Federal judges are also accustomed to dealing with federal law, and they often have better resources (more law clerks, nicer courtrooms) than state judges.

On the other hand, many federal judges do not like inmate lawsuits at all. They believe that these lawsuits are usually frivolous and waste resources that can be better spent on criminal cases and business disputes. All judges, state and federal, have their own levels of ability, experience, and political views. While judges are supposed to keep their personal biases from affecting how they decide cases, we all know that this still happens. You should therefore find out as much as you can about the state and federal judges in your area before you decide where to file.

Keep in mind that you may have more rights under state law. For example, a state supreme court may interpret its constitution's prohibition of "cruel and unusual punishments" more broadly than the Supreme Court interprets the Eighth Amendment of the U.S. Constitution. State courts may also have easier procedural requirements. For example, while inmates filing civil lawsuits in federal court must pay the entire filing fee ($350 — in installments if necessary, see § E of Chapter 14), many state courts charge less or do not require poor inmates to pay a filing fee at all.

Importantly, you can combine state-law and federal-law claims in a single lawsuit. As a general rule, if you could file a federal claim against state or local government officials[11] in federal court under 42 U.S.C. § 1983, you can file that

10 Or its equivalent. In New York, confusingly, the highest court in the state is the "Court of Appeals," and certain trial courts are called "Supreme Courts."

11 Lawsuits against federal officials may only be filed in federal court.

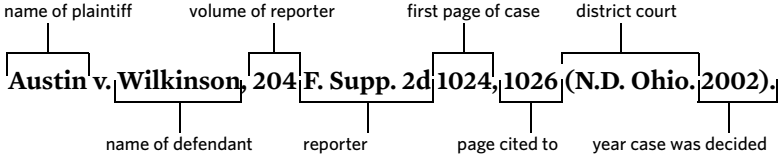
claim in state court instead.[12] If you do this, however, any defendant may *remove* your lawsuit (federal claims and related state claims) to federal court.[13]

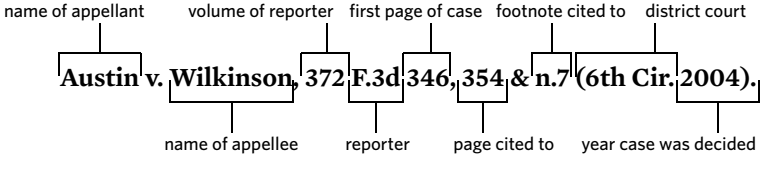
Conversely, under the doctrine of *supplemental jurisdiction*, you may file a state claim in federal court, provided that the state claim relates to a federal claim that you are filing at the same time.[14] Be aware, however, that the Eleventh Amendment prohibits federal courts from awarding injunctive relief against state government officials on the basis of state-law claims.[15] A federal court may also refuse to hear your supplemental state claim for other reasons.[16]

B. LEGAL CITATIONS

Lawyers and judges use some basic rules to cite cases, statutes, and other important legal materials. Once you understand these rules, you can easily cite cases and find the materials you need in a law library.

Case citations begin with the name of a case: (1) the last name of the first plaintiff, appellant, or petitioner; (2) the abbreviation "v." (for "versus"); and (3) the last name of the first defendant, appellee, or respondent. After a comma (","), the citation lists the volume number of the reporter containing that case, the abbreviation for that reporter, and the page on which the case begins. If the citation is to a particular page within the case, that page number is listed after another comma. Then, in parentheses ("( )"), the citation lists the abbreviation of the court that issued the decision (unless it is a Supreme Court decision) and the year of the decision. Here are three examples:





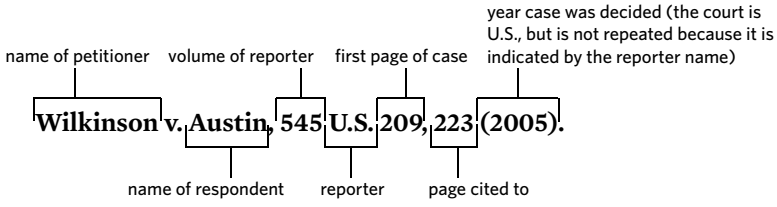
12 Howlett v. Rose, 496 U.S. 356, 110 S.Ct. 2430 (1990).

13 28 U.S.C. § 1441. A defendant must generally file a notice of removal within 30 days after receiving your complaint. 28 U.S.C. § 1446(b).

14 28 U.S.C. § 1367(a). The state claim should involve the same "nucleus of operative fact" as the federal claim. United Mine Workers v. Gibbs, 383 U.S. 715, 725, 86 S.Ct. 1130 (1966). For example, you might be able to include a supplemental state claim for assault in a federal lawsuit alleging an Eighth Amendment excessive force violation.

15 Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106, 104 S.Ct. 900 (1984). Pennhurst does not prohibit federal courts from awarding damages based on state-law claims, or awarding any kind of relief against local governments (cities and counties).

16 *See* 28 U.S.C. § 1367(c).



For cases that you cite more than once, you can use a short citation form. After you have cited a case in full, simply list the first part of the case name, the volume, the reporter, the word "at", and the particular page number you wish to cite. For example, "Wilkinson, 545 U.S. at 223" refers to page 223 of the case Wilkinson v. Austin fully cited above. Also, you can use the abbreviation "*Id.*" to refer back to the very last case you have cited.

When several cases are cited at one time, they are usually listed in the order of the highest to the lowest court: a Supreme Court citation will come first, then a court of appeals citation, then a district court citation. Citations to decisions by courts at the same level are ordered by date, from most recent to oldest. This manual orders citations a little differently. After Supreme Court decisions, both court of appeals and district court citations are ordered by federal circuit: First Circuit, then Second Circuit, etc., to the District of Columbia Circuit. This manual organizes citations this way so that you can locate decisions from your own circuit easily.

To cite a federal statute, write the name of the statute (if relevant); the volume of the United States Code containing the statute; "U.S.C.", the abbreviation for the code ("U.S.C.A." is used to cite to the United States Code Annotated); the section sign ("§"); and the statutory section you are citing to. Thus, the citation "42 U.S.C. § 1983" refers to section 1983 of volume 42 of the United States Code.

C. LEGAL RESEARCH

Unfortunately, many inmates do not have access to adequate legal resources. In 1996 the Supreme Court held that inmates do not have a freestanding right to a law library or legal assistance.[17] As a result of this decision, many jails and prisons have reduced or even eliminated their law libraries. While it is very hard to do legal research without a law library, this manual gives you the basic information you need to file a lawsuit. The Appendix lists additional resources that you can order by mail.

Well-equipped law libraries have the following kinds of books:

1. Case Reporters

Case reporters publish court decisions. As this chapter mentioned earlier, there are three case reporters for the U.S. Supreme Court: the United States Reporter

17 Lewis v. Casey, 518 U.S. 343, 350-53, 116 S.Ct. 2174 (1996).

(abbreviated "U.S."), the Supreme Court Reporter ("S. Ct."), and the Lawyer's Edition Reporter ("L.Ed.2d" or "L.Ed."). Each of these reporters publishes all of the Supreme Court's decisions. When citing a Supreme Court case, lawyers usually cite to just the United States Reporter, *e.g.*: "Wilkinson v. Austin, 545 U.S. 209 (2005)."[18] The other reporters have indexes that allow you to find a case using its "U.S." cite.

Case reporters are organized by volume. Thus, you can locate the *Wilkinson* case by finding the volume of the United States Reporter with "545" marked on its spine, and then turning to page 209.

Federal court of appeals decisions are published in the Federal Reporter ("F.3d", "F.2d", and "F."). District court decisions are published in the Federal Supplement ("F. Supp.2d" and "F. Supp."). State court decisions are usually reported in two case reporters: a reporter for that particular state (*e.g.*, the Georgia Reporter: "Ga.") and a regional reporter that publishes decisions from several states (*e.g.*, the Southeastern Reporter: "S.E.2d", which covers West Virginia, Virginia, North Carolina, South Carolina, and Georgia).

Reading court decisions can help you in several ways. First, a decision may establish a rule of law that affects your case. Second, before analyzing the specific facts before the court, a decision may review general principles of law. For example, in a case involving the delay of medical treatment, a court might begin by discussing an inmate's general right to medical care and the standard of deliberate indifference.[19] Third, courts frequently cite other cases on the same subject. For example, a ruling by the Fifth Circuit on excessive force will likely cite important Supreme Court decisions, earlier Fifth Circuit decisions on excessive force, decisions from other circuits, and other legal authorities. These cited decisions will in turn refer you to other cases. You can learn a lot about the law by moving from case to case this way.

Before you cite a case in a memorandum of law or other document, you should "shepardize" it. Shepardizing is a process of checking whether a decision is still "good law." Today, lawyers use the computer services Westlaw and Lexis to shepardize cases. Unfortunately, inmates do not have access to these computer services and must instead rely on books called Shepard's Citations. If your law library has these books, find the Shepard's for the case reporter in which your decision is published. You will likely need at least one bound volume of Shepard's and one unbound supplement. Your case will be indexed by its volume and page number. For each case, Shepard's lists the citation of each subsequent case that has cited it. To the left of each citation, Shepard's lists an abbreviation indicating

18 In this manual when we have cited to the United States Reporters ("U.S."), we have also provided the citation to the Supreme Court Reporter ('S.Ct.") since many prison law libraries will not have the "U.S." reporter but will have the "S.Ct." reporters. In your brief, you need not include the "S.Ct." cite.

19 Statements that are not necessary to decide the specific case before the court are considered dicta and do not bind courts in subsequent cases.

how your case was cited. An "f" means that a court followed the case you are shepardizing. An "o" means that a court overruled it. You may not cite a case that has been reversed, vacated, or overruled for that proposition of law in your memorandum unless you can distinguish it on the facts from your case.

2. Statutory Codes

Like case reporters, statutory codes are organized by volume. Thus, you can find 42 U.S.C. § 1983 by looking for the part of volume 42 of the United States Code that covers the range of section numbers that includes § 1983. Each state also has a statutory code that publishes all laws currently in effect in that state.

Statutory codes normally organize statutes by topic. You can do research by looking up topics you are interested in (*e.g.*, "jails" or "judicial immunity") in a code's index.

Annotated codes are particularly useful. An annotated code publishes statutes in the same order as an ordinary code. It also provides historical notes on how each statute was adopted and amended; references to related statutes; and a list of court decisions (with a short description of each holding) that have applied the various provisions of each statute.

3. Digests, Legal Encyclopedias, and Legal Dictionaries

Digests are very useful research tools. A digest is an index to court decisions, organized by topic. West's *Federal Practice Digest* covers federal practice and procedure. You can use its table of contents or index to find topics that you are interested in (*e.g.*, "Eighth Amendment," "Prisons," "Medical Care"). Each major topic is broken down into subheadings. Under each subheading the digest lists summaries of relevant Supreme Court, court of appeals, and district court decisions. There are also state-law digests. A digest is an excellent place to begin your research. Whenever you find a decision that appears helpful, write down its citation so that you can look it up later. Be sure to read the cases; do not rely on the digest alone.

Your law library may also have a *legal encyclopedia*, such as *Corpus Juris Secundum* or *American Jurisprudence*. Legal encyclopedias work like digests: they are organized by topic and provide citations to relevant cases. Encyclopedias are more general than digests, however, and do not always cite the most recent and helpful cases.

If you have access to a *legal dictionary*, use it. The leading legal dictionary is *Black's Law Dictionary*. Even if you believe you know what a particular word or phrase means, it never hurts to make sure. A legal dictionary provides examples of how words and phrases are used and refers you to related terms.

4. Treatises

A *treatise* is a book, or set of books, on a particular legal subject. This book is

an example of a treatise; it focuses on the health and safety rights of inmates. A treatise describes the "big picture" about a subject and points you to other important legal materials.

If you decide to file a civil rights lawsuit, there are several treatises that you may find helpful. Lawyers and courts frequently consult one of two multi-volume treatises on federal procedure: Wright and Miller's *Federal Practice and Procedure* and Moore's *Federal Practice*. These treatises explain such issues as the application of procedural rules, civil discovery, immunity doctrines and other defenses, and questions of substantive law. Schwartz and Kirklin's *Section 1983 Litigation* is a thorough and clearly written treatise on § 1983 and *Bivens* lawsuits. *Prosser and Keeton on the Law of Torts* is a well-known guide to tort law; it also explains such basic legal concepts as causation, injury, and damages. Weinstein's *Federal Evidence* is a multi-volume treatise written by a respected federal judge. Jayson's *Handling Federal Tort Claims* is the leading treatise on the FTCA. Finally, there are many treatises that deal with federal courts and constitutional law. These treatises can help you to understand the role that inmate lawsuits play in the grand scheme of constitutional rights and remedies in the United States.

5. Law Review Articles

Law reviews are publications edited by law students. Law reviews contain articles that analyze recent cases and argue for changes in the law. In general, courts do not give much weight to law review articles. Law review articles may, however, give you a better understanding of the law and help you to present your case effectively. Two law reviews publish information particularly useful to inmates. The Columbia Human Rights Law Review publishes *A Jailhouse Lawyer's Manual*, and the Georgetown Law Review publishes an annual issue on criminal procedure and inmates' rights. The Appendix explains how to order these publications by mail.

6. Staying Focused

As you do legal research, you should keep careful notes. Your notes should cover the following topics:

- substantive law that applies to your case
- procedural and evidentiary rules that you believe may be important
- citations, holdings, and summaries of the facts in important court decisions
- damage awards and injunctive relief that inmates have won in related cases
- defenses or objections that the defendants may make, and notes on how to respond

Good research notes will help you to develop an effective case strategy or "game plan."

When you do legal research, remember to keep your "eyes on the prize." Legal research is a tool that you use to achieve your goals, not a goal in itself. Do not get carried away and spend days researching a legal question that is not important to your case.

How will you know when you have done enough research? One clue will be that you will start to come across the same cases again and again. Remember, though, that the point of legal research is to *understand* the law, not merely to collect cases. You should be able to explain in plain terms why you are on the correct side of a dispute, and why your opponent is incorrect.

D. LEGAL WRITING

1. General Principles

A lawsuit involves a lot of writing: the complaint, amendments to the complaint, motions, legal memoranda, discovery requests, discovery responses, etc. For many people, writing is a frightening thing to do. While this manual may not be able to ease all of your concerns, it can give you a few tips on effective legal writing.

The most important tip is to *keep things simple*. Use short sentences. State one idea at a time. Organize related ideas into paragraphs. Avoid long or uncommon words, except when necessary to express your thoughts exactly. Above all else, avoid *legalese*: the use of legal-sounding words — "heretofore," "aforementioned," anything in Latin — to state ordinary ideas. Legalese does not impress judges. Try to do what the best lawyers do: express the facts and the law in a simple, straightforward manner.

Chapters 13 and 14 will explain how to tell your story in your complaint. In brief, you should state facts in chronological order (the order in which they happened). Let your facts speak for themselves: avoid unnecessary adjectives and adverbs. Include details that are helpful and important, and avoid facts that are irrelevant, such as facts about your criminal case.

When you make a legal argument, the "IRAC method" will help you to express your thoughts in a clear and logical manner. IRAC stands for "Idea — Rule — Application — Conclusion." To use this method, first state the *idea* that you are arguing for:

> Officer Singleton violated my Eighth Amendment rights by failing to intervene during inmate Smith's attack on me.

Second, state the *rule* of law that supports your idea:

> Prison guards have a constitutional duty to take reasonable measures to protect inmates who are being assaulted by other inmates. Gibbs v.

> Franklin, 18 F.3d 521 (7th Cir. 1994); Walker v. Norris, 917 F.2d 1449, 1453 (6th Cir. 1990); Ayala Serrano v. Lebron Gonzales, 909 F.2d 8, 14 (1st Cir. 1990); see generally Farmer v. Brennan, 511 U.S. 825 (1994).

Third, apply that rule of law to the facts of your case:

> Here, the evidence shows that even though Officer Singleton knew that inmate Smith was attacking me with a knife, Officer Singleton did not take any measures to protect me. He did not attempt to separate the two of us or take away Smith's knife. He did not order Smith to drop the knife or stop fighting. He did not open the cell so that I could escape. He did not even call for backup. Instead, Officer Singleton folded his arms, leaned against the wall, and watched as Smith continued to attack me for five minutes.

Lastly, *conclude* your argument in a sentence or two:

> By doing nothing to protect me, Officer Singleton acted with deliberate indifference to the substantial risk that I would be seriously harmed by inmate Smith. Officer Singleton's motion for summary judgment should be denied.

The IRAC method is a simple but effective way to write legal arguments.

When you respond to a defendant's argument, do not use language that is angry or disrespectful. Instead, explain why the argument fails under the law and the facts:

> Nurse Keenan argues that she should be dismissed from this lawsuit on the ground of qualified immunity. She argues that the law in August 1999 was not clearly established that a jail official violates the Fourteenth Amendment when she denies medical attention to an inmate who is coughing blood and complaining about stomach pain. However, the Eleventh Circuit has held that it was clearly established by 1995 that "an official acts with deliberate indifference when he knows that an inmate is in serious need of medical care, but he fails or refuses to obtain medical treatment for the inmate." Lancaster v. Monroe County, 116 F.3d 1419, 1425 (11th Cir. 1997). That is exactly what plaintiff alleges happened in this case. See also McElligott v. Foley, 182 F.3d 1248, 1260 (11th Cir. 1999); Harris v. Coweta County, 21 F.3d 388, 394 (11th Cir. 1994); Mandel v. Doe, 888 F.2d 783, 789-90 (11th Cir. 1989); H.C. by Hewitt v. Garrard, 786 F.2d 1080, 1086-87 (11th Cir. 1986); Ancata v. Prison Health Servs., Inc., 769 F.2d 700, 702 (11th Cir. 1985); see generally Estelle v. Gamble, 429 U.S. 97, 104-05 (1976) (holding that Constitution prohibits officials from intentionally denying inmates' access to medical care). These cases made the unlawfulness of Nurse Keenan's denial of medical care apparent at the time. See Anderson v. Creighton, 483 U.S. 635, 640 (1987). She is therefore not entitled to qualified immunity.

Legal arguments are often written in absolute terms. However, few legal disputes are really black-and-white. Each party can usually cite at least a few cases that support, or appear at first glance to support, its position. You should do your best to *distinguish* cases that your opponent relies on: read each decision, compare its facts and holding to the facts of your case, and point out significant differences. You may also find that a cited decision has been overruled by a higher court, or that it conflicts with a controlling decision in your circuit.

In the end, keep in mind that law is not an exact science. There is frequently more than one "right answer" for a judge to reach. Judges consider not only law and facts, but also *policy*: the effect that their decisions will have on the operation of government and the welfare of other people. You should always keep "the big picture" in mind when you write legal documents: why is it important for the court to rule in your favor?

This manual will provide additional examples of legal writing in Chapters 14 through 18.

2. Technical Rules

There are a few technical rules that you must follow whenever you file a document in court.

First, every document must begin with a *caption*. A caption states basic information about your case, including the name of the court, the names of the parties, your case's docket or file number, and the title of your document. At the start of your lawsuit, when you file your complaint, you must list all the parties in the case.[20] Afterwards, you may use a *short caption*: a caption that lists only one plaintiff and one defendant, followed by the abbreviation "*et al.*" if there are more parties in the case. Here is an example of a short caption:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

THOMAS SOTO-RODRIGUEZ, Plaintiff, vs. LUJAN COUNTY, et al. Defendants.	))))))	Civil Action No. 02-0814 MV/DVS

The clerk's office will assign your case a docket or file number (also called a "civil action number") when you file your complaint. Once the court issues any kind of

20 Fed. R. Civ. P. 10(a); *see* Chapter 14, § B.1.

order in your case, you should use that order's short caption as a model for future legal documents.

A *motion* is simply a request made by a party to a court. The party that files the motion is called the *movant*. If another party disagrees with the relief that the movant is seeking, it may file a *response* to the motion. The movant may then file a *reply*: a response to the response.

Some courts require parties to submit a separate *memorandum of law* in support of any motion they file. Other courts allow parties to include legal arguments in the motion itself. Read your court's local rules carefully on this point.

If your document is several pages long, you may find it helpful to organize it into separate sections with headings. Many lawyers routinely organize all legal memoranda into sections titled "Background," "Applicable Law," "Argument," and "Conclusion." However you organize your document, make sure that it is either typed or clearly hand-written. Double-space your text, and use wide margins. A judge will not rule in your favor if she cannot read your writing.

Courts deal with many motions every day, and they do not like to waste time trying to figure out what a party wants it to do. Therefore, at the conclusion of a motion or response, you should include a "Conclusion" section or a "WHEREFORE" clause stating exactly what you want the court to do. Here are two examples:

> CONCLUSION
>
> For the reasons set forth above, this court should issue a preliminary injunction ordering defendants to immediately provide plaintiff with the medication and treatment prescribed for plaintiff's heart condition by Dr. Martha Stevenson at Grady Memorial Hospital.
>
> WHEREFORE, Warden DuBois's motion for summary judgment should be denied.

Under Federal Rule of Civil Procedure 11(a), every document filed with a court must be signed by an attorney for the party, or, if the party is unrepresented, by the party itself. State courts have similar requirements. You should therefore include at the end of each document the date, your signature, name, and address:

> Respectfully submitted, this 5th day of June, 2002,
>
> Charlotte Rittenmeyer
>
> Charlotte Rittenmeyer, AIS #317650
> Benbow Prison for Women
> Evergreen, AL 36401

When you sign a court document, you certify that it "is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." You also certify that your legal claims

are supported by the law (or "by a nonfrivolous argument for the extension, modification, or reversal of existing law") and that your factual allegations have evidentiary support (or "are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery").[21] If the court concludes that you have violated this certification, it may punish you by issuing *sanctions*.[22]

Some courts require you to attach *proposed orders* to motions. To draft a proposed order, use as a model an order that the court has already issued. Write the relief that you want below the caption, and insert blanks for the date and the judge's signature:

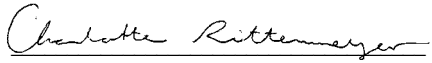
> ORDER
>
> Plaintiff's Motion to Extend Time to Conduct Discovery is GRANTED. It is ORDERED that the deadline for completing discovery is extended by 60 days from the current deadline. All discovery must now be completed by August 31, 2002.
>
> DONE this ____ day of _____, 2002.
>
> _____
> United States District Court

No party may have secret (or "*ex parte*") communications with the court. Therefore, any time you file a document with the court, you must also *serve* a copy of that document on all other parties in the case. Section F of Chapter 14 explains how to serve your complaint and *summons* on defendants. Service of other legal documents is easier. You simply send the document to each party's attorney and attach a *certificate of service* to document.[23] Here is an example:

> CERTIFICATE OF SERVICE
>
> This is to certify that I have this day served counsel for the opposing parties a copy of the foregoing document by first class United States mail in a properly addressed envelope with adequate postage thereon. The individuals served are:
>
> Stanley Jaggers, Esq.
> Jaggers & Wemmick, P.C.
> 145 Willow Street
> Arab, AL 35016
> Lionel Hutz, Esq.
> Alabama Department of Corrections
> Legal Division
> P.O. Box 301501
> Montgomery, AL 36130

21 Fed. R. Civ. P. 11(b). Again, most state courts have a similar certification rule.
22 Fed. R. Civ. P. 11(c).
23 Fed. R. Civ. P. 5(b), (d).

This 17th day of August, 2002.



Charlotte Rittenmeyer, AIS #317650

Many jails and prisons have special mailboxes for inmates' legal mail. Keep in mind that if a jail or prison official whom you are suing is represented by an attorney, you may not speak to or correspond with that official regarding your lawsuit. All documents must be served on the official's attorney. The official should not speak with you about the lawsuit either, regardless of whether you have an attorney.

It is seldom appropriate for you to send a letter to a judge. As a general rule, any document you send to a court should have a caption and a certificate of service, and should comply with all applicable rules of procedure. If you do send a letter, you must send a copy to all other parties in the case (or their attorneys). Indicate that you are doing this by listing their names (or their attorneys' names) at the end, after the abbreviation "cc":

cc: Stanley Jaggers, Esq., Jaggers & Wemmick, P.C.

Lionel Hutz, Esq., Alabama Department of Corrections, Legal Division

For every document that you file in court, make a copy for your own records. It is important to keep a well-ordered case file. This file should include orders from the court, documents filed by the defendants, copies of your own documents, and any correspondence that you have had with the defendants or the court (including notes from telephone calls or meetings). Mark on each document the date that you sent or received it. You should also keep a separate sheet listing the names, addresses, and telephone numbers of the district court clerk's office and all attorneys in the case.

CHAPTER 12

Exhaustion of Administrative Remedies

Most people can file civil rights lawsuits immediately after they suffer a violation of their constitutional rights. Inmates, however, cannot immediately file such a lawsuit in federal court and may not in some state courts since they must first *exhaust* their *administrative remedies*. "Administrative remedies" mean inmate grievances (or request or complaint forms) and appeals at your jail or prison. "Exhaust" means that you must fill out and submit all such forms, and wait for responses, before you file a lawsuit. You must do this correctly and on time — even if your jail or prison does not provide the remedies that you want. If you fail to exhaust all available administrative remedies, your lawsuit will be *dismissed*: thrown out before it begins. Depending on the prison grievance rules, you may be precluded from going back to complete the exhaustion process, which would mean that you could never receive a decision on the merit of your claims.

Filing grievances and appeals also helps you to satisfy the deliberate indifference requirement in failure-to-protect, medical care, and conditions lawsuits. As Chapter 6 explained, telling officials about the dangers that you face makes you better able to get the help you need, and to prove the officials' deliberate indifference in court if something bad happens to you.[1]

A. UNDERSTANDING THE EXHAUSTION REQUIREMENT

The exhaustion requirement was created by the Prison Litigation Reform Act. It states: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."[2]

Let's look more closely at when and how this requirement applies:

> *It applies in federal, not state, court:* The Prison Litigation Reform Act applies only to lawsuits filed in federal court. Many state courts,

1 Even before the Prison Litigation Reform Act was passed, the Supreme Court advised inmates "to take advantage of internal prison procedures for resolving inmate grievances. When those procedures produce results, they will typically do so faster than judicial processes can. And even when they do not bring constitutionally required changes, the inmate's task in court will obviously be much easier." Farmer v. Brennan, 511 U.S. 825, 847, 114 S.Ct. 1970 (1994). In other words, you will be better able to prove officials' actual knowledge. In addition, officials may make factual statements or provide certain documents when responding to your grievances and appeals; you can use these statements and documents to your advantage later in court.

2 42 U.S.C. § 1997e(a).

however, now require inmates to exhaust administrative remedies also.[3]

It applies to current, not former, inmates: The requirement applies only to lawsuits filed by current inmates. It does not apply to people who were released when they filed their lawsuits.[4]

It applies to all inmate lawsuits about jail or prison life: "whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong."[5] Exhaustion is required for each kind of claim discussed in this manual.

It applies even if you cannot get the remedies you want: So long as your jail or prison offers *some* administrative remedies, it does not matter whether those are the remedies that you want or could get in a lawsuit. In particular, an inmate who wants only money damages must exhaust even if the grievance process at his prison *never* provides money damages.[6]

It applies even when an inmate faces an immediate threat to her health or safety: As § A.4.b.i of Chapter 13 explains, a district court has the power to issue a *preliminary injunction* to prevent irreparable injury before an inmate can complete the administrative exhaustion process.[7] This does not mean, however, that the exhaustion requirement does not apply in urgent circumstances. Even if you have asked for a preliminary injunction to correct an ongoing constitutional violation, you must exhaust all available administrative remedies before you can obtain money damages or permanent injunctive relief.[8]

B. TIPS ON EXHAUSTING

1. Learning About Administrative Remedies

Most, but not all, jails and prisons have a system of administrative remedies. Many states have a single system that applies to all state prisons. The federal

3 *See, e.g.,* Adams v. Corrections Corp. of American, - P.3d -, 2008 WL 2204185 (Colo. App. May 29, 2008) (inmate must comply with state exhaustion requirements when challenging conditions of confinement); Dante v. Ryan, 979 So.2d 1122 (Fla. App. 3 Dist. 2008) (lawsuit dismissed for failure of inmate to prove that he had exhausted grievance process); Smith v. Tex. Dep't Of Criminal Justice-Inst. Div., 33 S.W.3d 338, 341 (Tex. App.-Texarkana 2000, pet. denied) (statute requires that the inmate must file a copy of the decision of the grievance system with the trial court to ensure that the inmate has exhausted his administrative remedies). *See also* Tex. Govt.Code Ann. §§ 501.007-.008 (Vernon 2004) (authorizing maximum payment of $500 as remedy for inmate's lost or damaged property and outlining specific "inmate grievance" procedures to be completed to exhaust administrative remedies). However, the Adams Court held that due to the narrow language of the statute the grievance exhaustion process does not apply to common law claims." *Id.* at * 6.

4 This is because the statute applies only to inmates who are "confined in any jail, prison, or other correctional facility." Norton v. City of Marietta, Oklahoma, 432 F.3d 1145, 1150 (10th Cir. 2005) ("it is the plaintiff's status at the time he files suit that determines whether § 1997e(a)'s exhaustion provision applies,..." (emphasis added)); Greig v. Goord, 169 F.3d 165, 167 (2d Cir. 1999). *But see*, Ruggiero v. County of Orange, 467 F.3d 170, 173-74 (2d Cir. 2006) (drug treatment program where parolee was confined was considered prison under PLRA). While former inmates generally cannot win injunctive relief, they can sometimes win money damages. Keep in mind, however, that you have a limited amount of time to file a lawsuit after a violation of your rights occurs.

5 Porter v. Nussle, 534 U.S. 516, 122 S.Ct. 983 (2002).

6 Booth v. Churner, 532 U.S. 731, 121 S. Ct. 1819 (2001).

7 *See* Jackson v. District of Columbia, 254 F.3d 262, 268 (D.C. Cir. 2001).

8 *Id.* at 268-69.

Bureau of Prisons has its own system.[9] If your jail or prison has no system of administrative remedies, you are not required to exhaust.[10]

It is important to learn about the system of administrative remedies at your jail or prison as soon as you arrive. Many facilities give new inmates a handbook explaining basic rules and procedures; at other facilities, guards explain these things to inmates in person. Be sure to find out the following information:

the number of steps (*e.g.*, informal complaint, grievance/complaint form, first appeal, second appeal) in the process;

the deadlines for each step;[11]

how to obtain the necessary forms;

how to submit the forms;

the kind of remedies that officials provide.[12]

It is best to get this information in writing: in an inmate handbook or a list of rules. Inmates sometimes rely on word-of-mouth information that they get from guards or other inmates, but it is difficult to prove such information in court. Because your ultimate goal is to prove to a court that you complied with all the rules at your jail or prison, get them in writing if you can.

2. Timing

File grievances and appeals as soon as you can. Many jails and prisons have deadlines — often, quite short deadlines — for inmates to submit grievances and appeals.[13] Your time for filing an appeal usually starts when you receive a response to your grievance (or lower appeal, if the system has more than one level of appeal). Be sure you know what these deadlines are for each step in the process, and do your best to comply with them.

If you miss a deadline, you should submit your grievance anyway. When filling out the form, explain why you missed the deadline. Even if your grievance is denied,

9 There are four steps in the federal Bureau of Prisons' administrative remedy program. Inmates must first attempt to resolve their concerns informally with staff. If informal resolution fails, the inmate must submit a grievance on form BP-9 (called an "Administrative Remedy Request") no later than 20 days after the date on which the basis for the grievance occurred. An inmate who is not satisfied with the Warden's response to his grievance must submit an appeal on form BP-10 no later than 20 days after the Warden signed the response. An inmate who is not satisfied with the Regional Director's response to his BP-10 appeal must submit an appeal on form BP-10 no later than 20 days after the Warden signed the response. An inmate who is not satisfied with the Regional Director's response to his BP-10 appeal must submit an appeal on form BP-11 to the General Counsel no later than 30 days after the Regional Director signed the response. 28 C.F.R. §§ 542.13 - .18.

10 *See* Aquilar-Avellaveda v. Terrell, 478 F.3d 1223, 1225 (10th Cir. 2007) (an administrative remedy is not considered to have been available if a prisoner, through no fault of his own, was prevented from availing himself of it.)

11 Some prison systems require that the informal complaint be completed in two days or the grievance is untimely.

12 Remember, it does not matter if the grievance process does not award damages and that is all you want. You still must exhaust the grievance process even if it cannot provide you the results you seek. Booth v. Churner, *supra*.

13 Woodford v. Ngo, 548 U.S. 81, 87, 126 S.Ct. 2378 (2006) ("Proper" exhaustion of administrative remedies is required, meaning that "a prisoner must complete the administrative review process in accordance with the applicable procedural rules, including deadlines, as a precondition to bringing suit in federal court."); Johnson v. Meadows, 418 F.3d 1152, 1159 (11th Cir. 2005) (An untimely grievance "is not sufficient to exhaust ... administrative remedies for purposes of the PLRA exhaustion requirement.").

you can argue in court that you did your best to comply with the rules. Whether you exhausted timely or not is an issue that Defendants must raise and if they don't raise it, they have waived it. Further, if you file an untimely grievance but prison staff has responded to the grievance on the merit, you have an argument that they waived the timely issue.

There may also be rules at your jail or prison that set deadlines for *officials* to respond to grievances and appeals. You can argue in court that the failure of officials to respond on time amounted to a denial of your grievance.[14] It is best, however, to wait for a response if you can. Remind officials if you do not hear anything from them after several weeks.[15]

3. Content

Generally, an inmate exhausts administrative remedies by filling out the grievance and appeal forms that his jail or prison provides. Be sure to carry through the process to its end: it is not enough to fill out a grievance but not an appeal form, or to tell your complaint to a guard without writing anything down.[16]

When filling out a grievance or appeal form, again, it is very important to follow the rules. Forms often require inmates to list specific information, such as the officers involved, date of the incident, and relief requested. Do not give officials the chance to deny your grievance on the ground that you did not provide all requested information. In determining whether you exhausted the grievance process, the court will review the requirements of the prison grievance process and not what courts from other circuits have required.

Remember, a grievance serves several purposes at once. It informs officials about ongoing dangers to your health or safety, or other problems at your jail or prison. It tells officials what remedies you want. It allows you, under the law, to file a lawsuit in the event that you do not receive the remedies you want.

Write grievances with each of these purposes in mind. If you have a medical condition that requires treatment, or if you have been exposed to dangerous conditions of confinement, describe those conditions in detail and tell officials what they should do in response. Section B.1 of Chapter 9 explained the kind of information that you should include in a medical request form or grievance.

14 Michigan's prison grievance process requires prison officials to respond to a grievance in a set time. If staff do not respond in a timely manner, the grievance process states that you can file at the next level. However, if you file a lawsuit when you did not receive a timely response, the court will dismiss the lawsuit for failure to exhaust. Cox v. Mayer, 332 F.3d 455, 225 n.2 (6th Cir. 2003).

15 In some circumstances, an inmate may not be able to exhaust all administrative remedies before the statute of limitations would ordinarily run on her claims. Most courts have tolled statutes of limitations during the period it took for the inmates to exhaust. *See*, e.g., Brown v. Valoff, 422 F.3d 926, 943 (9th Cir. 2005) ("we agree with the uniform holdings of the circuits that have considered the question that the applicable statute of limitations must be tolled while a prisoner completes the mandatory exhaustion process" (collecting cases)); Brown v. Morgan, 209 F.3d 595, 596 (6th Cir. 2000) (because PLRA prevents bringing § 1983 action until administrative remedies are exhausted, state statute of limitations tolled while prisoner exhausted). "Tolling" means to suspend the time that is passing so that it does not count in determining whether a statute of limitations bars a lawsuit.

16 Wright v. Hollingsworth, 260 F.3d 357, 358 (5th Cir. 2001) (rejecting argument that an inmate who failed to "pursue the grievance remedy to conclusion" substantially complied with § 1997e(a)).

The more detail you provide, the better able officials will be to fix your problem — and the more likely a court will find them deliberately indifferent if they do nothing. Attach additional pages if you need more space than that provided on the grievance or appeal form.

You do not have to include in a grievance all the information that you would include in a complaint.[17] Nevertheless, do your best to cover all the main points that you might raise later in a lawsuit. If you have the time, review § A of Chapter 13, which discusses the key parts of a civil rights lawsuit, and § B of Chapter 14, which explains how to write a complaint. Your grievance should include:

a description of any past or ongoing violation of your rights;

a list of all the officials whom you believe are responsible for each violation;

a list of witnesses to each violation;

the remedies that you want;

Do not be afraid to ask for a wide range of remedies. For example, an inmate who has been stabbed might ask for: medical treatment for his injuries, an official investigation into how the assault occurred, money to compensate him for his injuries and to punish the officials who allowed the assault to take place, the placement of the inmate who committed the assault in segregation, changes to the prison's classification system, and increased staff supervision of inmate living areas. You are unlikely to get everything you ask for. Nevertheless, you should request as many reasonable remedies as you can think of: to let officials know what they should do to make things right, and to keep your options open in case you want to file a lawsuit later.

Write grievances and appeals in a clear, straightforward manner. Do not use language that is insulting or sarcastic. Keep copies of all your grievances, appeals, and responses, so that you can show them to the court if you decide to file a lawsuit later.

C. PROVING EXHAUSTION

If you end up filing a lawsuit, you should allege in your complaint that you have exhausted all available administrative remedies. Even though this is not required after the *Jones* decision,[18] it is recommended that you explain exactly what

17 In Jones v. Block, 549 U.S. 199, 127 S.Ct. 910 (2007), the Supreme Court held that whether the inmate failed to exhaust is an affirmative defense that must be raised by prison staff or it is waived. The Court reversed the Sixth Circuit's requirement that an inmate had to specially provide the name of the prison staff in the grievance or the grievance was dismissed. The Court struck the "total exhaustion" requirement that if a defendant or claim is included in the lawsuit that was not included in the grievance that the lawsuit had to be dismissed. Pursuant to Jones, if a complaint contains an unexhausted claim or defendant, the unexhausted part should be dismissed without prejudice and the rest of the lawsuit should proceed.

18 *Id.* at 919-22 ("We conclude that failure to exhaust is an affirmative defense under the PLRA, and that inmates are not required to

you did to exhaust in the complaint. For instance, an inmate might include the following paragraph in her complaint:

> Plaintiff has exhausted all available administrative remedies at the Carlson Correctional Center. On March 2, 2008, plaintiff submitted a grievance raising the matters stated in this complaint to Officer Smith. On March 7, plaintiff received a response denying her grievance, signed by Grievance Coordinator Jones. On March 9, 2008, plaintiff submitted an appeal to Warden Doe. The warden denied her appeal on March 15. Copies of these documents are attached to this complaint.

Federal Rule of Civil Procedure 10(c) allows plaintiffs to attach grievances, appeal forms, and other exhibits to their complaints.

If there is no administrative grievance system at your jail or prison, say so in your complaint:

> There are no administrative remedies for inmates to exhaust in the Alabama Department of Corrections or at Benbow Prison for Women.

If you were unable to obtain the forms that you needed, you must prove this fact in court.[19] Courts tend not to believe unsupported assertions about officials withholding grievance and appeal forms. You must therefore make a record of such conduct. Here is an example of how an inmate could explain what happened:

> Plaintiff has exhausted all available administrative remedies. On March 2, 2008, plaintiff submitted a grievance raising the matters stated in this complaint to Officer Smith. On March 7, plaintiff received a response denying her grievance, signed by Grievance Coordinator Jones. Plaintiff immediately requested an appeal form from Officer Smith, but he told her that no forms were available. Plaintiff requested the form several more times from Officer Smith and from her counselor, Mr. Baker, but she did not receive the form until March 14. Plaintiff filed an appeal the next day, on March 15, but Warden Doe denied it on the ground that plaintiff had missed the 4-day deadline for filing administrative appeals. Copies of these documents are attached to this complaint, along with copies of three inmate request forms that plaintiff filed requesting the proper administrative appeal form.

specially plead or demonstrate exhaustion in their complaints." *Id.* at 921).

19 *See* Foulk v. Charrier, 262 F.3d 687, 698 (8th Cir. 2001) (holding that inmate exhausted his available administrative remedies, where his testimony established that prison officials failed to respond to his Informal Resolution Request, thereby preventing him from filing a grievance or appeal).

CHAPTER 13

Basics of a Federal Lawsuit

A lawsuit is not something to rush into. Even if your health or safety is at risk, you must think carefully before you file a lawsuit. Take time to think about the strengths and weaknesses of your case, the remedies you might win if everything goes right, the likelihood that something will go wrong, and the costs that you will have to bear in any event.

Chapter 14 explains how to write and file a complaint, along with everything else you must do to begin a federal lawsuit. This chapter addresses what you must understand to get to that point. Section A explains the basics of a federal lawsuit: how it works, whom you may sue, what remedies you may ask for. Section B explains how to match the facts of your case — both what you *know* you can prove, and what you *think* you can prove — with the elements of your claims. Section C discusses factors to consider when deciding whether to file a lawsuit. Finally, Section D summarizes the stages that a lawsuit goes through on its way to a dismissal, settlement, or trial.

A. SECTION 1983 AND BIVENS LAWSUITS

In order to enforce their rights under the federal constitution and a few particular federal statutes,[1] local and state inmates file lawsuits under 42 U.S.C. § 1983. Section 1983 is a *cause of action* that allows inmates to go to court, allege that their rights have been violated, prove their case, and win relief. Federal inmates, on the other hand, enforce their rights through *Bivens* lawsuits. *Bivens* is an *implied cause of action* that is modeled on § 1983.[2] Lawsuits filed under § 1983 or *Bivens* are called *civil rights lawsuits*.

Here is what § 1983 says:

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

1 *See* § B.2 of Chapter 2 for a discussion of the federal statutes that are applicable to those filing causes of actions pursuant to § 1983.

2 Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999 (1971). Technically, Bivens is a cause of action for damages. Federal courts are presumed to have the power to issue injunctions against federal officials who violate the Constitution. To keep things simple, this manual refers to both damages lawsuits and injunctive lawsuits filed against federal officials as "Bivens actions." However, the Tenth Circuit has held that a request for injunctive relief by a federal prisoner is not a Bivens action. Simmat v. U.S. Bureau of Prisons, 413 F.3d 1225 (10th Cir. 2005).

To understand § 1983 and *Bivens* better, let's break this language down into four parts: violations, plaintiffs, defendants, and remedies.

1. Violations

> *"... the deprivation of any rights, privileges, or immunities secured by the Constitution and laws...."*

The starting point for a § 1983 or *Bivens* lawsuit is a violation of your rights under federal law. Section 1983 allows state and local inmates to enforce their rights under the U.S. Constitution and some federal statutes. *Bivens* allows federal inmates to enforce constitutional rights.[3]

The first part of this manual (Chapters 3 through 10) discussed some important rights that inmates have. For every right that you have, there are *elements* that you must satisfy to prove a violation of that right. As you decide whether to file a lawsuit, it is important to see how the facts of your case match up with those elements. Section B, below, explains how to do this.

2. Plaintiffs

> *"... any citizen of the United States or other person within the jurisdiction thereof...."*

A person who files a § 1983 or Bivens lawsuit is called a *plaintiff*. You do not have to be a United States citizen to be a plaintiff. It does not make any difference whether you have been charged with or convicted of a crime — you still have rights that you can enforce in court.

a. Standing

All you really need to be a plaintiff in federal court is *standing*. Standing requires that you have (1) an actual or threatened injury (2) that is "fairly traceable" to the conduct of the defendants you are suing and (3) that can be remedied by the court.[4] The purpose of standing is to make sure that every case in federal court involves an ongoing controversy. People may not file federal lawsuits simply to express their general displeasure with the conduct of government officials.

Inmates clearly have standing to seek damages for injuries they suffer as a result of constitutional or statutory violations. Standing only becomes a problem when inmates seek injunctive relief, to prevent future violations from occurring. This problem is discussed in § A.4.b, below.

3 A federal prisoners may bring a claim for violation of the Religious Freedom Restoration Act (RFRA) or the American Disabilities Act (ADA) pursuant to 28 U.S.C. § 1331 (general jurisdictional statute of federal courts).

4 Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102-03, 118 S.Ct. 1003 (1998). *See* also Carolina Cas. Ins. Co. v. Pinnacol Assur., 425 F.3d 921, 926-27 (10th Cir. 2005) (discussing how standing must be established).

b. Joinder of Parties

The Federal Rules of Civil Procedure are very flexible when it comes to combining claims and parties in a single lawsuit. Rule 18(a) allows you to bring multiple, even unrelated claims against the same defendant in a lawsuit. Rule 20(a) allows you to file a lawsuit with other plaintiffs, so long as all plaintiffs (1) are interested in claims arising out of the same series of events and (2) share at least one common question of law or fact. A district court has broad power to *join* claims and parties, or to *sever* them (break them apart) into separate cases, as it sees fit.

Sometimes, when many inmates at a jail or prison (or a large unit within a jail or prison) seek an injunction to remedy conditions or practices that affect them all, they ask a district court to certify their lawsuit as a *class action* under Rule 23(b)(2). If the court agrees, it will establish a *plaintiff class* of all present and future inmates who are similarly situated to the inmates who filed the lawsuit. There are five requirements, set forth in the footnote below, for class certification under Rule 23(b)(2).[5] Class certification is useful because it focuses a court's attention on systemic problems at a facility and keeps the lawsuit from becoming *moot* when the original plaintiffs are released. Courts require Rule 23(b)(2) classes to be represented by lawyers.[6] If a judge believes that serious problems exist at a jail or prison, it may grant class certification and appoint a lawyer to represent all the inmates confined there.

3. Defendants

> *"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected...."*

Each plaintiff must name at least one *defendant* — a person or entity who may be sued under § 1983 or *Bivens* — who caused the violation of his rights and is able to provide a remedy. A Plaintiff often names more than one defendant. As a matter of strategy, naming multiple defendants improves your chances of obtaining a remedy.[7] Also, defendants sometimes "point the finger" at each other in an attempt to avoid liability; this can help you to prove your case.

Keep in mind, however, that you must have a good-faith basis for naming any

5 Rule 23(a) requires four conditions of all class actions: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." In addition, Rule 23(b)(2) requires that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

6 Fymbo v. State Farm Fire & Cas. Co., 213 F.3d 1320, 1321 (10th Cir. 2000) (concluding that non-attorneys proceeding *pro se* cannot adequately represent a class); Oxendine v. Williams, 509 F.2d 1405, 1407 (4th Cir. 1975) ("[I]t is plain error to permit [an] imprisoned litigant who is unassisted by counsel to represent his fellow inmates in a class action.").

7 An official whom you sue could turn out to be judgment proof: unable to pay a judgment of damages (*see* § A.4.a, below) awarded against him. In this event, the doctrine of joint and several liabilities will generally allow you to recover an award of compensatory damages from the other defendants in the case. *See, e.g.,* Patrick v. City of Detroit, 906 F.2d 1108, 1114-16 (6th Cir. 1990) (jury instruction on joint and several liability was proper, and "apportionment is improper when only joint and several liability is to be considered"); Smith v. Michigan, 256 F.Supp.2d 704, 711-12 (E.D. Mich. 2003) (discussing when joint and several liability does not apply).

person or entity as a defendant.[8] As your lawsuit proceeds, you will have to prove that each defendant violated your rights. In other words, you must consider each possible defendant's liability separately. You may not simply throw everyone you can think of "into the soup," in the hope that somebody will be found liable in the end.

Important legal rules govern whom you may name as a defendant in a § 1983 or *Bivens* lawsuit:

a. Under Color of State Law

Under § 1983, each defendant must have acted "under color of state law" when that person violated your rights. This is normally not a problem in inmate lawsuits. A jail or prison official generally acts under color of state law whenever he is "on the job." For example, an official who assaults an inmate acts under color of state law, even though his conduct might violate the rules of his job and/or state law.[9] By contrast, an official does not act under color of state law if, while off-duty, he assaults someone in a bar fight.

Early on, this manual explained that it would use the word "official" to refer to any person charged with carrying out a government function, whether employed by the government or not. This is because even people who do not work directly for the government act "under color of state law" when they perform government functions. Thus, a private doctor acts under color of state law when he provides medical services to prisoners pursuant to a contract.[10] Similarly, a corporation that administers medical services at a jail or prison — or even runs the entire facility — can be sued under § 1983 if the constitutional violation resulted from an actual policy or custom of the private contractor.[11]

Unlike a private contractor under § 1983, *Bivens* will not extend to provide a right of action against private contractors or their employees whose actions were not fairly attributable to government, or where the inmate had adequate state tort remedies.[12]

8 *See* Fed. R. Civ. P. 11(b), where the court can impose either monetary sanctions, dismissal of your claims or other adverse consequences if you don't have a good faith basis for naming prison officials as defendants.

9 *See* West v. Atkins, 487 U.S. 42, 50, 108 S.Ct. 2250 (1988); Flagg Bros., Inc., v. Brooks, 436 U.S. 149, 157 n.5, 98 S.Ct. 1729 (1978).

10 West v. Atkins, 487 U.S. at 54-57; *see generally* Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n., 531 U.S. 288, 121 S.Ct. 924 (2001). But *see* Collyer v. Darling, 98 F.3d 211, 231-32 (6th Cir. 1996) (private doctors did not act under color of state law); Sykes v. McPhillips, 412 F.Supp.2d 197 (N.D. N.Y. 2006) (no state action where private physician was not under contract and treated prisoner in hospital outside of prison).

11 Richardson v. McKnight, 521 U.S. 399; 405-06, 117 S.Ct. 2100 (1997) (*see* lower court cases cited therein); Johnson v. Karnes, 398 F.3d 868, 877 (6th Cir. 2005); Woodward v. Correctional Medical Services of Illinois, Inc., 368 F.3d 917, 929 (7th Cir. 2004) (private contractor can be held liable even if employee was not); Farrow v. West, 320 F .3d 1235, 1239 n. 3 (11th Cir. 2003) (private contractors may not be liable on a respondeat superior or vicarious liability basis)

12 Correctional Services Corp. v. Malesko, 534 U.S. 61, 122 S.Ct. 515 (2001) (federal prisoners in BOP facilities had no implied right of action against private prison contractor since inmate had alternative tort remedies, and had full access to remedial mechanisms established by BOP); Holly v. Scott, 434 F.3d 287 (4th Cir. 2006) (same); Peoples v. CCA Detention Centers, 422 F.3d 1090 (10th Cir. 2005) (negligence claim available under Kansas law to pretrial detainee at detention center operated by private contractor under contract with United States precluded detainee's Bivens claim against contractor's employees). *See also* Wilkie v. Robbins, _ U.S. _, 127 S.Ct. 2588 (2007).

Officials who work for a municipality (see § A.3d, below) act under color of *state* law and may be sued under § 1983. Because federal officials do not normally act under color of state law, they may be sued only in *Bivens* actions.[13]

b. Individual and Official Capacity

You must specify in the complaint whether you are suing a government official in his *individual capacity,*[14] his *official capacity*, or both. If you name a defendant in his individual capacity, you are suing that specific person and not the entity. If you name a defendant in his official capacity, you are suing whoever happens to occupy that official position at the time.[15] In the caption of your complaint, you should include a defendant's official title if you are suing him in his official capacity: *e.g.*, "John Smith, Warden of Jefferson State Prison, in his official capacity." You should also include this information in the paragraph in the complaint where you describe him as a party.

A lawsuit against a person in his *official capacity* is, in effect, a lawsuit against the government for whom the person works.[16] Thus, if you sue a guard at a county jail in his official capacity, you are effectively suing the county itself. Because you may sue a municipality (like a county, city, or town) directly under § 1983 (see § A.3.d, below), you generally gain little by suing a municipal official in his official capacity.

Why would you ever sue an official in his official capacity? The answer does not make a lot of sense, but it is the law. As § A.3.e explains below, the Eleventh Amendment to the U.S. Constitution prohibits you from suing a state (*e.g.*, California) or a state agency (*e.g.*, the California Department of Corrections). Thus, you may not sue a state official in his official capacity for damages, because that would in effect be a damages lawsuit directly against the state. Nevertheless, federal courts have the power to force states and state agencies to comply with the U.S. Constitution. Under what is called "the *Ex Parte Young* fiction," you may sue a state official in his official capacity for *injunctive relief* to force the state or state agency for whom the official works to obey the Constitution.[17]

You sue an official in his individual capacity to get an award of damages.[18] In theory, if you win such an award, the official will be personally responsible

13 Cabrera v. Martin, 973 F.2d 735, 742 (9th Cir. 1992) (federal officials acting under federal authority are generally not considered to be state actors, they may be liable under § 1983 if they are found to have conspired with or acted in concert with state officials to some substantial degree); Abate v. Southern Pac. Transp. Co., 993 F.2d 107 (5th Cir. 1993) (*Bivens* is federal counterpart to § 1983, which in effect extends protections afforded by § 1983 to parties injured by federal actors not liable under § 1983); Izen v. Catalina, 398 F.3d 363, 367 n. 3 (5th Cir. 2005) (Bivens action is analogous to § 1983 action — the only difference being that § 1983 applies to constitutional violations by state, rather than federal, officials), *cert. denied*, 126 S.Ct. 1908 (2006).

14 Courts sometimes refer to individual capacity as "personal capacity."

15 Under Federal Rule of Civil Procedure 25(d), if during the course of a lawsuit an official sued in his official capacity "dies, resigns, or otherwise ceases to hold office," his successor (the next person to hold his office) automatically takes his place as a defendant.

16 Kentucky v. Graham, 473 U.S. 159, 165-66, 105 S.Ct. 3099 (1985); Monell v. Department of Social Servs., 436 U.S. 659, 690 n.55, 98 S.Ct. 2018 (1978).

17 *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 102-05, 98 S.Ct. 2018 (1984); Ex Parte Young, 209 U.S. 123, 160, 28 S.Ct. 441 (1908).

18 Hafer v. Melo, 502 U.S. 21, 31 112 S.Ct. 358 (1991).

for paying it. In reality, officials sued in their individual capacity are normally represented by government-paid lawyers and *indemnified* (paid back) by the government for damages awards ordered against them.

The bottom line is:

> **If you want damages,** sue the responsible municipal, state, or federal officials in their individual capacity, and/or a municipality directly.
>
> **If you want an injunction,** sue the responsible state or federal officials in their official capacity, or a municipality directly.

If you want both damages and an injunction, you may sue an official in both capacities at the same time. For example, the caption of your complaint may list a defendant as follows: "Warden John Smith, in his individual and official capacities."

Officials sued in their individual capacity for damages are entitled to *qualified immunity*. This immunity shields officials from having to pay damages for violations that were not "clearly established" at the time they occurred. Qualified immunity does not apply to claims for injunctive relief. See § A.4.a.iv, below.

In addition, some officials — judges,[19] prosecutors,[20] and legislators[21] — have *absolute immunity*. This means that you may not sue them for anything they did, no matter how unfair or harmful, in the course of their official duties.

c. Supervisory Liability

A *supervisor* is an official who trains, oversees, gives orders to, and/or disciplines other officials. In a jail or prison, a supervisor can be a shift commander, a mid-level corrections officer like a captain or lieutenant, a head nurse or head doctor, a chief jailer, a county sheriff, a prison warden, or even the commissioner of the state department of corrections.

As courts are quick to observe, the doctrine of *respondeat superior* does not apply in § 1983 and *Bivens* lawsuits.[22] This means that you may not sue an official simply because she is the supervisor of someone else who violated your rights. In this respect, civil rights law is different than tort law, where a plaintiff can often recover damages from an employer for an employee's wrong.

19 Stump v. Sparkman, 435 U.S. 349, 356-57, 98 S.Ct. 917 (1978) (absolute immunity for damages liability). *See also* 42 U.S.C. § 1983 ("[I] n any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.").

20 Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984 (1975). In addition, you may not file a § 1983 lawsuit that challenges, directly or indirectly, a criminal conviction or the loss of good-time credits resulting from a disciplinary violation until these convictions are reversed or removed. *See* Edwards v. Balisok, 520 U.S. 641, 117 S.Ct. 1584 (1997); Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364(1994).

21 Bogan v. Scott-Harris, 523 U.S. 44, 118 S.Ct. 966 (1998). Although you may not sue municipal legislators (e.g., the members of a county commission or city council) for actions taken in their legislative capacity, you may sue the individual members of the legislative body when actions taken were in an administrative capacity. *See* Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391, 404-05 & n.29, 99 S.Ct. 1171 (1979).

22 Monell, 436 U.S. at 691. *See also* Hafer v. Melo, 502 U.S. 21, 112 S.Ct. 358 (1991).

For every official you name as a defendant, you must show *causation*. *Causation* is a link that explains how the official's act or *omission* (failure to act) caused the violation of your rights. Keep in mind that a violation may have multiple causes.

It is not difficult to show causation for most low-level (or "line") officials. A guard who beats you without justification *causes* a violation of your right against excessive force. A doctor who refuses to provide treatment for a serious medical need *causes* a violation of your right to medical care. In both examples, the official *personally participates* in the violation.[23]

A supervisor, too, can personally participate in a violation. Like a guard, a warden who beats an inmate can cause an excessive force violation. Similarly, if state law imposes on a county sheriff a duty to protect the health and safety of inmates, and the sheriff knowingly disregards a substantial risk of serious harm at the jail, he will be liable under § 1983. High-level officials are not shielded from liability for their direct acts or omissions simply because they supervise other officials.

Furthermore, personal participation is not the only way to show causation. An official will be liable under § 1983 or *Bivens* if he establishes or carries out a *policy* that results in a violation of your constitutional rights.[24] For example, a warden who directs guards to place unresisting prisoners in four-point restraints for the purpose of punishment will be liable for the constitutional violations that result, even if he is not present when guards strap inmates down. An official may also be liable because of a policy of inaction: a failure to respond reasonably to a *systemic health or safety problem* at a jail or prison. If, for example, a jail routinely fails to treat inmates with active tuberculosis, the jail's medical director will be liable for a sick inmate's decline in health or a healthy inmate's contraction of the disease. Several systemic health and safety problems are discussed in Chapters 9 - 10.

Be careful not to name a defendant who clearly bears no responsibility for your health or safety. Do not name, for example, the president of the United States or the director of the Central Intelligence Agency. Not only will the court immediately

23 Courts sometimes use the phrase "direct participation" to refer to the same idea. Remember that personal participation may involve either an act (e.g., striking an inmate) or an omission (e.g., watching another official strike an inmate and not doing anything to stop it). For claims that involve deliberate indifference (*see* Chapters 6-10), it is often an official's omission — i.e., his failure to act reasonably in response to a known substantial risk of serious harm — that causes the constitutional violation.

24 City of Canton v. Harris, 489 U.S. 378, 385, 109 S.Ct. 1197 (1989); *see also* Edgerly v. City and County of San Francisco, 495 F.3d 645, 660 (9th Cir. 2007) ("supervisors 'can be held liable for: 1) their own culpable action or inaction in the training, supervision, or control of subordinates; 2) their acquiescence in the constitutional deprivation of which a complaint is made; or 3) for conduct that showed a reckless or callous indifference to the rights of others.'" (citation omitted)); Bisbal-Ramos v. City of Mayaguez, 467 F.3d 16, 24 (1st Cir. 2006) (Supervisor "[d]eliberate indifference will be found only if it would be manifest to any reasonable official that his conduct was very likely to violate an individual's constitutional rights. The affirmative link requirement contemplates proof that the supervisor's conduct led inexorably to the constitutional violation." (citation omitted)); Camilo-Robles v. Hoyos, 151 F.3d 1, 6-7 (1st Cir. 1998) (supervisor may be held liable under § 1983 "if he formulates a policy or engages in a practice that leads to a civil rights violation committed by another"; "supervisory liability does not require a showing that the supervisor had actual knowledge of the offending behavior; he 'may be liable for the foreseeable consequences of such conduct if he would have known of it but for his deliberate indifference or willful blindness'"); Blyden v. Mancusi, 186 F.3d 252, 264 (2d Cir. 1999) ("A supervisor may be found personally involved in a deprivation of rights in several ways: [He] may have directly participated in the infraction.... [He], after learning of the violation through a report or appeal, may have failed to remedy the wrong.... [H]e may be liable because he[] created a policy or custom under which unconstitutional practices occurred, or allowed such a policy or custom to continue.... Lastly, [he] may be personally liable if he[] was grossly negligent in managing subordinates who caused the unlawful condition or event....").

dismiss such a defendant, it may throw out your entire lawsuit on the ground that it is *frivolous* or *malicious*. You must maintain your credibility in the eyes of the court at all times. If you follow the law and this manual's directions, this should not be a problem.

d. Municipal Liability

In addition to suing actual people — *i.e.*, officials who work in jails and prisons — you may sue *municipalities* under § 1983.[25] A municipality is a county, city, town, or other local government. You may not sue a municipality simply because a municipal worker (*e.g.*, a county jail guard) violated your rights.[26] Rather, you may do this only if a *policy* or *custom* of that municipality was a "moving force" behind the violation you suffered.[27] The decision of a *final policymaker* for a municipality counts as a policy.[28] A custom is a practice that is so longstanding and well-settled that it amounts to an unspoken rule for the municipality.[29]

If you believe that a municipality's policy of hiring, training, or supervising its employees caused your violation, you must show that the policy was so grossly inadequate that it amounted to *deliberate indifference* to your rights. In other words, the inadequate policy must reflect "a 'deliberate' or 'conscious' choice by the municipality."[30] You can satisfy this requirement either by showing a pattern of unconstitutional behavior by municipal employees or by showing that the violation of your rights was a "highly predictable" or "plainly obvious" consequence of the municipality's action or inaction.[31]

e. State and Federal Government Liability

Even though you may sue municipal governments directly under § 1983, you may not sue states or the federal government. The Eleventh Amendment prohibits § 1983 lawsuits against states and state agencies.[32] However, as § A.3.b explained,

25 Monell v. Department of Social Servs., 436 U.S. 658, 98 S.Ct. 2018 (1978). In addition, a private corporation is treated as a "person" under § 1983.

26 *Id.* at 691-94.

27 Board of County Comm'rs of Bryan County v. Brown, 520 U.S. 397, 403-04, 117 S.Ct. 1382 (1997). A municipality is not protected by either Eleventh Amendment immunity or qualified immunity. Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398 (1980). You may not win punitive damages from a municipality. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 101 S.Ct. 2748 (1981).

28 City of St. Louis v. Praprotnik, 485 U.S. 112, 108 S.Ct. 915 (1988); Pembaur v. City of Cincinnati, 475 U.S. 469, 106 S.Ct. 1292 (1986). While official policy is important to both supervisory liability (*see* § A.3.c, above) and municipal liability, you should keep these two kinds of liability separate in your mind. It is possible for one kind of liability to exist in a case, but not the other.

29 Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 109 S.Ct. 2702 (1989). A custom does not have to be specifically authorized or ordered by a final policymaker. Thus, if a county sheriff is aware of a certain widespread practice but does nothing to stop it, the county may be liable for violations that occur as a result of that custom.

30 City of Canton v. Harris, 489 U.S. 378, 389, 109 S.Ct. 1197 (1989); *see also* Board of County Comm'rs v. Brown, 520 U.S. at 407-08.

31 Board of County Comm'rs v. Brown, 520 U.S. at 408-10; City of Canton, 489 U.S. at 390 & n.10. This standard of deliberate indifference is different from the subjective standard discussed in Chapter 6. *See* Farmer v. Brennan, 511 U.S. 825, 841, 114 S.Ct. 1970 (1994) ("Canton's objective standard... is not an appropriate test for determining the liability of prison officials under the Eighth Amendment as interpreted in our cases."). In the context of municipal liability, you do not have to prove that officials "actually knew" about an inadequate policy, only that the inadequacy was so obvious that they "should have known." A need for training is obvious if such training would address a basic part of an official's duties, such as health screening procedures or limitations on the use of deadly force by guards. Therefore, if you sue a municipality under a theory of inadequate training, you should include in your complaint any facts that (1) show a pattern of violations similar to yours, or (2) show that the violation of your rights involved issues as basic to an official's duties as to make the need for training obvious.

32 Or, to be more precise, the Eleventh Amendment as interpreted by the Supreme Court prohibits it. *See* Hans v. Louisiana, 134 U.S. 1,

you may sue state government officials (1) in their individual capacity for damages and (2) in their official capacity for injunctive relief.

As for the federal government (the United States), it has *sovereign immunity*: a broad shield against all lawsuits not specifically permitted under the Constitution and federal law. The United States has not waived its sovereign immunity for any inmate lawsuits other than tort actions permitted under the Federal Tort Claims Act. See Chapter 2, § B.4. Therefore, you may not sue the United States or any federal agency (*e.g.*, the Bureau of Prisons) for damages for a violation of your constitutional rights; you may sue only federal officials in their individual capacity in a *Bivens* lawsuit.[33]

4. Remedies

> *"... shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."*

Finally, when you file a § 1983 or Bivens lawsuit, you must tell the court and the defendants what *remedies* (or "relief") you want.[34] In other words, why did you file? There are basically two kinds of remedies that you can seek in a civil rights lawsuit: damages and injunctive relief. The remedies that you request determine what you must prove to win.

a. Damages

An award of *damages* is money. If you have been "damaged" as a result of a defendant's violation of your rights, you may be able to win money for the injury that you suffered and/or the unlawfulness of the defendant's conduct.

i. *Compensatory, Nominal, and Punitive*

There are three types of damages: compensatory, nominal, and punitive.

Compensatory damages pay you back for an injury that you suffered as a result of a violation of your rights. The purpose of compensatory damages is to "make you whole again": to put you back where you were before the violation occurred. In an excessive force lawsuit, for example, compensatory damages might include the cost of medical treatment; wages that you lost because you could not work;

10 S.Ct. 504 (1890). In addition, states and state agencies are not considered "persons" under § 1983. Will v. Michigan Dep't of State Police, 491 U.S. 58 109 S.Ct. 2304 (1989).

33 You may also sue federal officials and agencies for injunctive relief "against threatened invasions of constitutional interests." American Federation of Government Employees Local 1 v. Stone, 502 F.3d 1027, 1038 (9th Cir. 2007) ("The power of the federal courts to grant equitable relief for constitutional violations has long been established. Thus,... there is a 'presumed availability of federal equitable relief against threatened invasions of constitutional interests.'" (citation omitted)); *see also* Dotson v. Griesa, 398 F.3d 156, 180 (2d Cir. 2005.

34 In a complaint, a plaintiff's request for remedies is called the prayer for relief. *See* Chapter 14.

and money to make up for your physical pain, permanent injuries, and emotional suffering.[35]

If you win *nominal damages*, you will get $1 or a similarly small amount of money. A judge or jury might award you just nominal damages if it concludes that even though the defendants violated your rights, you did not suffer an injury that requires compensation. If you seek compensatory and/or punitive damages in your lawsuit, you should also request nominal damages.[36]

An award of *punitive damages* (also called *exemplary damages*) serves to punish a defendant, rather than pay you back for what you lost. A judge or jury may award punitive damages under § 1983 if it concludes that a defendant's conduct was either motivated by an evil intent or involved reckless or callous indifference to your rights.[37] Because this standard comes very close to what you must show to win the merits of either an excessive force claim ("malicious and sadistic intent," see Chapter 7) or a claim involving deliberate indifference (see Chapters 6, 8, 9 and 10), it makes sense to request punitive damages in most such lawsuits.[38] You can win punitive damages from individual officials, but not from municipalities.[39]

ii. *Demanding And Proving Damages*

Any complaint filed in federal court must include "a demand for judgment for the relief the pleader seeks": a *prayer for relief*.[40] Although you do not have to state in your prayer for relief a specific amount of requested damages, you will at some point have to tell the defendants and the court how much you want.[41]

Be realistic. It is tempting to think that the more money you ask for, the more you will get. That is not how things work. Asking for an unrealistic amount of damages — *e.g.*, "ten million dollars" — will only make you look ridiculous. Even

35 As a general rule, § 1983 allows plaintiffs to recover for all injuries recognized in the common law of torts: e.g., physical injury, mental anguish and emotional distress, harm to reputation, economic loss, fear, anxiety, humiliation. *See* Carey v. Piphus, 435 U.S. 247 (1978). The new "physical injury" requirement of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(e), however, makes things more complicated for inmates. *See* § A.4.a.iii.

36 A request for nominal damages requires a judge or jury to decide whether your rights were violated, even if it does not believe that you suffered any injury. Such a finding of a violation may in turn help you to win punitive damages, or at least avoid having to pay the costs of your lawsuit. *See* Fed. R. Civ. P. 54(d). Also, if during your case you obtain the services of an attorney, that attorney may be able to recover her fees and costs from the defendants if you also requested declaratory or injunctive relief along with nominal damages. Some courts have held that nominal damages may be awarded even if not specifically requested in a plaintiff's complaint. *See, e.g.,* Allah v. Al-Hafeez, 226 F.3d 247, 251 (3d Cir. 2000) (construing *pro se* complaint to include claim for nominal damages where complaint sought only compensatory and punitive damages); Park v. Shiflett, 250 F.3d 843, 853-54 (4th Cir. 2001) (holding that where civil rights plaintiff had proved a constitutional violation but no actual injury, nominal damages were appropriate). Other courts disagree. *See, e.g.,* Davis v. District of Columbia, 158 F.3d 1342, 1348 (D.C. Cir. 1998) (declining to construe *pro se* complaint for compensatory damages as including claim for nominal damages). You are best off asking for nominal damages whenever you seek any damages at all.

37 Smith v. Wade, 461 U.S. 30, 46-52, 103 S.Ct. 1625 (1983) (upholding award of punitive damages to prisoner who had been beaten, harassed, and sexually assaulted by cellmates); Cooper v. Casey, 97 F.3d 914, 919 (7th Cir. 1996) ("[I]f the plaintiffs' testimony was believed the defendants made a wanton and cowardly attack and then deliberately refused medical assistance for the pain caused by the attack. We cannot think of a better case for an award of punitive damages.").

38 *But see* Coleman v. Rahja, 114 F.3d 778, 787 (8th Cir. 1997) ("A finding of deliberate indifference to a serious medical need, while establishing liability under § 1983, does not necessitate a finding of callous indifference warranting punitive damages.").

39 City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 101 S.Ct. 2748 (1981).

40 Fed. R. Civ. P. 8(a).

41 As Chapter 16 will explain, unless otherwise provided by a district court's local rules, Federal Rule of Civil Procedure 26(a)(1) requires the parties to make *initial disclosures* at the beginning of discovery. These required disclosures include a computation of each kind of damages that the plaintiffs have requested and any documents or evidentiary materials on which they based their computation. Defendants usually ask for this information in interrogatories and documents requests, also.

with a strong case, with the law on your side, serious injuries, and a sympathetic judge or jury, your damages will be measured in the hundreds or thousands of dollars, not the millions.

There is no simple formula that you (or a judge or jury) can use to figure out the proper amount of compensatory damages in a particular case. How do you convert into dollars the physical and psychological effects of a guard's unjustified use of a stun gun, or a three-week delay in the treatment of an infected tooth, or a sexual assault that took place in an unsupervised prison dormitory? Start with easily provable damages: medical expenses, lost wages, etc. Then try to break down into numbers the other injuries that you suffered. How many days did they last? What did your injuries prevent you from doing? What effects did you suffer? What effects do you still experience? You can get a better idea of what a particular injury is "worth" by researching damage awards in related cases, particularly cases decided in your area.

It helps to have a doctor testify about your pain and injuries. Unfortunately, few *pro se* inmates can get a doctor to testify on their behalf. You may, however, be able to present medical records, incident reports, or the testimony of inmates or staff who witnessed your injuries. You must try to make the judge or jury understand, as completely as possible, what you went through and how that experience changed your life.

With punitive damages, your goal is to show, to the extent you can, each defendant's evil intent or reckless or callous indifference. As is true of the intent requirements for the rights discussed in Chapters 6 through 10, you demonstrate a person's intent (what he was thinking) by pointing to what he said and what he did. Here, evidence of cursing, taunting, threats, racial epithets, and other unprofessional remarks will help your case. So will evidence that an official completely overreacted to a need for force or refused to take even the simplest measures to protect you from danger or relieve your pain. Just as you want a judge or jury to identify with your suffering, you want it to be shocked and repulsed by the conduct of the officials from whom you seek punitive damages.

iii. *The "Physical Injury" Requirement*

The Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(e), limits the kind of relief that inmates may recover. The PLRA states: "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."

Courts have generally held that § 1997e(e) requires the dismissal of any claim that is:

1. filed by an inmate[42] and

2. seeks compensatory (and perhaps nominal and punitive[43]) damages

3. for a psychological ("mental or emotional") injury

4. when that inmate did not also suffer a physical injury at the same time.[44]

Section 1997e(e) bars only claims for compensatory damages, not claims for injunctive relief, when the inmate seeks emotional damages but does not have a physical injury.[45] It does not bar you from seeking damages for a psychological injury if you also seek relief for a related physical injury.

It is not clear what kind of physical injury you must allege and prove under § 1997e(e).[46] Borrowing from the law on inmates' excessive force claims (see Chapter 7, § A.3.c), some courts have ruled that an inmate's physical injury must be more than *de minimis* (very small or trifling), but not necessarily significant.[47] These courts have found that the following injuries were de minimis:

being placed in an unsanitary segregation cell, near psychiatric patients who scream at all hours, beat on metal toilets, and throw feces[48]

a sore, bruised ear lasting for three days[49]

being forced to "dry shave" while standing naked outside one's cell[50]

Other courts have applied § 1997e(e) to dismiss damages claims involving the

42 Section 1997e(e) does not apply to people who have been released from jail or prison at the time they file their lawsuits. *See* Norton v. City of Marietta, 432 F.3d 1145, 1150 (10th Cir. 2005) (collecting cases concluding that plaintiff who brings action regarding prison conditions after his release does not have to satisfy PLRA's exhaustion requirement).

43 *See* Allah v. Al-Hafeez, 226 F.3d 247, 250-53 (3d Cir. 2000) (holding that § 1997e(e) barred inmate's claim for compensatory damages, but not claims for nominal and punitive damages); Oliver v. Keller, 289 F.3d 623, 630 (9th Cir. 2002) (1997e(e) only restricts the availability of certain types of relief (monetary damages in some instances), while leaving open the possibility of nominal and punitive damages); Cassidy v. Indiana Dep't of Corrections, 59 F. Supp.2d 787, 794 (S.D. Ind. 1999) (holding that nominal damages are not barred by § 1997e(e)), *aff'd*, 199 F.3d 374 (7th Cir. 2000); Perkins v. Kansas Dep't of Corrections, 165 F.3d 803, 808 n.6 (10th Cir. 1999) (remanding for district court to decide whether § 1997e(e) applies to nominal and punitive damages).

44 Most courts will just dismiss the claim for emotional damages and will allow you to develop your case to show that your constitutional rights were violated in seeking nominal and punitive damages. A few courts will dismiss your entire claim if you are suing for emotional damages without a physical injury.

45 Harper v. Showers, 174 F.3d 716, 719 (5th Cir. 1999); Perkins, 165 F.3d at 808; Harris v. Garner, 190 F.3d 1279, 1288 (11th Cir. 1999), *reinstated in relevant part*, 216 F.3d 970, 972 (11th Cir. 2000) (*en banc*); Davis v. District of Columbia, 158 F.3d 1342, 1346 (D.C. Cir. 1998).

46 Ibrahim v. District of Columbia, 463 F.3d 3, 7 (D.C. Cir. 2006) ("The PLRA does not define this term, and we have not interpreted its meaning in past cases, but we have no difficulty concluding that a chronic disease that could result in serious harm or even death constitutes 'serious physical injury.'").

47 The courts have also recognized that the injury may be de minimis but that recovery should still be allowed in a few exceptional cases.

We recognize that there may be highly unusual circumstances in which a particular application of force will cause relatively little, or perhaps no, enduring injury, but nonetheless will result in the impermissible infliction of pain. In these circumstances, we believe that either the force will be "of a sort repugnant to the conscience of mankind," and thus expressly outside the de minimis force exception, or the pain itself will be such that it can properly be said to constitute more than de minimis injury

Normal v. Taylor, 25 F.3d 1259, 1263 n.4 (4th Cir. 1994) (*en banc*).

48 Harper v. Showers, 174 F.3d at 717, 719.

49 Siglar v. Hightower, 112 F.3d 191, 193-94 (5th Cir. 1997).

50 Harris v. Garner, 190 F.3d at 1287.

violation of medical privacy,[51] the violation of bodily privacy,[52] mere exposure to a risk of violence,[53] and exposure to asbestos that has not yet resulted in a medical problem.[54] These rulings leave open the question whether § 1997e(e) will bar lawsuits seeking damages for acts of sexual harassment, racial discrimination, religious bigotry, and psychological torture.

Before you file a lawsuit, you should find out whether the Supreme Court or the court of appeals in your circuit has discussed § 1997e(e) in a recent case. In light of how courts have applied § 1997e(e) thus far, you should emphasize in your complaint (and in later documents) any physical injury that you suffered. Be ready to explain why this physical injury was more than de minimis. Do not discuss mental or emotional injuries in isolation; always try to link such injuries to a physical injury that occurred at the same time.

Section 1997e(e) is likely to be especially problematic in lawsuits seeking damages for unconstitutional conditions of confinement. Courts may be inclined to think that inmates who are denied regular exercise, clean blankets, or fresh air do not really suffer a physical injury and you will not be allowed to seek compensatory damages. In a damages lawsuit, you will need to explain to the court how each deprivation of a basic human need harmed your physical health to recover compensatory damages. For example, a denial of exercise might cause your muscles to weaken (or "atrophy"), hinder blood circulation in your legs, raise your blood pressure, and make you more vulnerable to colds and other medical problems.

iv. *Qualified Immunity*

If you file a § 1983 or *Bivens* lawsuit and ask for damages, you must be ready to deal with *qualified immunity*. Qualified immunity shields an official sued in his individual capacity for damages if the constitutional or statutory right that you allege the official violated was not "clearly established" at the time of the violation.[55]

To understand qualified immunity, consider this example: You may remember watching police officers arresting people in their homes on the TV show "COPS." In 1999 the Supreme Court held that the Constitution prohibits the police from bringing TV camera crews into a home during the execution of an arrest warrant.[56] At the same time, the Court held that the homeowners who had filed that particular lawsuit could not recover damages because their constitutional rights had not been "clearly established" when the police entered their home.[57]

51 Davis v. District of Columbia, 158 F.3d at 1345.
52 Harris v. Garner, 190 F.3d at 1286-87.
53 Jones v. Greninger, 188 F.3d 322, 326 (5th Cir. 1999).
54 Herman v. Holiday, 238 F.3d 660, 665-66 (5th Cir. 2001); Zehner v. Trigg, 133 F.3d 459, 460-61 (7th Cir. 1997).
55 Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727 (1982).
56 Wilson v. Layne, 526 U.S. 603, 119 S.Ct. 1692 (1999).
57 *Id.* at 614-18. Of course, once the Supreme Court ruled on the matter, no police officer could argue from that point on that the right was

Thus, even though the police violated the Constitution, they were entitled to qualified immunity.

With qualified immunity, the key question is when was the right "clearly established"? The Supreme Court has answered this question in the following way: Qualified immunity "seeks to ensure that defendants reasonably can anticipate when their conduct may give rise to liability, by attaching liability only if the contours of the right violated are sufficiently clear that a reasonable official would understand that what he is doing violates that right."[58] "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in light of preexisting law the unlawfulness must be apparent."[59]

Thus, in deciding whether a right was "clearly established," a court will examine the case law in effect at the time of the alleged violation. It will pay particular attention to the decisions of the Supreme Court and the court of appeals in its circuit, but may also consider the decisions of other circuit courts and district courts.[60] If you are responding to a defendant's assertion of qualified immunity, you should cite as many controlling decisions as you can find that have applied the right which you claim the defendants violated.[61]

Emphasize cases with facts similar to yours. One federal circuit — the Eleventh — demands great factual specificity in prior case law; it will grant qualified immunity unless courts previously applied the right in near-identical factual circumstances.[62] Other circuits are less demanding: they require only that the outlines of the right be sufficiently defined at the time of the violation.[63]

Courts have defined inmates' health and safety rights with substantial specificity and have applied this law in many different factual circumstances.[64] Therefore,

not clearly established.

58 United States v. Lanier, 520 U.S. 259, 270, 117 S.Ct. 11219 (1997) (internal quotation marks and brackets omitted).

59 Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034 (1987).

60 *See* Wilson, 526 U.S. at 617 (stating that courts should consider "cases of controlling authority in their jurisdiction" as well as the "consensus of cases of persuasive authority" in other jurisdictions).

61 A court must consider its "full knowledge of its own [and other relevant] precedents" in addressing an assertion of qualified immunity. Elder v. Holloway, 510 U.S. 510, 516, 114 S.Ct. 1019 (1994).

62 *See* Lassiter v. Alabama A & M Univ., 28 F.3d 1146, 1149-50 (11th Cir. 1994) (*en banc*) ("For the law to be clearly established to the point that qualified immunity does not apply, the law must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that what he is doing violates federal law.... For qualified immunity to be surrendered, preexisting law must dictate, that is, truly compel (not just suggest or allow or raise question about), the conclusion for every like situated, reasonable government agent that what [the] defendant is doing violates federal law in the circumstances.").

63 Assaf v. Fields, 178 F.3d 170, 177 (3d Cir. 1999) (not necessary for a court to have previously ruled on a case bearing a "precise factual correspondence" to the present one); Amaechi v. West, 237 F.3d 356, 362 (4th Cir. 2001) ("[T]he exact conduct at issue need not have been held unlawful for the law governing an officer's actions to be clearly established.... Rather, the particularity principle mandates that courts refer to concrete applications of abstract concepts to determine whether the right is clearly established."); White v. Lee, 227 F.3d 1214, 1238 (9th Cir. 2000) ("Closely analogous preexisting case law is not required to show that a right was clearly established."). The more extreme an alleged violation of your rights, the less likely it is that the court will grant the defendants qualified immunity. As the Supreme Court has observed: "[T]he easiest cases don't arise. There has never been... a § 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability." Lanier, 520 U.S. at 271.

64 *See, e.g.,* Harris v. Coweta County, 21 F.3d 388, 393 (11th Cir. 1994) ("The contours of the legal norms on deliberate indifference to medical needs have been subsequently evolving, and the particularity that [qualified immunity doctrine] requires has been given force

if you file a lawsuit alleging a violation of one of these rights, you should be able to make a strong argument against a defendant's assertion of qualified immunity. Many helpful case citations are listed in the footnotes of Chapters 5 through 10 of this manual. You will find more cases through your own legal research. Chapter 17 has a sample response to a motion for summary judgment on the ground of qualified immunity.

If a district court denies an assertion of qualified immunity at either the dismissal or summary judgment stage, the defendant may file an *interlocutory appeal*: an appeal that takes place before the district court has reached a final judgment in the case.[65] A court of appeals has jurisdiction to decide only questions of law as to the qualified immunity issue on an interlocutory appeal; a defendant may not challenge a district court's ruling that summary judgment is improper because material facts are in dispute.[66]

Qualified immunity does not protect municipalities[67] or non-government employees such as guards at a private prison.[68] It does not apply to claims for injunctive relief.

b. Injunctive and Declaratory Relief

The other kind of relief that you can request in a § 1983 or *Bivens* lawsuit is *injunctive relief*. An *injunction* is a court order that directs a defendant to do or not do something. Unlike damages, which can be awarded by either a jury or a judge, only judges have the power to award injunctive relief. Injunctive relief is sometimes called *equitable relief*; judges use principles of equity, or fairness, to decide what kind of injunction, if any, is appropriate in a particular case. Unlike damages, which are designed to remedy violations that occurred in the past, injunctive relief is awarded to prevent violations from occurring in the future.[69]

Before filing a claim for injunctive relief, you should think carefully about what officials at your jail or prison can and should do to fix the dangers that you face. As Chapter 12 explains, you must ask for the relief you want in administrative grievances and appeals before you proceed to federal court.

Declaratory relief is a statement by the court that what the defendants are doing, or have done, violates the law. Plaintiffs in civil rights lawsuits usually ask for a declaratory judgment whenever they ask for injunctive relief. A declaratory judgment is a milder form of relief than an injunction.[70] It is something that

by many reported cases testing the boundaries and details of deliberate indifference...."), cited in McElligott v. Foley, 182 F.3d 1248, 1260 (11th Cir. 1999).

65 Mitchell v. Forsyth, 472 U.S. 511, 526-30, 105 S.Ct. 2806 (1985).

66 *See* Behrens v. Pelletier, 516 U.S. 299, 312, 116 S.Ct. 834 (1996); Johnson v. Jones, 515 U.S. 304, 319, 115 S.Ct. 2151 (1995).

67 Owens v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398 (1980).

68 Richardson v. McKnight, 521 U.S. 399, 401, 117 S.Ct. 2100 (1997); Wyatt v. Cole, 504 U.S. 158, 167-69, 112 S.Ct. 1827 (1992).

69 Injunctive relief is also referred to as prospective relief. Prospective means "future."

70 Steffel v. Thompson, 415 U.S. 452, 469, 94 S.Ct. 1209 (1974); Perez v. Ledesma, 401 U.S. 82, 111, 91 S.Ct. 674 (1971). *See generally* 28 U.S.C. §§ 2201-02.

a court may issue by itself if it believes that the defendants are making good-faith efforts to correct a violation. It can be followed up by an injunction if the violation continues.

i. *Preliminary Injunctions*

If you go to trial in a lawsuit asking for injunctive relief, the district court will ultimately decide whether to enter a *permanent injunction*. It can take several years to get to trial, however, and you may need relief before then. Under Federal Rule of Civil Procedure 65(a), a district court has the power to enter a *preliminary injunction*: an order that protects you on a temporary basis, before the court can fully consider your request for permanent relief.[71] Plaintiffs in civil rights cases frequently file motions for preliminary injunctions.

To win a preliminary injunction, you must generally show four things: 1) you are likely to prove at trial that the defendants violated your rights; 2) you will likely suffer irreparable harm if the court does not issue a preliminary injunction; 3) the threat of harm that you face outweighs any harm that the preliminary injunction will cause the defendants; and 4) a preliminary injunction will serve the public interest.[72]

Your district court may conduct a hearing before it decides whether to grant your motion for a preliminary injunction. At this hearing you may be able to present evidence, as if you were at trial. See Chapter 18, § B. Courts sometimes enter preliminary injunctions based on declarations and exhibits submitted by the parties, without first conducting an evidentiary hearing.

Because of the changes in the law discussed in § 4.b.ii, below, many courts are unwilling to award inmates injunctive relief except in the most extreme circumstances. Therefore, if you need an injunction to protect your health and safety from imminent harm, you should probably move for a preliminary injunction when you file your complaint. If you cannot meet the standard for a preliminary injunction, you may not want to request injunctive relief at all.[73]

ii. *The PLRA and Lewis v. Casey*

Injunctive relief can be broad or specific.[74] In the past, many jail and prison

71 Rule 65(b) allows a plaintiff to request a temporary restraining order (TRO): an emergency, short-term injunction that is sometimes issued before the defendants even know about the plaintiff's request. Because *pro se* inmates cannot contact judges directly, it is practically impossible for them to win a TRO. You are best off requesting a preliminary injunction at the time you file your complaint.

The Prison Litigation Reform Act provides that in inmate lawsuits, a preliminary injunction automatically expires 90 days after its entry "unless the court makes the findings required under subsection (a)(1) for the entry of prospective relief and makes the order final before the expiration of the 90-day period." 18 U.S.C. § 3626(a)(2). *See* Mayweathers v. Newland, 258 F.3d 930, 936 (9th Cir. 2001). This means that if you are issued an injunction, you may have to file a motion to request that the court makes the findings required by § 3626(a)(2) or your injunction will automatically be terminated at the end of the 90 days.

72 Jackson v. District of Columbia, 254 F.3d 262, 267-68 (D.C. Cir. 2001); *see generally* FTC v. Dean Foods Co., 384 U.S. 597, 604, 86 S.Ct. 1738 (1966) (recognizing that federal courts have a "traditional power to issue injunctions to preserve the status quo while administrative proceedings are in progress....").

73 *See* Jolly v. Coughlin, 76 F.3d 468, 473 (2d Cir. 1996); Abu-Jamal v. Price, 154 F.3d 128, 133 (3d Cir. 1998); Mayweathers v. Newland, 258 F.3d at 938-39; Longstreth v. Maynard, 961 F.2d 895, 902 (10th Cir. 1992).

74 However, if you ask for a preliminary injunction, you may not be able to conduct discovery before your evidentiary hearing. The court might grant you "expedited discovery" or direct the defendants to reveal information and produce documents that are clearly important to your case. Nevertheless, you should be prepared to meet the standard for a preliminary injunction solely on the basis of evidence in

class action lawsuits ended in *consent orders* (or *consent decrees*): injunctions which the parties agreed to and which covered a broad range of issues. Some consent orders were 20 pages or longer. A few are still in effect. However, two events in 1996 — Congress' passage of the Prison Litigation Reform Act (PLRA) and the Supreme Court's decision in *Lewis v. Casey* — made it harder for inmates to win broad injunctions.

The PLRA states that a district court may not issue an injunction "unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right,[75] and is the least intrusive means necessary to correct the violation of the Federal right."[76] These requirements do not appear to change the law on injunctive relief that existed before the PLRA's enactment.[77] Nevertheless, you should be ready to explain to a court why the injunctive relief you are asking for satisfies the PLRA. The PLRA *does* change the rules on how inmates may settle injunctive lawsuits. These changes are discussed in § A.3 of Chapter 18.

In *Lewis v. Casey,* the Supreme Court stated that to win an injunction, an inmate must show an "actual or imminent injury."[78] This is a *standing* requirement: to proceed with a claim for injunctive relief, you must prove to the court that you have been personally harmed or endangered by the condition or practice you are challenging. Importantly, *imminent* means "likely to happen soon." It is not necessary for you to have already received an injury in order to win an injunction. As the Supreme Court has explained, "One does not have to await the consummation of threatened injury to obtain preventative relief."[79]

The Court in *Lewis* further stated that an award of injunctive relief "must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established."[80] This means, for example, that a district court will not order major changes to your jail's medical system simply because you did not receive your medication on a few occasions. Furthermore, even if the court concludes that the defendants violated your rights, it must generally give them

your possession and the witnesses who you know can provide helpful testimony.

75 Hutto v. Finney, 437 U.S. 678, 687, 98 S.Ct. 2565 (1978) (because of repeated failures by prison officials to comply with orders regarding conditions of confinement, district court was "justified in entering a comprehensive order to insure against the risk of inadequate compliance"); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15-16, 91 S.Ct. 1267 (1971) (once a constitutional violation has been found, district court has broad powers to fashion a remedy).

76 18 U.S.C. § 3626(a). The statute continues: "The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." *Id.*

77 *See* Smith v. Arkansas Dep't of Corrections, 103 F.3d 637, 647 (8th Cir. 1996) (observing that PLRA "merely codifies existing law and does not change the standards for determining whether to grant an injunction"); Gomez v. Vernon, 255 F.3d 1118, 1129 (9th Cir. 2001) (PLRA "has not substantially changed the threshold findings and standards required to justify an injunction").

78 Lewis v. Casey, 518 U.S. 343, 349-50, 116 S.Ct. 2174 (1996).

79 Pennsylvania v. West Virginia, 262 U.S. 553, 593, 43 S.Ct. 658 (1923), cited in Farmer v. Brennan, 511 U.S. 825, 845, 114 S.Ct. 1970 (1994). *See also* Helling v. McKinney, 509 U.S. 25, 33, 113 S.Ct. 2475 (1993) ("It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them."). If you have been injured by the condition or practice, that injury will help to prove that you are likely to be injured again in the future if an injunction is not issued.

80 Lewis v. Casey, 518 U.S. at 357.

a chance to propose an appropriate remedy for their violation.[81] Be sure to point out any inadequacies in the defendants' proposal.

iii. *Mootness*

In a lawsuit for injunctive relief, the court may consider changes that officials make after the lawsuit is filed. Thus, if, in a failure-to-protect lawsuit, officials increase staffing and improve guard training, the court might conclude that the substantial risk of serious harm to inmates has been eliminated and, therefore, no injunction is necessary. The plaintiff's request for injunctive relief will have become *moot*: it no longer presents a controversy for the court to decide.

In arguing mootness, officials carry a "heavy burden" of showing that the unsafe or unhealthy conditions have been corrected and will not return if your lawsuit is dismissed.[82] In responding to such an argument, you should press the officials to explain why they allowed the conditions to exist in the first place, and how the court can be sure that they will behave differently in the future.

B. MATCHING YOUR FACTS TO THE LAW

Lawsuits are mainly about facts. It is important to understand the law, of course. You must be able to cite and discuss constitutional provisions, cases, and statutes and challenge any misstatements about the law that your opponents make. In the end, however, facts matter more. You can think of a lawsuit as a basketball or football game. While you need to understand the rules of the game — the law — you will win only if you score the most points. In a lawsuit, facts are points.

1. Writing Your Facts Down

If you are thinking about filing a lawsuit, take the time to write down the facts that you know now. Tell your story in *chronological order*: the order in which things actually happened. Write in short sentences, skipping spaces between each sentence. This will allow you to include new details as you remember them and to improve the way you described other facts.

It is important to include *details*: people's names, places, the dates and times events took place, and the exact words people said. Details make a story more believable, more real. Certain details that seemed unimportant at the time may turn out, upon closer study, to be *relevant* (tending to prove an element of your claim).[83] For example, a guard's offhand remark may help to prove his deliberate indifference.

81 *See id.* at 362-63.

82 Friends of the Earth, Inc. v. Laidlaw Environmental Servs., Inc., 528 U.S. 167, 189, 120 S.Ct. 693 (2000); United States v. W.T. Grant Co., 345 U.S. 629, 632-33, 73 S.Ct. 894 (1953). On the other hand, if the evidence presented during a lawsuit shows that a substantial risk of serious harm continues at a particular facility, the responsible officials may not argue that they remain deliberately indifferent: the lawsuit has itself made them aware of the ongoing problem. Farmer, 511 U.S. at 846 n.9. Thus, in lawsuits seeking injunctive relief, the standard of deliberate indifference helps jail and prison officials when they correct problems promptly, but help inmates get relief in court when serious problems go uncorrected.

83 *See* Fed. R. Evid. 401.

Be careful, however, to write down only those details that you are sure of. For example, do not write that something happened at 2:35 p.m. if you are not sure about the exact time. It is much better to describe something in general terms than to get a detail wrong. Instead of saying "x" happened at 2:35 p.m. if you are not sure of the exact time, say that "x" happened at approximately 2:35 p.m.

Writing down your facts is an important first step. During the course of a lawsuit, you will have to tell the facts of your case several times. Early on, you will have to distinguish between facts that you *know* you can prove (facts that you personally observed or already have evidence in support of) and facts that you *believe* you can prove. Discovery is your chance to find out additional facts and gather evidence in support of your lawsuit. In addition, the *rules of evidence* limit the facts that you can present in court. *Relevance* is one important limitation. *Hearsay* is another: although your cellmate can testify about what he personally observed, you generally cannot testify about what your cellmate told you. Such secondhand information is inadmissible hearsay.[84] It is important to study the rules of evidence carefully.

2. Creating an Evidence Chart

Once you have written your facts down, the next step is to match those facts to the elements of each possible claim. You can use an *evidence chart* to do this. An evidence chart is a simple tool that allows you to understand the relationship between the law and your facts more clearly. It helps you to see the strong and weak points of a claim, and tells you where you need to focus your efforts during discovery.

The following is a sample evidence chart for a medical care claim:

Element	Facts Proving Element	Known Evidence	Evidence to be Discovered
Serious medical need			
Official's knowledge of need			
Failure to provide treatment			
Causation and injury			

84 Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed.R.Evid. 801(c). Hearsay is a complicated subject. Several important exceptions to the hearsay rule are listed in Federal Rules of Evidence 803 and 804. Also, a statement is not considered to be hearsay if it was given under oath and is inconsistent with the declarant's subsequent testimony, Fed.R.Evid. 803(d)(1)(A), or if it is a statement made by your opponent or the agent of your opponent, Fed.R.Evid. 803(d)(2). This last point is very useful: it allows you to introduce statements made by both the jail and prison officials you are suing and the people who work for those officials.

The chart has four columns. Column 1 lists the elements of your legal claim, the things that you must prove in order to win your case. The four elements for a medical care claim, listed above, are discussed in Chapter 9.

Column 2 is for the facts that support each element of your claim. As § B.1 of Chapter 9 explains, courts consider particular facts in determining whether an inmate has a serious medical need. Suppose that your medical problem is chronic asthma. The first row of Column 2 of your evidence chart could look like this:

Element	Facts Proving Element	Known Evidence	Evidence to be Discovered
Serious medical need	Have had chronic asthma since I was a child Been hospitalized three times for condition; last time in February 2005 at Wayne State Prison hospital Condition worsened upon arrival at Serrano County Jail in June 2005, probably as a result of excessive dust and smoke in the air; four asthma attacks in last 2 weeks		

At this point, it would help to review important court decisions on the "serious medical need" element (particularly cases addressing your particular medical condition), so that you would know what kind of facts courts consider relevant to this element.

Column 3 is for evidence that you could present right now, if you had to, to prove the facts in Column 2:

Element	Facts Proving Element	Known Evidence	Evidence to be Discovered
Serious medical need	Have had chronic asthma since I was a child Been hospitalized three times for condition; last time in February 2005 at Wayne State Prison hospital Condition worsened upon arrival at Serrano County Jail in June 2005, probably as a result of excessive dust and smoke in the air; four asthma attacks in last 2 weeks	**1. My testimony:** about my medical condition, hospitalizations, experiences at Serrano County Jail, asthma attacks. **2. Cellmate's testimony:** about observing my four asthma attacks at jail and repeated requests for medical care **3. Medical records from home:** showing history of my condition; past treatment	

Evidence that supports one element of your claim may support other elements, also. For example, if your cellmate observed you repeatedly ask jail officials for medical care, he will be able to testify about both the seriousness of your condition and the officials' actual knowledge of it.

Lastly, Column 4 is for evidence that you do not yet have — evidence that might help or hurt you in your effort to prove this element:

Element	Facts Proving Element	Known Evidence	Evidence to be Discovered
Serious medical need	Have had chronic asthma since I was a child Been hospitalized three times for condition; last time in February 2005 at Wayne State Prison hospital Condition worsened upon arrival at Serrano County Jail in June 2005, probably as a result of excessive dust and smoke in the air; four asthma attacks in last 2 weeks	**1. My testimony:** about my medical condition, hospitalizations, experiences at Serrano County Jail, asthma attacks. **2. Cellmate's testimony:** about observing my four asthma attacks at jail and repeated requests for medical care **3. Medical records from home:** showing history of my condition; past treatment	**1. Jail medical records:** What does my medical file say about my condition? Does it include all my written requests for care? Did the nurse note my asthma during my intake interview on June 5? Make document request during discovery. **2. Wayne State Prison records:** These should record my hospitalization and treatment for asthma in 2006-07. Were these records sent to Serrano County Jail when I was transferred there in June 2006? Make document request. **3. Medical testimony:** What do intake and sick-call nurses say about my asthma? Did sick-call nurse make notes during her examination of me on approx. June 11? Ask for this information through interrogatory and document request, and if necessary at depositions. **4. Guard testimony:** Officers Stevens and Bird were on duty during my four asthma attacks. Get their observations and any notes or reports through interrogatories and document requests, and if necessary at depositions.

As this evidence chart shows, there may be many important documents and information that you do not yet have. You should be thinking about discovery from the very start of your lawsuit: what information, documents, and exhibits should you try to get? Not everything you get will be helpful. Continuing with the above example, Officers Stevens and Bird may not have written any reports about your asthma attacks; they may even state in their interrogatory responses that they do not remember any attacks ever taking place. You need to find out such hurtful information early on, so that you can respond appropriately. For example, you might want to find other inmates who witnessed your asthma attacks or depose Officer Stevens and Bird about what exactly they do and do not remember.

As your lawsuit develops, you will find it helpful to update your evidence chart regularly. Include evidence that you get through discovery or that the defendants submit to the court. Updating your evidence chart will help you to keep track of the strengths and weaknesses of your claim, and to think of ways to make it stronger.

C. DECIDING WHETHER TO FILE

Everything you do has *costs* and *benefits*. Costs are the expenses and work involved in doing something. Benefits are what you hope to win and what you can gain by working toward that goal. In deciding whether to file a lawsuit, you need to weigh these costs and benefits carefully.

For inmates who file federal lawsuits, the costs are substantial. First, as § E of Chapter 14 explains, poor inmates must now pay the entire $350 filing fee, in installments if necessary. This new rule is unfair, but it is constitutional. In addition, you may have to pay other costs during a lawsuit: *e.g.*, to have your complaint served on the defendants,[85] subpoena fees,[86] deposition costs,[87] and witness fees[88] at trial.

Second, a lawsuit takes a lot of work, especially when an inmate proceeds *pro se*. If you have access to a law library, you will spend many hours studying the law. You will need to learn complicated rules of procedure, evidence, and substantive law. You will need to draft a complaint, gather evidence, draft motions, respond to defense motions, handle discovery, and possibly even present your case at trial. You will have to be respectful to defense attorneys, judges, and court personnel

85 If you are granted *in forma pauperis*, the US Marshall will serve the defendants without you paying the costs.

86 Padraza v. Jones, 71 F.3d 194, 196 n. 4 (5th Cir. 1995) (court will not issue a subpoena unless inmate pays the required fees.); Fernandez v. Kash N' Karry Food Stores, Inc., 136 F.R.D. 495, 496 (M.D.Fla.1991) (witness and mileage fees required to be paid by indigent plaintiff).

87 Brown v. Carr, 236 F.R.D. 311, 313 (S.D. Tex. 2006) (inmate must pay all costs associated with depositions, including witness fee and court reporter's services and well as the costs for copies of the transcripts); *See* Tajeddini v. Gluch, 942 F.Supp. 772, 782 (D.Conn.1996) ("*In forma pauperis* status does not require the Government to advance funds to pay for deposition expenses.").

88 28 U.S.C. § 1915(b); Marozan v. United States, 90 F.3d 1284 (7th Cir. 1996).

at all times, even if they disrespect you. Politicians sometimes complain about inmates filing lawsuits "for recreation." If this really happens, those inmates are badly misinformed: a lawsuit is a terrible way to entertain oneself.

Third, you expose yourself to the risk of retaliation when you file a lawsuit. No one likes to be sued, and there are a lot of things jails and prison officials can do to punish you for suing them. Retaliation is prohibited by the First Amendment (see Chapter 3, § C), but it still happens. In fact, the more serious an official's violation of the law, the greater an incentive he has to retaliate against you — to keep the truth from coming to light.

Fourth, most inmates lose their lawsuits. This is not to say that you will necessarily lose yours, but you must be realistic about your chances. It is hard for anyone without a lawyer to win a lawsuit. It is even harder for inmates, who have limited access to legal resources and are unpopular. Most inmates lose their cases at the dismissal or summary judgment stage. Even if you get to trial and your case is strong, the jury may decide to rule against you simply because you are inmate. Again, this should not happen, but it does.

As for benefits, this chapter has already discussed the kind of relief that you can hope to win in a lawsuit. To repeat, inmates seldom win a lot of money, and courts are less willing these days to award inmates injunctive relief. Nevertheless, a lawsuit may be your only way of getting a remedy for a violation of your rights.

Although a lawsuit involves a lot of work, some inmates find that the work makes them feel better about themselves. Life in jail or prison can be dehumanizing: you are assigned a number and forced to wear a uniform and follow countless rules. You are vulnerable to abuse by officials and other inmates. Working to enforce your rights in court may make you feel more human, more in control. You may also find, however, that the legal system is as disorderly and unfair as the system you are challenging.

In the end, this manual cannot tell you definitively whether you should file a lawsuit. It is a decision that only you can make, after considering the strengths and weaknesses of your case, the applicable law, and the costs and benefits discussed above.

D. SEEKING LEGAL REPRESENTATION

Unfortunately, few lawyers are willing to represent inmates in civil rights lawsuits these days. Nevertheless, if you believe that your rights have been violated, you should try to get legal representation before proceeding *pro se*.

Some private lawyers or law firms take personal injury and civil rights cases on a *contingency fee* basis. While you do not pay them money up front, they take a portion (such as 33%) of any money damages that you win. Also, in cases involving violations of federal law, a statute, 42 U.S.C. § 1988, allows lawyers

representing winning inmates to get back some of their fees and costs from the losing defendants. Unfortunately, the Prison Litigation Reform Act has restricted the amount of fees that lawyers can recover in inmate lawsuits.[89]

One way to locate lawyers who handle civil rights cases is to look in the yellow pages of your local phone book. Also, the bar association in your state may have a referral service that identifies lawyers interested in cases like yours. A few corporate law firms represent inmates *pro bono publico* ("for the public good").

There are also public-interest legal organizations, such as the American Civil Liberties Union's National Prison Project, that take cases on behalf of inmates. These organizations have limited resources and handle only certain types of cases (*e.g.*, injunctive class actions, conditions in juvenile facilities). Even if an organization cannot represent you, however, it may be able to refer you to private lawyers or provide you with legal guides or other helpful materials.[90]

When writing to lawyers, remember that their time is limited. Be brief and clear. Describe exactly what happened to you, when these events occurred, who was involved, what you have done to exhaust your administrative remedies, and what relief you want. Enclose copies of important documents (but not your only copies — you might not get them back!). Here is one example of a request for legal assistance:

Legal Correspondence: Privileged and Confidential

October 25, 2008
Hildegard Johnson, Esq.
123 West Lake Drive, Suite 500
Albany, NY 12209

Dear Ms. Johnson:

I am an inmate at Chingachgook Prison. I am writing to request your representation in a civil rights case.

On September 7, 2008, I was waiting in the chow line for lunch. The inmate ahead of me in line, Roy Bensinger, was complaining about the quality of food when two guards passed by. One of the guards, Officers Cooley, said to Bensinger, "Shut your mouth." Officer Cooley then pushed Bensinger against the wall and started punching him. The other guard, Officer Hartwell, looked at me and said, "You got a problem, too?" I didn't say anything, but just stood there. Officer Hartwell then took out his baton and hit me five times across the face

89 *See* 42 U.S.C. § 1997e(d)(1).
90 In 1996 Congress passed a law prohibiting legal services offices that receive funding from the federal government from representing inmates in civil rights cases.

and chest. I fell to the floor and crouched against the wall. Both Officer Hartwell and Officer Cooley kicked me several times. I never said or did anything to cause them to beat or kick me.

After this happened, Officer Cooley escorted me to medical, where I received stitches for two wounds on my head. I was bruised all over. The nurse gave me pain medication. Officer Cooley then took me to the segregation unit, where I was served with a disciplinary charge for "failure to follow orders." It was entirely false, but the disciplinary committee found me guilty anyway. I have been in segregation for more than a month now.

I still have pain in my head and chest and ringing in my ears. I filed a grievance about this incident, but it was denied on the ground that the officers had to use force against me because I was refusing to obey orders. Again, that is totally false. I know of four inmates who saw everything that happened, and they will all testify that I did not refuse any orders. I appealed my grievance to the warden, but he hasn't responded yet. For your review, I am enclosing copies of my grievance, appeal, and the medical records documenting my injuries.

I think that I have a strong excessive force claim under Hudson v. McMillian, 503 U.S. 1 (1992). I would like to seek money damages for my injuries and injunctive relief to prevent this sort of thing from happening again. Can you represent me? If not, can you refer me to other lawyers who might be willing?

Thank you for considering my case. I look forward to hearing from you soon.

Sincerely,

Earl Williams

Earl Williams, #34209

If you do not succeed in getting a lawyer on your own, you can ask the court to appoint a lawyer for you. Section D of Chapter 14 explains how to file such a *motion for appointment of counsel*.

E. THE PATH OF A FEDERAL LAWSUIT

This chapter will conclude by taking a brief look at the path that a typical inmate lawsuit takes in federal court. The next five chapters will examine the stages of litigation in more detail, but it is helpful to begin with the "big picture" first. Understanding the big picture allows you to *predict* what your opponents will do and *prepare* accordingly, rather than merely *react* as things happen. For example, if you can make an educated guess about the defenses a defendant will raise in a motion to dismiss, you can write your complaint in a way that makes

those defenses less likely to succeed.

1. The Litigation Process

The starting point of the whole process is, of course, a *violation* of your constitutional or statutory rights. A violation may involve a one-time infliction of injury (for which you may seek damages as a remedy), or an ongoing danger (for which you may seek an injunction), or both.[91]

The occurrence of a violation sets two time clocks running. First, as Chapter 12 explains, inmates must exhaust all available administrative remedies before filing a federal lawsuit. Most jails and prisons that have administrative remedies require inmates to file their grievances and appeals within a certain number of days. These deadlines can be quite short, and you need to comply with them to the best of your ability. Second, you must file your lawsuit within the time period set by the *statute of limitations*. Federal civil rights lawsuits use state-law statutes of limitations.[92] In some states, the statute of limitations is only one year long. You need to find out what the statute of limitations is in your state and make sure that you file your lawsuit within that time period. If you fail to do this, your lawsuit will be dismissed.

There is a lot of work to do at the front end of a lawsuit. You need to figure out which federal district court to file your lawsuit in. You must then write that district court and ask for its package of forms for *pro se* inmates. A complaint is a tricky thing to write; you will need to revise your first draft several times. You may also want to draft a motion to proceed *in forma pauperis*, to avoid having to pay all of the filing fees at once, i.e., the filing fee is now $350. If you are asking for injunctive relief, you may want to file a motion for a preliminary injunction (along with a supporting memorandum of law, declarations, and exhibits). Finally, you must have your complaint and summons served on all the defendants named in your complaint. Chapter 14 explains how to do these things.

After you file and serve your complaint (and accompanying documents), the defendants will file either an *answer* or a *motion to dismiss*. An answer allows you to begin discovery. A motion to dismiss halts the lawsuit: temporarily if the court denies the motion, permanently if the court grants it. Chapter 15 lists the defenses that defendants often raise in motions to dismiss and explain how to respond.

Discovery is each side's chance to find out more information about the matters

91 Remember that a violation usually involves more than the infliction of an injury. For example, if you seek damages for a violation of your constitutional right to protection from inmate assault, medical care, or humane conditions of confinement, you must allege and prove deliberate indifference. As Chapter 9 explained, this means that you must show that officials actually knew about a substantial risk of serious harm to your health or safety before your injury occurred. Ideally, you will have warned officials about such a substantial risk in advance.

92 Your state's "general or residual statute for personal injury actions" sets the maximum time period for filing federal civil rights claims. Owens v. Okure, 488 U.S. 235, 249-50, 109 S.Ct. 573 (1989).

raised in your lawsuit. There are number of important discovery tools, including interrogatories, document requests, requests for admissions, and depositions. Discovery is sometimes difficult for inmates to do. Chapter 16 explains how to get the information and exhibits that you need to prove your case. It also discusses how to respond to *defendants'* discovery requests.

Usually after the completion of discovery — but sometimes earlier — a defendant will file a *motion for summary judgment*. Such a motion contends that even if the court accepts all your evidence as true, you still cannot prove the elements of your claim. Many inmate lawsuits get thrown out at summary judgment. Chapter 17 explains how to respond to a motion for summary judgment.

At any time during this process — indeed, even *before* you file your lawsuit — you may be able to reach a *settlement* with the defendants. A settlement gives you some relief in exchange for agreeing to end your lawsuit. The other way you can win your lawsuit is by going to *trial*. At trial, the parties present evidence and argue their cases to a judge or a jury. Chapter 18 discusses settlements and trials.

2. Keeping Your Lawsuit Moving

People sometimes say that the "wheels of justice grind slowly." This saying is true in one sense: a lawsuit can last for many months, even years, in district court. Do not think, however, that the legal system is like a machine that, once you file your lawsuit, automatically processes it to a conclusion. That is not how the legal system works. *People* make the system work. People like yourself turn the wheels of justice.

Rule 1 of the Federal Rules of Civil Procedure states that their purpose is "to secure the just, speedy, and inexpensive determination of every action." This should be your goal, too: to move your case along quickly, with as little cost as possible, to a just end. Do not assume that the defendants share this goal! In many lawsuits — especially when the plaintiff has a strong case — it is in a defendant's interest to slow things down, to make it more difficult and more costly for the plaintiff to proceed, and to keep the case from coming to trial. The district court, too, may not be interested in moving your case along: courts have too many cases on their docket and are often happy to let inmate lawsuits fall by the wayside.[93]

It is up to you, therefore, to push your lawsuit along. You do this by fighting efforts to get your case dismissed, making timely discovery requests, responding promptly to discovery requests made by opposing parties, answering all letters and inquiries from the defendants and the court, and asking for a trial date as soon as you are ready. Remember that the Federal Rules of Civil Procedure, as well as the local rules of your district court, are on your side. These rules set

93 If you let this happen, you may be in danger of having your lawsuit thrown out. Courts dismiss lawsuits that plaintiffs fail to prosecute. Fed.R.Civ.P. 41(b). This happens when a case has been before a court for many months, but nothing has happened.

deadlines and give you the tools to enforce those deadlines.

It is important to keep a calendar during your lawsuit. On this calendar you should compute and mark down all deadlines.

Computing deadlines can be tricky. Sometimes a court order will direct you to file a document on an exact date: *e.g.*, "Plaintiff shall file her response to the defendants' motion by February 3, 2002." At other times, a court order or a rule will direct you to do something within a designated number of days after a particular event: *e.g.*, "Plaintiff shall file her response no later than 20 days after service of the defendants' motion." In the latter case, you must apply Federal Rule of Civil Procedure 6 to compute your deadline. Here are some basic points from that rule:

> In computing a deadline, you begin counting the designated number of days on the day *after* a particular event occurs. Thus, if the defendants personally serve their motion on you on January 5, your counting begins with January 6.
>
> If the designated number of days is 10 days or less, you *do not* count Saturdays, Sundays, or legal holidays to compute your deadline. If the designated number of days is 11 or greater, you *do* count Saturday, Sundays, and legal holidays.[94]
>
> If the designated number of days ends on a Saturday, Sunday, or a legal holiday, your deadline will be the very next weekday (*e.g.*, Monday, Tuesday, etc.) that is not a legal holiday.
>
> If a court order or rule directs you to do something in a designated number of days after "service" of a document, and if that document was served on you by mail, add three days to the designated number. Thus, in the example given above, if the defendants serve their motion on you by mail, you must respond within 23 days after the motion was *sent* (even if it actually took two or four days for the motion to arrive).

Normally "filing" means the time when the clerk of court actually receives a document. *Pro se* inmates can use the *mailbox rule*. This rule treats your legal document as "filed" when you give it to jail or prison officials for mailing.[95] The mailbox rule does not apply, however, if you use other means to mail your document. The *mailbox rule* applies to filing in federal district courts and appellate courts. For the *mailbox rule* to apply, you must follow the proper prison

94 Twelve legal holidays are listed in Rule 6(a). The rule also recognizes legal holidays designated by the state in which your district court is located.

95 Huston v. Lack, 487 U.S. 266, 108 S.Ct. 2379 (1988) (date of filing with the court is the date the prisoner delivers the legal document to prison authorities for mailing). *See also* Lyons-Bey v. Pennell, 93 F. App'x. 732 (6th Cir. 2004) (*pro se* prisoner mailbox rule applied to response to motion to dismiss civil complaint).

mailing procedures.[96]

Keep in mind that you do not have to wait until deadlines are near to file legal documents. You should get into the habit of working on documents sooner rather than later, and filing them as soon as they are ready.

If you cannot finish your work on a document before a deadline, you should ask for an *enlargement* (extension) of time. District courts have discretion under Rule 6(b) to grant enlargements "for good cause shown" if the request is made before the deadline has arrived. As soon as you know that you will be unable to meet a deadline, you should file a *motion for enlargement* that explains why and how much extra time you will need.[97] If you ask for an enlargement after a deadline has passed, the court will grant your request only if it concludes that your "failure to act was the result of excusable neglect."[98] This is a tougher standard than "good cause."

In addition to keeping a calendar, you should have a *task list*. On this list you should write down everything you need to do in your lawsuit. Include known deadlines, and mark tasks that are "high priority" (need to be done soon). Cross off tasks after you complete them, and update your list with new tasks as they arise. Keeping a task list will help you to stay focused and organized.

96 The Tenth Circuit recently explained how a prisoner is to establish the *mailbox rule* should be applied: [A]n inmate must establish timely filing under the *mailbox rule* by either (1) alleging and proving that he or she made timely use of the prison's legal mail system if a satisfactory system is available, or (2) if a legal system is not available, then by timely use of the prison's regular mail system in combination with a notarized statement or a declaration under penalty of perjury of the date on which the documents were given to prison authorities and attesting that postage was prepaid. Price v. Philpot, 420 F.3d 1158, 1166 (10th Cir. 2005). *See also* United States v. Ceballos-Martinez, 387 F.3d 1140, 1145 (10th Cir. 2004) ("If a prison lacks a legal mail system, a prisoner *must* submit a declaration or notarized statement setting forth the notice's date of deposit with prison officials and attest that first-class postage was pre-paid.") (emphasis in original); Grady v. United States, 269 F.3d 913, 918 (8th Cir.2001) ("[T]he prison mailbox rule... consist[s] of two requirements. A prisoner must have actually deposited his legal papers with the warden by the last day for filing with the clerk. And the prisoner must at some point attest to that fact in an affidavit or notarized statement.").

97 Although Rule 6(b) states that a formal motion is not necessary to request an enlargement, the local rules of your district court may establish specific procedures for making such a request.

98 Fed. R. Civ. P. 6(b). For a general discussion of what qualifies as "excusable neglect," *see* Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd., 507 U.S. 380, 395, 113 S.Ct. 1489 (1993).

CHAPTER 14

Filing a Complaint

Every basketball game begins with a jump ball; every football game begins with a kickoff. With a federal lawsuit, you "put the ball in play" by filing and serving a *complaint*. This document states how your rights were violated, names defendants, and requests relief. Along with your complaint, you may want to file other documents, such as a motion to proceed *in forma pauperis* (which allows you to pay the $350 filing fee in installments if you cannot pay it all at once),[1] a motion for a preliminary injunction,[2] and a motion for appointment of counsel.[3] This chapter explains how to prepare these documents. It also explains how to arrange for *service* of your complaint.[4] You cannot undertake discovery until the defendants have been properly served.

Like the other chapters in this manual, this chapter assumes that you intend to file your lawsuit in federal court. Different rules of procedure will apply if you decide to file in state court.

A. FINDING THE RIGHT DISTRICT COURT

In preparing a federal lawsuit, the first thing you must do is locate the appropriate district court. As § A.1.a of Chapter 11 explains, each state has at least one federal district court; many states have several. The rules of *venue* require that a civil rights lawsuit be filed in: (1) a district where any defendant resides, if all defendants reside in the same state; or (2) a district in which "a substantial part of the events or omissions giving rise to the claim occurred"; or, if neither (1) or (2) apply: (3) a district in which any defendant may be found.[5]

As a general rule, you should file your lawsuit in the district that contains the jail or prison where your rights were violated.[6] Figure out the county in which this jail or prison is located, then use the list in the Appendix to find the right district court.

You should then write a letter to the district court clerk to ask for the forms that

1 *See* § E of this chapter. Under the Prison Litigation Reform Act, you cannot get a full waiver of paying the filing fees. If you qualify as an indigent, the court will set up a payment schedule, which requires prison officials to take up to 20% of money you have in your prison account each month.

2 For a discussion of injunctive relief, *see* §C of this chapter and §A.4.b of Chapter 13.

3 For a discussion of appointment of counsel, *see* §D of this chapter.

4 For a discussion of service of papers, *see* §F.2 of this chapter.

5 28 U.S.C. § 1391(b).

6 Even if a different district is permitted under the rules, the court will likely transfer your case to the district that contains the jail or prison where the relevant events occurred. For example, suppose that your rights were violated at a prison in the Southern District of Alabama, but you file your lawsuit in the Middle District of Alabama because you are suing the Commissioner of the Department of Corrections (who officially resides in Montgomery, located in the Middle District). Although you are allowed to do this under 28 U.S.C. § 1391(b)(1), it is likely that the court will transfer your case to the Southern District under the doctrine of *forum non conveniens*. *See* 28 U.S.C. § 1404.

it provides to inmates who wish to file *pro se* lawsuits. Here is a sample letter:

> September 4, 2008
> Office of the Clerk
> United States District Court
> [Street and City address]
>
> Re: Pro Se Form Package
>
> To the Clerk of Court:
>
> I am an inmate at the [name of jail or prison]. Because I believe that my constitutional rights were violated at this institution, which is located in this federal district, I am interested in filing a lawsuit in this district court. Please send me the package of forms that the Court provides to inmates who wish to file a pro se lawsuit under 42 U.S.C. § 1983.
>
> Please send these forms to me at the following address:
>
> Daniel E. Manville
> #135706
> DeKalb County Jail
> 4425 Memorial Drive
> Decatur, GA 30032
>
> Also, if possible, please send me a copy of the district court's local rules.
>
> I look forward to receiving these materials as soon as possible. Thank you for your assistance.
>
> Sincerely,
> Daniel E. Manville

Most district courts have their own set of *pro se* forms. Some courts require all *pro se* litigants to use those forms; in other courts, use of the forms is optional. If you decide not to use a district court's *pro se* forms, be sure to include all the information asked for on the forms in the documents that you submit.

The next section will explain how to write a complaint without using *pro se* forms. This discussion will help you even if you use the forms, since the forms generally track the requirements established by the Federal Rules of Civil Procedure.

B. WRITING THE COMPLAINT

This section explains the "how to" of writing a § 1983 or *Bivens* complaint. As you read, you may find it helpful to refer back to § A of Chapter 13 (addressing the basic requirements of § 1983 and *Bivens* lawsuits), in order to understand why certain items must go in (or be kept out of) a complaint.

It is difficult to write a good complaint. You must consider the facts that you

know and the facts that you believe to be true but cannot yet prove, and match those facts against the elements of your claims. You must present your case in a manner that is clear and logical, but also persuasive. You must choose your defendants carefully and anticipate what defenses they will raise. You need not cite to any case law in your complaint to support your facts or claims.

Do not be afraid to make changes to what you have written. Even the most experienced civil rights attorney will go through several drafts of a complaint before submitting it to the court. You should too. Your final draft should be either typed or clearly handwritten in black ink, with double-spaced lines and wide margins on all sides.

This section will now discuss the various parts of a complaint. Each subsection will contain the applicable part of a sample complaint alleging failure-to-protect and medical care claims.[7]

1. Caption and Jury Demand

At the top of the first page of any legal document you file, there must be a caption. For example:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

DANIEL E. MANVILLE,	)	
Plaintiff,	)	
vs.	)	Civil Action No.
HEATHER JOHNSON, and	)	Judge
CRAIG COOPER, sued in	)	Magistrate Judge
their individual capacities,[8]	)	
Defendants.	)	

JURY TRIAL DEMANDED
COMPLAINT FOR MONEY DAMAGES AND INJUNCTION

Courts use captions like road signs because it helps them to identify cases quickly. As § D.2 of Chapter 11 explains, parties can use a *short caption* (identifying just one plaintiff and one defendant) in later documents. For a complaint, however, you must use a *full caption*, as shown above; listing each person that you are suing. At the very top, identify the district court where you are filing your complaint.

7 A failure to protect claim for a pretrial detainee is brought pursuant to the Fourteenth Amendment, where as a claim for denial of medical care is brought pursuant to the Eighth Amendment. Both types of claims are brought pursuant to the Eighth Amendment for a person convicted and sentenced whether confined in a jail or prison.

8 If you were suing for an injunction, you would have to sue the Defendants with the most authority in his or her official capacity.

Below those lines, in the left half of the page, list the names of the parties: you and any other plaintiffs, and all defendants. The plaintiffs and defendants are separated by the abbreviation "vs." for "versus" (against). For every person you name as a defendant, state whether you are suing that person in her individual capacity, her official capacity, or both. See § A.3.b of Chapter 13 for a discussion of suing a party in his/her individual or official capacity.

On the right-hand side, on the same line as the "v.", a caption normally lists the case (or *civil action*) number assigned by the district court clerk. Because this number is assigned only after you have filed your complaint, you should leave a blank space, as shown above. Once you file your case and receive a case number you will also receive the name of the judge and magistrate judge which your case has been assigned. In all future pleadings, you will include their names.[9]

If you want a jury to decide your case at trial, you should write the phrase "JURY TRIAL DEMANDED" below the space for your case number. The Seventh Amendment to the U.S. Constitution guarantees all parties in § 1983 or *Bivens* damages lawsuits the right to a jury trial.[10] Under Federal Rule of Civil Procedure 38(b), you must make a jury demand no later than ten days after an answer is filed by the Defendant. A defendant may request a jury trial if you do not. You are best off making your jury demand when you file your complaint, as in the above example.

A civil jury in federal court consists of between six and twelve people.[11] If your case gets to trial, and one of the parties has demanded a jury, the parties will select jurors from a larger group of citizens (the *venire*).[12] After hearing each side's evidence and arguments, the court will read the jury a set of jury instructions and a verdict form. After these instructions are read to the jury, they will deliberate to decide whether any of the defendants are liable and, if so, how much damages you are to be awarded. The jury's decision must be unanimous.[13] If no party demands a jury, you will have a *bench trial* decided by a magistrate judge or a district judge.[14]

It is hard to generalize about juries. Sometimes they sympathize with inmates who have been injured, sometimes with the jail or prison officials who are being sued. Many lawyers view juries as "wild cards": they are more likely to return an extreme verdict (*i.e.*, either ruling against the inmate altogether, or awarding the inmate a large amount of money) than judges are. If you must try the case yourself

9 Some courts, such as the United States District Court for Colorado, do not allow the names of the judges to be placed on legal pleadings. By local rules, you are required to place the judge and magistrate judge's initials after the case number, such as: "07-cv-0000-DEM-KH." Make sure you know what the district court where you will file the complaint requires.

10 If any party makes a proper jury demand, it may not be withdrawn without the consent of all parties. Fed.R.Civ.P. 38(d). There is no right to jury trial for injunctive claims or Federal Tort Claims Act lawsuits. These two types of cases will be tried to the judge.

11 Fed.R.Civ.P. 48.

12 Fed.R.Civ.P. 47.

13 Fed.R.Civ.P 48. The parties may stipulate to less than unanimous but defendants seldom do.

14 Soon after the court starts processing your case, you should be sent a notice asking whether or not you will consent to a trial before the magistrate judge. You are not required to take any steps if you do not want to try your case before a magistrate judge.

before a jury, most judges will require you to be quite exact with the presentation of your case. When a case is tried before a judge, the judge will not hold you to as high of a standard in presenting your case as he would before a jury. Further, most judges are familiar with the prison system, whereas, most jurors are not. As a practical matter, it takes more work to conduct a jury trial than a bench trial. These are factors that you must consider when deciding whether to demand a jury.

2. Statement of Jurisdiction

As § A.1.a of Chapter 11 explains, federal courts are courts of *limited jurisdiction*. This means that you must state in your complaint why the district court has jurisdiction to hear your lawsuit. In most cases, the below example will be sufficient. Even though 42 U.S.C. § 1983 provides the basis for bringing a civil rights claim it does not provide authority (jurisdiction) for a court to hear a civil rights case. The jurisdictional basis for bringing a civil rights action is 28 U.S.C. § 1331, which covers all federal constitutional and statutory claims.[15] The other federal statute you should cite is 28 U.S.C. § 1343(a)(3). This statute gives federal jurisdiction to the federal courts to hear claims brought against state officials when acting "under color of any state law, statute...." If you are raising state-law claims in addition to your federal claims, you should add the following sentence: "This Court has supplemental jurisdiction over plaintiff's state-law claims pursuant to 28 U.S.C. § 1367."[16]

I. JURISDICTION

1. Plaintiff brings this lawsuit pursuant to 42 U.S.C. § 1983. This Court has jurisdiction under 28 U.S.C. §§ 1331 & 1343. Plaintiff also seeks a declaratory judgment pursuant to 28 U.S.C. § 2201.[17]

3. Statement of Venue

As § A of this chapter discussed, the rules of *venue* require a lawsuit to be filed in an appropriate district court. Inmates almost always file in the district that contains the jail or prison where their rights were violated.

II. VENUE

2. The District of Colorado is an appropriate venue under 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claims occurred in this district.

4. List of Parties

Before stating your factual allegations, you should list yourself, any other

15 You should cite this provision when your lawsuit involves a claimed violation of a constitutional provision, such as the Eighth Amendment, and/or you claim a violation of a federal statute, such as the American with Disabilities Act (ADA).

16 For a discussion of supplemental or "pendent" jurisdiction, *see* § A.3 of Chapter 11.

17 If you have a claim for violation of the ADA, it has its own jurisdiction statute and you should cite it. 42 U.S.C. § 12133.

plaintiffs, and all the defendants. The most important thing to do in this section is to explain each defendant's responsibility: not what he did wrong, but who he is and how he had the authority to act in the first place. You can do this by stating each defendant's title and job duties. You may also cite federal and state statutes applicable to each defendant's position. For example:

III. PARTIES

3. Plaintiff Dan Manville was at all times relevant to this action a prisoner incarcerated at the Colorado State Penitentiary, which is located in the District of Colorado.

4. Defendant Heather Johnson was at all times relevant to this action the Warden at the Colorado State Penitentiary and was acting under the color of federal and state law. By statute the warden is responsible for ensuring the safety and well-being of prisoners under his supervision. C.R.S. § 17-1-104. By prison policy an inmate is not to be confined in segregation unless he poses a serious threat. DOC Ad. Reg. 600-01, § IV(A)(1), (4). She is sued in her individual and official capacities.

5. Defendant Craig Cooper was at all times a sergeant of security at the Colorado State Penitentiary. He was the segregation unit commander and was responsible to ensure the safety of Plaintiff. He is sued in his individual capacity.

If you are seeking to hold a municipality liable, you must show that your rights were violated as a result of a decision made by a *final policymaker*. *See* § A.3.d of Chapter 13. Federal courts look to state law to see whether a state official has final policymaking authority for a city or county. There will often be case law in your circuit on this point. If you believe that a particular municipal official has this authority, you should say so in the section where you name them as a party.

As in the caption, you must state in this section whether you are suing each defendant in her individual capacity, her official capacity, or both. *See* § A.3.b of Chapter 13. You do not need to do this for non-human defendants like municipalities or corporations.

In the caption, be sure to include the following: "at all times relevant to the events described herein, the defendants have acted and continue to act under color of state law." See § A.3.a of Chapter 13. In a *Bivens* complaint, write that the defendants acted "under color of federal law."

5. Exhaustion of Administrative Remedies

The Prison Litigation Reform Act requires exhaustion of the available prison grievance

process prior to filing a lawsuit pertaining to prison conditions.[18] For example:

> IV. EXHAUSTION OF ADMINISTRATIVE REMEDIES
>
> 6. Plaintiff sought to exhaust his administrative remedies as required by prison policy but both Defendants Johnson and Cooper would not provide any grievance forms to Plaintiff.

Although it is not necessary to include in the complaint that you have exhausted your administrative remedies, it is recommended.[19] If possible, you should attach all grievances, including grievance appeals, to the complaint.

6. Factual Allegations

The "Factual Allegations" section of the complaint is your first chance to tell the court what your case is about. There are a lot of things to think about when writing this section. You must state facts sufficient to cover each element of each claim that you are making. For each violation that you claim a defendant is responsible for, you must state facts linking the defendant to the violation. You must present the facts clearly, so that the court can understand what your claims are about.[20] **Since you will be filing the lawsuit *pro se*, it is recommended that you place one fact in each numbered paragraph.**[21] You must keep out legal arguments and facts that have nothing to do with your claims (such as information about your criminal charges or convictions).

The Federal Rules of Civil Procedure require you to have "evidentiary support" for the factual allegations you make.[22] This means that you cannot allege facts that you know are untrue. On the other hand, because you have not yet had a chance to conduct discovery, you are not expected to know all the facts in the case — particularly facts in the defendants' control. If you are aware of evidence that supports a particular allegation, you may make it in your complaint. If you believe that you will be able to find evidence in support of a fact "after a reasonable opportunity for further investigation or discovery," you may include it in your complaint with the phrase "Upon information and belief...." The example below uses this phrase in paragraph 16 with factual allegations that the plaintiff believes to be true, but is not sure about.

18 *See* Chapter 12 for a discussion on exhaustion of remedies.

19 In Jones v. Bock, 549 U.S. 199, 127 S.Ct. 910 (2007), the Supreme Court reversed the Sixth Circuit, which had upheld the dismissal of Plaintiff's complaint for failing to plead or demonstrate "total" administrative exhaustion. The Supreme Court held that a "[f]ailure to exhaust is an affirmative defense under the PLRA, and that inmates are not required to specially plead or demonstrate exhaustion in their complaints." *Id.* at 921. The Court also overturned the Sixth Circuit's requirement that failure to exhaust the grievance process as to any of the named Defendants or claims in the lawsuit will result in a "total" dismissal of the complaint for failure to exhaust. What the lower court should do in such a situation is to dismiss the defendant or claim that is not exhausted and proceed with the lawsuit against the exhausted defendants and claims. *Id.* at 923.

20 *See* § E.1.b of Chapter 15 for a discussion of the standard of review by the district court of a motion to dismiss.

21 Many *pro se* complaints will contain numerous individual paragraphs each from one/half to a full page long with a lot of different facts and a lot of case citations. In a complaint, the federal court wants to know what the facts are to support your claims that your rights were violated. In a complaint, a judge does not want case law from you.

22 Fed.R.Civ.P. 11(b)(3).

V. FACTUAL ALLEGATIONS

7. On or about May 23, 2008, Plaintiff arrived at the Colorado State Penitentiary.

8. On or about May 23, 2008, Defendant Warden Johnson ordered that Plaintiff be placed in an intake holding cell for processing and that Plaintiff be restrained with handcuffs and leg irons.

9. Shortly after placement in an intake holding cell, Plaintiff notified Defendant Cooper that the handcuffs were so tight that they were restricting circulation to his hands.

10. Plaintiff's request to Defendant Cooper that his handcuffs either be loosened or removed was denied.

11. Over the next 24 hours, Plaintiff remained restrained and began to experience discomfort, pain, and soreness around his wrists.

12. Plaintiff's continued requests to Defendant Cooper and other unknown prison officers that his handcuffs either be loosened or removed were denied.

13. On or about May 24, 2008, Plaintiff requested a toothbrush, soap, towel, and an opportunity shower from Defendant Cooper.

14. As to the claim in paragraph 13, Defendant Cooper denied Plaintiff's request.

15. Defendant Cooper informed Plaintiff that Defendant Johnson had ordered that Plaintiff was not to be permitted out of his cell unless escorted by at least two prison officials and that he was not allowed to have any items within his cell.

16. Upon information and belief, toothbrushes, toothpaste, soap, and towels were items that were allowed to be possessed by all other inmates confined in the intake holding cells at the facility.

17. On or about May 25, 2008, Plaintiff asked Defendant Cooper for an opportunity to take a shower.

18. As to the claim in paragraph 17, Defendant Cooper again denied Plaintiff's request, because Defendant Johnson had instructed Defendant Cooper to not allow him to shower.

19. On or about May 25, 2008, Plaintiff again asked that his handcuffs be loosened or removed, because he felt numbness in his hands due to a lack of proper blood circulation.

20. As to the claim in paragraph 19, Defendant Cooper again denied Plaintiff's request.

21. On or about May 26, 2008, Defendant Johnson ordered Defendant Cooper to replace Plaintiff's handcuffs with belly chains.

22. Defendant Cooper replaced Plaintiff's handcuffs with belly chains and was witness to Plaintiff's blue colored hands and extremely red and irritated wrists.

23. On or about May 26, 2008, Plaintiff asked Defendant Cooper for an opportunity to shower and brush his teeth.

24. As to the claim in paragraph 23, Defendant Cooper denied Plaintiff's requests.

25. On or about May 27, 2008, Defendant Johnson briefly visited Plaintiff's intake cell and told Plaintiff that he could shower and have out-of-cell access to hygiene materials only under Defendant Cooper's discretion.

26. Plaintiff did not see or have an opportunity talk to Defendant Cooper on that day.

27. On or about May 28, 2008, Plaintiff asked Defendant Cooper for an opportunity to shower and to brush his teeth.

28. As to the claim in paragraph 27, Defendant Cooper denied Plaintiff's request.

29. On or about May 29, 2008, Plaintiff asked Defendant Cooper if he could remove his belly chains and leg irons, because his wrists were black and blue and had formed painful sores.

30. As to the claim in paragraph 29, Defendant Cooper denied Plaintiff's requests.

31. After May 29, 2008, Plaintiff made daily requests to Defendant Cooper and other prison officers for removal of all restraints.

32. As to the claim in paragraph 31, Defendant Cooper and other prison officers denied all requests.

33. After May 29, 2008, Plaintiff made daily requests to Defendant Cooper and other prison officers for opportunities to shower and brush his teeth.

34. As to the claim in paragraph 33, Defendant Cooper and other prison officers denied all requests.

35. On or about June 10, 2008, Plaintiff asked Defendant Cooper for a grievance form.

36. Defendant Cooper replied to Plaintiff's grievance request by telling

Plaintiff that "his request had been heard, but denied" and "that there was not need to waste the paper and ink."

37. Plaintiff responded to Defendant Cooper that his confinement was not legal and violated his legal rights.

38. Defendant Cooper responded by threatening Plaintiff that if he did not stop complaining that he would be restrained with handcuffs to eyebolts installed in the wall of Plaintiff's intake holding cell.

39. On or about June 13, 2008, Plaintiff asked Defendant Johnson again for grievance forms.

40. As to the claim in paragraph 39, Defendant Johnson ignored Plaintiff's request and walked away from the holding cell as if she did not hear his request.

41. Finally, on June 15, 2008 Plaintiff was removed from his cell, removed from his restraints and allowed to shower and brush his teeth. He was also given fresh prison clothing.

42. Plaintiff was not allowed to get a haircut or shave his facial hair.

43. Plaintiff had spent a total of 23 days inside his intake holding cell in some form of restraints and without any opportunity to shower or brush his teeth.

44. Plaintiff was then placed back in belly-chains and leg irons and placed back into his intake holding cell.

45. On or about June 16, 2008, Plaintiff asked Defendant Cooper when he was going to be removed from the intake unit and placed in a general population unit.

46. Defendant Cooper responded that Plaintiff would not be transferred until Defendant Johnson gave the order to.

47. On or about June 17, 2008, Plaintiff asked Defendant Cooper if he could exercise outside his intake cell.

48. As to the claim made in paragraph 47, Defendant Cooper denied Plaintiff's request.

49. On or about June 20, 2008, after 5 days without the opportunity to shower and brush his teeth, Plaintiff asked Defendant Cooper if he could do so.

50. As to the claim in paragraph 49, Defendant Cooper denied Plaintiff's requests.

51. After June 20, 2008, Plaintiff continued his daily requests to

Defendant Cooper and prison officers for an opportunity to shower and to brush his teeth.

52. As to the claim in paragraph 51, Defendant Cooper and other prison officers denied Plaintiff's requests.

53. On or about June 25, 2008, Plaintiff asked Defendant Cooper for relief medication for the sores that had formed around his wrists where his restraints rested upon.

54. As to the claim in paragraph 53, Defendant Cooper denied Plaintiff's request.

55. After June 25, 2008, Plaintiff made daily requests to Defendant Cooper and prison officers for relief medication for his sores.

56. As to the claim made in paragraph 55, Defendant Cooper and other prison officers denied Plaintiff's requests.

57. Finally, on July 11, 2008, Plaintiff was removed from his restraints and his intake holding cell and given an opportunity to shower, brush his teeth, shave, and received a haircut from the prison barber.

58. Plaintiff requested relief medication for his wrists, but Defendant Cooper denied his request.

59. Plaintiff had been confined for 26 days straight in restraints and without an opportunity to shower, brush his teeth, or exercise outside his cell.

59. Plaintiff was then placed into handcuffs and leg irons and placed back into the intake holding cell.

60. On or about July 12, 2008, Plaintiff was not delivered any meals.

61. Plaintiff's asked Defendant Cooper numerous times throughout the day for a meal.

62. As to the claim in paragraph 61, Defendant Cooper denied Plaintiff's request.

63. On or about July 13, 2008, Plaintiff was removed from his restraints, given relief medication for the sores on his wrists, and removed from the intake unit.

64. Plaintiff was transferred to the facility's General Population Unit where he has daily opportunities to partake in hygienic activities and exercise outdoors.

65. Defendants Johnson and Cooper lacked penological and/or security

justification to treat plaintiff in the manner as described above during his entire confinement in the intake holding cell.

66. Defendants Johnson and Cooper acted wantonly, maliciously and willfully.

It is not clear how detailed the factual allegations in a § 1983 and *Bivens* complaint must be. Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement showing that the pleader is entitled to relief." This is called *notice pleading*: a plaintiff need only state the basic facts of her claims. The Supreme Court has held that notice pleading is sufficient for § 1983 claims against municipalities and when suing municipal officials in their official capacities.[23] It has also suggested that notice pleading is sufficient for other civil rights claims as well.[24] Some circuits, however, still require that § 1983 and *Bivens* complaints include detailed factual allegations about government officials sued in their individual capacity.[25] To be safe, it is our advice to always include as much particular detail in your complaint as you can. You win lawsuits based upon your facts.

Your complaint should be no longer than necessary. After you finish the first draft of your factual allegations, check them against the elements of your claims. Each allegation should relate to an element, either directly (*e.g.*, by stating what an official actually knew about a particular problem) or indirectly (*e.g.*, by describing grievance procedures so that it is clear how the defendants learned about the problem). If a factual allegation does not move a claim forward, take it out.

7. Causes of Action

In the "Causes of Action" section (also called "Claims for Relief" or "Counts"), you state the different legal theories on which you believe you are entitled for relief. As a general rule, you should list a separate count for each legal provision.[26] If you claim that different defendants are responsible for different violations of your rights, you should list the responsible defendants under each

23 In Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 113 S.Ct. 1160 (1993), the Supreme Court reversed the ruling of the Fifth Circuit, which had upheld the dismissal of a complaint for failure to plead specific facts regarding a county's inadequate training. The Court held that such a heightened pleading standard was inconsistent with the Federal Rules of Civil Procedure, and that "federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." *Id.* at 168-69. *See also* Jordan v. Jackson, 15 F.3d 333, 337-40 (4th Cir. 1994) (rejecting requirement that plaintiff must plead multiple instances of similar constitutional violations to support allegation of municipal policy or practice); Lanigan v. Village of East Hazel Crest, 110 F.3d 467, 479-80 (7th Cir. 1997) (holding that "boilerplate allegations" of inadequate training and supervision were sufficient under Leatherman); Atchinson v. District of Columbia, 73 F.3d 418, 422 (D.C. Cir. 1996) (stating that with regard to factual allegations supporting claim of deliberate indifference, plaintiff "need not allege all that a plaintiff must eventually prove").

24 In Crawford-El v. Britton, 523 U.S. 574, 118 S.Ct. 1584 (1998), the Supreme Court held that the Federal Rules do not permit the imposition of a heightened burden of proof in § 1983 lawsuits against individual officials, where the plaintiff's claim depends on proving a defendant's improper motive. *Id.* at 584-94. The First, Sixth, Seventh, Tenth, and D.C. Circuits have interpreted *Crawford-El* to mean that there is no heightened pleading standard in civil rights cases. *See* Educadores Puertorriquenos en Accion v. Hernandez, 367 F.3d 61, 66-7 (1st Cir. 2004); Dubay v. Wells, 506 F.3d 422, 427 (6th Cir. 2007); Nance v. Vieregge, 147 F.3d 589, 590 (7th Cir. 1998); Currier v. Doran, 242 F.3d 905, 916-17 (10th Cir. 2001); Harbury v. Deutch, 233 F.3d 596, 611 (D.C. Cir. 2000).

25 *See, e.g.*, Marsh v. Butler County, 268 F.3d 1014, 1022 (11th Cir. 2001) (*en banc*).

26 Fed.R.Civ.P. 10(b).

count. Otherwise, you can refer to the "defendants" as a group. Rather than restate all of the applicable facts in each count, you can "adopt by reference" the factual allegations that you have already made, as shown in paragraphs 67 and 71 below.[27]

V. CAUSES OF ACTION

Count I

Plaintiff Was Subjected To Cruel and Unusual Punishment In Violation of The Eighth Amendment To The Constitution.

67. Plaintiff incorporates paragraphs 1 through 66 as though they were stated fully herein.

68. Defendants Johnson and Cooper violated Plaintiff's Eighth Amendment right to be free from cruel and unusual punishment by keeping Plaintiff in restraints and confined to his intake holding cell for forty-nine days while awaiting processing into General Population at the Colorado State Penitentiary.

69. Defendants Johnson and Cooper violated Plaintiff's Eighth Amendment right to be free from cruel and unusual punishment by depriving Plaintiff reasonable access to basic personal hygiene materials such as soap, a toothbrush, toothpaste and clean clothing for periods of twenty-three days and twenty-six days while confined in the intake holding cell.

70. Defendants Johnson and Cooper violated Plaintiff's Eighth Amendment right to be free from cruel and unusual punishment by depriving Plaintiff of any exercise outside of his cell for forty-nine days while confined in his intake holding cell.

Count II

Plaintiff Was Denied Due Process Under The Fourteenth Amendment To The Constitution.

71. Plaintiff incorporates paragraphs 1 through 66 as though they were stated fully herein.

72. Defendants Johnson and Cooper violated Plaintiff's Fourteenth Amendment rights to due process by continuously keeping Plaintiff in restraints for forty-nine days that Plaintiff was confined in his intake holding cell awaiting processing into General Population at the Colorado State Penitentiary.

27 Fed.R.Civ.P. 10(c).

73. Defendants Johnson and Cooper violated Plaintiff's Fourteenth Amendment right to due process by depriving Plaintiff reasonable access to basic personal hygiene materials such as soap, a toothbrush, toothpaste and clean clothing for periods of twenty-three days and twenty-six days while confined in the intake holding cell.

74. Defendants Johnson and Cooper violated Plaintiff's Fourteenth Amendment right to due process by depriving Plaintiff of any exercise outside of his cell for forty-nine days while confined in his intake holding cell.

75. Defendants Johnson and Cooper violated Plaintiff's Fourteenth Amendment right to due process by depriving Plaintiff of an opportunity to aggrieve the conditions of his confinement.

8. Prayer for Relief

The prayer for relief is the section of the complaint that tells the court what you want. You may ask for several different kinds of relief in this section.[28] Section A.4 of Chapter 13 describes the kinds of relief that inmates can ask for in § 1983 or *Bivens* lawsuits. The below example asks for both damages (nominal, compensatory, and punitive) and injunctive relief (preliminary and permanent). You do not have to specify the exact amount of damages that you want, although some plaintiffs do. You must, however, tell the court what kind of injunctive relief you want it to order. Make sure that your request for injunctive relief relates to an ongoing violation of your rights.[29] For example, the plaintiff above would not be justified in asking for any injunctive relief since he has now been placed in general population and can get all of these items he was denied in segregation.

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays that this Court:

A. Declare that the acts and omissions described herein violated Plaintiff's rights under the Constitution and laws of the United States;
B. Order Defendants to pay compensatory and punitive damages;
C. Order Defendants to pay reasonable attorney fees and costs; and
D. Grant other just and equitable relief that this Honorable Court deems necessary.

9. Signature

Like other legal documents, your complaint must be signed. By signing the complaint, you certify that you are a party in the case; that your allegations have some evidentiary support; that your claims have some arguable basis in the

28 Fed.R.Civ.P. 8(a)(3).
29 Section C, below, explains how to write a motion for a preliminary injunction.

law; and that you are not filing your complaint to harass officials or for another improper purpose.[30]

Respectfully submitted,

_____

Daniel Manville
Colorado State Penitentiary
P.O. Box 19999, Prison # 23001
Canyon City, CO 80000

Dated: December 9, 2008

10. Verification

The Federal Rules of Civil Procedure do not require parties to *verify* (confirm the truth of) their pleadings.[31] However, you may find it useful to do this. As § A.1 of Chapter 17 explains, courts allow parties to submit verified complaints as evidence in support of or in opposition to motions for summary judgment. Also, as shown in § C, below, you can use a verified complaint to support a motion for a preliminary injunction.

> Pursuant to 28 U.S.C. § 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on August 15, 2008.
>
> _____
>
> Daniel Manville

The verification in the above example uses the form for declarations allowed by federal statute, 28 U.S.C. § 1746.[32] Keep in mind that you may be prosecuted for perjury if you knowingly verify a complaint that contains false allegations. Since you are already obligated under the Federal Rules of Civil Procedure to plead facts that you believe are true, this should not be a problem.

C. MOVING FOR A PRELIMINARY INJUNCTION

As § A.4.b.i of Chapter 13 explains, Federal Rule of Civil Procedure 65(a) allows you to request a *preliminary injunction*: an order protecting you on a temporary basis, before the court is able to rule on your request for permanent relief. It is appropriate to ask for a preliminary injunction if you face a substantial risk of serious, irreparable harm, due to an ongoing constitutional violation at your jail or prison.

The motion below asked for a preliminary injunction for an inmate who the

30 *See* Fed.R.Civ.P. 11.
31 Fed. R. Civ. P. 11(a).
32 *See* § B.9 of Chapter 14.

government would not allow to be represented by law students in a clinical program. Here is a sample motion and brief in support of a preliminary injunction. Some courts require that the brief be separate from the motion but there seems to be a trend in the Local Rules allowing the motion and brief to be one document.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[NAME OF PLAINTIFF],[33]	)	
Plaintiff,	)	
vs.	)	Civil Action No. 05-CV-02342-WYD-MJW[34]
MICHAEL MUKASEY, et al.,	)	Judge
Defendants.	)	Magistrate Judge

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND/OR PROTECTIVE ORDER AND BRIEF IN SUPPORT

Plaintiff, by his Counsel, the Student Law Office of the University of Denver Sturm College of Law, Civil Rights Clinic, pursuant to Fed.R.Civ.P 65, requests that this Court grant this motion, and states in support the following:

1. Pursuant to Local Rule. 7.1, in good faith, Plaintiff sought the concurrence in this motion but never heard from Defendants' counsel.

STATEMENT OF FACTS

2. The Civil Rights Clinic (CRC) is one of five clinics that comprise the Student Law Office (SLO), the clinical legal education program of the University of Denver Sturm College of Law.

3. The SLO was established so that law students, under the supervision of clinical faculty who are also licensed attorneys, could represent clients who otherwise would not have access to counsel.

4. The supervising attorneys in the SLO are not allowed to provide

33 This is a real case. In fact, the injunction was issued by the district court and the U.S. Government has threatened to take an interlocutory appeal of that order. The actual names of the parties and some of the attorneys have been eliminated.

34 The Local Rules of the District Court for Colorado requires that the case number be placed at the top of the caption and that the judge and magistrate judge be listed by initials.

representation to clients unless its law students are allowed to appear and litigate those cases in the same manner that an attorney would.

5. In this matter, the SLO became aware that Plaintiff had filed a motion to remove his then counsel, to have the court appoint another attorney and to reopen discovery (Doc. 96).

6. Counsel Manville, one of the SLO's professors, received Special Administrative Measures (SAMs) clearance so that he could talk to Plaintiff about the possibility of the SLO providing representation to him.

7. On October 1, 2007, Counsel Manville and two law students from the SLO appeared at a hearing before this Court. Plaintiff appeared by telephonic conferencing (Doc. 99).

8. At the October 1 hearing, this Court granted Plaintiff's motion to remove his former counsel, stated that Counsel Manville and the two SLO students were to file their appearances on Plaintiff's behalf, and stated that Plaintiff, through the SLO, could file an appropriate motion to extend the discovery deadlines (Doc. 101).

9. Counsel Manville filed his appearance that same day (Doc. 100), and then filed a motion to amend the Scheduling Order deadlines (Doc. 102).

10. On October 25, 2007, this Court granted in part Plaintiff's motion to amend the scheduling order.

11. The SLO has sought to obtain SAM clearance for the student attorneys so that they can provide representation to Plaintiff. Specifically, Interim Clinical Director had several telephone conversations with Assistant United States Attorney in which she requested SAM clearance for the student attorneys, and also sent a letter to AUSA in which she described the nature and degree of supervision of the student attorneys in the SLO:

As a practical matter, this means that no work on a client's case is performed without a supervising attorney's knowledge and approval. In cases involving SAMs prisoners, no contact with a client will occur (via telephone call or in-person meeting) without a supervising attorney present, all incoming correspondence will be reviewed by a supervising attorney prior to receipt by the student attorneys, and no outgoing correspondence will be sent from our office to these clients without the express written approval of a supervising attorney.

Ltr. from Professor to AUSA, Oct. 11, 2007, attached as Exhibit 1.

12. Recently, Professor was informed by AUSA that SAMs clearance would not be provided to law students.

13. As stated in Professor's declaration, the reason given for this denial by AUSA was:

> When I asked why the Government was refusing to grant clearance to the student attorneys, again pointing out that the SAMs permit communication with paralegals and investigators as described in ¶¶ 5-8 *supra*, Mr. XXXX informed me that student attorneys are not like attorneys, paralegals or investigators who "have a lot to lose" if they violate SAM restrictions.
>
> Declaration of Professor, attached as Exhibit 2, at paragraph 10. *See also* the SAMs Clearance Form signed by Plaintiff, attached as Exhibit 3.

14. Professor was told that "so far" there had been no issues with the FBI background checks of the student attorneys.

15. The denial of SAM clearance to the students was done in an arbitrary and capricious manner and in violation of both the First Amendment and the Due Process Clause.

16. If the law students cannot receive SAMs clearance, the SLO will have to withdraw from this case.

17. Plaintiff seeks an injunction so that SLO student attorneys can receive SAMs clearance to represent him.

STANDARD FOR PRELIMINARY INJUNCTION

18. For Plaintiff to obtain a preliminary injunction, he must establish: (1) he will suffer irreparable injury unless the injunction issues, (2) the threatened injury outweighs any damage the proposed injunction might cause the opposing party, (3) that the injunction, if issued, will not be contrary to the public interest, and (4) that it has a substantial likelihood of success on the merits. *Oklahoma ex rel. Oklahoma Tax Comm'n. v. International Registration Plan,* 455 F.3d 1107, 1112-13 (10th Cir. 2006). Where the first three requirements are met, a modified, less stringent, test as to the "success on the merits" element may apply. *Davis v. Mineta,* 302 F.3d 1104, 1101 (10th Cir. 2002).

Plaintiff Will Suffer Irreparable Injury Unless the Injunction is Issued

19. Plaintiff will suffer irreparable harm if the injunction is not granted allowing the law students to represent him since the SLO will be required to withdraw its representation.

20. If the law students are not able to provide representation to the Plaintiff, the SLO will have to withdraw from this case.

21. The SLO was not established so that its faculty/attorneys could litigate cases under the auspices of the University of Denver College of Law. Rather, because the SLO is a law school clinic in which our students receive academic credit, the student attorneys handle every aspect of the cases to which they are assigned: client and witness interviewing, propounding and responding to written discovery, taking and defending depositions, drafting and arguing motions, and conducting trials.

22. One of the faculty/attorneys in the SLO is an ex-offender, has written extensively in the area of the rights of prisoners, and has over 20 years of experiences in prison litigation. Over these 20 years, Counsel Manville has been subjected to a large number of protective orders relating to the good order and security of the prison and relating to the safety of staff and prisoners. This vast experience will be used in the supervision of the law students to ensure that all the requirements of SAMs are followed. Plaintiff being denied this vast experience, through the supervision of the law students, in the litigating of this matter would cause irreparable injury.

23. As this Court is aware, it is often difficult to obtain *pro bono* counsel to handle cases on behalf of prisoners and it is unlikely that this Court will find other counsel to represent the Plaintiff.

24. Plaintiff has shown that he would suffer irreparable injury if the injunction is not granted.

Defendants Will Suffer Little, if Any Harm,
if This Court Grants This Injunction

25. There are procedures contained in the SAM agreement that impose severe repercussions on the law students if they communicate with people not involved with the SLO as to any discussions they have with or information they obtain from the Plaintiff. First, the law students can be prosecuted for violating the terms of SAMs. *See, e.g., U.S. v. Sattar*, 314 F.Supp.2d 279 (S.D.N.Y. 2004) (where the government criminally prosecuted a number of individuals, including a lawyer, for violation of the signed SAMS agreement).

26. Further, this Court can issue a protective order subjecting the law students to contempt proceedings if they violate the order limiting their sharing of any direct conversation with the Plaintiff.

27. Defendants' claim that the law students have little to lose does

not take into account that a violation of the SAM and a protective order would prevent the law students from ever getting admitted to practice law.

28. Pursuant to SAMs, paralegals and legal investigators are allowed approval to see inmates who are placed on SAMs. Exhibit 2. These individuals and the law students have the same to lose: their livelihood and licenses.

Issuance of the Injunction Will Not be Contrary to the Public Interest

29. The actions of refusing to provide SAM clearance for the sole reason that the government believes that law students don't "have a lot to lose" violates the First Amendment right of access to counsel as set forth in *Procunier v. Martinez*, 416 U.S. 396 (1974):

> By restricting access to prisoners to members of the bar and licensed private investigators, this regulation imposed an absolute ban on the use by attorneys of law students and legal paraprofessionals to interview inmate clients. In fact, attorneys could not even delegate to such persons the task of obtaining prisoners' signatures on legal documents. The District Court reasoned that this rule constituted an unjustifiable restriction on the right of access to the courts. We agree.

Id. at 419. The Court went on to state that:
[I]nmates must have a reasonable opportunity to seek and receive the assistance of attorneys. Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid. *Ex parte Hull*, 312 U.S. 546, 61 S.Ct. 640, 85 L.Ed. 1034 (1941).

Id. See also Souza v. Travisono, 498 F.2d 1120, 1121 (1st Cir. 1974) (holding that the killing of a guard by an inmate could not be used by prison staff to preclude law students from legal visits when other safeguards could be used to maintain order).

30. Prior to this Court authorizing law students to provide representation to *pro se* prisoners, these prisoners must provide written permission that they have consented to this representation. This Court's procedures require certification by the College of Law that the law students have completed certain courses and that the law students will be supervised. *See, e.g., Jordan v. Pugh*, Case No. 1:02-cv-1239 (D. Colo) (Doc. 270, 271, and 272.)

31. In this matter, Notices of Entry of Appearance of Law Students have been filed. Plaintiff has agreed to be presented by SLO student attorneys (Doc. 110 and 111).

32. Pursuant to this Court's General Order 2005-3, "Order Adopting Student Practice Rule", see attached as Exhibit 3, the law students are allowed to "appear in that matter on behalf of any party who has consented in writing," *Id.* at A.1, and "such appearance authorizes the student to appear in that matter in court or other related proceedings when accompanied by the supervising attorney and to prepare and sign court papers which are signed by the supervising attorney." *Id.* at A.2. Courts that have admitted law students have conferred on them the same responsibilities as are conferred on attorneys. *See Matter of Hatcher*, 150 F.3d 631, 636 (7th Cir. 1998) ("[The law student] bears the same ethical responsibilities to her client and to the court that a full-fledged member of the bar would have, just as an associate in a law firm does despite working under the supervision of a partner. * * * This court expects no less of the third-year law students permitted to practice before it."). *cf. Smith v. Coughlin,* 748 F.2d 783, 789 (2nd Cir. 1984) (ban on visits by paralegal personnel to convicted inmate violated the Sixth Amendment; although inmate could not prove compensable injury, he was entitled to nominal damages); *Abu-Jamal v. Price*, 154 F.3d 128, 136-37 (3rd Cir. 1998) (for death row prisoner; upholding requirement of prisons that to establish legal visit the visitor must be employed by attorney).

33. Plaintiff is not claiming that the Attorney General cannot restrict access by legal professionals to inmates on SAMs restrictions. Plaintiff is claiming that such restrictions cannot be imposed without a finding of "some colorable threat to security" and such decision cannot be imposed in an arbitrary or capricious manner.

Therefore, a prison warden may prohibit a prisoner from communicating with counsel through a para-professional where the para-professional poses "some colorable threat to security...." *Id.* Such a determination must be based on the sound judgment of the prison administrator and must not be "arbitrary or patently unreasonable."

Crusoe v. DeRobertis, 714 F.2d 752, 756 (7th Cir. 1983), citing *Phillips v. Bureau of Prisons*, 591 F.2d 966, 973 (D.C. Cir. 1979). *See also Smith v. Coughlin*, 577 F.Supp. 1055, 1063 (S.D. N.Y. 1983), *judgment aff'd and rem'd*, 784 F.2d 783 (2nd Cir. 1984); *Souza v. Travisono*, 498 F.2d 1123-24.

34. The only justification given by Defendants is that the law students did not have much to lose if they violated the SAM restrictions. This statement is ludicrous, does not establish "some colorable threat to security" and is imposed in an arbitrary or capricious manner.

35. The Bureau of Prisons for years has required its "Warden[s] ... [to] give those students or legal assistants working in legal aid programs the same status as attorneys with respect to visiting and correspondence except where specific exceptions are made in this section and in Part 540 of this Chapter." 28 C.F.R. § 543.15(b).

36. This Regulation also requires the SLO to supervise its students and to enter into an agreement that the SLO faculty/attorneys will "accept[] professional responsibility for acts of each student ... affecting the institution." 28 C.F.R. § 543.15(c).

37. Pursuant to this Regulation, the Warden of ADX has "require[d] each student ... to complete and sign ... a pledge to abide by Bureau regulations and institution guidelines." *Id.*

38. For the 18 months that SLO students have visited prisoners at ADX, not once has any student been denied visiting privileges nor have any students been subjected to a loss of privileges for violating any rules. See 28 C.F.R. 541.15 and 28 C.F.R. 540.19.

39. The public interest is best served when an injunction is issued to protect First Amendment rights. *Elrod v. Burns,* 427 U.S. 347, 373 (1976) (plurality opinion) ("[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *cf. Inc. v. Reg'l Transp. Dist.,* 129 F.3d 1343, 1347 (10th Cir. 1997) ("The public interest also favors plaintiffs' assertion of their First Amendment rights.").

40. In this matter, the public interest is best served by granting Plaintiff's Motion for Preliminary Injunction or Protective Order since the public has no interest in enforcing unconstitutional restrictions on access to counsel. If no injunction is issued, Plaintiff will have no recourse, such as money, when he ultimately prevails in this litigation. *See Cate v. Oldham,* 707 F.2d 1176, 1188-89 (11th Cir. 1983) (noting that "direct penalization, as opposed to incidental inhibition, of First Amendment rights constitutes irreparable injury" and that "[o]ne reason for such stringent protection of First Amendment rights certainly is the intangible nature of the benefits flowing from the exercise of those rights; and the fear that, if these rights are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future").

WHEREFORE, for the reasons stated above, this Court should issue an injunction holding that the Defendants, or their agents, cannot prevent the students from receiving SAMs clearance for the reason that they don't "have a lot to lose".

DATED: December 3, 2007
Respectfully submitted,

STUDENT LAW OFFICE
__s/ Daniel Manville[35]
Daniel Manville, Esq.
University of Denver College of Law
2255 E. Evans Ave., Suite 335
Denver, CO 80208
Telephone: xxx-xxx-xxxx
Fax: xxx-xxx-xxxx
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this December 3, 2007, a true and correct copy of the above and foregoing MOTION for an Injunction was placed in the mailbox, with proper postage attached, at the prison for delivered to [Name of Defendants' Counsel], Attorney for the Defendants, United States Attorney's Office, 1225 Seventeenth St., Ste. 700, Denver, Colorado 80202.
__s/ Daniel E. Manville
Daniel E Manville, Esq.

Keep in mind that this motion and memorandum are just samples. If you decide to ask for a preliminary injunction, your motion and memorandum will differ depending on the facts of your case, your legal claims, the injunctive relief that you are requesting and the law in your circuit. Also, remember that in many cases a court will order an evidentiary hearing before granting a motion for a preliminary injunction. This means that you must be ready to present evidence in support of your claims — *i.e.*, your testimony, testimony from other inmates and guards, reports and other documents — before you have had a chance to conduct full discovery.

Pursuant to the Prison Litigation Reform Act, a court "shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right."[36] This language must be placed in any injunction. The failure to place such language in the order granting the injunction will allow the defendant to file a motion to have the injunction set aside and that motion must be granted.[37] If the federal court does not place language similar to this in an order granting you an

35 You will actually have to sign the pleadings before filing it.
36 18 U.S.C § 3626(a).
37 18 U.S.C. § 3626(b)(2).

injunction, you will need to file a motion for reconsideration and ask the court to include this language in your injunction.

D. MOVING FOR APPOINTMENT OF COUNSEL

Section D of Chapter 13 encouraged you to write to private lawyers and public-interest legal organizations to ask for legal representation. If you end up filing a lawsuit *pro se*, you can also ask the district court to appoint a lawyer for you. Unlike criminal cases, where every person who faces the possibility of imprisonment has a constitutional right to be defended by a lawyer,[38] poor people do not have a right to a lawyer in civil rights lawsuits. However, a federal statute, 28 U.S.C. § 1915(e)(1), gives district courts the authority to appoint lawyers in certain circumstances.

As a general rule, courts seldom appoint lawyers for *pro se* inmates.[39] In deciding whether to appoint a lawyer for you, a court will consider the following factors:

> Does your lawsuit have merit?
>
> Will it require factual investigation that you cannot perform due to your imprisonment?
>
> Are the legal issues unusually complex?
>
> How able are you to present your case?
>
> Will a trial in your case turn on the credibility of witnesses, so that there is a need for a lawyer to conduct cross-examination?
>
> Any special reasons why the appointment of a lawyer would further justice?[40]

Your chances of getting a court-appointed lawyer will be greater if you can show that you tried to get a lawyer on your own.

Here is a sample motion for appointment of counsel:

38 Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006 (1972); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792 (1963).

39 *See, e.g.,* Johnson v. Doughty, 433 F.3d 1001, 1006-07 (7th Cir. 2006) (A plaintiff may request counsel in a civil action under § 1915(e)(1), but appointment is left within the discretion of the district court and can only be reviewed for an abuse of discretion. "In reviewing denials of counsel, the test is not whether this court [Appellate Court] would have appointed counsel if it were in the district court's position."); Carmona v. U.S. Bureau of Prisons, 243 F.3d 629, 632 (2d Cir. 2001) ("we look first to the "likelihood of merit" of the underlying dispute. ") Rucks v. Boergermann, 57 F.3d 978, 979 (10th Cir. 1995) (courts are to evaulate the merits of a prisoner's claims, the nature and complexity of the factual and legal issues, and the prisoner's ability to investigate the facts and present his claims). Some courts have simply stated that "exceptional circumstances" must be shown to justify appointment of counsel. In practice, these courts' decisions generally focus on the same factors discussed in this section, *see, e.g.,* Reneer v. Sewell, 975 F.2d 258, 261 (6th Cir. 1992) ("Appointment of counsel in a civil case... is a privilege that is justified only by exceptional circumstances.") (internal quotations and citations omitted)); Javeri v. McMickens, 660 F.Supp 325, 326 (S.D. N.Y. 1987) (counsel appointed where constitutional "issue of substance" was presented).

40 *See* Hendricks v. Coughlin, 114 F.3d 390, 392 (2d Cir. 1997); Parham v. Johnson, 126 F.3d 454, 457-61 (3d Cir. 1997) (Provides a good summary of what factors a reviewing court may consider when determining whether or not the district court abused its discretion in not appointing counsel.). In both of these cases, the court held that the district court abused its discretion by failing to appoint counsel.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

	)	
DAN MANVILLE,	)	
Plaintiff,	)	
vs.	)	Civil Action No.
[NAME OF DEFENDANT],	)	Judge
Defendants.	)	Magistrate Judge

PLAINTIFF'S MOTION FOR APPOINTMENT OF COUNSEL
AND
BRIEF IN SUPPORT[41]

Pursuant to 28 U.S.C. § 1915(e)(1), plaintiff moves for an order appointing counsel to represent him in this case. In support of this motion, plaintiff states:

1. Plaintiff cannot afford to hire a lawyer. He has been granted leave to proceed *in forma pauperis* in this case.
2. Plaintiff's imprisonment will greatly limit his ability to litigate this case. This case will likely involve substantial investigation and discovery.
3. The issues in this case are complex. A lawyer would help plaintiff to apply the law properly in briefs and before the Court. Plaintiff has never before been a party to a civil legal proceeding.
4. A trial in this case will likely involve conflicting testimony. A lawyer would assist plaintiff in the presentation of evidence and the cross-examination of opposing witnesses.
5. Plaintiff has made repeated efforts to obtain a lawyer. Attached to this motion are four letters from local civil rights lawyers denying plaintiff's requests for representation.

WHEREFORE, plaintiff requests that the Court appoint counsel to represent him in this case.

Respectfully submitted,
Daniel E. Manville

[certificate of service]

41 You use this format when not submitting a separate brief in support of your motion but are including citations within the motion.

[attached letters]

Even if the district court denies your motion for appointed counsel at the start of your lawsuit, it may reconsider later if it finds that your case raises important or complex issues. If the court schedules your case for trial, you will want to renew your motion.

E. MOVING TO PROCEED IN FORMA PAUPERIS

1. Filing Fee

Any inmate who files a lawsuit in federal court must pay a fee. The current filing fee is $350.[42] Because many inmates cannot afford to pay the entire fee at once, a federal statute allows them to pay it over time, in installments. To pay the fee in this manner, you must file a motion to proceed *in forma pauperis* (as a "pauper" or poor person, also called "IFP").[43] The court will grant you IFP status if it concludes that you are unable to pay fees and costs as they arise.

Once you write the district court for its *pro se* filing package, you will get a form (possibly called a *financial affidavit* or *application to proceed in forma pauperis*) to fill out regarding your financial resources (the money and property that you own). You must fill out this form to the best of your ability.[44] The district court will dismiss your lawsuit if it finds out that your "allegation of poverty is untrue."[45]

In addition to filling out this form, you must submit to the court "a certified copy of [your] trust fund account statement (or institutional equivalent)... for the 6-month period immediately preceding the filing of the complaint..., obtained from the appropriate official" of each jail or prison where you are or were confined.[46] You may have to sign an authorization form to get a copy of your account statement. Some jails and prisons do not keep inmate accounts; even when they do, inmates sometimes experience problems trying to get copies of account statements. If you cannot get a copy of your account statement for any reason, submit a declaration explaining why to the court.

After you submit your financial affidavit / application to proceed IFP and the certified copy of your account statement, the court will decide whether to grant you IFP status. If it does, it will set a schedule for you to pay the filing fee in installments.[47] It may direct an official at your jail or prison to remove funds from

42 28 U.S.C. § 1914(a) (2006). The court will not refund this fee once you pay it, even if you voluntarily dismiss your lawsuit.

43 Prior to the enactment of the Prison Litigation Reform Act (PLRA) in 1996, courts often waived the filing fee for inmates who were too poor to pay it. Now, even inmates without funds are required to pay the filing fee. The court will enter an order informing prison officials that any time you get any money put into your prison account that an amount, up to 20%, will be deducted for payment towards the money you owe the federal court. Courts have upheld the new filing fee requirement as constitutional.

44 If you are unable to get such a form from the district court, you should submit an affidavit providing the following information: the nature of your lawsuit, why you believe you are entitled to a remedy, a statement of all the assets (cash, property) that you own, and why you cannot pay the $350 filing fee on your own. 28 U.S.C. § 1915(a)(1).

45 28 U.S.C. § 1915(e)(2)(A) (2006).

46 28 U.S.C. § 1915(a)(2) (2006).

47 28 U.S.C. § 1915(b) provides: "The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of:

your account as they become available. If the court denies your IFP application, you will have to pay the entire $350 filing fee before proceeding with your lawsuit.

Importantly — unless you fall under the "three strikes" provision discussed in § E.3 below — you should never be barred from filing a lawsuit on the ground that you cannot pay even a partial filing fee.[48]

2. Why Apply for IFP Status?

You may ask why you should bother filling out these forms to apply for IFP status if you will still have to pay the entire filing fee over time. There are several reasons. First, as § F, *supra*, will explain, IFP status allows you to have your complaint served on the defendants quickly and without cost by the U.S. Marshal's Service.[49] Second, you may not have to pay the costs of preparing transcripts or the district court record for appeal.[50] Lastly, as § D explained above, district courts have the power to appoint lawyers for inmates who cannot afford to hire them on their own.

3. The "Three Strikes" Provision

One group of inmates cannot be granted IFP status no matter how poor they are (unless they are in "imminent danger of serious physical injury"). These are inmates who have had three lawsuits or appeals ("strikes") dismissed as frivolous, malicious, or for failure to state a claim upon which relief may be granted.[51] Inmates who have three "strikes" must pay the entire $350 filing fee up front.

There may be a section on your *pro se* complaint form or financial affidavit that asks you to list lawsuits and appeals that you have filed in the past, so that the court can count your "strikes." Not every lost lawsuit or appeal counts as a strike.[52] Sections B and E.1.b of Chapter 15 explain when lawsuits may be dismissed as

(A) the average monthly deposits to the prisoner's account; or

(B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint....

(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid."

You should notify the court if officials at your jail or prison fail to make the required payments or overcharge your account. Officials' mistakes or delays should not be held against you. *See* McGore v. Wrigglesworth, 114 F.3d 601, 611 (6th Cir. 1997) ("A prisoner cannot be penalized when prison officials fail to promptly pay an assessment.").

48 28 U.S.C. § 1915(b)(4).

49 28 U.S.C. § 1915(d).

50 28 U.S.C. § 1915(c). However, if the court enters a judgment against you requiring you to pay costs, you must pay those costs in the same manner as you must pay filing fees under § 1915(a)(2). Some district courts have discretion not to award costs against poor inmates, *see* Feliciano v. Selsky, 205 F.3d 568, 572 (2d Cir. 2000), while others have said you are required to pay costs, *see* Hampton v. Hobbs, 106 F.3d 1281, 1285 (6th Cir. 1997) (*in forma pauperis* status will not by itself provide an automatic basis for denying taxation of costs against an unsuccessful litigant).

51 28 U.S.C. § 1915(g). Lawsuits and appeals dismissed before the enactment of the PLRA count as strikes. *See, e.g.,* Welch v. Galie, 207 F.3d 130, 132 (2nd Cir. 2000); Wilson v. Yaklich, 148 F.3d 596, 604 (6th Cir. 1998); Rivera v. Allin, 144 F.3d 719, 730 (11th Cir. 1998).

52 *See, e.g.,* Snider v. Melindez, 199 F.3d 108, 115 (2d Cir. 1999) (dismissal for failure to exhaust does not count as strike); Clemente v. Allen, 120 F.3d 703, 705 n.1 (7th Cir. 1997) (appeal was not considered a strike in absence of published law on issue prior to court ruling); Patton v. Jefferson Corr. Ctr., 136 F.3d 458, 462-64 (5th Cir. 1998) (counting as a strike the dismissal of a § 1983 action that included habeas claims that were dismissed without prejudice); Dupree v. Palmer, 284 F.3d 1234, 1236 (11th Cir. 2002) ("proper procedure is for the district court to dismiss the complaint without prejudice when it denies the prisoner leave to proceed *in forma pauperis* pursuant to the three strikes provision of § 1915(g)."); Day v. Maynard, 200 F.3d 665, 667 (10th Cir. 1999) ("a dismissal without prejudice counts as a strike, so long as the dismissal is made because the action is frivolous, malicious, or fails to state a claim.").

frivolous, malicious, or for failure to state a claim.

Even if you have three strikes against you, you may still proceed *in forma pauperis* if the district court concludes that you face an "imminent danger of serious physical injury." A danger is "imminent" if serious physical injury could happen at any moment. An inmate must be in imminent danger when she files her complaint to fall under this exception to the "three strikes" rule.[53]

F. FILING AND SERVICE

1. Filing

You must file with the district court your complaint and (if appropriate) the other documents discussed in this chapter. You file legal documents by sending them to the clerk of the court. Make sure that each document you send is signed. Some district courts require both the original and a copy of each document. Check your local rules. Most courts require a *pro se* inmate to send two copies of every document to be filed with the court.

If you can make copies, you should keep a copy of any document you file for your own records. In addition, keep a record of the dates on which documents were filed, and send to the court an extra copy of the first page of each document and a self-addressed stamped envelope.[54] In a cover letter, ask the clerk of the court to return a "file-stamped copy" to you. The clerk will return the first page stamped with the document's filing date.

2. Service

In addition to filing documents with the court, you must also *serve* them on each defendant you name. For documents other than your complaint, service is done by attaching a *certificate of service*. See § D.2 of Chapter 11. Normally, after service of the complaint on the individually named defendants, you are to serve all future documents on the lawyer that files an appearance for the defendants. After the complaint is served and until an appearance is filed by counsel for the defendant, you must serve any pleadings upon the defendant.

A special rule governs the service of complaints.[55] A copy of the complaint

53 *See* Abdul-Akbar v. McKelvie, 239 F.3d 307, 317 (3rd Cir. 2001) (*en banc*) (collecting cases and overruling contrary prior Third Circuit authority); Bañños v. O'Guin, 144 F.3d 883, 884 (5th Cir. 1998) (inmate with three strikes is entitled to proceed with his action on appeal only if he is in imminent danger at the time that he seeks to file his suit in district court or seeks to proceed with his appeal or files a motion to proceed IFP); Ashley v. Dilworth, 147 F.3d 715, 717 (8th Cir. 1998) (placement in close proximity to inmates on "inmate alert list" meet imminent danger criteria); Ciarpaglini v. Saini, 352 F.3d 328, 330 (7th Cir. 2003) (discontinuation of bipolar medication can meet imminent danger standard); Gibbs v. Cross, 160 F.3d 962, 967 (3rd Cir. 1998 (continuing headaches and other symptoms as a result of exposure to dust, lint, and shower odor also meets this standard); Choyce v. Dominguez, 160 F.3d 1068 (5th Cir. 1998) (remanding for reconsideration of imminent danger determination where prisoner alleged incident complained of "was only one episode in an ongoing pattern of threats and violence" in retaliation for prior litigation), *but see* Martin v. Shelton, 319 F.3d 1048, 1050 (8th Cir. 2003) (forced to work outside in inclement weather twice in five month period does not create imminent serious physical injury).

54 Be sure to mark this envelope "LEGAL CORRESPONDENCE: DO NOT OPEN EXCEPT IN THE PRESENCE OF ADDRESSEE".

55 Fed. R. Civ. P. 4.

and a *summons* must be personally served on each defendant you have named. A summons is a form that the clerk of the court will issue once you file your complaint. It is signed by the clerk, bearing the seal of the court, and directing the defendant to respond to your complaint within a certain number of days. The clerk will send you summons forms along with the *pro se* forms package.

You should fill out summons forms for each defendant and submit them with your complaint and motion to proceed *in forma pauperis*. A complaint must be served within 120 days after it has been filed.[56] It is in your interest to have it served as quickly as possible, to get your lawsuit moving.

If the court grants you *in forma pauperis* status, the U.S. Marshal's Service will serve your complaint for you.[57] You will be responsible for providing the addresses of each defendant to the U.S. Marshal so the complaint and summons can be served.

The Federal Rules provides that "[s]ervice may be effected by any person who is not a party and who is at least 18 years of age."[58] Therefore, if you are not proceeding *in forma pauperis*, you can ask a professional process server, friend, or family member to serve your complaint and summons personally.[59] You may also ask the court to order the U.S. Marshal's Service to effect service, for a fee, if you have not been granted *in forma pauperis*.

Finally, you may ask the defendants to *waive service* under Fed.R.Civ.P. 4(d) instead of seeking service by use of a summons. To use this process, you will need to obtain from the clerk of the court some blank "acknowledgment of service" forms.[60] Once you get the form you will need to follow its instructions very closely.

You must include an extra copy of the notice/request, a copy of the complaint, and a stamped envelope for the defendant to return by mail his "Waiver of Service of Summons."[61] The defendant will have at least 30 days to respond.[62] If the defendant agrees to waive service, he will have 60 days from the date of your request to file an answer or motion to dismiss.[63] If the defendant does not agree to waive service, without good cause, you may later file a motion to have the defendant pay the costs of having your complaint served by a professional process server or the U.S. Marshal's Service.[64]

56 Fed.R.Civ.P. 4(m).
57 28 U.S.C. § 1915(d).
58 Fed.R.Civ.P. 4(c)(2).
59 Personal service can be made "by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process." Fed.R.Civ.P. 4(e)(2). There are special rules for service of corporations, federal officials, and municipal governments. *See* Fed.R.Civ.P. 4(h), (i), & (j).
60 Fed.R.Civ.P. 4(d)(2)(A-E).
61 Fed.R.Civ.P. 4(d)(2)(C), (G).
62 Fed.R.Civ.P. 4(d)(2)(F).
63 Fed.R.Civ.P. 4(d)(3).
64 Fed.R.Civ.P. 4(d)(2). It is still your responsibility to have your complaint served within 120 days of its filing in the event that the defendant does not agree to waive service. The waiver-of-service rule does not apply to federal officials (i.e., Bureau of Prisons employees).

CHAPTER 15

Initial Responses to Your Complaint

This chapter looks at what can happen to your lawsuit after it is filed and served, but before you are able to begin discovery. During this time, problems with your complaint may be raised by the district court on its own or by the defendants in a motion to dismiss. You must be prepared to defend your complaint against a motion to dismiss, but you should also consider amending your complaint to correct problems that the court or the defendants bring to your attention.

A. INITIAL PROCESSING

As soon as you file your complaint, the clerk's office will assign a *civil action number* to your case. You must write this number in the caption of all subsequent legal documents that you file.

The clerk's office will assign your case to a district judge and, perhaps, a magistrate judge. The clerk may ask whether you will consent to have the magistrate judge exercise the powers of a district judge in your case. This is an important decision that you should make only after investigating both assigned judges. See Chapter 11, § A.1.a.

If you filed a motion to proceed *in forma pauperis*, a court employee will examine your motion, financial affidavit or declaration, and account statement. Remember, the court will dismiss your lawsuit if it finds that your "allegation of poverty" is untrue.[1] If the court grants your motion, it will require you to pay a partial filing fee right away (and the rest later in installments) and will direct the U.S. Marshal's Service to serve your complaint on the defendants. If the court denies your motion, you will have to pay the entire filing fee ($350) and arrange for service yourself. Your lawsuit will not proceed until you have paid your filing fee, in the amount directed by the court, and all the defendants have been served.

B. DISTRICT COURT SCREENING

After the clerk's office processes your complaint,[2] the district court will *screen* it. Three different provisions of the Prison Litigation Reform Act (PLRA) require courts to review and dismiss any lawsuit, in whole or in part, that (1) is "frivolous

1 28 U.S.C. § 1915(e)(2)(A).

2 Or perhaps even earlier. 28 U.S.C. § 1915A(a) directs district courts to screen inmate complaints "before docketing, if feasible or, in any event, as soon as practicable after docketing." A lawsuit is "docketed" when the clerk's office assigns it a civil action number.

or malicious," (2) fails to state a claim upon which relief may be granted, or (3) seeks money damages from a defendant who is immune from damages liability.[3]

These three conditions boil down to one: condition #2. The Supreme Court has interpreted the phrase "frivolous and malicious" narrowly, to cover only complaints that allege facts rising "to the level of the irrational or the wholly incredible."[4] Such a complaint obviously "fails to state a claim upon which relief may be granted." Similarly, a plaintiff who sues a defendant who is immune cannot win relief from that defendant: that is what "immune" means. Condition #2, therefore, includes both conditions #1 and #3. Section E, below, will explain when a complaint may be dismissed for failing to state a claim.

The PLRA's screening provisions require district courts to review and dismiss inmate lawsuits *sua sponte*: on the court's own motion. You do not get an opportunity to file a memorandum of law before the court rules. Of course, most federal judges are familiar with the basic requirements of § 1983 and *Bivens* lawsuits, and many errors that *pro se* inmates make in drafting their complaints are easy to spot. For example, a judge will know right away that a § 1983 claim for damages against a state department of corrections (as opposed to the department's commissioner) must be dismissed under the Eleventh Amendment.[5] Other grounds for dismissal, however, are more complicated. When courts act without the benefit of briefing by the parties, they are more likely to make mistakes.

What should you do if your district court dismisses part or your entire lawsuit during the screening process? If you believe that the court has made a mistake, you must act quickly. Point out the mistake in a motion for reconsideration.[6] Keep your argument short and to the point. For example:

> In its Order of February 3, 2001, the court ruled *sua sponte* that plaintiff's claims against Zinn County were due to be dismissed on the ground of legislative immunity. The doctrine of legislative immunity, however, protects only individual legislators in their personal capacity. It does not protect municipalities. *Bogan v. Scott-Harris*, 523 U.S. 44, 53 (1998); *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 677 (1996).

3 28 U.S.C. § 1915(e)(2)(B); 28 U.S.C. § 1915A; 42 U.S.C. § 1997e(c)(1). Section 1915(e)(2)(B) applies only when the plaintiff has applied to proceed *in forma pauperis*. Section 1915A provides that in addition to screening out improper claims, the district court must identify claims that are "cognizable" (may have merit).

4 Denton v. Hernandez, 504 U.S. 25, 33, 112 S.Ct. 1728 (1992); *see also* Neitzke v. Williams, 490 U.S. 319, 325, 109 S.Ct. 1827 (1989). Before it enacted the PLRA, Congress required district courts to screen out only *in forma pauperis* lawsuits that were "frivolous or malicious."

5 Under § 1983, you cannot sue a state entity or the state since they are protected by the Eleventh Amendment Immunity. However, in a lawsuit brought pursuant to the American with Disabilities Act, you must sue the public entity and not officials. *See* 42 U.S.C. §§ 12131-12133; United States v. Georgia, 546 U.S. 151,154, 126 S.Ct. 877 (2006); Walker v. Snyder, 213 F.3d 344, 346 (7th Cir. 2000).

6 Although such motions are frequently filed, the Federal Rules of Civil Procedure do not expressly mention "motions for reconsideration." If you file a motion for reconsideration within 10 days of an order, a court will likely treat it as a Rule 59(e) motion to "alter or amend judgment." Otherwise, the court will likely treat it as a Rule 60(b) motion for "relief from a judgment or order." Check the local court rules for the district court you are before since many district courts have local rules that may contain a rule specifically dealing with a motion for reconsideration.

> It was therefore an error for the court to dismiss Zinn County on this ground. Plaintiff's claims against Zinn County should be reinstated.

If a magistrate judge recommends dismissal, you should file *objections* to the judge's recommendation. Be sure to do this within 10 days of service.[7] If the district judge adopts the recommendation, or if she dismisses your lawsuit on her own and denies your motion for reconsideration, your only remaining option will be to appeal, which you will have 30 days to file the notice of appeal.[8]

More often than not, if a district court dismisses part or all of your lawsuit, it will have a good reason for doing so. As we saw in the last chapter, writing a § 1983 or *Bivens* complaint is difficult. Even experienced lawyers make mistakes or leave things out of complaints that result in their dismissal. Under the PLRA district courts retain the power to dismiss lawsuits with *leave to amend*.[9] Thus, unless your original complaint lacks merit entirely and cannot be saved by an amendment, you should be able to correct your mistakes by filing an amended complaint. You should consider filing a motion to amend even if the court does not mention the possibility of amendment in its dismissal order. Amendment is discussed in § G, below.

C. WAIVERS OF REPLY

In addition to district court screening, the PLRA created a strange new reply procedure for inmate lawsuits. Normally, once a complaint has been served, the defendants must reply by filing either a motion to dismiss or an answer. In inmate lawsuits, however, defendants now have a third option: they may file a *waiver of reply*.[10] In effect, the defendants may choose not to reply to your complaint at all. Furthermore, so long as the defendants do not reply, the court may not grant you any relief!

How does your lawsuit get moving? If the defendants file a waiver of reply, the district court must review your complaint to determine whether you have "a reasonable opportunity to prevail on the merits." This review does not appear to be any different from the review already required for district court screening

7 Under Federal Rule of Civil Procedure 72(b), you have 10 days to serve and file "specific written objections" after you receive a copy of the magistrate judge's recommendation.

8 Fed.R.App.P 4.

9 Intri-Plex Technologies, Inc. v. Crest Group, Inc., 499 F.3d 1048, 1056 (9th Cir. 2007); Powers v. Snyder, 484 F.3d 929, 933 (7th Cir. 2007); Spear v. Nix, 215 Fed.Appx. 896, 902 (11th Cir. 2007); Kikumura v. Osagie, 461 F.3d 1269, 1291-1292 (10th Cir. 2006); Ciralsky v. C.I.A., 355 F.3d 661, 670 (D.C. Cir. 2004); Kozohorsky v. Harmon, 332 F.3d 1141, 1144 (8th Cir. 2003); Shane v. Fauver, 213 F.3d 113, 117 (3d Cir. 2000); Gomez v. USAA Fed. Sav. Bank, 171 F.3d 794, 796 (2d Cir. 1999). *See also* Johnson v. Johnson, 466 F.3d 1213, 1214 (10th Cir. 2006) (*per curiam*); Slayton v. American Exp. Co., 460 F.3d 215, 230 (2d Cir. 2006); Rosenzweig v. Azurix Corp., 332 F.3d 854, 864 (5th Cir. 2003); Bazrowx v. Scott, 136 F.3d 1053, 1054 (5th Cir. 1998). *But see* Peterson v. Bussard, 240 Fed.Appx. 491, 492 (3d Cir. 2007) (*per curiam*) (holding that dismissal without leave to amend was appropriate because amended pleading could not overcome the procedural bar to suit); Otero v. Commonwealth of Puerto Rico Indus. Com'n, 441 F.3d 18, 22 (1st Cir. 2006) (holding that "exceptional circumstances" are required to justify sua sponte leave to amend); McGore v. Wrigglesworth, 114 F.3d 601, 612 (6th Cir. 1997) (holding that PLRA precludes district courts from granting leave to amend when dismissing inmate complaints for failure to state a claim); Song v. City of Elyria, Ohio, 985 F.2d 840, 843 (6th Cir. 1993) (holding that the district court had no duty to inform plaintiffs that they had the right to file a motion for leave to amend).

10 42 U.S.C. § 1997e(g).

under the PLRA. If the court determines that you have "a reasonable opportunity to prevail," it will order the defendants to reply by filing a motion to dismiss or answer within a certain number of days. If the court does not act on a waiver of reply for several weeks, you may want to file a motion asking for an order directing the defendants to reply.

If the defendants refuse to file either a motion to dismiss or an answer after the court has ordered them to reply (or if they did not bother to file even a waiver of reply), you may request a *default judgment* under Federal Rule of Civil Procedure 55. Rule 55 establishes different procedures for requesting default judgments, depending on the kind of relief you are seeking and the defendants you have named. Courts generally do not like to enter default judgments. Even if a court enters one, it may set it aside later if the defendants show "good cause."[11] You are therefore unlikely to win relief on the basis of a default judgment. Nevertheless, requesting a default judgment may be the only way you can force the defendants to respond to your complaint.

D. SPECIAL REPORTS

District courts sometimes order defendants to file *special reports* in response to inmate lawsuits.[12] Special reports are not mentioned in the Federal Rules of Civil Procedure. Nevertheless, some courts use them as a tool to get the basic facts about a lawsuit out as quickly as possible. In preparing a special report, defendants must investigate the allegations made in the complaint and report on their findings to the court. Defendants may also attach relevant documents to their reports, such as medical reports, incident reports, or official affidavits or declarations.

It can be helpful to get a special report. It can give you some useful information early on, before the process of discovery begins. It can also indicate how the defendants plan to fight your lawsuit. The defendants' investigation might even lead them to realize that they have violated your rights and make them willing to discuss settlement.

More likely than not, however, the defendants will use the special report as a means of persuading the court to throw out your lawsuit. Despite court instructions, some jail and prison officials include in special reports only facts and evidence favorable to them.

You must therefore be careful when you respond to a special report. Because special reports are not expressly authorized by the Federal Rules of Civil Procedure, the rules governing your response will be set by the district court.

11 Fed. R. Civ. P. 55(c).

12 In the Tenth Circuit, these reports are called Martinez Reports, *see* Fields v. Oklahoma State Penitentiary, 511 F3d 1109, 1112 (10th Cir 2007).

Follow those rules carefully. In addition, pay close attention to the advice given in § E, below, on motions to dismiss and the advice given in Chapter 17 on motions for summary judgment. In particular, you should emphasize that the Federal Rules do not permit a court to dismiss lawsuits on the basis of evidence presented by the defendants, if you have not yet had a chance to conduct discovery and present evidence yourself.

E. MOTIONS TO DISMISS

If your complaint survives district court screening (and, if the defendants filed a waiver of reply, the court ordered them to reply), the defendants must file either a motion to dismiss or an answer. Answers are discussed in § H, below. This section deals with motions to dismiss.

1. Procedure

Federal Rule of Civil Procedure 12(b) governs motions to dismiss. If your complaint has multiple claims for relief and/or names multiple defendants, the defendants may move to file for *full dismissal* (challenging your entire lawsuit) or *partial dismissal* (challenging some, but not all, of your claims or defendants). Multiple defendants may join in a single motion or file motions separately.

The filing of a motion to dismiss *tolls* (suspends) the time by which a defendant must answer your complaint. If the district court denies its motion to dismiss, the defendant will then have 10 days to file an answer.[13] If the court grants the motion, your lawsuit (or the part of your lawsuit that the motion challenged) will end at the district-court level. A full dismissal is a final judgment that you can appeal. As a general rule, however, you may appeal a partial dismissal only after the rest of your lawsuit has been resolved in the district court.[14]

Seven kinds of motions to dismiss are listed under Rule 12(b). Rule 12(b)(1) and Rule 12(b)(6) motions are the most common.[15]

a. Rule 12(B)(1): Subject-Matter Jurisdiction

A Rule 12(b)(1) motion to dismiss argues that the district court lacks *subject-matter jurisdiction* over your lawsuit. It challenges the very power of the federal court to hear your case.

District courts treat most Rule 12(b)(1) motions no differently than Rule 12(b)(6) motions (discussed below). In other words, courts generally accept a complaint's

13 Fed. R. Civ. P. 12(a)(4).

14 *See* Fed. R. Civ. P. 54(b).

15 A defendant will file a Rule 12(b)(2) motion only if he lives outside your state and argues that the district court lacks personal jurisdiction over him. A Rule 12(b)(3) motion argues that you have filed your lawsuit in an improper or inconvenient venue (i.e., the wrong district court). *See also* 28 U.S.C. § 1391 (establishing requirements for federal-court venue); 28 U.S.C. §§ 1404, 1406 (authorizing district courts to transfer a lawsuit to a proper or more convenient venue). Rules 12(b)(4) and (5) deal with defects in how the complaint was served on the defendants. A Rule 12(b)(7) motion argues that the plaintiff failed to sue an indispensable party under Rule 19(a).

factual allegations as true and view all reasonable inferences in the plaintiff's favor.[16] This does not happen, however, when defendants make a *factual attack* on subject-matter jurisdiction. For example, the defendants may argue and present evidence showing that because the violation you are challenging has been fixed, your request for injunctive relief is *moot*. See Chapter 13, § A.4.b.iii. In deciding a factual attack on jurisdiction, the court will not necessarily assume that the factual allegations in your complaint are true. You should, however, at least get a chance to respond to the arguments and evidence presented by the defendants.

b. Rule 12(B)(6): Failure to State a Claim

The most common kind of motion to dismiss is a Rule 12(b)(6) motion, for *failure to state a claim upon which relief can be granted*. Rule 12(b)(6) is a "catch-all" provision: defendants use it to raise many different grounds for dismissal.[17] A Rule 12(b)(6) motion argues that even if all the factual allegations in your complaint are true, you still cannot win. In other words, either you failed to allege a proper violation of your rights, or the law does not give you a remedy for the violation you alleged.

In deciding a Rule 12(b)(6) motion, the district court must assume that every fact alleged in a *pro se* complaint is true.[18] It must also draw reasonable inferences from those allegations in your favor that are *plausible*.[19] Recently the U.S. Supreme Court stated that when presented with a Rule 12(b)(6) motion the district court is to "look to the specific allegations in the complaint to determine whether they *plausibly* support a legal claim for relief."[20] The Court went on to state that rather than adjudging whether a claim is "improbable," "[f]actual allegations [in a complaint] must be enough to raise a right to relief above the speculative level."[21] What this means is that you must state factual allegations in your complaint that are plausible. A district court need not accept your conclusory allegation as being true without factual support, i.e., that Lt. Manville ordered the officers to assault me." The statement that Lt. Manville ordered that you be assaulted is a conclusory statement and under the prior Rule 12(b)(6) standard the court in accepting the statement in the complaint as true could find that your claim against Lt. Manville should not be dismissed. However, under

16 California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 516, 92 S.Ct. 609, 614 (1972). A Rule 12(b)(1) motion to dismiss that is based on the allegations in your complaint is called a facial attack.

17 United States v. Gaubert, 499 U.S. 315, 327, 111 S.Ct. 1267, 1276 (1991). Defendants may not attach to a Rule 12(b)(6) motion affidavits or other evidence contesting allegations made in your complaint. If they do this, the court should either exclude the evidence or convert the motion into a Rule 56 motion for summary judgment. Fed. R. Civ. P. 12(b).

18 *See* Erickson v. Pardus, - U.S. -, 127 S.Ct. 2197, 2200 (2007) ("when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." (internal citations omitted)).

19 Two recent decisions by the U.S. Supreme Court changed the standard established in Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99 (1957), that a court could grant a Rule 12(b)(6) motion only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See* Bell Atlantic Corp. v. Twombly, - U.S. -, 127 S.Ct. 1955 (2007) and Erickson v. Pardus, *supra*.

20 *Id.* at 1215 n. 2 (emphasis added). *See also* Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007), cert. granted sub nom Ashcroft v. Iqbal, 2008 WL 336310 (June 16, 2008).

21 Twombly, at 1965. *See also* Dudnikov v. Chalk & Vermilion Fine Arts, Inc., 514 F.3d 1063, 1070 (10th Cir. 2008) (stating that courts must take as true "all plausible, non-conclusory, and non-speculative" facts alleged in a plaintiff's complaint).

the *Atlantic Bell* and *Erickson*'s standard, a district court can find that your claim that Lt. Manville ordered you to be assaulted is not plausible based upon your failure to allege some supporting facts, such as, "while being assaulted, Officer Baum stated that Lt. Manville ordered us to give you an ass-whipping."[22] Another example is that you cannot allege in your complaint only that there is "a lack of a rational relationship" between the prison rule imposing on your right and any legitimate state interest.[23] You need to allege facts in your complaint to support the statement of "a lack of rational relationship" to make it plausible that you can prove your claim.

Rule 12(b)(6), you may have noticed, involves the same inquiry as that involved in district court screening under the PLRA. (*See* § B, above.) In both situations, the district court must dismiss your lawsuit if the complaint "fails to state a claim upon which relief may be granted." If your complaint survives district court screening, you might assume that the court is certain to deny a defendant's Rule 12(b)(6) motion to dismiss. Do not assume this. It is one thing for a court to review a complaint *sua sponte* during the screening process. It is another thing for a defendant, especially one represented by a good lawyer, to go through your complaint paragraph by paragraph, identify arguable defects, and then file a motion and brief in favor of dismissal.

You must take a motion to dismiss seriously regardless of what happened previously in your lawsuit.[24] Read the defendant's motion carefully, research the law, and file a thorough response. Section 2 will review grounds that defendants often raise in motions to dismiss, and § 3 will explain how to respond to such a motion.

2. Grounds for Dismissal

A defendant can raise a variety of grounds for dismissal in a Rule 12(b)(1) or Rule 12(b)(6) motion. Here are the grounds most often raised in inmate lawsuits:

a. Rule 12(B)(1) Grounds

Eleventh Amendment: The Eleventh Amendment to the U.S. Constitution (as interpreted by the Supreme Court) bars § 1983 lawsuits against states and state agencies. Because the Eleventh Amendment limits the subject-matter jurisdiction of federal courts, defendants may raise this ground in a Rule 12(b)(1) motion. The Eleventh Amendment does not bar lawsuits (1) against state officials in their individual capacity for damages or (2) against state officials in their official

22 *Id.* at 1974 (requiring inmate to plead "enough facts to state a claim to relief that is plausible on its face."). In *Twombly*, the Court, noted that "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1964-65. The Court upheld the dismissal of a complaint where the plaintiffs did not "nudge [ ] their claims across the line from conceivable to plausible." *Id.* at 1974.

23 *See* Giarratano v. Johnson, 521 F.3d 298, 303-05 (4th Cir. 2008).

24 Once you have reviewed the motion to dismiss and if you decide that you should have alleged more facts to support some of your statements in the complaint, you should file a motion to amend the complaint to allege those facts. You will also need to file a response to the motion but you can reference the motion to amend the complaint to correct any factual shortcoming.

capacity for injunctive relief. See Chapter 13, § A.3.b.

Standing to seek injunctive relief: Federal courts treat standing as a jurisdictional requirement. According to the Supreme Court, you must have an "actual or imminent injury" to seek injunctive relief: the violation that you challenge must be presently injuring you, or must be likely to injure you in the near future.[25] See Chapter 13, § A.4.b.ii.

Mootness of an injunctive claim: Your claim for injunctive relief becomes moot if the defendants correct the violation of your rights and "subsequent events [make] it absolutely clear that the allegedly wrongful behavior [cannot] reasonably be expected to recur."[26] See Chapter 13, § A.4.b.iii. Rule 12(b)(1) mootness challenges almost always rely on facts not set forth in the complaint.

b. Rule 12(B)(6) Grounds

Failure to allege elements: Rule 12(b)(6) authorizes dismissal if the plaintiff has failed to state a claim upon which relief may be granted. This happens, in its simplest form, when a complaint does not include sufficient factual allegations to satisfy each element of the plaintiff's claim. Imagine, for example, that in a failure-to-protect lawsuit, the plaintiff alleged only that the defendants were "negligent" in allowing him to be assaulted by other inmates — not that the defendants had actual knowledge of a substantial risk of serious harm and failed to respond reasonably. Because a failure-to-protect claim requires a showing of deliberate indifference (*see* Chapter 7), and because deliberate indifference requires more than negligence (*see* Chapter 6, § C.2), such a complaint would be dismissed under Rule 12(b)(6).

Although Federal Rule of Civil Procedure 8(a) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," some courts had adopted a *heightened pleading* standard requiring more detailed allegations in § 1983 and *Bivens* lawsuits filed against individual officials. *See* Chapter 14, § B.5. There is no heightened pleading standard when a § 1983 or *Bivens* lawsuit is being reviewed by a district court.[27]

Defendant's involvement: A related ground for dismissal exists when the plaintiff has failed to allege each defendant's involvement in a violation. From reading your complaint, a court should have a good idea how each defendant's conduct

25 Lewis v. Casey, 518 U.S. 343, 349-50, 116 S.Ct. 2174, 2179 (1996). Lewis dealt with the right of access to the courts. It is not yet clear how strictly courts will apply this decision to other constitutional claims. If you file any kind of injunctive lawsuit, you should be ready to explain why you have standing under Lewis.

26 United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203, 89 S.Ct. 361, 364 (1968), cited in Friends of the Earth v. Laidlaw Environmental Servs., Inc., 528 U.S. 167, 189, 120 S.Ct. 693, 708 (2000).

27 *See Erickson*, at 2200 (holding that the court of appeals had "depart[ed] from the liberal pleading standards" of Rule 8(a)). The Court reiterated that "[s]pecific facts are not necessary," and that the complainant "need only 'give the defendant fair notice of what the... claim is and the grounds upon which it rests.'" *Id.* (quoting Twombly, 127 S.Ct. at 1964 (internal quotation marks omitted) (alteration in original)). *See also* Boykin v. KeyCorp, 521 F.3d 202 (2d Cir. 2008) ("[B]oth Twombly and [Erickson v. Pardus, ---U.S. ----, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007)] explicitly disavow that Rule 8(a) requires any plaintiff... to plead 'specific facts.'").

resulted in the violation of your rights. Remember that a defendant can be liable even if she did not directly participate in the events that caused you injury. For example, a county sheriff who authorizes her staff to punish inmates by denying them heat and blankets will be liable for the resulting constitutional violation, even if she did not turn down the thermostat herself. *See* Chapter 13, § A.3.c.

Qualified immunity: If you sue officials in their individual capacity for damages, they may assert qualified immunity. Qualified immunity shields officials from damages liability if existing case law did not "clearly establish" the right that they allegedly violated. While the Supreme Court has stated that it is unnecessary for "the very action in question [to have] previously been held unlawful,"[28] some lower federal courts grant qualified immunity unless a right has previously been applied in very similar factual circumstances. *See* Chapter 13, § A.4.a.iv.

Legislative, prosecutorial, and judicial immunity: Legislators, prosecutors, and judges are almost always shielded from liability in § 1983 and *Bivens* lawsuits.

State law immunities: For supplemental state-law claims, government officials may be protected by state immunity rules. Because the rules on immunity differ from state to state, you must research your state's statutes and case law carefully.

Failure to exhaust administrative remedies: As Chapter 12 explains, the Prison Litigation Reform Act prohibits inmates from filing federal lawsuits "until such administrative remedies as are available are exhausted." You must submit grievances and complete all available appeals, even if you know that officials will not give you the relief you want. If you do not fully exhaust, the district court will dismiss your lawsuit.

Heck v. Humphrey and *Edwards v. Balisok*: Another kind of inmate exhaustion requirement has been created by the Supreme Court. In *Heck v. Humphrey* the Court held that an inmate may not file a § 1983 damages claim that necessarily implies the invalidity of his imprisonment, unless and until his conviction or sentence has been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus."[29] In *Edwards v. Balisok*, the Court extended *Heck* to prison disciplinary violations: an inmate who loses good-time credits may not file a lawsuit implying the invalidity of the violation, unless and until he gets the lost good-time credits restored through state proceedings or federal habeas corpus.[30]

The "physical injury" requirement: The Prison Litigation Reform Act bars inmates

28 Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039 (1987).
29 512 U.S. 477, 487, 114 S.Ct. 2364, 2372 (1994).
30 520 U.S. 641, 648, 117 S.Ct. 1584, 1589 (1997).

from seeking damages for "mental or emotional" injuries if they did not also suffer related physical injuries. *See* Chapter 13, § A.4.a.iii. This statute is confusing and controversial. If the defendants raise the "physical injury" requirement in your lawsuit, you should research how courts in your circuit have applied it.

Statute of limitations: You must file a § 1983 or *Bivens* lawsuit within a certain amount of time — as short as one year — after your rights have been violated. The applicable statute of limitations in § 1983 and *Bivens*-lawsuits is based on the "general or residual statute for personal injury actions" in your state.[31] If you miss the applicable statute of limitations, the district court will dismiss your lawsuit — no matter how strong it is on the merits.

Res judicata and collateral estoppel: A court will not re-decide a case or issue that it or another court has already decided. *Res judicata* is claim preclusion: a party may not file a new lawsuit if an earlier lawsuit involving the same parties and the same cause of action ended in a final judgment. *Collateral estoppel* is issue preclusion: a party may not re-argue a factual issue that was litigated and decided in an earlier lawsuit or criminal case involving that party. Both of these defenses may be raised in a motion to dismiss.

3. RESPONDING TO A MOTION TO DISMISS

If the defendants move to dismiss your complaint, you will need to become an expert on the law fast. Do as much research as you can on the grounds raised by the defendants. Read any available treatises on civil rights or federal practice and procedure. If you have access to case reporters, look up the leading decisions by the Supreme Court and your circuit court of appeals. Also, read each decision cited by the defendants. If a particular decision hurts your position, see whether you can *distinguish it* in a meaningful way — show that the facts in the decision are different from your own. Do not accept the defendants' legal statements or citations at face value, as they are presenting the law in the light most favorable to their position. If the defendants cite cases inaccurately or fail to mention controlling case law, you should bring such inaccuracies and omissions to the court's attention.

You must also correct any misrepresentations about the allegations in your complaint. As § E.1 explained, you are entitled under Rule 12(b)(6) — and usually, but not always, under Rule 12(b)(1) — to have your allegations accepted as true and interpreted in a favorable light. Also, in many circuits, courts must "liberally construe" complaints filed by *pro se* plaintiffs.[32] If the defendants misrepresent

31 Owens v. Okure, 488 U.S. 235, 249-50, 109 S.Ct. 573, 582 (1989); Wilson v. Garcia, 471 U.S. 261, 276-80, 105 S.Ct. 1938, 1947-49 (1985).

32 *See, e.g.,* Haines v. Kerner, 404 U.S. 519, 520-21, 92 S.Ct. 594, 596 (1972); Kay v. Bemis, 500 F.3d 1214, 1218 (10th Cir. 2007); Weilburg v. Shapiro, 488 F.3d 1202, 1205 (9th Cir. 2007); Bertin v. U.S., 478 F.3d 489, 492 (2d Cir. 2007); Kaba v. Stepp, 458 F.3d 678, 687 (7th Cir. 2006); Andrade v. Gonzales, 459 F.3d 538, 543 (5th Cir. 2006); Stringer v. St. James R-1 School Dist., 446 F.3d 799, 802 (8th Cir. 2006); Rodi v. Southern New England School Of Law, 389 F.3d 5, 12 (1st Cir. 2004); Alston v. Parker, 363 F.3d 229, 234 (3d Cir.

your allegations or refer to facts outside the complaint, you should point out these errors in your response.

Keep in mind that it is better to acknowledge a mistake and move on, than to fight a battle you deserve to lose. As § G will explain below, Rule 15(a) allows you to amend your complaint once as of right any time before the defendants file an answer or the district court enters a final judgment. Thus, if the defendants' motion to dismiss points out a serious but correctable defect, you should correct the defect in an amended complaint. As § B already discussed, the district court may also grant you leave to amend when it dismisses your complaint. Finally, you can file a *notice of dismissal* at any time before the defendants answer your complaint or move for summary judgment.[33] This is called *voluntary dismissal*. Unless you specify otherwise (and so long as you did not previously dismiss your claims), your lawsuit will be dismissed *without prejudice*. This means that you may re-file the same claims later in a new lawsuit.

F. OTHER EARLY DEFENSE MOTIONS

There are a few additional motions that defendants may make early on to challenge the adequacy of your complaint.

If your complaint is so vague or ambiguous that the defendants "cannot reasonably be required to frame a responsive pleading," the defendants may move for *a more definite statement* under Federal Rule of Civil Procedure 12(e). Such a motion must "point out the defects complained of and the details desired."[34] So long as your complaint satisfies the basic requirements of notice pleading — *i.e.*, "a short and plain statement of the claim showing that the pleader is entitled to relief"[35] — the court will likely deny the defendants' motion and direct them to get the details they want through discovery. The court may take a different view, however, if it applies a heightened pleading standard in civil rights lawsuits.

Under Rule 12(f), the defendants may move to *strike* (take out) any allegations in your complaint that are "redundant, immaterial, impertinent, or scandalous." The defendants must show that the allegations are unrelated to any claim and that the defendants will be harmed if the allegations stay in. Rule 12(f) motions are seldom granted.

After the defendants answer your complaint, Rule 12(c) allows them to move for *judgment on the pleadings*. Courts generally decide such motions the same way they decide motions to dismiss: they accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. Defendants may not assert in

2004); Montgomery v. Huntington Bank, 346 F.3d 693, 698 (6th Cir. 2003); De'Lonta v. Angelone, 330 F.3d 630, 633 (4th Cir. 2003); Trawinski v. United Technologies, 313 F.3d 1295, 1297 (11th Cir. 2002); Richardson v. United States, 193 F.3d 545, 548 (D.C. Cir. 1999).

33 Fed. R. Civ. P. 41(a)(1)(i).

34 Fed. R. Civ. P. 12(e).

35 Fed. R. Civ. P. 8(a).

a Rule 12(c) motion defenses or objections that they failed to assert in their answer.

Although Rule 56 motions for *summary judgment* are usually filed at the end of discovery, defendants may file them earlier. They may do this, for example, if they believe that you cannot prove a particular element of your claim and do not want to waste time responding to discovery requests on other matters. Chapter 17 explains how to respond to a summary judgment motion generally. If you need to conduct discovery before responding to the defendants' motion, be sure to make a proper request under Rule 56(f).

G. AMENDED AND SUPPLEMENTAL COMPLAINTS

Federal Rule of Civil Procedure 15 allows plaintiffs to *amend* (make changes to) or *supplement* (add new information to) their complaints. This is a particularly useful rule for plaintiffs who need to correct mistakes in their original complaints.

Rule 15(a) gives you a right to amend your complaint once, for any reason, before the defendants file an answer. You may amend once as of right even after the defendants file a Rule 12(b) motion to dismiss.[36] Thus, if the defendants point out in their motion an important but correctable defect in your complaint, you should amend your complaint to correct it. Do this *before* the district court rules on the defendants' motion; although the court may grant you leave to amend if it dismisses your complaint (see § B), your *right* to amend ends when the court enters a final judgment against you.[37]

After the defendants file their answer, or if you previously amended your complaint, you may amend "only by leave of court or by written consent of the adverse party." In such circumstances, first ask the defendants' lawyer if they will consent to your proposed amendment. If the defendants refuse, file a motion for *leave to amend* with the court.[38] Rule 15(a) states that a court shall give leave to amend "freely... when justice so requires." The court may deny you leave if you have engaged in undue delay or bad faith, if your earlier amendments failed to correct defects in your complaint, or if your proposed amendment would be *futile* (would fail to save the complaint from dismissal).[39]

Under Rule 15(a), an amended complaint takes the place of the original complaint (except to the extent that it adopts or incorporates the original). Thus, if you correct a defect in your original complaint through an amendment,

36 Rule 15(a) states that "a party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served." An answer is a responsive pleading, but a motion to dismiss is not. *See, e.g.,* Breier v. Northern Cal. Bowling Proprietors' Ass'n, 316 F.2d 787, 789 (9th Cir. 1963).

37 Dwares v. City of New York, 985 F.2d 94, 101 (2d Cir. 1993); Camp v. Gregory, 67 F.3d 1286, 1289 (7th Cir. 1995). With amendment as of right, you do not have to file a motion or ask the court for leave: instead, file your "Amended Complaint" or "First Amended Complaint" with the court and serve it on the defendants pursuant to Rule 5(a).

38 Plaintiffs normally summarize the proposed changes in their motions and attach complete proposed amended complaints. If your proposed amendment is minor, you can simply describe it in your motion for leave to amend.

39 *See* Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962).

the defendants may not continue to argue for dismissal on that ground.

Rule 15(c) controls the "relating back" of amendments. If your amendment "relates back," it will be treated as though it were filed at the time of your original complaint — not when you actually filed it. This point is important when the applicable statute of limitations expires between the two filing dates. Under Rule 15(c)(2), a claim asserted in an amended complaint "relates back" if it "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original [complaint]." Under Rule 15(c)(3), if you have amended your complaint to add a new defendant (e.g., to identify by name a defendant originally listed as a "John Doe"), your amendment will "relate back" only if the defendant received notice of your complaint within 120 days after its filing *and* "knew or should have known" that he would have been named as a defendant "but for a mistake" concerning his identity.

If you want to add allegations about events that occurred *after* you filed your original complaint, you should ask the court for leave to file a *supplemental complaint* under Rule 15(d). Your new allegations must relate in some way to the allegations in your original complaint. In deciding whether to allow supplemental complaints, courts consider the same factors that they consider when deciding whether to allow amendments under Rule 15(a).

H. ANSWERS

So long as the district court does not dismiss your complaint first, the defendants must eventually respond to it by filing an *answer*. Normally the defendants must do this within 20 days after they have been served with your complaint and summons.[40] If you are suing federal officials, they have 60 days to serve their answer.[41] If the defendants agreed to waive service of your complaint (*see* Chapter 14, § F.2), they have 60 days from the date on which you requested a waiver of service.[42] If the defendants filed a motion to dismiss, they must file their answer within 10 days after the court denied their motion.[43]

In their answer, the defendants must (1) state their defenses to each of your claims and (2) admit or deny each "averment" or statement in your complaint.[44] Section E.2, above, reviewed some of the most common defenses that defendants raise in inmate lawsuits. If the defendants in good faith dispute your entire complaint, they may state that they "deny each and every averment in the complaint." Otherwise, they must respond to your complaint paragraph by paragraph, identifying which statements they agree with, which statements

40 Fed. R. Civ. P. 12(a)(1)(A).
41 Fed. R. Civ. P. 12(a)(3).
42 *See* Fed. R. Civ. P. 4(d), 12(a)(1)(B).
43 Fed. R. Civ. P. 12(a)(4).
44 Fed. R. Civ. P. 8(b).

they deny, and which statements they do not have sufficient knowledge or information (after conducting a reasonable investigation) to admit or deny.[45] For your own reference, you should mark on a copy of your complaint each statement that the defendants admit, so that you do not waste time trying to prove it later.

A defendant may make in an answer a *counterclaim*: a claim for relief against the plaintiff.[46] In the unlikely event that a defendant makes a counterclaim against you, you must file a *reply* within 20 days after service of the answer.[47] In this reply you must state your defenses and admit or deny each statement in the counterclaim, just like a defendant responding to a complaint.

Once the parties file all appropriate answers and replies, your lawsuit will proceed to discovery. If you have asked for a preliminary injunction, you may get a chance to present evidence and argue your case at an evidentiary hearing. Otherwise, you will spend the following months conducting discovery, engaging in settlement talks, and preparing your lawsuit for summary judgment proceedings and trial.

45 Fed. R. Civ. P. 8(b). An assertion of insufficient knowledge or information is treated as a denial.
46 Fed. R. Civ. P. 13.
47 Fed. R. Civ. P. 12(a)(2).

CHAPTER 16

Discovery

Discovery is the process that allows you and the other parties to learn facts regarding your lawsuit and gather evidence. Under the Federal Rules of Civil Procedure — which may be altered in important ways by your district court's local rules — the parties represented by counsel must first meet to discuss how discovery should proceed.[1] However, the disclosure rules do not apply when the plaintiff is in custody and is proceedings *pro se*.[2] Further, discovery cannot be undertaken by a confined *pro se* party without permission of the court.[3] This then means that once your lawsuit has been served upon at least one of the defendants, you should file a motion with the court seeking permission to engage in discovery or that the court hold a scheduling conference.[4] The following discussion is based upon your having received permission from the court to engage in discovery.

Discovery is a very important part of a lawsuit. The information and exhibits that you gather may ultimately determine whether you win or lose. Discovery, however, is not fun to do. Because it takes place largely outside the district court's supervision, the parties often end up battling each other at length. Discovery can be even tougher for *pro se* inmates, who lack legal training, experience, and the money to pay for certain tools, such as a stenographer for depositions. And as much as you stand to gain from discovery, it also allows the defendants to get hurtful information and exhibits from *you*. This chapter will explain how to make proper discovery requests, automatic disclosures, and discovery responses.

A. INFORMAL INVESTIGATION

The other sections of this chapter address discovery: the formal process, governed by the Federal Rules of Civil Procedure, by which a party to a lawsuit demands information and exhibits from other parties and people. Do not think, however, that this process is the only — or even the best — way of learning facts and gathering evidence. *Informal investigation* is the process of obtaining information and exhibits on your own, without the power of the court behind you.

The informal investigation should be undertaken prior to filing the lawsuit since

1 Fed. R. Civ. P. 26(a).

2 Fed. R. Civ. P. 26(a)(1)(E)(iii); Fed. R. Civ. P. 26(f).

3 *See* Fed. R. Civ. P. 26(f), which states that a party with counsel cannot proceed with discovery until after the parties have prepared a scheduling order and it has been adopted by the court. Rule 26(f) also states that this requirement does not apply to those "exempted from initial disclosure under Rule 26(a)(1)(E)..." Since confined *pro se* plaintiffs are exempted from *initial disclosures*, you cannot engage in discovery without first obtaining permission of the court.

4 You should also file a motion with the court for appointment of counsel so that discovery can be undertaken and asking that the provisions of Rule 26 apply once counsel is appointed. *See* Section D of Chapter 14 for a discussion of appointment of counsel.

once the lawsuit is filed it is not always possible to talk to jail and prison officials about sensitive issues. This informal process can involve simply talking to people and writing letters to obtain useful background information, such as the names and titles of particular guards. You may also be able to get certain information, such as written rules or polices, by submitting an inmate request form.

It is easier to talk to fellow inmates. Inmates can be valuable witnesses in a lawsuit, but you need to be careful. In casual conversation, inmates, like other people, tend to exaggerate certain facts and leave other facts out. In a lawsuit, such shadings of the truth can have terrible consequences. If you ask an inmate or any other person to sign a declaration or testify at a deposition, hearing, or trial, you must emphasize to them the importance of telling the complete truth.[5]

A *declaration* is an unsworn statement that serves the purpose of an affidavit (a statement sworn to before a notary public). A federal statute, 28 U.S.C. § 1746, allows the use of declarations in federal court proceedings. You can submit declarations as evidence in opposition to a defendant's motion for summary judgment,[6] or in support of a motion for a preliminary injunction.

Declarations are easy to prepare. At the top of the page,[7] write a title and then a short introductory sentence. Then write in short, numbered paragraphs the information that the declarant (the person signing the declaration) has to provide. Finally, the declaration must conclude with the following statement and date. See below:

> **Declaration under Penalty of Perjury of Jason Compson**
> Jason Compson, being competent to make this declaration and having personal knowledge of the matters stated therein, declares pursuant to 28 U.S.C. § 1746:
>
> 1. On the afternoon of February 3, 2008, I was sitting in my cell, Cell #8, on the second floor of the Edmondson County Jail. The plaintiff, Dalton Ames, was in Cell #7, next to mine. We were talking off and on, around the wall between our cells. He was telling me about a baseball game he was listening to on the radio.
>
> 2. At about 5:00 p.m., Sergeant Head walked up the stairs, past my cell, and opened the door to Cell #7. She appeared very angry. As she

5 Never give or promise something to a person in exchange for his testimony or declaration. When writing letters to your witnesses you have to be very careful in what you say because what you think is harmless might be used by the other side to impeach your witness or you.

6 While Federal Rule of Civil Procedure 56(e) states that summary judgment motions may be supported and opposed by affidavits, depositions, and answers to interrogatories, courts have held that a party may submit declarations made under the penalties of perjury (pursuant to 28 U.S.C. § 1746) instead of affidavits. *See* Roberson v. Hayti Police Dep't, 241 F.3d 992, 994-95 (8th Cir. 2001) (plaintiff's verified complaint is equivalent of affidavit for summary judgment purposes, and complaint signed and dated as true under penalty of perjury satisfies requirements of verified complaint under § 1746). The making of a knowingly false declaration makes the declarant subject to perjury charges as well as sanctions. *See* 18 U.S.C. § 1621; Fed. R. Civ. P. 56(g); U.S. v. Zonca, 97 F.Supp.2d 1127, 1131 (N.D. Fla. 1999), *aff'd* 208 F.3d 1012 (11th Cir. 2000) (unpublished).

7 If you have already filed your complaint, you should include a short case caption at the top of each declaration.

opened the cell door, she cursed out Ames loudly. She called him a "no-good, back-stabbing son-of-a-bitch." She also said, "That's the last time you'll talk to the Sheriff about me."

3. I saw Sergeant Head roughly grabbing Ames by the arm as she led him out of the cell. She continued to call him a "son-of-a-bitch." I thought it was unusual for the Sergeant to be up on the second floor alone. The guards at the jail almost always work in pairs.

4. Sergeant Head led Ames down the hall and down the stairs. I did not see him again for eleven days.

5. Ames was brought back to the second floor, this time by two different guards, on the morning of February 14, 2002. He looked terrible, a lot worse than when I saw him last. His face was pale and unshaven. His clothes were filthy. He appeared to have lost about 10 pounds. There was a cut and a large bruise on the left side of his forehead, and bruises all over his arms and legs. I could see his right leg shaking, also.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on September 5, 2008.

Jason Compson

A declaration should include only facts that are based on the declarant's personal knowledge, not arguments or opinions.[8]

You will likely have to prepare declarations for other people. Write each declaration based on your notes of what the person has told you. While you should generally use the language that the person used, avoid slang and obscenity. Keep each declaration focused on the issues in your lawsuit. After you prepare a declaration, ask the declarant to read it carefully. Explain that he may be prosecuted for perjury if he knowingly makes a false statement. If the declarant wants to make minor changes to what you have prepared, he should cross out or insert words and write his initials by the change. If the declarant wants to make major changes or a lot of minor changes, you should prepare a new declaration. Give the declarant a copy of his signed declaration if he wants one.

It is sometimes hard to decide when to ask for a declaration. The main disadvantage of getting a declaration early is that you will have to produce it

8 Rule 56(e) states that in summary judgment proceedings "[s]upporting and opposing affidavits [or declarations] shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant [or declarant] is competent to testify to the matters stated therein." The phrase "personal knowledge" refers to facts that the declarant has personally observed, as opposed to rumors or unsupported beliefs. The declarant in summary judgment proceedings must also show his "competence" to state those facts: i.e., how was he in a position to obtain such personal knowledge?

to the defendants at the beginning of discovery: if not in your initial automatic disclosures (see § C.1, below), then probably in response to the defendants' first set of document requests (see § E.2, below). The defendants can then use the declaration to *impeach* the declarant if he later testifies inconsistently.[9] On the other hand, either you or an inmate witness may be transferred or released, making it difficult for you to prepare the witness's declaration later. In addition, because people forget important details over time, you may want a person to record his observations while they are fresh. If you are unsure, you should probably get a declaration now, rather than wait.[10]

There are also documents in the outside world that you can get. Most states have open-government or public-records laws that allow citizens to request certain documents from state and local government agencies.[11] These laws vary from state to state, and some states have complicated rules regarding the records that an agency may withhold.[12] Not all government workers fully understand their duties under these laws and may deny or delay proper requests. Research your state's law carefully before making any requests. Because some agencies are reluctant to release records to inmates, you should consider having a friend or family member make a request for you.

Depending on the nature of your lawsuit, you may want to request inspection reports from fire marshals, state and county health departments, grand juries (whose reports on county jails are usually available at the local courthouse), and other agencies. Another useful source of information is the local newspaper. Public libraries often keep newspapers for several years, sometimes indexed by story subject. You may want to ask a friend or family member to review a library's newspaper archives to find stories on conditions at your jail or prison. Lastly, there is a great deal of information available on the Internet. For example, some prison systems post their policies and procedures on their web sites. Again, while most inmates do not have Internet access, a friend or family member may be able to search the Internet for you and send you the materials they find.

B. THE RULE 26(F) MEETING

Federal Rule of Civil Procedure 26(d) provides that the parties may not begin formal discovery until they have met pursuant to Rule 26(f). Rule 26(f) states that the parties must meet "as soon as practicable" to do three things: (1) "to

9 Impeach means to undermine a witness's credibility. Your trial may happen years after the relevant events took place, and by this time a witness's memory of the events may have changed. A party can make a witness appear less believable by pointing out the inconsistencies between the witness's trial testimony and the declaration he signed earlier.

10 You should consider sending the original of any evidence you receive to someone outside the prison to keep it safe for you. Due to the number of shakedowns done of your cell and the transfers you may be subject to, some of your evidence may disappear. Therefore, always be safe by sending the original outside the prison for storage until you need them at trial.

11 The Freedom of Information Act (FOIA) allows you to request certain documents from federal agencies. Most states have a similar law but it might have a different name.

12 For example, in the 1990s, the Michigan Legislature amended the Freedom of Information Act to preclude inmates from using its provision to obtain documents from the state.

discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case," (2) to make or arrange for the initial disclosures required under Rule 26(a)(1) (see § C.1, below), and (3) to develop a proposed discovery plan.

Read your local rules carefully. Fed. R. Civ. P. 26(f) does not require the parties in *pro se* inmate lawsuit to have a Rule 26(f) meeting. You will need the court permission to start discovery. One way to obtain this permission is to file a motion with the court requesting that a pretrial conference, also known as a scheduling conference, be held.[13]

If the Rule 26(f) requirement applies to your lawsuit, you should write a letter to the defendants' lawyers asking for a meeting either in-person or by telephone at their earliest convenience. The meeting will likely have to take place at your jail or prison. Since many attorneys will not meet with a *pro se* plaintiff, counsel for the defendants can call the jail or prison to arrange it so you can talk to them.[14]

At the meeting (by telephone on in-person), you should make a settlement offer.[15] If the defendants reject your offer (as they likely will), you should ask them to make a counteroffer. Do not be upset if you cannot reach a settlement at this point; few parties do. The important thing is for you to express your willingness to settle and make a reasonable offer. Section A of Chapter 18 discusses settlement in more detail.

As for the proposed discovery plan, Rule 26(f) states that the parties must discuss the following topics:

> the timing of initial disclosures under Rule 26(a)(1)
>
> the subjects on which discovery may be needed
>
> when discovery should be completed
>
> whether discovery should be conducted in phases or limited to particular issues[16]
>
> whether any changes should be made to the limitations on discovery imposed by the Federal Rules or your district court's local rules (see § E)
>
> whether the district court should enter any protective orders under

13 Local Rule 16.1(b) for the United States District Court for the Eastern District of Michigan allows counsel or a party without counsel to request such a hearing. This is one reason you should check the local court rules.

14 Many of the pretrial conferences that I had over the years were done by telephone. Counsel for neither party was willing to drive over 2 hours in one direction.

15 Most courts require the parties to discuss settlement at this meeting. Thus, you mentioning settlement is not a sign of weakness on your part.

16 It is usually not in the plaintiff's interest to limit discovery this way. The defendants may argue that the initial phase of discovery should be limited to issues relating to qualified immunity. Some courts have approved this approach. However, it is quite difficult to separate, for purposes of discovery, qualified immunity issues from other issues.

Rule 26(c) (see § F.4) or any other orders relating to scheduling

The parties must make a good-faith attempt to agree on a proposed discovery plan. They must submit to the court a report on their plan (and any disagreements) within 10 days. Before attending a Rule 26(f) meeting, you should review the applicable federal and local rules, note all applicable deadlines and limits, and make a discovery plan for yourself (see § D). This preparation will help you figure out what positions to take during the Rule 26(f) meeting.

After the district court receives the parties' Rule 26(f) report, it will enter a *scheduling order* that sets the deadlines for the parties to join other parties, amend their pleadings, file motions (the *motion cut-off date*), and complete discovery (the *discovery cut-off date*).[17] This scheduling order may also set deadlines for the parties' initial disclosures, limit the extent of discovery, and set dates for a pretrial conference and a trial. As soon as you receive a scheduling order, write all of its deadlines on your calendar and update your personal discovery plan.

C. AUTOMATIC DISCLOSURES

Most discovery provisions require you to act in order to get something. Section E, below, explains how you can use discovery tools to request the information and exhibits that you want. Some discovery, however, is automatic: the Federal Rules require each party to produce the designated information and exhibits even if no one has asked for them. A party that fails to comply with automatic discovery is subject to sanctions, including a prohibition against using the undisclosed evidence later.[18]

1. Initial Disclosures

Federal Rule of Civil Procedure 26(a)(1) requires parties to make initial disclosures (sometimes called "mandatory interrogatories") within 10 days of the Rule 26(f) planning meeting.

The first two provisions of Rule 26(a)(1) cover a lot of ground. Disclosure (A) requires the parties to list the name ("and, if known, the address and telephone number") of every person who has information about disputed issues in the lawsuit[19] and to identify "the subject of the information."[20] The defendants' response to Disclosure (A) will provide a good starting point for your discovery efforts. Disclosure (B) requires the parties to produce copies of (or describe by category and location of) "all documents, data compilations, and tangible things

17 Fed. R. Civ. P. 16(b).
18 *See* Fed. R. Civ. P. 37(a)(2)(A), (c).
19 A factual allegation is disputed if the defendant did not admit the allegation in its answer.
20 The providing of this information is limited to those individuals that "the disclosing party may use to support its claims or defenses,..." Fed. R. Civ. P. 26(a)(1)(A). This means that the other side does not have to provide the names of every staff that worked on the date and time of your incident. This disclosure is limited to those names that will provide information to support its defenses. In your case, you must provide the names of those who will support your claims.

in the possession, custody, or control of the party" that are relevant to disputed issues and will be used to support its defense. The documents and things that the defendants produce may prove critical to your case.

If you are seeking damages, Disclosure (C) requires you to provide a computation of each category of damages you are seeking, along with any documents or evidentiary materials on which your computation is based, "including materials bearing on the nature and extent of injuries suffered." Your response should include any medical records that you have, any proof of lost wages, and any evidence relating to psychological injury that you have suffered. Disclosure (D) requires a defendant to produce any insurance agreement that will cover or reimburse him if he has to pay your damages.

Plaintiffs generally have more to gain from initial disclosures than defendants. It is therefore important that you make *your* required disclosures promptly and fully. For Disclosure (A), list everyone you can think of who has information about your lawsuit: inmates, guards, medical officials, family members, etc. For Disclosure (B), provide copies of all relevant documents in your possession. Err on the side of providing more information, not less. You then will be in a strong position to insist that the defendants make *their* initial disclosures, if they have not done so already.[21]

Be sure to read the local rules of your district court. Rule 26(a)(1) allows district courts to change the initial disclosure requirements, and many district courts have done so. Some courts do not require parties to make any initial disclosures. Other courts require parties to disclose different information and exhibits, or to make disclosures at an earlier time (*e.g.*, when you file your complaint).

2. Disclosure of Expert Testimony

Federal Rule of Civil Procedure 26(a)(2) requires each party to identify any person whom they plan to call as an expert at trial. This disclosure must be made at least 90 days before a scheduled trial date, or as otherwise directed by the court. Unless you plan to use an expert, you do not have to worry about this rule.

If a defendant has retained an expert witness or intends to call as a witness an employee whose duties regularly involve giving expert testimony, the defendant must identify the witness and provide a report that contains a "complete statement" of the witness's opinions, information and exhibits relied on, qualifications, and compensation, and a list of other cases in which the witness has testified, in a deposition or at trial, during the past four years.[22]

21 Rule 26(a)(1) states that a party is not excused from compliance because "another party has not made its disclosures." Nevertheless, it is difficult to ask a court to compel a defendant's disclosures if you have failed to do so yourself. If a defendant fails to make the disclosures within the required time, or if its disclosures are clearly inadequate under Rule 26(a)(1), you should raise this matter in a letter to the defendant's lawyer. If the defendant still does not respond properly, you should file a motion to compel with the district court. *See* § F, below.

22 Fed. R. Civ. P. 26(a)(2)(B).

3. Pretrial Disclosures

At least 30 days before trial, Federal Rule of Civil Procedure 26(a)(3) requires each party to disclose the names, addresses, and telephone numbers of witnesses whom the party may or will call; a designation of any depositions the party intends to introduce as evidence; and a list of all documents or other exhibits that the party may or will introduce.[23]

4. SUPPLEMENTATION

Finally, every party has a *duty to supplement* an automatic disclosure or discovery response if the party learns that the disclosure or response "is in some material respect incomplete or incorrect and... the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing."[24] Thus, if you discover new information that changes an answer you have given to a defendant's interrogatory, you must bring that new information to the defendant's attention. The defendants, too, must update their automatic disclosures and responses to your discovery requests.

D. PLANNING YOUR DISCOVERY

1. Identifying Your Weak Points

Discovery involves a lot of work. Before you begin, you need to think carefully about what facts and evidence you need. What issues in your lawsuit are most strongly disputed by the defendants? What further evidence do you need to prove each element of your claims? What factual statements have the defendants made, in their answer and elsewhere, that concern or confuse you?

In discussing whether you should file a lawsuit, Section B.2. of Chapter 13 advised you to create an *evidence chart*, to see how the facts of your lawsuit match up with the elements of your claims. Take another look at your evidence chart now. Is it still accurate and complete? If not, make the necessary changes. Then, keeping in mind what the law requires you to prove, use the chart to identify the weak points of your case. What elements are you able to prove only through your own testimony? What elements are you not sure you can prove at all? Your highest priority during discovery will be to make these weak points stronger.

2. The Scope of Discovery

The most important rule in discovery is Federal Rule of Civil Procedure 26(b)(1). This rule, which applies to all the discovery tools discussed in § E, states:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending

23 Many courts required the parties to jointly prepare a "Final Pretrial Order" for trial. This document substitute for providing of this information.

24 Fed. R. Civ. P. 26(e)(1), (2).

> action.... The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.[25]

Rule 26(b)(1) allows you to ask for a wide range of information, documents, and things. In particular, it allows you to ask for more than just evidence that is admissible to prove your claims at trial (or to respond to a motion for summary judgment). Suppose that you filed a failure-to-protect lawsuit. Under the Federal Rules of Evidence, testimony about prior incidents of inmate-on-inmate violence at your jail or prison is not necessarily admissible. Nevertheless, Rule 26(b)(1) allows you to ask officials about such incidents, because "the information sought [is] reasonably calculated to lead to the discovery of admissible evidence." The information could, for example, lead to admissible evidence regarding the officials' policies on inmate safety or their deliberate indifference toward your own safety.

Because of Rule 26(b)(1), it is seldom proper for a party to object to a discovery request on the ground that the request "exceeds the scope of discovery." It is clearly improper for a defendant to object on the ground that the requested information would not be admissible in court.

Nevertheless, you should be careful not to make discovery requests that are unnecessarily broad. First, as a matter of strategy, an overly broad discovery request allows a defendant to flood you with information and exhibits, forcing you to spend hours trying to find the "needle in the haystack" that helps your case. Second, notwithstanding Rule 26(b)(1), courts do not always enforce a wide scope of discovery in inmate lawsuits. If you make a discovery request that bears no relation to the issues in your lawsuit, a court may decide that you are harassing the defendants or using the discovery rules to get information for other purposes. Courts are particularly reluctant to compel jail or prison officials to answer overly broad discovery requests relating to institutional security.[26] A court has the power to deny a discovery request if it believes that the burden it imposes on a defendant outweighs its likely benefit to you.[27]

You should therefore write discovery requests that are broad enough to cover important issues but focused enough that the court will require them to be answered. This is not easy to do. To get a feel for the right level of specificity, take

25 Privilege is discussed in § F.2, below. Review this section before you write your discovery requests, so that you do not waste time asking for information that is not discoverable under Rule 26(b)(1).

26 Some security concerns can be addressed through the issuance of protective orders, which are discussed in § F.4, below.

27 Federal Rule of Civil Procedure 26(b)(2) allows a district court to limit the "frequency or extent of use of the discovery methods otherwise permitted under these rules" if it determines that "(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit." By signing a discovery request or response, you certify that your request or response is not made "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation" and is "not unreasonable or unduly burdensome or expensive." Fed. R. Civ. P. 26(g)(2)(B), (C).

a look at the sample discovery requests in § E, below. One trick you can use is an "including but not limited to" clause. Consider the following document request:

> Please produce all documents that evidence, mention, or refer to the plaintiff's broken arm, *including but not limited to* medical intake records, medical request forms and responses, examination and treatment records, hospitalization records, medication logs, and discharge forms.

An "including but not limited to" clause tells a party that you expect, at the very least, the specified information or documents.

As you write your discovery requests, keep Rule 26(b)(1) in mind. You should always be able to explain how a request is "reasonably calculated to lead to the discovery of admissible evidence."

3. Organizing Your Discovery Requests

As § E will explain, there are a number of discovery tools that you can use. Plan your discovery so that you use these tools in a logical order. Here is one way to do this:

> By the time formal discovery begins, you will have already done a good deal of informal investigation into your claims. You should continue that informal investigation during the discovery process. Depending on the local rules of your district court, the parties may have to make initial disclosures under Rule 26(a)(1). The defendants' disclosures will likely identify people whom you will want information from and documents and things that you will want to inspect and/or copy. A logical next step will be to file a set of interrogatories and a set of document requests. If your district court does not require initial disclosures, interrogatories and document requests will give you your first opportunity to get basic information and exhibits about your case.

Depending on what you learn from the defendant's initial disclosures, interrogatory responses, and documents, you may want to follow up with more specific discovery requests. If you can arrange for oral depositions, you should take depositions of the most important people in your lawsuit. If you cannot arrange for oral depositions, consider filing either depositions upon written questions or a second set of interrogatories. You may also want to make a request to inspect and take photographs of important things or places. Finally, at some point, you should file requests for admission to establish basic facts and the genuineness of important documents.

This is only one way to organize the discovery process. Some lawyers prefer to begin with an early round of depositions, so that they know how important documents are organized or which employees were involved in the relevant

events. You should use the discovery tools discussed in § E in the order that makes the most sense to you, given your needs and abilities.

4. Keeping Your Eye on the Clock

You have only a limited amount of time to conduct discovery. At the beginning of the discovery process (after a Rule 26(f) meeting, if you have one), the district court will set a *discovery cut-off date*. This is the point when all discovery stops. All discovery requests must be served early enough so that the deadline for a party to respond, as specified under the applicable Federal Rule, arrives *before* the discovery cut-off date. Mark the discovery cut-off date on your calendar, and then count backwards to mark the final day on which you may serve interrogatories, document requests, and requests for admission.[28]

It is generally in the defendants' interest to slow the discovery process down. You must therefore pay attention to the defendants' discovery deadlines and prompt them when they fail to respond to your requests on time. A polite letter to a defendant's lawyer is usually sufficient. If the defendant still fails to respond, you may have to file a *motion to compel*. See § F.3, below. A series of delays may force you to ask the district court to extend the discovery cut-off date.

Be sure to respond on time to any discovery requests that the defendants serve on you. District courts have the power to impose a wide range of sanctions against parties that fail to cooperate in the discovery process.[29]

E. DISCOVERY TOOLS

1. Interrogatories

Interrogatories are written questions served on other parties. Parties must answer or object to each interrogatory separately and under oath. Here is some information that you can get by using interrogatories:

- the identity of parties and their agents or employees
- the identity of the defendants' witnesses, including any experts
- the existence and location of documents and exhibits relevant to your claims
- details about particular events
- the defendants' position about issues in the case
- facts, exhibits, witnesses, and other evidence that the defendants plan to use in opposition to your claims

28 Remember to include an extra three days for service of your discovery requests. *See* Fed. R. Civ. P. 6(e); discussed in Section E of Chapter 13.

29 *See* Fed. R. Civ. P. 37.

Federal Rule of Civil Procedure 33 governs the asking and answering of interrogatories. This rule may be modified by your district court's local rules. For example, while Rule 33 states that you may not ask more than 25 interrogatories of any particular party,[30] a district court may set a different limit or may not limit interrogatories at all.

Rule 33 requires a party to answer interrogatories within 30 days after service.[31] The party must respond to each interrogatory separately, with either an answer or an objection. If the party objects to an interrogatory, it must "state the reasons for objection and shall answer to the extent the interrogatory is not objectionable."[32] If a party does not know the answer to an interrogatory right away, it must make a reasonable inquiry to find out the answer. This inquiry may involve asking questions of other people and reviewing relevant records. As mentioned in § C-4, a party also has a duty to *supplement* an earlier interrogatory response if it learns that its response was in some way incomplete or incorrect.[33]

Here is a sample set of interrogatories, for an excessive force lawsuit:

[caption]

PLAINTIFFS' FIRST INTERROGATORIES TO DEFENDANT CHARLES RYDER

Pursuant to Rule 26 and Rule 33 of the Federal Rules of Civil Procedure, plaintiff requests that defendant Charles Ryder answer the following interrogatories:

1. Please identify all positions and titles, with corresponding dates of employment, that you have held as an employee at Fraley State Prison. Describe your job responsibilities for each position and title.

2. Please describe in as much detail as possible the training you have received while working at Fraley State Prison on the use of force, including but not limited to the use of "stun guns" and other electroshock devices.

3. Please describe in as much detail as possible every policy, procedure, and practice that governs the use of "stun guns" and other electroshock devices at Fraley State Prison.

30 Rule 33(a) counts "all discrete subparts" as separate interrogatories. Thus, a court might conclude that the following question consists of two interrogatories:

Please identify all prison staff members who were on duty in the Special Housing Unit between 4 p.m. and 12 a.m. on December 17, 2001, and list any incidents that were reported during that time period.

On the other hand, courts generally allow parties to ask for a range of related information in a single interrogatory:

Please identify all prison staff members (by name, rank and title at the relevant time, current rank and title, and last known home and work address) who were on duty in the Special Housing Unit between 4 p.m. and 12 a.m. on December 17, 2001.

31 Fed. R. Civ. P. 33(b)(3).

32 Fed. R. Civ. P. 33(b)(1).

33 Fed. R. Civ. P. 26(e)(2).

4. Please identify all officials responsible for formulating, implementing, and monitoring compliance with the policies, procedures, and practices described in your response to Interrogatory #3.

5. Please describe in as much detail as possible the complete circumstances surrounding your use of force against the plaintiff on July 27, 2007.

6. Please state the name, affiliation, title, last known address, and last known telephone number of each person who has knowledge of any of the facts stated in your response to Interrogatory #5.

7. Please identify each document, as the term is defined in Federal Rule of Civil Procedure 34(a)(1), that evidences, mentions, or refers to any of the facts stated in your response to Interrogatory #5.

8. Please describe in as much detail as possible the complete circumstances surrounding all other instances in which you have used a "stun gun" or other electroshock device, or threatened to do so, while working at Fraley State Prison. Include in your response the circumstances surrounding any review or disciplinary action that occurred after each actual or threatened application of force.

9. Please identify each person known to you and not otherwise identified in your answers to these interrogatories who has provided any information, or assistance of whatever nature or description, relating to any of your answers to these interrogatories.

10. Please identify each person who has made to you sworn or unsworn statements or provided information for affidavits or statements that relate to the allegations made in plaintiff's complaint and state the information provided.

[signature, certificate of service]

Interrogatories are useful to get basic facts (*e.g.*, who was there? when did something happen?). They are less useful when the facts are more complicated. Unfortunately, parties often write interrogatory answers in a manner intended to reveal as little relevant information as possible.

For this reason, lawyers prefer to follow up interrogatories (if they ask any interrogatories at all) with oral depositions, discussed in § E.4, below. Because it is difficult for *pro se* inmates to take oral depositions, you should consider filing an additional set of interrogatories or taking a deposition upon written questions.

2. Document Requests

Documents can be critical to an inmate lawsuit. For example, in a failure-to-protect, medical care, or conditions lawsuit (see Chapters 7-10), such documents as jail or prison records and inspection reports may serve to establish the defendants' deliberate indifference. By the time discovery begins, you may have obtained some relevant documents through informal investigation. It is likely, however, that the most important documents in your case lie in the exclusive control of the jail or prison officials you are suing. The Federal Rules allow you to get copies of these documents.

Federal Rule of Civil Procedure 34 allows you to serve on a defendant (or other party) *requests for the production of documents* (also called "*document requests*"). For purposes of this rule, the term "document" is defined broadly. It includes "writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained."[34] The term also includes electronic mail ("e-mail") and other new forms of technology. A party must produce all requested, non-privileged documents that are in its "possession, custody or control."[35]

You may file document requests at any time during the discovery process. As a matter of strategy, it generally makes sense to file a set of document requests early on. The documents you receive may point you to other evidence, which you can then ask for before discovery ends.

A party must respond in writing to your request within 30 days after service. Rule 34(b) provides: "The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts."

In most cases, a party will provide you copies of the requested documents. Sometimes, the party will produce boxes of documents for you to examine. If this happens, you should be provided access to a photocopier, or at least allowed to mark documents that you want copies of. If the party tells you that you must pay for copies, and you cannot afford to pay, you may have to bring this problem to the court's attention.

By the end of discovery, you need to have *in your possession* copies of all documents that you believe help your case. Inspection without copying is not enough, because you will need to attach the documents to your summary judgment response and introduce them as exhibits at trial. If you do not yet know whether a particular document helps you or not, make a copy. Also, make copies of any documents

34 Fed. R. Civ. P. 34(a)(1).
35 *Id.*

that you believe the defendants will use in their defense.

Here is a sample set of document requests, for a lawsuit challenging a guard's failure to intervene in a fight:

[caption]

PLAINTIFFS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

Pursuant to Rule 26 and Rule 34 of the Federal Rules of Civil Procedure, plaintiff requests that the defendants produce the following documents. Please produce the documents to plaintiff at the Riverlane Detention Center ("the Detention Center"), Villa Armina, California, or at such place as all parties shall hereafter agree. Please note that the term "document" is defined broadly in Federal Rule of Civil Procedure 34(a)(1) and includes regulations, SOPs, memoranda, correspondence, and e-mails.

1. All documents that contain, mention, construe, or refer to policies on staff supervision of inmates at the Detention Center.
2. All documents that contain, mention, construe, or refer to policies on staff responses to inmate-on-inmate threats and violence at the Detention Center.
3. All documents that evidence, mention, or refer to the assault on plaintiff by inmate Ronald Oranger on March 1, 2007, including but not limited to medical records, incident reports, statements and other investigative materials, and documents relating to subsequent inmate and staff discipline, if any.
4. The complete contents of plaintiff's Detention Center file, including but not limited to disciplinary reports, incident reports, evaluations, criminal justice information, and medical and mental health records.
5. All documents that evidence, mention, or refer to inmate Ronald Oranger's institutional conduct or disciplinary history, at the Detention Center or any other facility.
6. All incident reports that evidence, mention, or refer to incidents of inmate-on-inmate assault at the Detention Center that have occurred since March 1, 2004.
7. All documents written or created since March 1, 2004, that contain, mention, construe, or refer to any inspection, inquiry, or complaint about safety conditions or the risk of inmate-on-inmate violence at the Detention Center, whether formal or informal, official or unofficial, including inmate, staff, and civilian grievances, complaints

and appeals, and including responses to such documents prepared by Detention Center staff or their agents.

8. All other documents, items of evidence, or sworn or unsworn statements or affidavits that relate to the allegations made in plaintiff's complaint.

9. All documents that contain, mention, construe, or refer to any insurance agreement or arrangement according to which an insurance company or other person or entity will guaranty, act as a surety for, or otherwise bear any responsibility for litigating this action, including but not limited to paying the defendants' attorneys' fees, costs, or out-of-pocket expenses, or paying for any monetary or injunctive relief ordered as part of a court or consent judgment.

[signature, certificate of service]

3. Inspection of Things and Places

In addition to document requests, Federal Rule of Civil Procedure 34(a) provides for (1) the inspection of tangible things in a party's possession or control, and (2) entry upon a party's land or other property "for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated objection or operation thereon."

Lawyers representing inmates sometimes use Rule 34(a) to have their retained experts tour and inspect conditions or operations at a jail or prison. Most *pro se* inmates cannot afford to retain an expert. Nevertheless, if a particular thing or condition is in dispute in your case, consider filing a request to inspect it. For example, if you are challenging the improper use of four-point restraints, you may want to request access to the restraint room to take notes and photographs.[36]

A request for inspection or entry upon land must describe each item to be inspected "with reasonable particularity" and specify "a reasonable time, place, and manner of making the inspection and performing the related acts."[37] A party must respond to your request in writing within 30 days after service.

Jail and prison officials will likely object to any request for inspection or entry upon land that you make, on the ground that your request endangers security. You must be able to explain to the court how your request is reasonably calculated to lead to the discovery of admissible evidence. You should also express your willingness to agree to a protective order limiting the use of photographs or other information obtained from your inspection, or to have an independent

36 Cheap, disposable cameras are now available at many stores.

37 Fed. R. Civ. P. 34(b).

representative of the court conduct the inspection.[38]

4. Depositions

The most powerful discovery tool is the deposition. Unfortunately, most *pro se* inmates are not able to use it.

Federal Rule of Civil Procedure 30 allows a party to take a *deposition upon oral examination* of any other person ("the deponent"). The deponent does not have to be a party. The party taking the deposition has the power to issue a subpoena to compel the a non-party deponent to appear and testify.[39] The party must, however, obtain the court's permission before it takes the deposition of an inmate.[40] Rule 30(a)(2)(A) limits to 10 the number of depositions that a side may take; the local rules of your district court may set a different limit.

A typical deposition takes place in a room with tables and chairs. The party asking the questions (or, usually, the party's lawyer) sits across from the deponent (whose lawyer, if any, sits beside her). On the side is a stenographer or court reporter who, after placing the deponent under oath, records on a machine everything that is said. The party asks questions, and the deponent answers. The deponent may object to the way a particular question is asked, but unless the question is clearly abusive or asks for privileged information (see § F.2, below), the deponent must answer. After the deposition is over, the stenographer prepares a transcript, which the parties may then use for a variety of purposes.[41]

Depositions are useful because the deponent has no place to hide. If she answers a question in a vague or confusing manner, you can immediately follow up with another question. The deponent may not consult with her lawyer after every question. You can also use documents to challenge statements that the deponent has made. Consider the following exchange from a deposition transcript:

> **Q.** Did you have any knowledge of the plaintiff's epilepsy, prior to his seizure on August 17, 2000?
>
> **A.** Not that I can recall.

38 Be aware that officials may change things at a jail or prison before your inspection takes place. At one Alabama county jail, the officials spent a full week in advance cleaning, repairing the locks and plumbing, and painting the walls. (The expert nearly fainted from the paint fumes.) If this happens in a damages case, you will have to prove by other means what the conditions were at the relevant time. The court, however, may be interested to learn about the officials' attempt to hide the truth. You can also argue, for purposes of proving deliberate indifference, that the officials' pre-inspection changes demonstrate how easy it would have been for them to fix conditions earlier, before you were injured. *But see* Fed. R. Evid. 407 (limiting use of subsequent remedial measures to prove a party's "culpable conduct").

39 *See* Fed. R. Civ. P. 30(a)(1), 45.

40 Fed. R. Civ. P. 30(a)(2).

41 Rule 32 governs the use of depositions in court proceedings. You can submit deposition excerpts in support of your summary judgment response or motion. Fed. R. Civ. P. 56(e). You can use a deposition to contradict or impeach a witness who testifies differently at trial. Fed. R. Civ. P. 32(a)(1). You can use the deposition of a defendant or the defendant's "officer, director, or managing agent" as direct evidence: i.e., you can submit the deposition transcript to the court without having to call the deponent as a witness. Fed. R. Civ. P. 32(a)(2). Finally, in certain circumstances you can submit as evidence the deposition of a witness who is dead or otherwise unavailable. Fed. R. Civ. P. 32(a)(3). In all of these situations, any deposition testimony that you use must be admissible under the Federal Rules of Evidence.

Q. Do you recall asking the plaintiff any questions about his health upon his arrival at the Wilson County Jail on July 30, 2000?

A. No.

Q. Please take a look at what has been marked as Exhibit 3. Do you recognize this document?

A. It's a health intake form, for the plaintiff Robert Jones.

Q. Can you identify the signature at the bottom of this form?

A. It's mine.

Q. And on line 10 of the form, under the heading "Health Problems Reported," you wrote "Inmate complains that he is epileptic"? Did I read your handwriting correctly?

A. Yes. Now I remember. Inmate Jones said that he had a mild case of epilepsy. Because he said it was mild, I did not think he needed to see a doctor right away.

Q. Did you note anywhere on this form that Mr. Jones's condition was "mild"?

A. No.

Q. Why not?

As this brief exchange shows, a deposition gives you a lot more power to uncover the truth than interrogatories do.

Pro se inmates generally find that depositions cost too much and are too difficult to arrange. The party who takes a deposition must pay for the costs of its recording.[42] Stenographers can charge $1000 or more for a single day's work. However, you do not have to use a stenographer to record your deposition. You may use instead a tape recorder or a video recorder that records sound. You need to seek the consent of opposing counsel if you wish to use one of these other methods.[43] Regardless of what method is used, the deposition must be conducted before "an officer" who is authorized to administer oaths under Rule 28, such as a notary public or a representative appointed by the court. Rules 30(b)(4) and (f)(1) explain what this officer must say and do before and after the deposition

42 Fed. R. Civ. P. 30(b)(2).

43 *See* Fed. R. Civ. P. 29 (stating that by written stipulation the parties may "provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner"). If you want to take a deposition, you should write a letter to the defendants' attorney proposing a plan. For example, you might propose that the deposition take place using a video camera supplied by your prison, before a staff member who is a notary public. If the defendants do not agree to a reasonable arrangement, you may want to file a motion with the district court asking it to decide how the deposition should take place. In your motion, explain whom you want to depose, what information you believe the proposed deponent has regarding your case, and your efforts to reach a reasonable arrangement with the defendants.

takes place. Rule 30(f)(1) also provides that the deposition recording must be filed with the court, unless the court or a local rule directs otherwise.

If you can arrange for an oral deposition, send your deponent (or her attorney, if she has one) a *notice of deposition* several weeks in advance.[44] If the deponent is not a party, you must issue a deposition subpoena under Rule 45 (you can obtain the proper form from your district court clerk's office) and pay the deponent a witness fee.[45] You must still send opposing counsel a notice of deposition of a non-party who is required to appear by subpoena.

It takes a lot of work to prepare for a deposition. You want to cover every issue in your lawsuit that the deponent might know something about. For each issue, you should think carefully about the questions you will ask. As much as possible, ask questions that are simple, open-ended, and non-threatening. For each issue, ask general questions first (*e.g.*, "What is the jail's policy regarding the treatment of physically disabled inmates?"), then move to more specific questions regarding your claim (*e.g.*, "What did you do after you received my request for access to a wheelchair?"). It helps to write down a list of questions in advance, but do not stick to that list like a script. You must listen carefully to each answer a deponent gives and follow up whenever appropriate. If the deponent gives an answer that is vague, confusing or incomplete, do not be afraid to say so: *e.g.*, "I'm not sure I understand you. Is it your testimony that you did not receive my request for a wheelchair?" or "What did you mean when you testified that you 'deferred to the warden's judgment'?" Because it is your goal to keep the deponent talking, do not cut her off or argue with her. Be polite and respectful at all times, even when the deponent's lawyer objects.[46]

As an alternative to oral depositions, Federal Rule of Civil Procedure 31 allows you to take *depositions upon written questions*. In this kind of deposition, you write and submit your questions in advance to defendants' counsel. Defendants' counsel may prepare a set of follow-up questions, which he will send to you. You then have an opportunity to prepare some reply questions. Once all the questions have been prepared, they are then submitted to the person being deposed. The questions and the deponent's answers are recorded by a stenographer or by other means. Because you are unable to ask follow-up questions, a deposition upon written questions does not have the main advantages of an oral deposition. It

44 *See* Fed. R. Civ. P. 30(b)(1) ("A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs.").

45 The current fee is $45 plus a travel allowance based on the number of miles that the witness must travel to attend the deposition. 28 U.S.C. § 1821. Ask the clerk's office what rate you should use to calculate the travel allowance.

46 Parties often agree to the "usual stipulations" at the start of a deposition. You should not agree to this since you are not likely familiar with the "usual stipulations." Her lawyer may state "Objection as to form" or "Objection leading" to some of your questions. If this happens, consider whether you can ask your question in a more understandable or straightforward manner. If you cannot improve on how the question is phrased, simply say to the deponent, "You can answer the question." As a general rule, a deponent may refuse to answer your question only if it asks for privileged information or violates a court order. Privilege is discussed in § F.2, below.

is more like a set of in-person interrogatories. Unlike interrogatories, however, you can use a deposition upon written questions to discover information from a non-party.

5. Requests for Admission

Another useful discovery tool is the *request for admission*. Federal Rule of Civil Procedure 36 provides that you may require a defendant (or other party) to admit or deny "the truth of any matters within the scope of Rule 26(b)(1) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request." Here, then, are the three kinds of requests for admission you can make:

(1) *Statement or opinions of facts*: When writing your requests, focus on basic facts that are relevant to elements of your claim. For example: "Please admit that at 10:00 p.m., November 6, 2007, Officer Terry Smith received a request slip from the plaintiff stating that the plaintiff was in active labor."

(2) *Application of law to facts*: Although it is improper to make a request for admission about an abstract principle of law (*e.g.*, "Please admit that the definition of a 'serious medical need' is...."), you may ask the defendant to admit to a specific application of a legal rule. For example: "Please admit that while in active labor, the plaintiff had a serious medical need."

(3) *Genuineness of documents*: As Chapter 17 and 18 will explain, you must show that exhibits on which you rely are genuine or *authentic*. You can avoid problems later by getting the defendants to admit that certain documents in your possession are authentic. For example: "Please admit that the document marked as Attachment A is the note that Officer Terry Smith sent to the plaintiff on November 6, 2007, in response to the plaintiff's request for medical care."

An admission is deemed conclusively established, unless the court later permits a withdrawal or amendment of the admission.[47] This means that if the defendants have admitted a particular fact, you do not have to prove that fact in a response to a summary judgment motion or at trial. You can simply introduce the admission.

You may file requests for admission at any time during the discovery process. As a matter of strategy, plaintiffs often wait until the final months of discovery before doing so, because they want to find out as much information as possible before deciding which matters the defendants are likely to admit. However, if there are important facts that you want to establish at the beginning of discovery, you can file requests for

47 Fed. R. Civ. P. 36(b).

admission then. Rule 36 does not limit the number of requests for admission that you may make, although the local rules of your district court might.

In writing requests for admission, keep each request simple and to the point. Focus on facts that are important, but not particularly controversial. For example, most officials will refuse to admit that they were "deliberately indifferent to the serious medical needs of the plaintiff." An official might, however, admit other, less controversial facts which you can use later to prove his deliberate indifference. Read a defendant's interrogatory responses and deposition testimony carefully to see what he may be willing to admit under Rule 36.

A party must respond in writing to requests for admission within 30 days after service. If the party does not respond in time, the matter will be deemed admitted.[48] The answering party must either object (stating the reasons for the objection); respond "admit" or "deny"; or "set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter." A party may not refuse to answer a request for admission on the ground that the party does not have the relevant information or knowledge without first making a "reasonable inquiry" into the matter. A party also has a good-faith duty to admit those parts of requests that can be admitted and "qualify or deny the remainder."[49]

A party that fails to admit an undisputed matter may be punished later. Federal Rule of Civil Procedure 37(c)(2) provides that if an answering party fails to admit the genuineness of any document or the truth of a matter as requested, and the requesting party later proves it in court, "the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees." In other words, a court can order a party to pay you the costs of proving something at trial, if that party could have saved you the trouble by admitting it earlier.

F. OBJECTIONS, MOTIONS TO COMPEL, AND PROTECTIVE ORDERS

1. Objections

If a person believes that a discovery request is improper, she will *object* to it. An objection does not always mean that the person is refusing to answer. For example, a person may object to an interrogatory on the ground that it is vague, but then give an answer to the extent she understands it. A person may also answer a deposition question after objecting to its form.

In addition to asserting privileges (see § F.2, below), defendants routinely object to plaintiffs' discovery requests on the ground that they are "oppressive" or unduly burdensome, vague, and beyond the scope of discovery. Such objections are frequently, but not always, unfounded. It *is* unduly burdensome for a plaintiff

48 Fed. R. Civ. P. 36(a).
49 *Id.*

to ask for all medical records at a prison for the past twenty years, if all he needs are his own records for the past two years.[50] Similarly, parties sometimes phrase requests in a confusing or unclear manner, leaving a person unsure which information or exhibits he must produce. And while Rule 26(b)(1) allows you to obtain non-privileged information that is "reasonably calculated to lead to the discovery of admissible evidence," it is improper to ask for information that is completely irrelevant to your lawsuit.

You are best off avoiding such objections by writing proper discovery requests at the outset. Make sure that every request you make relates in some way to an issue in your lawsuit. Do not ask for an excessive number of documents. Write your requests in a simple, direct manner, so that it is clear what information and exhibits you want.

If a person objects to one of your discovery requests, before you seek to compel a response, ask yourself whether you can change the request in a way that makes it less objectionable. For example, if a defendant objects to an interrogatory on the ground of vagueness, see if you can write the interrogatory more clearly. If so, you should state your revised interrogatory in a letter to the defendant's lawyer or resubmit it altogether. Even if the defendant continues to object, your attempt to work out the dispute will help you in your efforts to compel a response later.

2. Privileges

A *privilege* shields certain information from disclosure, both during discovery and at trial. You may not discover privileged information under the Federal Rules. However, a person may *waive* (give up) a privilege if he reveals the information to others. For example, the attorney-client privilege, discussed below, does not generally shield a conversation between an official and his lawyer if a third party was present during the conversation.

Not every claim of privilege is well-founded. Government officials sometimes assert privileges that are based on the law of their state. In a federal lawsuit, a party may assert a privilege based on state law only with respect to supplemental state-law claims. Otherwise, federal case law determines whether a particular privilege applies or not.[51]

One of the most important privileges is the *attorney-client privilege*. This privilege shields the disclosure of confidential communications between a lawyer and her client. A related privilege is the *work product privilege*, which gives a qualified protection to documents and things "prepared in anticipation of litigation or for trial" by a party or his lawyer.[52] This privilege shields your

50 As noted earlier, a court may limit or deny a discovery request if it determines that the burden the request imposes outweighs its likely benefit. Fed. R. Civ. P. 26(g)(2)(C).

51 Fed. R. Evid. 501.

52 *See* Fed. R. Civ. P. 26(b)(3); Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385 (1947). Work product is discoverable only if a party makes a

legal research, charts, and notes on strategy.

The Fifth Amendment to the U.S. Constitution provides a *privilege against self-incrimination*. This means that a person may refuse to respond to a discovery request (*i.e.*, "take the Fifth") if the response would tend to incriminate him. This privilege applies to depositions, interrogatories, requests for admission, and document requests, as well as at trial. Although a person may not be punished for exercising his Fifth Amendment privilege, in a civil lawsuit (as opposed to a criminal prosecution) a party may comment on the person's exercise of the privilege.[53] If you are unsure whether your response to a discovery request (including a question at a deposition) would tend to incriminate you, you should consult a criminal lawyer before responding.

Federal, state, and local government agencies must produce relevant, non-privileged documents, just like any other party.[54] You should be ready to challenge any official's assertion of a *governmental*, *state secret*, or *executive* privilege. Such privileges, if they are valid at all, should not apply to requests for relevant information in a federal civil rights lawsuit. Before filing a motion to compel, however, be sure to research the applicable law in your circuit.

Other privileges may exist. Your district court may or may not recognize privileges for communications with a spouse, physician, clergy member (such as a priest, pastor, or rabbi), journalist, or social worker. Again, if someone asserts one of these privileges in your lawsuit, you must research the applicable law in your circuit.

A party that asserts a privilege during discovery must do three things:

> state the specific privilege relied on
>
> "describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection"[55]
>
> respond to the discovery request to the extent that the asserted privilege does not apply

3. Motions to Compel

District courts do not like to get involved in discovery disputes. They expect parties to work out most disputes by themselves. However, if a person or party

sufficient showing that it has a "substantial need of the materials" and that "the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Fed. R. Civ. P. 26(b)(3).

53 Baxter v. Palmigiano, 425 U.S. 308, 96 S.Ct. 1551 (1976). This means that a defendant may argue that the court should infer from your refusal to respond that you actually committed the relevant crime. You should be careful not to raise in your lawsuit any issue on which you may have to assert your Fifth Amendment privilege later. If this happens, a district court may dismiss your lawsuit.

54 United States v. Procter & Gamble, 356 U.S. 677, 681, 78 S.Ct. 983 (1958).

55 Fed. R. Civ. P. 26(b)(5). Defendants sometimes produce a "privilege log" that lists all the documents that they refuse to produce.

fails to respond to a discovery request or make an automatic disclosure, and you cannot resolve the dispute on your own, Federal Rule of Civil Procedure 37(a) allows you to file a motion asking the district court to compel a response or disclosure. Under this rule, a response that is *evasive* (intended to avoid the question) or incomplete is treated like no response at all.[56]

In a motion to compel, you must certify that you have "in good faith conferred or attempted to confer with the person or party failing to make the [response or disclosure] in an effort to secure the [response or disclosure] without court action."[57] To comply with this requirement, you should write a letter to the non-responding person (or lawyer, if he has one) as soon as a discovery dispute arises. Your letter should describe the problem with the response or disclosure and state how it should be fixed. If the person's objection is legally unfounded, explain why this is and cite applicable case law.

If you end up filing a motion to compel, you should explain in your motion how the discovery dispute arose. Your district court's local rules may require you to attach copies of your discovery request and any response. Describe your efforts to work out the dispute and attach a copy of all letters exchanged. If the non-responding person simply ignored your letter, state that fact in your motion. Finally, you should ask the court to compel the person's response and award other relief as it sees fit. Be sure to file your motion to compel before the *motion cut-off date* set by the district court.

In deciding whether to grant a motion to compel, the district court will consider a number of factors, including the clarity and specificity of your discovery request, the validity of any objections made, and any other reason given for the failure to respond.

As a general rule, when a court rules on a motion to compel, the loser must pay the expenses of the winner. This means that if you win, you may receive reasonable expenses incurred in bringing your motion. If you lose, however, you may have to pay the other side's expenses.[58]

Choose your battles carefully. Not every inadequate discovery response warrants the filing of a motion to compel. It takes a lot of work to research and write such a motion. District courts have wide discretion to decide discovery disputes as they see fit. Some discovery requests involve unimportant side issues or information that a party could get through other means. Move to compel the production of only information and exhibits that you need, but do not yet have.

4. Protective Orders

A person who receives a discovery request may move for a *protective order* under

56 Fed. R. Civ. P. 37(a)(3).
57 Fed. R. Civ. P. 37(a)(2)(A), (B).
58 Fed. R. Civ. P. 37(a)(4).

Federal Rule of Civil Procedure 26(c). A protective order limits the scope and/or manner of the discovery and can even deny the discovery request altogether.[59] Rule 26(c) authorizes a district court to enter a protective order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Before filing a motion for a protective order, the person must first try to meet with the party who made the discovery request to work out the dispute "without court action."

You can use protective orders in two important ways. First, you may move for a protective order if a defendant makes a discovery request that is clearly designed to embarrass you, cause a delay, or make it unnecessarily expensive or difficult for you to continue with your lawsuit. Remember, though, defendants have the same right to conduct discovery as you do! (See § G, below.)

Second, you can use protective orders as a tool to get responses to *your* discovery requests. Officials frequently object when inmates request information or exhibits involving jail or prison security. Suppose that you have asked for a floor plan of your prison unit, so that you can show where various officials were when you were assaulted. The defendants will likely object on security grounds. At this point, you may want to propose that the officials and you enter into a protective order; such an order would prohibit you from showing the floor plan to other inmates and require you to return it as soon as your lawsuit ends. If, after you make such a proposal, the officials still refuse to give you the floor plan, you will be in a stronger position to ask the court to compel a response.

G. RESPONDING TO DEFENDANTS' DISCOVERY REQUESTS

As an old saying goes, "sauce for the goose is sauce for the gander." Just as you can use the Federal Rules to discover information and exhibits from the defendants, they can use the same rules to get information and exhibits from you. This section discusses how to respond to defendants' discovery requests.

You, the plaintiff, have the burden of proving your case. The defendants do not have to present any evidence at all. Furthermore, it is likely that many important records already lie in the defendants' possession or control. For these reasons, defendants in civil rights cases do not usually need to do as much discovery as plaintiffs do. Nevertheless, defendants are entitled to the same broad scope of discovery as you are. They may request information and exhibits, from you or other people, "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action."[60] Furthermore, defendants usually have more resources to conduct discovery than you do. You must therefore be ready to respond to interrogatories, documents requests, requests for admission,

59 Rule 26(c) lists eight kinds of protective orders that a district court may enter.

60 Fed. R. Civ. P. 26(b)(1). Of course, a defendant must serve you with a copy of any discovery request that it sends to other people.

and deposition questions.

One item that defendants will likely ask about is your criminal record. Defendants can use this information, within certain limits, to attack your credibility as a witness at trial.[61] Defendants may also ask about your disciplinary record in jail or prison, other lawsuits you have filed, the extent of your injuries, how you calculated the damages you are claiming, and any other allegation you made in your complaint.

In responding to discovery requests, one rule stands above all others: *tell the truth*. You should tell the truth for two reasons. First, it is the right thing to do. Second, in a lawsuit a lie almost always comes back to hurt you. If you exaggerate your injuries in an interrogatory answer, for example, you will be in trouble when the court orders you to undergo a physical examination or you have to present evidence about your injuries in a summary judgment response. Defendants often ask plaintiffs questions that they already know the answers to, just to catch them in a lie. It only takes one lie, exaggeration, or inadequate disclosure for you to lose credibility in the eyes of the court.

You must do everything you can to respond to defendants' discovery requests promptly and adequately. Failure to do so can lead to sanctions, including fines, a prohibition against using certain evidence at trial, and even the dismissal of your lawsuit.[62] In addition, you must have "clean hands" if you want a court to compel the defendants to respond to *your* discovery requests.

With interrogatories, answer each question separately. Pay attention to your local rules. Some courts, for example, require you to write the defendants' question before each answer. Rule 33(b) requires each party to sign its interrogatory answers, even if they were prepared by a lawyer.

Defendants sometimes ask plaintiffs *contention interrogatories*. A common kind of contention interrogatory asks you to justify a particular allegation: *e.g.*, "State all facts which you contend support your allegation that Officer Ballinger violated your right to medical treatment." It can take a lot of work to respond to such an interrogatory, because an allegation is often based on a wide range of facts. Rule 33(b) appears to allow contention interrogatories, but provides that a court may delay your time for answering until discovery has ended.[63] If you need certain information or exhibits in order to prepare a definite answer to a contention interrogatory, consider filing a motion asking the court to allow a later response. When you do respond to a contention interrogatory, try to write down every possible fact that supports the allegation in question. It is better to flood

61 *See generally* Fed. R. Evid. 609.

62 Fed. R. Civ. P. 37(a).

63 Rule 33(b) states: "An interrogatory otherwise proper is not necessarily objectionable merely because it seeks an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time."

the defendants with information than to leave an important fact out. Supplement your response if you discover more facts later.

Document requests are usually straightforward. If there are any documents that you have not yet produced pursuant to Rule 26(a)(1) (the initial disclosure rule), you will likely have to produce them in response to the defendants' document requests. This will include declarations or affidavits that you have gathered up to this point. For this reason, plaintiffs sometimes wait until summary judgment motions are filed to prepare and gather declarations. This is not a good rule for *pro se* plaintiffs since the witnesses to obtain statements from may not still be at the same prison you are and you only have a short time to file a response.

With requests for admission, read every request closely and, if necessary, make a reasonable inquiry into the matter. Make sure that you understand exactly what the request means before you respond; do not get tricked into admitting something that is not true. Remember that you can admit part of a request and "qualify or deny the remainder."[64]

If your lawsuit alleges that you have been injured physically or psychologically, a defendant may ask that you undergo a *physical or mental evaluation*. Under Federal Rule of Civil Procedure 35(a), a district court may order you to submit to a physical or mental examination "by a suitably licensed or certified examiner" if the defendant shows "good cause" for the examination.[65] The court's order must inform you of the "time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made." You have the right to receive a written report of the examiner's findings, diagnoses, and conclusions. If you ask for such a report, however, the defendants will be able to get from you reports of other examinations that you have undergone.[66]

Finally, you need to be very careful if the defendants take your deposition. A deposition can last for several hours and make you tired and frustrated. Nevertheless, because a defendant can use your deposition testimony against you in many different ways, you need to stay on your toes at all times.

Your deposition will likely take place at your jail or prison. Defendants and their lawyers may attend your deposition, but other officials should be kept out. The defendants' lawyer or lawyers will ask you questions. Here are some basic guidelines to follow when answering:

Stay calm. Do not let yourself get angry, sarcastic, or upset.

Listen to each question carefully. Answer that question only, and keep

64 *See* Fed. R. Civ. P. 36(a).

65 The district court must make the "good cause" determination on a case-by-case basis, balancing the defendant's need for the information against your privacy and safety interests. Schlagenhauf v. Holder, 379 U.S. 104, 118, 85 S.Ct. 234 (1964).

66 Fed. R. Civ. P. 35(b).

your answer as brief as possible. Do not volunteer any information that you are not asked. Once you answer a question, stay silent — even if the lawyer appears to be waiting for more.

Pause before giving each answer. Do not interrupt a lawyer's question. If the lawyer interrupts your answer, object: you have a right to give a complete answer to every question you are asked.

If you do not understand a question, say so. If you answer a question, the court will assume that you fully understood it.

If you get tired, ask for a break.

At the end of the questioning, you (as a *pro se* party) may give additional testimony. Do this only if you believe that your earlier testimony was unclear or misrepresented. Do not testify about any issues that have not already been raised.

Under Rule 30(e), you have a right to request a transcript of your deposition, so that you can review it and make any necessary "changes in form or substance."

CHAPTER 17

Summary Judgment

Summary judgment is a tool that courts use to get rid of claims that are too weak to go to trial. Few *pro se* inmate lawsuits get to trial without the defendants first trying to defeat them this way. Summary judgment motions are usually, but not always, filed after the plaintiff has had a chance to conduct some discovery.[1]

Summary judgment proceedings in federal court are governed by Federal Rule of Civil Procedure 56. Your district court may also have local rules that apply. In some federal circuits, *pro se* inmates must receive detailed information about the rules of summary judgment whenever a defendant files a motion.[2]

This chapter explains the rules of summary judgment and how to respond to a defendant's motion. It will help to read this chapter before you file a lawsuit, because there are things that you can do when writing your complaint and conducting discovery that will make you better prepared for a summary judgment motion later.

A. THE RULE 56(C) STANDARD

The main purpose of summary judgment is to identify and then throw out legal claims that are factually unsupported. A district court may throw out entire lawsuits or only certain claims or defendants.[3] Under Federal Rule of Civil Procedure 56(c), a court will enter summary judgment if the defendants show "that there is *no genuine issue as to any material fact* and that [the defendants are] entitled to judgment as a matter of law."[4]

Let's look at what makes a fact "material," and what makes an issue "genuine."

1. Material Facts

A fact is "material" if it could affect the outcome of your lawsuit. To defeat a motion for summary judgment, you must be able to present a sufficient amount of evidence on each element of your claim.[5] If you do not have enough evidence

1 As discussed in Chapter 15, defendants will usually file a motion to dismiss your complaint soon after it is served on them. Assuming that all of your claims or parties are not dismissed, the parties will be allowed to engage in discovery. Once the discovery is completed, Defendants will file a motion for summary judgment.

2 *See, e.g.,* McPherson v. Coombe, 174 F.3d 276, 280-82 (2d Cir. 1999); Roseboro v. Garrison, 528 F.2d 309, 310 (4th Cir. 1975); Bryant v. Madigan, 84 F.3d 246, 248 (7th Cir. 1996); Rand v. Rowland, 154 F.3d 952, 957-59 (9th Cir. 1998) (*en banc*) (district court must inform the plaintiff of his or her rights and obligations under Rule 56). Some courts have held that this requirement is met if the notice of the consequences of summary judgment is contained in defendants' motion. *See, e.g.,* Champion v. Artuz, 76 F.3d 483, 485-86 (2d Cir. 1996) (holding that a description of the requirements of Rule 56(e) in the moving party's papers might constitute sufficient notice to a *pro se* litigant of the nature and consequences of the motion).

3 A court may also use Rule 56 to declare certain facts as established and thus narrow the issues to be resolved at trial. Fed. R. Civ. P. 56(d).

4 Fed. R. Civ. P. 56(c) (emphasis added).

5 For example, with a failure-to-protect claim for damages, the defendants will win summary judgment if they can show that there is no

on one element, you cannot save your claim by pointing to the strength of your evidence on the other elements.

The defendants may challenge more than just the sufficiency of your evidence on the elements in a motion for summary judgment. They may also raise any of the defenses listed in § E.2 of Chapter 15 — even if the court earlier rejected the defense at the dismissal stage. It is common, for example, for defendants to re-assert in summary judgment motions the defense of qualified immunity and the "physical injury" requirement.

You might ask how can a court uphold in a summary judgment order a defense that it rejected when the defendants raised it in a motion to dismiss. The reason is that the motions involve different sets of facts. As Chapter 15 explained, most motions to dismiss involve only the facts alleged in your complaint.[6] The court and the defendants must look to the specific allegations in the complaint to determine whether they plausibly support a legal claim for relief. A summary judgment motion, by contrast, goes beyond the allegations in your complaint. In fact, unless you filed a verified complaint (which has the effect of an affidavit or declaration[7]), the allegations in your complaint will not help you at all. Instead, you must respond to a summary judgment with *evidence*.

2. Genuine Issues

For any material fact that the defendants contend is undisputed, you must show that there is a "genuine" issue (or dispute). A material fact is genuinely disputed if, after hearing both your evidence and the defendants' evidence at trial, a reasonable judge or jury *could* rule in your favor.

Consider this example: In a medical care lawsuit, a doctor whom you have sued submits a declaration stating that she took medically appropriate measures to treat you immediately after she learned about your serious medical need. If this declaration goes unanswered by you, the doctor will win summary judgment: there will be no genuine issue regarding the doctor's failure to provide you treatment. To defeat the doctor's summary judgment motion, you will have to present admissible evidence showing either that the doctor did not do anything to treat you or that the measures she took were so grossly incompetent or inadequate as to "shock the conscience." See Chapter 9, § B.3.a, § B.3.c. Because,

genuine issue of material fact regarding (1) the existence of a substantial risk of serious harm, (2) the defendants' actual knowledge of this risk, (2) their failure to respond reasonably, or (4) causation between the defendants' deliberate indifference and the injury you suffered. (*See* Chapter 8.) The defendants only need to make this showing with respect to one element in order to win.

6 The most important exception to this rule is a factual attack on subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1).

7 A verified complaint containing allegations based on the plaintiff's personal knowledge is the equivalent of an opposing affidavit or declaration for summary judgment purposes. Hernandez v. Velasquez, 522 F.3d 556, 561 (5th Cir. 2008); Hope v. Klabal, 457 F.3d 784, 488 (8th Cir. 2006); Jones v. Blanas, 393 F.3d 918, 923 (9th Cir. 2004) (holding that where the plaintiff is *pro se*, the court "must consider as evidence in his opposition to summary judgment all of [plaintiff's] contentions offered in motions and pleadings, where such contentions are based on personal knowledge and set forth facts that would be admissible in evidence, and where [plaintiff] attested under penalty of perjury that the contents of the motions or pleadings are true and correct" (emphasis added)). Verified complaints are discussed in Chapter 14, § B.9.

after hearing such evidence, a reasonable judge or jury could rule in your favor, the doctor should lose her summary judgment motion.

As a rule, a court should not weigh the evidence or resolve factual disputes when deciding a motion for summary judgment. It should assume the truth of your evidence and draw all reasonable inferences in your favor.[8]

Nevertheless, your evidence has to be strong. A mere "scintilla" of evidence is not enough to defeat a motion for summary judgment.[9] In fact, courts sometimes *do* weigh conflicting evidence when deciding summary judgment motions. Consider this example: In an excessive force lawsuit, the parties dispute whether a guard was justified in striking you with a baton in the exercise yard. In moving for summary judgment, the guard submits declarations from himself, two other guards, and three inmates who observed the incident, each declaration stating that you had your fists raised and were shouting threats and obscenities. In response, you submit only your own declaration denying that any of this happened. You might think that because the court must assume the truth of your evidence, it will deny the motion. This is not the way things work. If a court believes that your evidence is too weak to be believed, or too overwhelmed by the defendants' evidence, it will enter summary judgment against you.

This is the reality of summary judgment practice today. District courts have too many cases on their dockets, and summary judgment is their tool to get rid of weak civil rights lawsuits — even ones with claims that technically satisfy the Rule 56 standard. Defendants understand this reality and, as a result, file motions for summary judgment in almost every case.

You therefore cannot merely show the "bare bones" of your claim when you respond to a summary judgment motion. Instead, you must persuade the court that there is "meat" on the bones. Try to convince the court that your evidence is not only believable, but compelling; that the defendants have acted with complete disregard for their duties under the Constitution; and that, as a result, you have suffered a serious injury or face a serious danger now. Support your claim with as much evidence as you can. Draw inferences from the evidence to make your claim even stronger.

The next section will discuss how to present evidence in response to a motion for summary judgment.

B. SUMMARY JUDGMENT PROCEDURE

While defendants may move for summary judgment at any time, a plaintiff

8 Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 456, 112 S.Ct. 2072 (1992); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505 (1986).

9 *Anderson*, 477 U.S. at 248-52.

must wait at least 20 days after service of her complaint before filing a summary judgment motion.[10] Any motion for summary judgment must be filed at least 10 days before a scheduled hearing or disposition on the motion.[11] Once discovery is underway, courts usually enter scheduling orders that set deadlines for the filing of summary judgment and other "dispositive" motions.

Most summary judgment motions are filed by defendants.[12] With such motions, there are two basic steps. First, the defendants must make a showing that you, the *non-moving party*, have no basis for a claim. The defendants can do this by referring to the pleadings (*i.e.*, your complaint) and such evidence as affidavits and/or declarations, initial disclosures, exhibits, deposition transcripts, answers to interrogatories, or admissions.[13] You then have the burden of setting forth "specific facts showing that there is a genuine issue for trial."[14] If you fail to carry this burden, the district court will grant the defendants' motion.

1. Moving for Summary Judgment

When they file motions for summary judgment, defendants typically submit several documents, including the following:

- the motion, identifying the claims on which summary judgment is sought and the legal and factual grounds for the motion
- if required by local rules, a notice of motion stating the date, time, and location of the hearing on the motion[15]
- evidence (declarations, admissions, etc.) in support of the motion
- a memorandum explaining why the defendants are entitled to judgment as a matter of law on the basis of the undisputed facts
- a proposed order stating the disposition and relief sought

In addition, most district courts require the moving party to file a separate *statement of undisputed facts*: a document that lists the specific facts that the party believes are material and not genuinely disputed. Each listed fact is typically followed by citations to affidavits or other evidence.

2. Responding to a Motion

As the non-moving party, you must fight the defendants' motion on two fronts: the facts and the law.

10 Fed. R. Civ. P. 56(a), (b).
11 Fed. R. Civ. P. 56(c).
12 Seldom, if ever, will a plaintiff win a summary judgment motion if filed before the completion of discovery.
13 Fed. R. Civ. P. 56(c). To discharge their initial burden in seeking summary judgment, the defendants must generally do more than simply allege that you have failed to prove your case. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S.Ct. 2548 (1986); *id.* at 328 (White, J., concurring); Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991).
14 Fed. R. Civ. P. 56(e). You "may not rest upon the mere allegations" in your complaint. *Id.*
15 This information can be obtained from the chambers of the judge who will hear and decide the motion.

a. Facts

For each material fact that the defendants contend is undisputed, you must present a sufficient amount of evidence to show a genuine dispute. It is not enough to state in a response or legal memorandum that a fact is disputed. Facts that you fail to dispute with *evidence* will be deemed admitted by the court.

During the discovery process, you will have updated your *evidence chart* (see Chapter 13, § B.2, and Chapter 16, § D.1) to show how the evidence you have gathered supports the various elements of your claim. Now is the time to put that evidence to use. If the defendants challenge the sufficiency of your evidence on a particular element, you will need to present everything you have on that element in your response. If you intend to prove the element at trial with witness testimony, you will need to put that testimony into a declaration, signed by the witness, for use in your response. (See Chapter 16, § A.) It takes a good deal of time and effort to prepare declarations. You should therefore begin doing this as soon as you are served with a motion for summary judgment. Submit as many helpful declarations as you can, along with your own declaration. Make sure that every declaration you submit is accurate, complete, and shows how the witness knows the facts stated therein.[16] In the declaration, it should include the date that someone observed you being assaulted; the date that person was assaulted and the injuries that resulted from his being assaulted; and the date of incidents that person observed happen to others.[17]

If discovery materials are already on file with the court,[18] you can cite them without attaching copies to your response. If you cite discovery materials that were prepared during your lawsuit but have not yet been placed in the record, you must attach those materials to your response. Finally, to refer to a document or exhibit not produced by the defendants during discovery (*e.g.*, a medical record that you kept at home, your personal copy of a completed grievance), you must attach it to your response with a declaration establishing its authenticity under the appropriate rules of evidence or the court will not consider it.[19]

16 *See* Fed. R. Civ. P. 56(e) (stating that an affidavit or declaration must "show affirmatively that the [witness] is competent to testify to the matters stated therein"). Many lawyers begin declarations with a statement like, "Darl Bundren, being competent to make this declaration and having personal knowledge of the matters stated therein, declares...." The facts contained in a declaration must be admissible in evidence. Also, the declaration must state specific facts: conclusory statements (e.g., "the defendants were deliberately indifferent") are inadequate to defeat a summary judgment motion. *See, e.g.*, Murphy v. Missouri Dept. of Corrections, 372 F.3d 979, 988-89 (8th Cir. 2004) (district court's grant of summary judgment in favor of prison officials was reversed, because the prison officials offered only conclusory statements in support of their assertion that their policies were the least restrictive manner to achieve the compelling interest of institutional security); Kulak v. City of New York, 88 F.3d 63, 71 (2nd Cir. 1996) ("conclusory statements, conjecture, or speculation by the party resisting the motion will not defeat summary judgment"). You may not rely on a "sham" declaration that contradict a witness's earlier discovery response or deposition testimony. No genuine issue of material fact results when the witness retracts information that she provided to the defendants earlier.

17 *See, e.g.*, Spiller v. City of Tex. City Police Dep't, 130 F3d 162, 1657 (5th Cir. 1997).

18 District courts have different rules about the filing of discovery materials. Some courts that generally prohibit the parties from filing discovery materials require inmates in civil rights lawsuits to do so.

19 A document is authentic if it is not a fake or an altered copy of an original. The authenticity requirements for exhibits are set forth in Federal Rules of Evidence 901 and 902. Consult a treatise on evidence for more information. A declaration establishing a document's authenticity should be signed by a witness who would be competent to introduce the document at trial. *See* Chapter 16, § A.

b. Law

As for the law, you should respond to the defendants' legal arguments with the same intensity as you would respond to a motion to dismiss. (See Chapter 15, § E.3.) Read each case cited by the defendants, and correct all misrepresentations or omissions. You should summarize both the applicable law and relevant facts in your response, even if the defendants already did so in their motion. (Remember, defendants write motions and legal memoranda for the purpose of winning their case; do not take anything they write at face value.) Keep in mind that substantive law defines which facts are material and which are not.[20] Even if you are unable to dispute a fact listed by the defendants, you may be able to show that the fact is immaterial to your claim.

Regardless of whether the defendants argue for summary judgment on the elements or on the ground of a particular defense (*e.g.*, qualified immunity), the court must view the evidence in the light most favorable to you.

In responding to a summary judgment motion, your ultimate goal is to show why you are entitled to win relief under the law.[21] Therefore, do not limit your argument to the points raised in the defendants' motion. Give the court a full look at your case, including injuries or ongoing dangers, and explain why the relief you have requested is proper.

c. Example

Here is a sample response to a summary judgment motion:

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROSA COLDFIELD,	)	
Plaintiff,	)	
vs.	)	Civil Action No. 08-0318-TS-Y
STEPHEN JAMES, et al.,	)	
Defendants.	)	

PLAINTIFF'S RESPONSE TO DEFENDANTS'
MOTION FOR SUMMARY JUDGEMENT

20 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505 (1986) ("[S]usbstantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted."). Substantive law also limits the range of reasonable inferences that can be drawn from the evidence. Matsuhita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 102 S.Ct. 2597 (1986).

21 Fed. R. Civ. P. 56(e); *Anderson*, 477 U.S. at 245-46.

Plaintiff submits this response to defendants' motion for summary judgment. Because defendants have failed to meet their burden of demonstrating that there is no dispute as to any material fact, and because the facts set forth in plaintiff's Statement of Material Facts and the attached evidence show that defendants violated her clearly established constitutional rights, this Court should deny defendants' motion.

I. Defendants Are Not Entitled to Qualified Immunity.

Defendants argue that the doctrine of qualified immunity shields them from liability for their decision to subject plaintiff to cruel and inhumane conditions for seven days in "the hole" at the Murphy Correctional Center for Women ("Murphy"). As the Supreme Court has explained, "qualified immunity seeks to ensure that defendants 'reasonably can anticipate when their conduct may give rise to liability,' by attaching liability only if '[t]he contours of the right [violated are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" United States v. Lanier, 520 U.S. 259, 270 (1997). "This is not to say that an official action is protected by qualified immunity unless the very action in question has been held unlawful; but it is to say that in the light of preexisting law the unlawfulness must be apparent." Anderson v. Creighton, 483 U.S. 635, 640 (1987).

Here, it was apparent by June 2001 that the Eighth Amendment prohibited defendants from subjecting the plaintiff to the inhumane conditions of confinement in "the hole." In Hutto v. Finney, 437 U.S. 678 (1978), the Supreme Court addressed very similar conditions. In Hutto, "[a]n average of 4, and sometimes as many as 10 or 11, prisoners were crowded into windowless 8' x 10' cells containing no furniture other than a source of water and a toilet...." *Id.* at 682. Inmates were confined to these cells for "an indeterminate period of time." *Id.* At night, each inmate was given a mattress to spread on the floor, but mattresses were not given to the same inmates each night. *Id.* The district court found that "the isolation cells are dirty and unsanitary, that they are pervaded by bad odors from the toilets, and that the plain cotton mattresses on which the inmates sleep are uncovered and dirty." Holt v. Sarver, 300 F. Supp. 825, 832 (E.D. Ark. 1969). The Supreme Court affirmed the district court's ruling that such conditions of confinement violate the Eighth Amendment's prohibition against cruel and unusual punishment and warrant injunctive relief. Hutto, 439 U.S. at 687.

As plaintiff's Statement of Material Facts shows, "the hole" at Murphy is approximately the same size as the segregation cells at issue in Hutto. At the time of plaintiff's confinement there, defendants had placed 8 other inmates in the cell. No mattresses were provided. The plaintiff was subject to similar deprivations of ventilation, sanitation,

and exercise as those analyzed in Hutto. In addition, the temperature in "the hole" regularly exceeded 90 degrees. The Eleventh Circuit has held that extreme temperatures in prisons violate the Eighth Amendment. *See* Chandler v. Baird, 926 F.2d 1057, 1065-66 (11th Cir. 1991), and cases cited therein. *See also* Moore v. Morgan, 922 F.2d 1553, 1555 n.1 (11th Cir. 1991) (describing Alabama jail as "incredibly crowded" and "not close to any known standard" where inmates had between 15 to 22 square feet of space each — far less than that provided to plaintiff in "the hole" — and were denied opportunity for exercise); Smith v. Sullivan, 553 F.2d 373, 379 (5th Cir. 1977) ("[C]onfinement for long periods of time without the opportunity for regular outdoor exercise, as a matter of law, constitutes cruel and unusual punishment.").

These precedents preclude entry of summary judgment against plaintiff on the ground of qualified immunity. Indeed, this case presents government misconduct so egregious that any reasonable official would have known that it violates the Constitution, regardless of preexisting case law. As the Supreme Court has observed, "the easiest cases don't arise. There has never been... a § 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability." Lanier, 520 U.S. at 271 (citation omitted). Defendant's motion should therefore be denied.

II. Defendants Are Not Entitled to Relief under 42 U.S.C. § 1997e(e).
Defendants also argue that plaintiff has not suffered any physical injury and is therefore not entitled to receive damages under 42 U.S.C. § 1997e(e). This is plainly incorrect. As the plaintiff's declaration and medical records show, she suffered headaches, muscle cramps, loss of appetite, vomiting, dehydration, breathing difficulty, and pain in her back, arms, and legs as a result of her placement in "the hole." These injuries are indisputably "physical" in nature and more than de minimis. They were so serious that Dr. Albers determined that plaintiff required hospitalization for four days after her removal from "the hole." Defendants do not cite any case law in support of their argument that § 1997e(e) precludes a damages remedy for plaintiff in this situation. Summary judgment on this basis is improper.

III. Plaintiff's Request for Injunctive Relief is Not Moot.
Finally, defendants contend that plaintiff's request for injunctive relief is moot. They have failed, however, to carry their "heavy burden" of showing that the inhumane conditions of "the hole" have been corrected and will not return if plaintiff's injunctive claim is dismissed. *See* Friends of the Earth, Inc. v. Laidlaw Environmental Servs., Inc.,

528 U.S. 167, 189 (2000); United States v. W.T. Grant Co., 345 U.S. 629, 632-33 (1953). In fact, as the declarations from inmates Wilson, Tordone, and Prettyman show, defendants *continue* to place inmates in "the hole" for several days at a time. While defendants have installed a fan outside the cell door, to blow air in, they have failed to improve sanitation, provide inmates mattresses, or allow them an opportunity for exercise. The heat in "the hole" remains high, and inmates continue to experience medical problems similar to those that preceded plaintiff's hospitalization. Plaintiff herself was placed in the cell a second time in September 2001, after she filed this lawsuit. Because injunctive relief remains necessary to correct this ongoing violation of the Eighth Amendment, the defendants' motion should be denied.

CONCLUSION
For all of the above reasons, defendants' motion for summary judgment should be denied.

Sincerely,

Rosa Coldfield

Rosa Coldfield
AIS #405382
Murphy Correctional Center for Women
P.O. Box 7355
Opp, AL 36467

[certificate of service]

3. Requesting More Time for Discovery Under Rule 56(F)

It takes a lot of time and work to prepare a good summary judgment response. You must research the applicable law and respond to the defendants' arguments; review each fact which the defendants contend is undisputed, identify facts that are not material to your claim, and show which material facts are genuinely disputed; prepare declarations for yourself and other witnesses; organize the declarations and other evidence for easy reference by the court; and explain to the court why you are entitled to relief under the law.

Depending on the defendants' motion, you may need several weeks to prepare your response. Figure out how much time you need as soon as you are served with the defendants' motion. If you cannot prepare a response adequately within the time set by the court or allowed under the rules, move for an *enlargement of time* right away. See Chapter 13, § E.2.

Defendants sometimes move for summary judgment before discovery has ended (or even before it has begun). While defendants may do this under the Federal

Rules, early summary judgment motions are problematic for plaintiffs. Your ability to prepare an adequate response — to "set forth specific facts showing that there is a genuine issue for trial" — is limited if you have had little or no opportunity to conduct discovery.

If you face this problem in your lawsuit, you should request a continuance under Rule 56(f).[22] Rule 56(f) permits a court to delay the date by which you must respond to a summary judgment motion, so that you may prepare declarations and/or conduct additional discovery. To win a Rule 56(f) continuance, you must show you were diligent in your efforts to conduct discovery before the defendants filed their motion. Thus, if during the first three months of discovery you did not serve any interrogatories, document requests, requests for admissions, or notices of depositions on the defendants, you will have a tough time convincing the court that you deserve more time for discovery now that the defendants have moved for summary judgment.[23] As one court put it, "Rule 56(f) is designed to minister to the vigilant, not to those who slumber upon perceptible rights."[24]

If you want a continuance under Rule 56(f), act quickly; make your request at the very latest — sooner if possible — when you submit your response to the defendants' summary judgment motion. Different circuits have different rules about how to make Rule 56(f) requests. To be safe, you should file two documents: (1) a *Motion for Rule 56(f) Continuance*, and (2) a declaration (or affidavit) explaining why you "cannot for reasons stated present... facts essential to justify [your] opposition."[25] Your declaration should explain, as specifically as possible: what information and exhibits you expect to get through additional discovery; how the information and exhibits would allow you to show the existence of genuine issues of material fact; and why you were unable to get the information and exhibits earlier.[26]

C. SEEKING SUMMARY JUDGMENT

Although most motions for summary judgment are filed by defendants, plaintiffs can move for summary judgment also. In fact, parties sometimes file *cross-motions* for summary judgment, each side believing that it is entitled to judgment

22 Rule 56(f) states: "Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." *See also* Stanback v. Best Diversified Prods., Inc., 180 F.3d 903, 911 (8th Cir. 1999) (party opposing summary judgment who believes he has not had adequate opportunity for discovery must seek relief under Rule 56(f), which requires affidavit showing what specific facts further discovery might unveil); Leigh v. Warner Bros., Inc., 212 F.3d 1210, 1219 (11th Cir. 2000) ("a party must be able to show substantial harm to its case from the denial of its requests for additional discovery.").

23 The district court will grant the defendants' motion if it concludes that, after having adequate time to conduct discovery, you have failed to establish each element of your claim. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548 (1986).

24 Ayala-Gerena v. Bristol Myers-Squibb Co., 95 F.3d 86, 92 (1st Cir. 1996).

25 Fed. R. Civ. P. 56(f).

26 For example: Did the defendants file their motion before the discovery process even began? Did you learn about the existence of important documents only as a result of earlier discovery requests? Have the defendants refused to produce certain information and exhibits, leading you to move to compel their responses?

as a matter of law. (They cannot both be right!)

To win full summary judgment as a plaintiff, you must present irrefutable proof of the defendants' liability. You must establish each element of your claim with evidence that the defendants are unable to dispute.[27] This is very hard to do, but possible if the parties have stipulated to the material facts, if the defendants have admitted these facts, or if the facts are conclusively established by official jail or prison records.

Under Federal Rule of Civil Procedure 56(c), a court may award partial summary judgment on the issue of liability only. If you win such a partial summary judgment, trial will be necessary only to determine what relief you should receive. Also, under Rule 56(d) a court may enter an order listing material facts that are not in controversy and are therefore established for purposes of your lawsuit. For example, if a court concludes in its order that you had a serious medical need, that will be one less element of your medical-care claim that you will have to prove at trial.

27 Because here the defendants are the non-moving party, the court must assume the truth of their evidence and draw all reasonable inferences in their favor.

CHAPTER 18

Settlements and Trials

If your lawsuit survives initial screening, dismissal, and summary judgment, it will probably end in one of two ways: settlement or trial. This chapter discusses both.

A. SETTLEMENT

A *settlement* is a final agreement between the parties. The typical settlement gives a plaintiff some of the relief that she wants, and, in return, she agrees to bring her lawsuit to an end. Both the plaintiff and the defendants avoid the enormous risks and work involved in going to trial. As lawyers sometimes say, "a bad settlement is better than a good lawsuit."[1]

Our legal system relies on settlements to function. There are simply not enough judges and courtrooms to conduct trials in all of the thousands of lawsuits filed each year. While a court cannot force you to accept a defendant's settlement offer, it may react badly if it believes that you have not made a serious effort to settle your lawsuit. A court will also react badly towards the defendants if you have been reasonable in your willingness to settle and they refuse.

You should take an active role in settlement negotiations. This means not only considering settlement offers made by the defendants, but also making offers yourself. You can make a settlement offer at any time, even before you file your complaint.[2] Jail and prison officials are often reluctant to be the first to make a settlement offer.[3] You can "break the ice" by doing this first.

One advantage that you have as a *pro se* inmate is that the defendants do not have to pay attorney fees if you win. Settlements in civil rights cases often get bogged down in disputes over how much the defendants should pay the plaintiffs' attorneys for their work.[4] This should not be a problem in your case.

1 This is because even a good lawsuit can result in a jury verdict against you. Until you pick a jury, you have no idea of the character of the people who will decide your case. You may end up with a majority of jurors who dislike inmates and believe that they should not sue corrections officers. Even if you pick a good jury, most jurors will not award an inmate a similar amount that they would award a non-prisoner plaintiff.

2 The Federal Rules require the parties to meet to discuss settlement as part of the submission of a discovery plan in regards to a scheduling conference. Fed. R. Civ. P. 26(f); *see also* Section B of Chapter 16. A district court may also require the parties to discuss settlement at a pretrial conference. Fed. R. Civ. P. 16(a), (c).

3 Officials may think that it is a sign of weakness to make the first settlement offer. They may also assume that inmates are too irrational to take part in serious settlement negotiations. Finally, they may be represented by private lawyers who earn fees by the hour and therefore have an incentive to drag your lawsuit out until just before trial. Although you are required to communicate with the defendants' lawyers, not the defendants directly, lawyers have an ethical duty to relay all settlement offers to their clients.

4 42 U.S.C. § 1988 authorizes courts to order defendants in civil rights lawsuits to pay reasonable attorney fees and costs to prevailing plaintiffs. The purpose of this statute is to encourage lawyers to represent people with strong civil rights claims. Unfortunately, the Prison Litigation Reform Act limits the amount of attorney fees that can be recovered in inmate lawsuits. *See* 42 U.S.C. § 1997e(d). As a result, fewer lawyers are willing to represent inmates.

1. *Settlement Strategy*

From the start of your lawsuit, you should keep two goals in mind. The first is the relief that you are officially requesting. If you seek injunctive relief, you must state the specific changes that you want in your complaint (and in your motion for a preliminary injunction, if you file one). If you seek damages, you may state a requested amount in your complaint's prayer for relief or just ask for "nominal, compensatory and/or punitive damages."[5] The second goal — which you should keep to yourself — is the relief that you are willing to settle for. This, your "bottom line," may change depending on what happens during your lawsuit, but it should be substantially less than your official request.

When you make your first settlement offer, propose something between your official request and your bottom line. Settlement offers are normally communicated only to other parties, not to the district court. Nevertheless, you should proceed as though the court were reviewing every move you make. Thinking this way will help to keep your settlement proposals reasonable. If the defendants later contend that you did not make reasonable efforts to settle, you will be able to prove them wrong.[6]

In settlement negotiations, the strength of each party's position is determined by what it has to fall back on. Thus, a defendant may be unwilling to settle early on if it believes that it will win a motion to dismiss or a motion for summary judgment. Once those motions are denied, the defendant's willingness to settle should increase. For your part, there will always be a chance that if you do not settle, you will end up with no relief at all. Even if you survive dismissal and summary judgment and present a strong case at trial, you may still lose simply because you are an inmate.[7] You must therefore be willing to reach a reasonable settlement at any time.

You must also remember that if you do not have a physical injury, the PLRA prevents you from obtaining compensatory damages for mental and emotional anguish. This means that if you are claiming a first amendment or due process violation which does not encompass a physical injury, you can only receive nominal, not compensatory, damages from a jury.[8] Given that opposing counsel will be aware of this law, you cannot demand $10,000 on the basis that your legal mail was open or your disciplinary due process rights were violated.

5 Either during discovery or your depositions, opposing counsel is likely to ask you the amount in damages that you believe you are entitled to. It is unlikely that they will ask you at that time what amount you will settle your case for. They will also ask you to describe your injuries which support your claim for damages.

6 For this reason, it is helpful to make all settlement offers in writing and to send letters confirming any settlement offers that the defendants make orally.

7 I have tried a number of cases where the jury returned a favorable verdict for the inmate-plaintiff but awarded only a dollar or a few hundred dollars. When some of the jurors were asked later about this low damage award, the response was the person is an inmate and does not need money.

8 *See, e.g.,* Hutchins v. McDaniels, 512 F.3d 193, 197-98 (5th Cir. 2007) (*per curiam*) (absent a showing of physical injury, a prisoner can only pursue punitive or nominal damages based upon a violation of his constitutional rights); Al-Amin v. Smith, 511 F.3d 1317, 1335 (11th Cir. 2008) (same).

In the final weeks before trial, you should offer the defendants your bottom line: the very least you are willing to settle for. If they reject your offer, your only option will be to go to trial.

2. Damage Settlements

In a lawsuit for damages, the parties normally settle by agreeing to a specific dollar amount that the defendants will pay to the plaintiff. The parties then stipulate to the dismissal of the lawsuit under Federal Rule of Civil Procedure 41(a)(1). A district court does not have to approve a Rule 41(a)(1) dismissal; however, all parties must sign the stipulation for the dismissal to be effective.

A damages settlement should specify how and when the defendants will pay you the money. It should state whether the payment will be sent to your jail or prison account, a private bank account, or elsewhere. If you receive a substantial amount of money, you should consider placing it in a savings account or investment. You will also need to determine what, if any, taxes must be paid on the money.

Some states have enacted a correctional reimbursement statute, which requires the state to seek from an inmate the costs of their room and board whenever the inmate comes into possession of any money. As part of a damage settlement, you need to obtain an agreement, and have it placed in the settlement, that the state waives its rights to seek reimbursement for room and board from this settlement.

3. Injunctive Settlements

By enacting the Prison Litigation Reform Act (PLRA), Congress made it harder for inmates and jail and prison officials to settle lawsuits that seek injunctive relief.

Before the PLRA, inmates and officials normally settled an injunctive lawsuit by submitting a consent order (or consent decree) to the district court for its approval. In a consent order, the defendants agree to make certain changes, but usually deny that they have violated anyone's rights. District courts enforce consent orders the same way they enforce other injunctions.

Such consent orders are no longer allowed in inmate lawsuits. The PLRA states that a district court may not grant or approve any injunction — including a consent order — unless the court finds that "such relief is narrowly drawn, extends no further than necessary to correct the violation of a Federal right, and is the least intrusive means necessary to correct the violation of the Federal right."[9] In other words, unless the court specifically finds that inmates' rights were violated, it cannot enter an injunction to improve jail or prison conditions.

You can get around this provision of the PLRA in one of two ways. First, you

9 18 U.S.C. § 3626(a), (c)(1).

can propose a consent order in which the parties stipulate to the required PLRA findings. Since 1996 several injunctive lawsuits have been settled on the basis of consent orders containing PLRA stipulations like the following:

> The parties agree and stipulate, and the Court hereby finds, that the prospective relief set forth in this *Consent Order* is narrowly drawn, extends no further than necessary to correct the violations of the plaintiff's federal rights set forth in his complaint, and is the least intrusive means necessary to correct these violations. The parties agree and stipulate, and the Court hereby finds, that this *Consent Order* will not have an adverse impact on public safety or the operation of a criminal justice system. Accordingly, the parties agree and stipulate, and the Court hereby finds, that this *Consent Order* complies in all respects with the provisions of 18 U.S.C. § 3626(a).

Defendants may object to this language on the ground that by stipulating to a violation, they are exposing themselves to future damages lawsuits. Whether this concern is well-founded or not, some plaintiffs have addressed it by adding the following language to their PLRA stipulation:

> This *Consent Order* is not intended to have any preclusive effect except between the parties in this action. Should the issue of the preclusive effect of this *Consent Order* be raised in any proceedings other than this action, the parties agree to certify that this *Consent Order* was intended to have no such preclusive effect.

You should research what courts in your circuit have said about PLRA stipulations before inserting one into your proposed consent order.

The second way to get around the PLRA is a "private settlement agreement."[10] This kind of settlement is essentially a contract under state law: the defendants agree to do certain things in exchange for the plaintiff agreeing to dismiss the lawsuit. The parties do not have to stipulate to the PLRA findings set forth above. However, the plaintiff can enforce the agreement only in state court, not federal court, and only for contract-law remedies.[11] A private settlement agreement is generally less useful than a consent order, but it may be the only kind of settlement that the defendants in your lawsuit will agree to.

B. TRIAL

Trials are hard to do well. They require a solid understanding of substantive law, procedural law, and the rules of evidence; the ability to recall and apply

10 18 U.S.C. § 3626(c)(2).

11 *See* 18 U.S.C. § 3626(c)(2)(B). To enforce a private settlement agreement, you will effectively have to file a new lawsuit in state court, for breach of contract. The doctrine of "specific performance" allows one party to a contract to seek a court order requiring the other party to do what it agreed to do.

legal knowledge on a split-second's notice; excellent communication skills; the confidence to address and persuade a judge or jury; and, above all else, preparation. For every hour you spend in a courtroom, you may need ten or more hours to prepare adequately.

Hundreds of books have been written on the subject of trial practice. This chapter only hits the main points. If the court schedules a trial in your case, you should read any trial treatises or guides that you can get your hands on. You must also study the Federal Rules of Evidence. You should file another motion for appointment of counsel when you receive the order setting the trial date.[12]

1. Pretrial Proceedings

At the beginning of discovery, the district court may set a date for the trial of your lawsuit. Such dates usually get postponed, often several times. Nevertheless, district courts like to set trial dates far in advance to keep the parties focused on completing discovery, filing all necessary motions, and negotiating a settlement.

At any time in a lawsuit, and as many times as it wants, the district court may order the parties to appear at a *pretrial conference*.[13] The court has many tools that it can use at a pretrial conference to make the case move more quickly and efficiently, force the parties to prepare for trial more thoroughly, and encourage settlement.[14] Even though district courts seldom require *pro se* inmates to personally attend pretrial conferences, you should prepare for the telephonic hearing by reviewing everything that has happened thus far in your lawsuit, paying close attention to motions that the court has not yet ruled on and any ongoing discovery disputes. You should also be ready to discuss settlement.[15]

Just before trial, a district court may hold a *final pretrial conference*. "The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence."[16] Since you are confined, Defendants' counsel will be response for the preparation of the final pretrial order. You have a right to submit your information to opposing counsel to be included in the FPTO. Such as: your statement of the case; your statement of disputed facts and law; your statement of what facts have been admitted by the defendants;[17] your list of witnesses and exhibits, your objections to witnesses or

12 *See* Section D of Chapter 13. You are always better off having counsel to present your case to a jury than yourself. That counsel will know the rules of evidence and civil procedure. That counsel will have had experience of picking a jury, of examining witnesses, of preparing jury instructions and of presenting arguments to the court and jury.

13 Fed. R. Civ. P. 16(a). Most of the time the court will have the *pro se* plaintiff appear by telephone. You may wish to request that opposing counsel also appear by telephone at these conferences so that counsel is not provided an unfair advantage.

14 *Id.; see also* Fed. R. Civ. P. 16(c).

15 Defendants who have previously refused to consider settlement offers may rethink their position as the date for trial nears. Judges sometimes frown on settlements that are reached "on the eve of trial," because by that point the court will have expended substantial time and resources on your case. You should therefore give the defendants your final settlement offer (your "bottom line") several weeks before your trial is scheduled to begin. The court may order the parties to undergo mediation if it believes that a settlement is still possible.

16 Fed. R. Civ. P. 16(d).

17 If you list any facts that you believe are admitted, you should include where that admission is found. Such as: "'Defendants were

exhibits offered by the defendants, etc.

If opposing counsel disagrees with something that you want included, counsel should include it but then write after it why he objects to its inclusion. You also have a right to object to anything that defendants want included in the FPTO and to have that objection included after what is being offered by the defendant.[18]

Regardless of whether a conference is held, the district court must enter a *final pretrial order*.[19] A pretrial order typically includes the following information:

any amendments to the complaint and answer

statement of your case to be read to the jury

statement by defendants of their case that will be read to the jury

the relief that the plaintiff wants

facts that the parties *stipulate* to (agree on)

issues of fact and questions of law that remain to be decided at trial

witnesses that each party will call

exhibits that each party will introduce

for jury trials, proposed voir dire questions and jury instructions

for a bench trial the requirement of when the trial brief is due.

Once the court receives the parties' proposed pretrial order, it will resolve any remaining disputes, such as objections listed in it, and enter a final pretrial order. As soon as you receive a final pretrial order, you should check it carefully. If it is not correct or complete, file a motion to amend it right away. The final pretrial order will control all remaining proceedings in your lawsuit. You may not, for example, call at trial a witness who is not listed in the final pretrial order. The court may amend the final pretrial order "only to prevent manifest injustice."[20]

At some point the district court will require the parties to file pretrial motions. There are several kinds of pretrial motions that you should consider filing. First, a *motion in limine* is a request to limit the evidence that the other side may present at trial. You should file a motion in limine if you expect the defendants to raise irrelevant or otherwise inadmissible issues at trial.[21]

acting under color of law.' Request for Admissions No. 6."; "'Defendant Jones was working in segregation on March 21, 2008.' Answer to Complaint, paragraph 17." These are just some examples of how you should list the stipulated facts in the final pretrial order. If Defendants object to the inclusion, the court then can easily review where you contend this admission was made.

18 An example is where defendants have listed in the FPTO two witnesses which they previously had never told you about during discovery process so you could have had an opportunity to obtain information about them. You would include a statement after each witness that you object, given that the witness was not disclosed previously under defendants' continuing discovery obligation of Rule 26a.

19 Fed. R. Civ. P. 16(e).

20 *Id.*

21 For example, inmates frequently file motions in limine to prevent defendants from commenting on criminal convictions or disciplinary

Second, if you intend to call other inmates as witnesses, you will need to file a motion for a *writ of habeas corpus ad testificandum*, a court order directing jail or prison officials to bring the inmates to the trial on a specific day.[22] In your motion, you should explain what each inmate will testify about and why that testimony is important. You must serve *witness subpoenas* on all of your non-inmate witnesses. You can get subpoena forms from the district court clerk. If the court has granted your motion to proceed *in forma pauperis*, you may ask it to direct the U.S. Marshals Service to serve your witness subpoenas. Otherwise you will have to arrange for personal service of your subpoenas and you are required to pay each witness the fee and travel allowance required under 18 U.S.C. § 1821.[23]

Third, you should consider renewing your motion for appointment of counsel. Section D of Chapter 13 explains how to write such a motion. Even if the court denied your motion earlier, it may reconsider now that it has concluded that your case deserves to go to trial.

As mentioned earlier, you will not regret whatever time you spend preparing for your trial. You must be ready for each stage of the trial process. Preparation will give you the ability and confidence to present your case most effectively, so that the judge or jury will be able to find that your rights were violated and award an appropriate remedy.

2. Conducting a Trial

Trial procedures vary from court to court. Some district courts have special rules for *pro se* inmate trials; others do not. You must study carefully any local rules or orders on the subject of trial procedure.

Your trial will be either a bench trial or a jury trial. You will have a *jury trial* if you have asked for money damages and either you or a defendant has made a proper jury demand. See Chapter 14, § B.1. A jury consists of six to twelve people,[24] normally selected by the parties from a larger pool of prospective jurors after *voir dire*. At a jury trial, the judge makes legal rulings about the evidence that each side may present and instructs the jury on the law. After hearing the evidence, the jury applies the law and decides whether the defendants violated your rights and, if so, how much damages they must pay.

If you requested only injunctive relief or if no party made a proper jury demand, you will have a *bench trial*. At a bench trial, a district judge or magistrate judge[25] decides whether the defendants violated your rights, and, if so, what relief is appropriate.

violations that fall outside the scope of Federal Rule of Evidence 609.

22 District courts have the power to issue such writs under 28 U.S.C. § 2241(c)(5).

23 The current fee is $45 per day, plus a travel allowance based on the number of miles that the witness must travel to attend the trial. The clerk's office can tell you what the current rate is for travel allowances. You do not have to pay witness fees or allowances to other inmates, 28 U.S.C. § 1821(f), but are required to pay it to any prison staff or other witness that you want to subpoena to testify at trial.

24 Fed. R. Civ. P. 48.

25 The Magistrate Judge can only hold a trial of your case if both parties have agreed to it. Fed. R. Civ. P. 73.

While most federal trials are held in federal courthouses, a district court may conduct part or all of a bench trial at your jail or prison. This makes it easier for inmates and officials to testify. It is important to know in advance where your trial will be held, so that you can write the proper information on your witness subpoenas and motion for a *writ of habeas ad testificandum*.

If you have a jury trial, you should ask the district court (or the U.S. Marshals who are holding you at the courthouse) for permission to change into street clothes before you enter the courtroom. If friends or family members can lend you a business suit, you should wear it; otherwise, a clean shirt and pants will do. You may be shackled or otherwise restrained as you are transported from your jail or prison to the federal courthouse. You should not, however, be shackled in the presence of the jury. The U.S. Marshals may require you to wear a hidden restraint device (such as a "stun belt") or take other security precautions.

As you enter the courtroom for the first time, a bailiff or clerk will tell you where to sit: the plaintiff's table. Take the time to locate the defendants' table, the jury box, the judge's bench, and the work stations for the clerks or the court reporter.[26] Your judge may address the parties before the trial begins, to discuss procedures and rule on any outstanding motions. It will then be time to go to work.

a. Jury Selection

The first stage of a jury trial is the selection of the jury. The district court will have directed a large, randomly chosen group of citizens to appear at the courthouse on the first day of your trial. This group is called the *venire*. Many courts instruct members of the venire to answer detailed questionnaires by mail; if so, you should review those questionnaire answers carefully and identify venire members whom you want to keep off the jury or ask additional questions.

At the courthouse, the venire members will be asked questions in person during the process of *voir dire*. Different courts conduct voir dire differently.[27] Sometimes the parties ask the questions, sometimes only the judge does. Sometimes the questions are addressed to the venire as a whole; sometimes individual venire members are questioned one at a time. The main goal of voir dire is to determine which venire members have biases that would prevent them from deciding your case fairly and impartially.[28] For example, a venire member who states that she could not rule in an inmate's favor in any circumstances would not be qualified to serve on the jury.

You and the defendants may ask the judge to *strike* (remove) *for cause* venire

26 Be sure to treat courthouse staff courteously. Judges usually find out if a party has behaved rudely.

27 Your district court may specify the procedure for voir dire in its local rules. It is unlikely that the court will allow you to undertake the voir dire but you are allowed to submit written questions that you wish the judge would ask the prospective jurors.

28 Some examples of biases are: one of the prospective jurors has a brother that is a corrections officer; another had a relative, who was a police officer, who was murdered in the line of duty; another had a relative that they visited confined in prison; etc.

members who are biased or otherwise unable to serve as jurors. Then, you and the defendants may each use a limited number of *peremptory strikes* to remove other venire members, people whom each side believes are unsympathetic to its position.[29] The court will have a procedure for the parties to record their peremptory strikes in alternate order. The judge will seat the jury based on who is left in the venire. After the jury is sworn in, your trial will begin.

b. Opening Statement

In a jury trial, each side may begin with an *opening statement*. The plaintiff gives her opening statement first. Defendants sometimes wait to present their opening statement after the plaintiff has presented her evidence. In a bench trial, the judge may direct the parties to skip opening statements altogether, since the judge is already familiar with each side's general position.

An opening statement is simply a summary of the evidence you intend to present. Begin by introducing yourself to the jury and explaining why you filed your lawsuit. Then tell the basic facts of your claims clearly and in chronological order. Do not exaggerate what happened or state facts that you cannot prove. One of the biggest mistakes a plaintiff can make is to state a fact in her opening statement and then fail to prove it. The jury will remember, or opposing counsel will tell the jury this during his closing argument!

Most jurors do not know much about jails or prisons. You can use your opening statement to give them background information that they need to understand what happened in your case. However, do not stray far from the main issues. You may want to conclude with a brief statement of your legal claims and the relief that you are seeking. Do not, however, attempt to argue why the jury should rule in your favor. Such argument is improper in an opening statement.

Depending on what happened at voir dire, the opening statement may be your first chance to address the jury directly. It is important, therefore, to make a good impression. People often assume the worst of inmates: they think that inmates are con-men and complainers living in taxpayer-supported Holiday Inns. You want your jurors to think just the opposite about you: you want to appear at all times polite, earnest, hardworking, respectful, and appreciative of the jury's and judge's time. Use the titles "Mr." or "Ms." to refer to witnesses, the defendants, and their lawyers. Refer to the judge as "the Court," and address him as "Your Honor." Address the jury as "ladies and gentlemen" or "members of the jury."

If there are weak points to your case, it is probably a good strategy for you to mention them in your opening statement. Doing this will allow you to minimize

29 28 U.S.C. § 1870 provides that in federal civil cases each side may make three peremptory strikes. A district court may give each side additional peremptory strikes, depending on the circumstances. A party may not exercise a peremptory strike on the basis of a venire member's race or gender. *See* J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S.Ct. 1419 (1994); Edmondson v. Leesville Concrete Co., Inc., 500 U.S. 614, 111 S.Ct. 1950 (1991).

the damage and beat the defendants to the punch. For the same reasons, you should state why you are in jail or prison and list any of your criminal convictions that are admissible under Federal Rules of Evidence 609.[30]

After opening statements, you will present your evidence to the judge or jury. As the plaintiff in a civil trial, you have the *burden of proof*. You will fail to carry this burden if you do not present sufficient evidence to prove each element of your claims. The defendants will win without having to present any evidence themselves.

In a civil case, the plaintiff must prove each element by a *preponderance of the evidence:* the judge or jury must conclude that your alleged "facts are more likely than not true." This standard of proof is much less demanding than the "beyond a reasonable doubt" standard which government prosecutors must meet to convict a person of a crime. You can think of the "preponderance" standard as a seesaw: to win, you simply need to tip the seesaw more in your direction than in the defendants'. Be aware, however, that juries do not always apply this standard of proof correctly. You must therefore prove your case as convincingly as you can.

c. Direct Examination of Witnesses

Witness testimony is an important part of any trial. We have all watched witnesses testify on TV. After being called by a lawyer, the witness walks to the stand and swears to tell the truth. The lawyer asks the witness a series of open-ended questions. This part of the witness's testimony is the *direct examination*. The lawyer for the other side then has a chance to *cross-examine* the witness. Cross examination is discussed in § e, below. After cross examination, the lawyer who called the witness may ask additional questions on *re-direct*.

A plaintiff normally begins by calling witnesses who have first-hand information about the case and are sympathetic to the plaintiff. As a general rule, you must ask such friendly witnesses *open-ended questions* on direct examination.[31] A question is open-ended if it could be answered in several different ways — as opposed to just "yes" or "no" — and is not intended to "lead" the witness in a certain direction.[32]

Of course, by the time you call a witness at trial, you should already know how he will answer your questions. If you can, you should prepare each witness by going

30 You do not need to go into the details of your convictions, since the defendants are not allowed to raise such details themselves. Rule 609 permits parties only to state a witness's offense, its date and disposition. They may not "harp on the witness's crime, parade it lovingly before the jury in all its gruesome details, and thereby shift the focus of attention from the events at issue in the present case to the witness's conviction in a previous case." Campbell v. Greer, 831 F.2d 700, 707 (7th Cir. 1987); *see also* United States v. Howell, 285 F.3d 1263, 1267-68 (10th Cir. 2002) (finding that evidence of the number and nature of felony offenses is ordinarily required under Rule 609(a)(1) because a witness's convictions bear to differing degrees on credibility depending on these characteristics).

31 You may, however, use leading questions to ask about preliminary matters and issues that are not in dispute, to direct the witness's attention to a specific topic, and (sometimes) to refresh the witness's recollection.

32 Here are some examples of open-ended questions: "Where were you on this date? Did you observe anything that was unusual? Please describe what you saw. Who else was present? What happened after that?"

over your questions and his answers in advance. Although you may not "coach" the witness on the substance of his answers, you may encourage the witness to include relevant details, speak clearly, and keep his composure on the stand. No matter how well you prepare him, however, the witness may not understand or answer fully all of your questions at trial. You therefore need to pay close attention to what the witness says and be prepared to ask follow-up questions or guide the witness back to the main issues.

To prove the elements of your claims, you may have to call *adverse witnesses*: people who oppose your interests and do not want to testify on your behalf. Inmates sometimes call guards, doctors, or nurses as adverse witnesses — even the defendants themselves. You are allowed to ask adverse witnesses *leading questions*: questions that contain or suggest their own answers.[33] Leading questions allow you to control a witness's testimony. Consider the following exchange:

Q: You knew on Saturday afternoon that my arm had been broken, isn't that correct?

A: Well, I guess so.

Q: At approximately 3 p.m. you came into my cell?

A: Yes

Q: You observed the bone sticking out of my skin?

A: Yes.

Q: You knew that I was in pain?

A: Yes.

Q: And, at that time, you told me that nothing could be done until the doctor came in on Monday morning, correct?

A: Yes.

Here, even though the witness does not want to admit such facts, his ability to qualify his answers or avoid the subject is limited by the short, leading questions. You should not ask an adverse witness any questions that you do not already know the answer to. Many lawyers limit their questioning of adverse witnesses to facts that they have previously admitted: *i.e.*, in a declaration or a deposition.

Finally, most *pro se* inmates give their own testimony at trial. As a *pro se* plaintiff, you may tell your story in a *narrative*, rather than a question-and-answer format. Because this testimony may be your most important evidence, you should

33 Fed. R. Evid. 611(c).

prepare carefully. You may want to use an outline to make sure that you cover all important issues.[34] Do not, however, read aloud a written statement word-for-word. After you tell your story, the defendants will cross-examine you like any other witness.

All testimony must comply with the Federal Rules of Evidence. For example, you may not ask for, and a witness may not give, testimony that is irrelevant or inadmissible hearsay. You must also establish a *foundation* for each witness's testimony. For most witnesses, this means that they must explain how they obtained personal knowledge of the relevant facts.[35] For example, before testifying about the details of a particular assault, an inmate should first explain how he was able to observe the assault take place. Some common evidentiary objections are listed in § f, below.

d. Presentation of Exhibits

In addition to witness testimony, you may also introduce *exhibits* as evidence. An exhibit can be a document (*e.g.*, an inspection report, grievance form, or letter) or a thing (*e.g.*, a tool, weapon, or map).

Parties often stipulate to the admissibility of exhibits before trial. If that happens, all you need to do at trial is to bring each exhibit to the judge's or jury's attention at the appropriate time. If an exhibit has not been stipulated to, you must have a witness establish a *foundation* for it.[36] Follow these steps:

1. Mark the exhibit for identification. The court reporter or clerk will label your exhibit with a number or letter.
2. Show the exhibit to the defendants' lawyer.[37]
3. Show the exhibit to the witness. In most courts, you must ask for permission before approaching a witness. As you show the exhibit to the witness, state for the jury and court reporter what you are doing: *e.g.*, "Officer Singleton, I am handing you what has been marked as plaintiff's exhibit five, which is a letter dated August 30, 2001."
4. Ask the witness to identify the exhibit. The witness should explain

34 Remember that when you are testifying and if you use any document to refer to, opposing counsel has a right to review it and then ask you questions from it. This means if you do use an outline, keep it very general and do not have information on that document you do not want the other side to see.

35 Expert witnesses are not required to testify from personal knowledge. A different kind of foundation must be established for expert testimony. *See* Fed. R. Evid. 703.

36 Every exhibit must meet three basic requirements: (1) the witness who identifies the exhibit must be competent to do so; (2) the exhibit must be relevant; and (3) the exhibit must be authentic (i.e., not fake). The authenticity requirements for exhibits are set forth in Federal Rules of Evidence 901 and 902. Some of these requirements are quite complicated. You should consult a treatise on evidence or trial practice for more information.

37 Most courts require you to have a copy of the proposed exhibit to give to defense counsel and also one to give to the court. You will also want a copy of the exhibit in your hand as you are asking the witness questions about the exhibit in his position. If you want the jury to look at the exhibit as you are asking questions, you will need one for them. Generally, you should have at least five copies of any documents you intend to use as an exhibit.

what the exhibit is and how she knows. Depending on the exhibit, you may need to ask additional questions to establish a proper foundation.[38]

5. Offer the exhibit into evidence: *e.g.*, "Your Honor, I offer plaintiff's exhibit five." The judge will examine the exhibit, ask the defendants if they have any objections, and then admit or deny it.

Once the court admits an exhibit into evidence, you may show it to the jury. Always ask for the court's permission first, however: *e.g.*, "Your Honor, may I show plaintiff's exhibit five to the jury?" You may use the exhibit to prove your case in several different ways. You may ask a witness to discuss an exhibit's contents or explain how it relates to an issue in your lawsuit. If the exhibit is a map or diagram, the witness may use it to explain how and where particular events took place. You may also discuss the exhibit in your closing argument.

e. Cross Examination of Witnesses

For every witness that a party calls on direct examination, the other side will have a chance to *cross-examine* that witness. Cross examination is limited to the general issues that the witness testified about on direct examination. A party may ask leading questions (explained in § c, above) throughout cross examination.[39]

Cross examination is a very powerful tool. You can use cross examination to get a witness to admit facts that are helpful to your case. You can repair or limit the damage that the witness did to your case during her direct examination. You can show that the witness was unable to observe the things she claims she did, or that her direct testimony is inconsistent with her prior statements in documents. You can expose the witness as biased or otherwise unworthy of belief.

It is difficult, however, to do cross examination well. Many lawyers view cross examination as an opportunity to yell, point their fingers, and call the witness a liar. This approach succeeds only in making the lawyer look like a bully. You must do better.

Here are some basic rules for conducting an effective cross examination:

- Preparation is key. Before conducting a cross examination, review everything the witness has said, written, or signed. Ideally, you will have taken the witness's deposition during discovery. If not, the defendants' interrogatory answers or the final pretrial order should

38 For example, if you are offering an exhibit for the purpose of proving that its contents are true, you must establish that the exhibit is not inadmissible hearsay. Jail and prison records often fall under the "business records" exception to the hearsay rule, which covers documents kept in the course of a "regularly conducted" activity. Fed. R. Evid. 803(6). Investigative reports and other government documents fall under the "public records" exception. Fed. R. Evid. 803(8), (9). A document written by a defendant or a defendant's agent may constitute an admission by a party-opponent, which is not hearsay at all. Fed. R. Evid. 801(d)(2).

39 The only exception to this rule is that if you call a defendant to testify on direct examination, the lawyer for the defendant must ask open-ended questions during cross-examination.

indicate the issues about which the witness will testify. Be ready to challenge the witness's testimony on those issues.

- Do not try to address every statement the witness made on direct. An effective cross examination usually makes no more than three points. Do not ask the witness to repeat parts of her direct testimony unless you intend to impeach or limit that testimony.
- Maintain control of the witness by asking her short, leading questions. Do not ask questions that begin "why" or "how." If the witness does not answer your question, ask it again, politely but firmly. If the witness continues to avoid the question, ask the court to direct the witness to answer.
- Do not ask a question unless you already know the answer. Cross examination is not like a deposition or interrogatory; you are not trying to learn new things about your case. If you "go fishing" for new information on cross examination, you will likely catch something that hurts your case.
- If a witness testifies on direct examination in a way that is inconsistent with a statement she made earlier, you can address the inconsistency on cross examination in one of two ways. First, you can refresh the witness's recollection. Here is an example of how this works:

  Q: You testified on direct examination that you do not believe that Officer Theiss had any weapons when he walked into my cell?

  A: Yes.

  Q: On that same day, you wrote a report about what happened, didn't you?

  A: Yes. It's our policy to file incident reports after such events.

  Q: (Handing document to witness.) Is this the incident report you wrote?

  A: Yes.

  Q: Please read the highlighted statement at the bottom of the page to yourself. Tell me when you are finished.

  A: I'm done.

  Q: Sergeant Sinclair, does that report refresh your recollection about what Officer Theiss was carrying when he walked into my cell?

A: Yes, I'm sorry. Officer Theiss had a baton and a stun gun. Refreshing recollection is worth doing if you believe that a witness is merely confused or forgetful.[40] If you believe that the witness is deliberately misstating the truth about an important matter, and you have in your possession a prior statement that clearly contradicts the witness's direct testimony, you can *impeach* the witness on cross examination. A successful impeachment not only proves the fact at issue, but also discredits the witness. Here is an example:

Q: Sergeant Sinclair, you testified during your direct examination that Officer Theiss did not have any weapons when he walked into my cell?

A: That's right.

Q: As shift sergeant, you wrote an incident report about what happened?

A: Yes.

Q: Michigan prison policy requires you to write an incident report any time force is used against an inmate on your shift, correct?

A: That's right.

Q: An incident report must accurately state what happened during the incident?

A: Yes.

Q: You filed this particular incident report less than two hours after Officer Theiss entered my cell?

A: Yes.

Q: So when you wrote the report, the facts were still fresh in your mind?

A: Pretty much, yes.

Q: Since then, more than two years have gone by?

A: Yes.

Q: Please look at Exhibit Number Seven for identification. Do

40 You may also refresh the recollection of a witness on direct examination. In that case, however, before showing the witness a particular document, you must first establish that the witness is unable to remember a fact and that the document would help her to remember.

you recognize your signature at the bottom of the page?

A: Yes.

Q: Is this the incident report that you wrote and filed on December 23, 1999?

A: It is.

Q: And at the bottom of the page, your report states: "Officer Theiss entered inmate Greene's cell dressed in riot gear and equipped with a baton and stun gun." Did I read your report correctly, sir?

A: Yes.

As this example shows, there are four basic steps to impeaching a witness: (1) recommit the witness to the testimony she gave on direct testimony, (2) introduce the witness's prior statement, (3) show why that statement is more likely to be true than the witness's direct testimony, and then (4) confront the witness with the inconsistency. After you confront a witness with a prior inconsistent statement, move on to your next point. Do not ask the witness to explain the inconsistency or call her a liar. It is more effective to let the judge or jury reach this conclusion on its own. Further, in your closing you can again point out this inconsistency.

If you undergo cross examination by the defendants' lawyer, remember to keep your cool. Do not get angry or sarcastic. Do not argue with the lawyer or try to outsmart him. Pause before answering each question. If you do not understand the lawyer's question, say so. Above all else, do not lie or exaggerate: do not give the lawyer an opportunity to attack your credibility.

Discuss cross examination with witnesses whom you intend to call on direct. If possible, you should do a practice cross examination with each witness (with you playing the role of the defendants' lawyer), so that the witness will know what to expect.

f. Objections

If a party believes that a legal error has occurred or will soon occur at trial, it can bring that error to the court's attention by making an *objection*. Objections may be made to a party's question, a witness's answer, the introduction or use of an exhibit, or to the behavior of a party, a juror, or the judge. An objection serves two purposes. If the court *sustains* the objection (rules in favor of the party making the objection), the error will be immediately corrected. For example, if the court sustains an objection to the admissibility of an exhibit, the exhibit will not go into evidence. If the court *overrules* or *denies* a party's objection, and if the party then loses at trial, it will have preserved its ability to challenge the claimed error

on appeal.

Objections need to be made quickly at a trial. For example, if the defendants ask a witness an improper question, you should object before the witness can answer. If a witness begins to testify improperly in response to a proper question, you should interrupt her testimony with an objection. Once the jury hears a witness give improper and hurtful testimony, it is difficult for a court to undo the damage. As some lawyers say, you cannot "unring" a bell.

Do not object to evidence that helps your case. For example, if a defendant asks for information that you believe will help to prove an element of your claim, do not object — even if the question calls for inadmissible hearsay.

To make an objection, say the word "objection." Sometimes the ground for your objection will be obvious, and the court will rule right away. Other times, you will need to state the ground: *e.g.*, "Objection, leading," or "Objection, the witness's answer is non-responsive."[41]

There is not enough room in this manual to discuss all the possible objections that you can make. Consult the Federal Rules of Evidence and a treatise on evidence or trial practice for more information. Before you go to trial, you should familiarize yourself with the following evidentiary objections:

Objection	**Applicable Federal Rule**
Irrelevant	401-02
Unfairly prejudicial	403
Improper character evidence	404, 608, 609
Subsequent remedial measure	405
Privilege	501
Lack of personal knowledge	602
Leading	611(c)
Improper lay opinion	701
Hearsay	801-05
Exhibit not authenticated	901-02
Exhibit not "best evidence"	1001-04

Also: compound, vague, argumentative, speculative, narrative, asked and answered, assumes facts not in evidence, and non-responsive answer.

If the defendants make an objection while you are asking a question or testifying, stop until the court rules. The court may ask you to respond to the defendants' objection and explain why the question or testimony is proper. If the court sustains the objection, be sure to react appropriately. For example, if the court sustains an objection on the ground that your question is compound, rephrase

41 *See* Fed. R. Evid. 103(a)(1).

your question so that you are asking one thing at a time. If you do not understand the basis for a judge's ruling, ask the judge for an explanation.[42] It is better to admit what you do not know than to continue to make the same mistake and risk making the judge angry.

g. Closing Argument

After you finish presenting your evidence, the defendants may move for judgment as a matter of law. The district court will grant the motion if it concludes that "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue."[43] If the court denies their motion, the defendants will then present evidence in support of their side. If the defendants' evidence raises new issues, you may present additional evidence in *rebuttal*. At the close of all the evidence, the defendants may again move for judgment as a matter of law. You may do this also, although the court will grant your motion only if you presented uncontradicted evidence in support of each element of your claim.

If the court does not enter judgment as a matter of law for either party, the next stage of the trial will be *closing arguments*. This is your chance to tell your whole story and persuade the judge or jury why it should rule in your favor.

Unlike an opening statement, it is appropriate to *argue* in a closing argument. Here are some things you can do:

apply the substantive law to the facts[44]

explain why certain facts are important and other facts are not

persuade the judge or jury to infer facts from the evidence

comment on the motive and credibility of witnesses

use analogies and stories to illustrate a point

point out the flaws in the defendants' evidence and arguments

appeal to common sense and moral principles

The judge or jury will have just spent several hours or even days listening to the evidence. You do not want to bore the judge or jury by reciting the same evidence — witness by witness, exhibit by exhibit — in your closing argument. Instead, organize the evidence into a coherent story. As you tell your story, cite the items

42 In a jury trial, you may ask the judge for permission to approach the bench so that you can ask for an explanation out of the jury's hearing.

43 Fed. R. Civ. P. 50(a). Rule 50(a) governs motions filed in jury trials. Rule 52(c) governs motions filed in bench trials. In considering such a motion, the district court must view the evidence in the light most favorable to the plaintiff and draw all reasonable inferences in the plaintiff's favor. It may not make determinations about witnesses' credibility or weigh the evidence. This standard is the same as the standard for summary judgment under Rule 56. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505 (1986).

44 Most courts will have had a conference to resolve jury instructions before closing argument so that the parties will know what law they are to apply to the facts in their argument to the jury. *See* § h, below.

of evidence that support each point you are making. For example:

> It is clear that Officer Weston knew that I was in danger before inmate Stevenson assaulted me. He was the officer responsible for reviewing grievances filed by inmates in my cell block, and it is undisputed that I had filed two grievances complaining about Stevenson's threats. You can read my grievances: they are Plaintiff's Exhibits Three and Four. During his testimony, Officer Weston did not deny that he had received and read these grievances; he just said he couldn't remember when he did this. In Assistant Warden Black's deposition — which has been submitted into evidence — he testified that he had discussed Stevenson's threats against me with Officer Weston two days before Stevenson attacked me. And as I testified, Officer Weston made a joke to me about Stevenson's threats the very morning before I was attacked. He said, "Maybe you should be sleeping with your back against the wall." All of this evidence shows that Officer Weston had actual knowledge of the substantial risk of serious harm that I faced.

Be sure to use all available evidence that helps your case: admissions, stipulated facts, depositions submitted into evidence, exhibits, the testimony of the witnesses you called, your own testimony, and any helpful testimony given by the defendants' witnesses. Although you may not refer to facts unsupported by the evidence, you (and the judge or jury) may draw reasonable inferences from the evidence.

You should organize the facts according to the elements of your claim. For example, in a medical care lawsuit, your closing argument should address in turn (1) your serious medical need, (2) the defendants' knowledge of the need, (3) their failure to provide adequate treatment, and (4) how their failure caused your injuries.[45] Since in a jury trial, you should know by this point how the judge will instruct the jury on the applicable substantive law, you are allowed to read the jury instruction to the jury, but you must first state that the "court will likely instruct the jury that I am required to prove these elements. For example:

> Before you begin your deliberations, the judge will instruct you on the required elements of a medical care claim under the Eighth Amendment. The judge will likely instruct you that a serious medical need exists when "the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain." In this case, the evidence shows that I was suffering from a serious medical need in August 2001. Dr. Koppell testified that...

Also, if the court has given you a copy of a special verdict form (see § h, below),

45 Remember, you need to prove these elements for each defendant you have sued.

you may show that form to the jury during your closing argument and explain how it should fill the form out.

The story you tell should not only match up with the elements of your claim, but also be persuasive in its own right. You can do this by including in your closing argument details that will make the judge or jury sympathize with what you went through.[46] In a deliberate indifference case, describe the steps that you took to inform officials of the risks you faced and how afraid you were when the officials refused to do anything. If you suffered a physical injury, explain what your pain was like and how you have been unable to do basic things as a result. Do not get weepy or melodramatic — jurors do not respond well to plaintiffs who "oversell" their injuries — but be sure to include such details in your story.

As for the defendants' evidence, some of it may support your claims. Emphasize this evidence during your closing argument: *e.g.*, "The defendants' *own* medical expert testified that my condition amounted to a serious medical need...." or "Defendant Smith *himself* admitted that he was aware of my condition by the beginning of February...." An admission by an opposing party is the strongest kind of evidence. Other evidence you can limit on the ground that it does not relate to the main issues in your lawsuit. If the defendants presented testimony that flatly contradicted the testimony of your witnesses, you will need to challenge the credibility of the defendants' witnesses. Was a witness's testimony implausible as a matter of common sense? Was it inconsistent with the witness's prior statements or other evidence presented by the defendants? Was the witness unable to remember important details? Is the witness biased toward the defendants or against you? Give the judge or jury reasons why it should believe your witnesses, not the defendants.

In addition to showing that your rights were violated, you will need to explain why you are entitled to the relief you seek. In an injunctive lawsuit, you must show that the changes you have requested are the "least intrusive means" necessary to correct the violation of your rights.[47] In a damages lawsuit, you must tell the judge or jury not only the amount of money that you want, but also the method that you used to calculate that amount. Try to explain these things in common sense terms, keeping in mind how difficult it is to put a dollar figure on pain and suffering. If you have requested both compensatory and punitive damages, you must explain why each kind of award is appropriate under the law.

As the plaintiff, you give your *closing argument in chief* first. After the defendants give their closing argument, you may follow up with a *rebuttal argument*. Rebuttal is your chance to point out the flaws and inaccuracies in the defendants'

46 It is improper, however, to ask jurors to imagine how they would feel if they were "in your shoes." This is sometimes called the "Golden Rule" of closing argument.

47 18 U.S.C. § 3626(a).

argument. It is also your last chance to persuade the judge or jury why it should rule in your favor. If the court limits the time for each side's closing argument, you must divide your time between your argument in chief and your rebuttal argument.

As much as you can, you want to connect — logically, legally, and emotionally — with the judge or jury during your closing argument. For this reason, do not read your argument word-for-word from a pad of paper. Instead, spend most of your time looking into the eyes of the judge or jury. Use an outline to keep yourself on track.[48] Speak in a simple, direct manner. Avoid legalese. Use maps and other exhibits to show where and how things happened. In a bench trial, you will probably stand behind a lectern when you deliver your closing argument. In a jury trial, you may be able to walk around the courtroom. (Be careful not to pace back and forth, however; jurors find it distracting.) At some point during your closing argument, thank the jury for its time and attention.

h. Jury Instructions; Verdict or Decision

In a bench trial, the judge decides the case after closing arguments. She may immediately issue an oral decision from the bench, or she may take the time to think the case over and issue a written decision. Before ruling, judges sometimes direct the parties to file *post-trial briefs*. If your trial was held before a magistrate judge, and the parties did not consent to having that judge issue a final dispositive ruling, you may file objections to the magistrate judge's proposed findings of fact and recommendations.[49]

In a jury trial, the court will give *jury instructions* after closing arguments. Jury instructions tell the jurors what law they must apply during their deliberations. Some jury instructions deal with such basic issues as the plaintiff's burden of proof or the believability of witnesses and are given in all civil trials. Your court will also give instructions on the specific issues in your lawsuit. In a lawsuit challenging systemic excessive force at a city jail, for example, the court will instruct the jury on the elements of an excessive force claim and principles of municipal liability.

Examine any instructions proposed by the defendants carefully. Check all cited cases to see whether they actually apply to your lawsuit and are still good law. Compare each instruction to the legal research you have done. Object to any proposed instruction that states the law incorrectly or in a confusing or biased way. You may propose jury instructions on your own,[50] and you may suggest alternative language in your objections to other proposed instructions.

48 While it is not easy to speak without a written script, you will get better the more you practice.

49 Fed. R. Civ. P. 72(b).

50 Parties may be required to list all proposed jury instructions in the final pretrial order. If you can, review a book of pattern instructions for federal courts in your circuit and make copies of instructions that should be given in your case.

Judges hold *charge conferences* before closing arguments to discuss proposed instructions and objections.[51]

The court will direct the jury to return either a *general verdict* (a single statement disposing of the case) or a *special verdict* "in the form of a special written finding upon each issue of fact."[52] The jurors will deliberate in a closed room as long as it takes to reach an unanimous verdict.[53]

3. Post-Judgment Proceedings

The losing party may file a number of motions challenging a district court's judgment. In a jury trial, the party can renew a motion for judgment as a matter of law that it made at the close of evidence.[54] In either a jury or bench trial, the party may file a motion asking the court to set aside the verdict or decision and order a new trial.[55] It may also move to amend or alter the judgment.[56] All of these motions must be filed no later than 10 days after entry of the judgment. In addition, within a year after entry of the judgment, a party may file a motion asking for relief from a judgment on the grounds of mistake, inadvertence, surprise, or excusable neglect; "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial"; or fraud, misrepresentation, or other misconduct by an adverse party.[57]

If you lose at the district court level, you may appeal by filing a *notice of appeal* with the district court clerk (not the court of appeals clerk) within 30 days after entry of final judgment.[58] Your notice of appeal must identify all the parties who are appealing, the judgment or order appealed from, and the court to which you are appealing (normally the court of appeals of your circuit).[59] This manual does not cover appellate procedure. If you intend to appeal, you should consult the Federal Rules of Appellate Procedure, the rules of your circuit court, and a treatise on appellate practice.

If the district court enters a judgment directing the defendants to pay you damages, and the defendants refuse to pay, you may enforce the judgment by filing a *writ of execution*.[60] Defendants do not generally have to pay a damages award while they are pursuing post-trial motions or an appeal challenging the judgment.[61] However, if they lose those motions and/or appeal, they must also pay you interest on the award beginning from the date the district court entered

51 *See* Fed. R. Civ. P. 51.
52 Fed. R. Civ. P. 49(a).
53 Jury verdict must be unanimous, unless otherwise stipulated by the parties. Fed. R. Civ. P. 48. If a jury cannot reach a unanimous verdict, the court will declare a mistrial, requiring the parties to start again.
54 Fed. R. Civ. P. 50(b).
55 Fed. R. Civ. P. 59(a).
56 Fed. R. Civ. P. 59(e).
57 Fed. R. Civ. P. 60(b)(1), (2), (3).
58 *See* Fed. R. App. P. 3-4.
59 Fed. R. App. P. 3(c).
60 Fed. R. Civ. P. 69(a).
61 Defendants may have to post a security bond during their appeal of a damages award. *See* Fed. R. App. P. 8(b).

judgment.[62]

If the district court grants you an injunction, and the defendants fail to comply, you may enforce the injunction through *contempt proceedings*. Contempt proceedings can get complicated, but here are the basic steps: (1) You file a motion for an order to "show cause" why the defendants should not be held in contempt. Support this motion with evidence, such as declarations and exhibits, showing that the defendants have not made a reasonable effort to comply with the injunction. (2) If the court enters a "show cause" order, the defendants must either show that they have made a reasonable effort to comply or explain why their non-compliance is justified. (3) The district court may conduct an evidentiary hearing to resolve any factual disputes. It will then decide whether or not the defendants are in contempt. (4) If the court holds the defendants in contempt, it will decide what, if any, contempt remedies are appropriate. District courts have broad discretion to enter contempt orders designed to coerce defendants into compliance and/or to compensate people who have been injured by the defendants' non-compliance. One effective remedy is the *per diem* fine: an order directing the defendants to pay a certain amount of money every day until they are in full compliance.

A defendant may move to modify or terminate a judgment for injunctive relief "when it is no longer equitable that the judgment should have prospective application."[63] In addition, the Prison Litigation Reform Act provides that an injunction may be terminated after two years, unless the district court concludes that there is a "current and ongoing violation" of federal law.[64]

C. CONCLUSION

Good luck.

62 28 U.S.C. § 1961.

63 Fed. R. Civ. P. 60(b)(5). *See also* Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 393, 112 S.Ct. 748 (1992) (allowing for modification of injunction if "a significant change in facts or law warrants revision of the decree and... the proposed modification is suitably tailored to the changed circumstances").

64 18 U.S.C. § 3626(b)(1). After the initial two-year period, a defendant may move for termination every year. *Id.*

Glossary

abuse: improper, hurtful conduct

allegation: a statement that a party expects to prove; a plaintiff *alleges* facts in the "Factual Allegations" section of a complaint; see Chapter 14, § B.6

amendment: a change, deletion, or addition; a plaintiff has a right to *amend* a complaint one time before the defendants file an answer; see Chapter 15, § G

answer: a pleading, filed by a defendant, that responds to a complaint; see Chapter 15, § H

assault: an intentional infliction of injury upon another person

automatic disclosure: rules that require the production of information and exhibits to opposing parties without a request; see Chapter 16, § C

causation: the link between a defendant's conduct and the violation of a plaintiff's rights; the plaintiff must show causation in any civil rights lawsuit

cause of action: legal authority that allows a plaintiff to file a lawsuit; 42 U.S.C. § 1983 and *Bivens* are two causes of action

citation: an abbreviated reference to a case, statute, or other legal -provision; see Chapter 11, § B

civil rights lawsuit: a lawsuit that alleges a violation of the plaintiff's federal rights by a government official; *Bivens* lawsuits allege violations by federal officials; lawsuits filed under 42 U.S.C. § 1983 allege violations by state and local officials; see Chapter 13

claim: a legal demand for enforcement of a person's rights

color of state law: when a state or local government official appears or purports to be acting in the performance of his official duties; a defendant must have acted under color of state law to be held liable in a § 1983 lawsuit; see Chapter 13, § A.3.a

complaint: a pleading, filed by a plaintiff, that sets forth a claim and starts a lawsuit; see Chapter 14, § B

conditions of confinement: the physical environment in which inmates live; the Constitution prohibits jail and prison officials from knowingly exposing inmates to conditions that deprive them of a basic human need; see Chapter 10

consent order, consent decree: an injunctive order drafted by the parties as a settlement and submitted to the court for its approval and enforcement; see Chapter 18, § A.3

constitution: the supreme law of a nation or state; the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution require jail and prison officials to protect the health and safety of inmates

cross examination: at trial, the questioning of a witness by a party opposed to the one that called the witness; see Chapter 18, § B.2.e

damages: money that a court orders a defendant to pay to a plaintiff; *nominal damages* involve a small amount of money (usually $1) awarded to recognize the defendant's violation of the plaintiff's rights; *compensatory damages* pay a plaintiff back for the injuries she has suffered; *punitive damages* punish the defendant for her evil or reckless acts; see Chapter 13, § A.4.a

deadline: the date before which a legal document must be filed or served

declaration: a statement of facts that is made under penalty of perjury and serves the purpose of an *affidavit* (a sworn statement); see Chapter 16, § A

declaratory relief: a judgment by a court stating that the plaintiff's rights were violated; see Chapter 13, § A.3.b

defendant: a person from whom a plaintiff seeks a remedy in a lawsuit

defense: a reason, offered by a defendant, why the plaintiff should lose a claim

deliberate indifference: the "state of mind" requirement that inmates must satisfy to prove a violation of their rights to protection from assault, medical care, and humane conditions of confinement; inmates must show that each defendant (1) actually knew about a substantial risk of serious harm, and (2) failed to respond reasonably; see Chapter 6

de minimis: small, trifling; for an excessive force claim under the Eighth Amendment, an inmate's injury need not be serious, but must be more than de minimis; see Chapter 7, § A.3.c.iii

deposition: the testimony of a witness given in response to oral or written questions, not in open court; see Chapter 16, § E.4

direct examination: at trial, the questioning of a witness by the party that called her; see Chapter 18, § B.2.c

discovery: the pretrial process, governed by rules of civil procedure, during which parties obtain facts about a lawsuit and gather evidence; see Chapter 16

document request: a discovery tool used to obtain documents and exhibits from other parties; see Chapter 16, § E.2

element: a fact or condition that a plaintiff must prove in order to win a claim

enlargement of time: an extension on a deadline granted by a court; see Chapter 13, § E.2

evidence: testimony, documents, and exhibits presented to a court for the purpose of proving or disproving allegations in a lawsuit; *direct evidence* proves an allegation by itself; *circumstantial evidence* consists of facts from which a judge or jury may infer the truth of an allegation

excessive force: the use of force that is greater, in amount or in kind, than what is justified in the circumstances; the Constitution prohibits jail and prison officials from using excessive force against inmates; see Chapter 7

e**xhaustion of administrative remedies:** a requirement that a party pursue all available remedies offered by a government agency before proceeding to court; the Prison Litigation Reform Act requires an inmate to exhaust all available remedies at his jail or prison before filing a civil rights lawsuit; see Chapter 12

exhibit: a document or thing used as evidence in a lawsuit

factor: a fact or condition that a court considers when deciding a particular issue

failure-to-protect claim: a claim involving the alleged failure of jail or prison officials to protect an inmate from assault by other inmates; see Chapter 8

federal court: a court of the United States, granted limited jurisdiction to hear cases pursuant to Article III of the U.S. Constitution; see Chapter 11, § A.1

Federal Tort Claims Act: a statute that allows inmates to sue the United States directly when a federal official commits an act that would be a tort under the law of the state in which it occurred; see Chapter 2, § B.4

foundation: information that establishes the admissibility of testimony or an exhibit

frivolous: something that is groundless or of no importance; a lawsuit is frivolous if its allegations are irrational or wholly unbelievable

habeas corpus ad testificandum: a court order directing jail or prison officials to bring an inmate witness to a courthouse; see Chapter 18, § B.1

immunity: a shield from liability

impeachment: the presentation of evidence showing that a witness is unworthy of belief; see Chapter 18, § B.2.e

inference: a fact that is drawn from other facts through the exercise of logic and common sense

injunction: a court order that prohibits a defendant from doing something or commands the defendant to do something; inmates seek *injunctive relief* in civil rights lawsuits to improve their medical treatment, personal safety, and conditions of confinement; see Chapter 13, § A.4.b

injury: a wrong or damage done to another person; a plaintiff in federal court must show that he has suffered an injury or is likely to suffer an injury in the future (see Chapter 13, § A.2.a); inmates must show that they have suffered a physical injury in order to win an award of compensatory damages for a psychological injury (see Chapter 13, § A.4.a.iii)

interrogatory: in discovery, a written question submitted to another party; see Chapter 16, § E.1

judge: an officer who is appointed or elected to preside and carry out the law in a court

judgment: a decision by a court that resolves a claim or lawsuit

jurisdiction: the power of a court to hear and decide particular kinds of claims; *federal-question jurisdiction* gives federal courts the power to hear claims involving the U.S. Constitution and federal statutes; *supplemental jurisdiction* gives federal courts the power to hear state-law claims that are related to proper federal claims

jury: a group of citizens sworn to decide questions of fact at trial; a party to a lawsuit must make a *jury demand* early in a lawsuit to receive a jury trial (see Chapter 14, § B.1); a *jury instruction* is a direction given by the judge regarding the applicable law

lawsuit: a legal action consisting of one or more claims filed by at least one plaintiff against at least one defendant

leading question: a question that contains or suggests its own answer; parties may ask leading questions during cross examination and to adverse witnesses

liability: responsibility under the law; in a lawsuit, a plaintiff attempts to prove that the defendants are *liable* for the violation of his rights

malicious and sadistic intent: the "state of mind" requirement that inmates must satisfy to prove an excessive force claim under the Eighth Amendment; a person is *malicious and sadistic* if he desires to see another person suffer; see Chapter 7, § A.3

material: important; a fact is material if it might affect the outcome of a lawsuit

medical care: the treatment of disease or injury by a licensed medical professional; the Constitution prohibits jail and prison officials from acting with deliberate indifference to an inmate's serious medical need; see Chapter 9

memorandum of law: a document that a party files in court to show legal support for its position; also called a *brief*

mootness: a rule prohibiting courts from hearing disputes that have already been resolved; a court may not grant injunctive relief if officials correct a violation and

show that the violation will not return; see Chapter 13, § A.4.b.iii

motion: a party's formal request for a court order

motion to compel: a motion filed to force another party to comply with its discovery obligations; see Chapter 16, § F.3

motion to dismiss: a motion filed by a defendant that attempts to defeat a lawsuit based on what the plaintiff alleged in his complaint; see Chapter 15.E

motion for summary judgment: a motion, most often filed by defendants, that asserts that the opposing party does not have enough evidence to support a claim or is otherwise unable to win at trial; see Chapter 17

negligence: a standard of liability in tort law; a person is *negligent* if he fails to use such care as a reasonable person would use in similar circumstances; negligence is not enough to satisfy the standard of deliberate indifference in inmate lawsuits; see Chapter 6, § C.2

objective: relating to what exists in the world, not in a person's mind

order: the decision by a court to direct or prohibit a particular act

physical injury: a requirement for inmates who seek damages in civil rights lawsuits; see Chapter 13, § A.4.a.iii

plaintiff: a person who files a lawsuit

pleading: the formal statement of a party's claims or defenses

privilege: a shield for certain kinds of information from disclosure, during discovery and at trial; see Chapter 16, § F.2

preponderance of the evidence: the standard of proof in lawsuits; under this standard, a plaintiff must present evidence showing that each element of a claim is more probable than not

procedural law: the law that determines how one's rights can be enforced in court; this manual discusses procedural law in Chapters 11 through 18

pro se: appearing in court on one's own behalf, unrepresented by a lawyer; also called *in propria persona*

protect: to shield a person from injury; the Constitution requires jail and prison officials to protect inmates from substantial risks of serious harm of which the officials are aware

qualified immunity: a defense available to government officials sued in their individual capacity in civil rights lawsuits; an official is shielded from liability if the right he allegedly violated was not clearly established at the time of the violation; see Chapter 13, § A.4.a.iv

regulation: a rule or order, issued by an administrative agency, that has the force of law

relevant: tending to prove or disprove an allegation

relief: the remedies that a plaintiff asks for in a lawsuit

remedy: payment or conduct ordered by a court to enforce a plaintiff's right; in civil rights lawsuits, *damages* and *injunctive relief* are the two general kinds of remedies that plaintiffs seek; see Chapter 13, § A.4

removal: a tool that a defendant can use to transfer to federal court a lawsuit with federal claims that the plaintiff originally filed in state court; see Chapter 11, § A.3

request for admission: a discovery tool used to force another party to admit or deny a fact, the application of the law to a fact, or the genuineness of a document; see Chapter 16, § E.5

response: a document that a party files in court to express its opposition to another party's motion

right: a form of power or protection that exists under the law; this manual deals with the rights of inmates to health and safety

rule: a guide for conduct prescribed by law; *rules of civil procedure*, *local rules*, and *rules of evidence* govern the conduct of parties and their attorneys in lawsuits

sanction: a penalty imposed by a court on a party for its failure to obey a rule or order

service: the delivery of a legal document to a party or the party's attorney; for service of complaints, see Chapter 14, § F.2; for service of other documents, see Chapter 11, § D.2

settlement: an agreement by opposing parties to resolve a claim or lawsuit; see Chapter 18, § A

standing: a requirement that the plaintiff in a lawsuit have an actual or threatened injury that is traceable to the conduct of the defendants and that can be remedied by the court; see Chapter 13, § A.2.a

state court: a court of one of the 50 states or the District of Columbia; see Chapter 11, § A.2

statute: an act of a legislature declaring, commanding, or prohibiting something; also called a *law*; federal statutes are enacted by the United States Congress

statute of limitations: a statute that sets the maximum time period for filing a lawsuit; each state's general or residual statute for personal injury actions sets the maximum time period for federal civil rights actions filed within that state

stipulation: an agreement by opposing parties to the truth of particular facts

substantive law: the law that creates and defines one's rights; this manual discusses substantive law in Chapters 3 through 10

subjective: relating to the thoughts and perceptions in a person's mind

summons: a form signed by the clerk, bearing the seal of the court, that directs a defendant to respond to a complaint within a certain number of days; see Chapter 14, § F.2

supplementation: in discovery, the required provision of additional information regarding a disclosure or response that a party learns is incomplete or incorrect; see Chapter 16, § C.4

testify: to give evidence as a witness under oath or affirmation

tort: a wrong or injury; *tort law* provides remedies to people who have been wronged or injured

trial: an examination before a court of the disputed issues in a lawsuit; see Chapter 18, § B

venire: the group of citizens from which a jury is selected

venue: the particular court in which a lawsuit must be filed; see Chapter 14, § A

violation: an act or omission that results in the denial of another person's rights

voir dire: the process of questioning the members of a venire, to determine their qualifications and suitability to serve as jurors; see Chapter 18, § B.2.a

waiver of reply: a procedure in inmate lawsuits that allows defendants to file neither a response nor a motion to dismiss, until ordered to act by a court; see Chapter 15, § C

witness: a person who testifies at a trial or deposition about what he observed

United States District Courts

ALABAMA (11TH CIR.)

Northern District of Alabama
Hugo L. Black U. S. Courthouse
1729 Fifth Avenue North
Birmingham, AL 35203
(Counties: Bibb, Blount, Calhoun, Cherokee, Clay, Cleburne, Colbert, Cullman, DeKalb, Etowah, Fayette, Franklin, Greene, Jackson, Jefferson, Lamar, Lauderdale, Limestone, Madison, Marion, Marshall, Morgan, Pickens, Saint Clair, Shelby, Sumter, Talladega, Tuscaloosa, Walker, Winston)

Middle District of Alabama
1 Church Street
Montgomery, AL 36104
(Counties: Autauga, Barbour, Bullock, Butler, Chambers, Chilton, Coffee, Coosa, Covington, Crenshaw, Dale, Elmore, Geneva, Henry, Houston, Lee, Lowndes, Macon, Montgomery, Pike, Randolph, Russell, Tallapoosa)

Southern District of Alabama
113 St. Joseph Street
Mobile, AL 36602
(Counties: Baldwin, Choctaw, Clarke, Conecuh, Dallas, Escambia, Hale, Marengo, Mobile, Monroe, Perry, Washington, Wilcox)

ALASKA (9TH CIR.)

District of Alaska
222 West 7th Avenue, Room 229
Anchorage, AK 99513

ARIZONA (9TH CIR.)

District of Arizona
Sandra Day O'Connor U.S. Courthouse
401 W. Washington Street
Phoenix, AZ 85003

ARKANSAS (8TH CIR.)

Eastern District of Arkansas
600 W. Capitol Avenue, Suite A149
Little Rock, AR 72201-3325
(Counties: Arkansas, Chicot, Clay, Cleburne, Cleveland, Conway, Craighead, Crittenden, Cross, Dallas, Desha, Drew, Faulkner, Fulton, Grant, Greene, Independence, Izard, Jackson, Jefferson, Lawrence, Lee, Lincoln, Lonoke, Mississippi, Monroe, Perry, Phillips, Poinsett, Pope, Prairie, Pulaski, Randolph, Saint Francis, Saline, Sharp, Stone, Van Buren, White, Woodruff, Yell)

Western District of Arkansas
P. O. Box 1547
Fort Smith, AR 72902
(Counties: Ashley, Baxter, Benton, Boone, Bradley, Calhoun, Carroll, Clark, Columbia, Crawford, Franklin, Garland, Hempstead, Hot Springs, Howard, Johnson, Lafayette, Little River, Logan, Madison, Marion, Miller, Montgomery, Nevada, Newton, Ouachita, Pike, Polk, Scott, Searcy, Sebastian, Sevier, Union, Washington)

CALIFORNIA (9TH CIR.)

Northern District of California
450 Golden Gate Avenue
P.O. Box 36060
San Francisco, CA 94102
(Counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo, Sonoma)

Eastern District of California
501 I Street, Suite 4-401
Sacramento, CA 95814
(Counties: Alpine, Amador, Butte, Calaveras, Colusa, El Dorado, Fresno, Glenn, Inyo, Kern, Kings, Lassen, Madera, Mariposa, Merced, Modoc, Mono, Nevada, Placer, Plumas, Sacramento, San Joaquin, Shasta, Sierra, Siskiyou, Solano, Stanislaus, Sutter, Tehama, Trinity, Tulare, Tuolumne, Yolo, Yuba)

Central District of California
U.S. Courthouse
312 N. Spring Street
Los Angeles, CA 90012
(Counties: Los Angeles, Orange County, Riverside, San Bernardino, San Luis Obispo, Santa Barbara, Ventura)

Southern District of California
U.S. Courthouse
880 Front Street, Suite 4290
San Diego, CA 92101-8900
(Counties: Imperial, San Diego)

COLORADO (10TH CIR.)

District of Colorado
U.S. Courthouse, Room A105
901 19th Street
Denver, CO 80294-3589

CONNECTICUT (2D CIR.)

District of Connecticut
U.S. Courthouse
141 Church Street
New Haven, CT 06510

DELAWARE (3D CIR.)

District of Delaware
J. Caleb Boggs Federal Building
844 N. King Street, Lockbox 18
Wilmington, DE 19801

DISTRICT OF COLUMBIA (D.C. CIR.)

District for the District of Columbia
U.S. Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001

FLORIDA (11TH CIR.)

Northern District of Florida
U.S. Federal Courthouse
111 N. Adams St.
Tallahassee, Florida 32301
(Counties: Alachua, Bay, Calhoun, Dixie, Escambia, Franklin, Gadsden, Gilchrist, Gulf, Holmes, Jackson, Jefferson, Lafayette, Leon, Levy, Liberty, Madison, Okaloosa, Santa Rosa, Taylor, Wakulla, Walton, Washington)

Middle District of Florida
401 West Central Boulevard, Suite 1200
Orlando, FL 32801-0120
(Counties: Baker, Bradford, Brevard, Charlotte, Citrus, Clay, Collier, Columbia, De Soto, Duval, Flagler, Glades, Hamilton, Hardee, Hendry, Hernando, Hillsborough, Lake, Lee, Manatee, Marion, Nassau, Orange, Osceola, Pasco, Pinellas, Polk, Putnam, Saint Johns, Sarasota, Seminole, Sumter, Suwannee, Union, Volusia)

Southern District of Florida
U.S. Courthouse, 8th Floor
400 N. Miami Avenue
Miami, FL 33128
(Counties: Broward, Dade, Highlands, Indian River, Martin, Monroe, Okeechobee, Palm Beach, Saint Lucie)

GEORGIA (11TH CIR.)

Northern District of Georgia
2211 U.S. Courthouse
75 Spring Street, S.W.
Atlanta, GA 30303-3361
(Counties: Banks, Barrow, Bartow,

Carroll, Catoosa, Chattooga, Cherokee, Clayton, Cobb, Coweta, Dade, Dawson, DeKalb, Douglas, Fannin, Fayette, Floyd, Forsyth, Fulton, Gilmer, Gordon, Gwinnett, Habersham, Hall, Haralson, Heard, Henry, Jackson, Lumpkin, Meriwether, Murray, Newton, Paulding, Pickens, Pike, Polk, Rabun, Rockdale, Spalding, Stephens, Towns, Troup, Union, Walker, White, Whitfield)

Middle District of Georgia
U.S. Courthouse
P.O. Box 128
475 Mulberry Street
Macon, GA 31202
(Counties: Baker, Baldwin, Ben Hill, Berrien, Bibb, Bleckley, Brooks, Butts, Calhoun, Chattahoochee, Clarke, Clay, Clinch, Colquitt, Cook, Crawford, Crisp, Decatur, Dooly, Dougherty, Early, Echols, Elbert, Franklin, Grady, Greene, Hancock, Harris, Hart, Houston, Irwin, Jasper, Jones, Lamar, Lanier, Lee, Lowndes, Macon, Madison, Marion, Miller, Mitchell, Monroe, Morgan, Muscogee, Oconee, Oglethorpe, Peach, Pulaski, Putnam, Quitman, Randolph, Schley, Seminole, Stewart, Sumter, Talbot, Taylor, Terrell, Thomas, Tift, Turner, Twiggs, Upson, Walton, Washington, Webster, Wilcox, Wilkinson, Worth)

Southern District of Georgia
125 Bull Street, Room 304
Savannah, GA 31401
(Counties: Appling, Atkinson, Bacon, Brantley, Bryan, Bullock, Burke, Camden, Candler, Charlton, Chatham, Coffee, Columbia, Dodge, Effingham, Emanuel, Evans, Glascock, Glynn, Jeff Davis, Jefferson, Jenkins, Johnson, Laurens, Liberty, Lincoln, Long, McDuffie, McIntosh, Montgomery, Pierce, Richmond, Screven, Taliaferro, Tattnall, Telfair, Toombs, Treutlen, Ware, Warren, Wayne, Wheeler, Wilkes)

GUAM (9TH CIR.)

District of Guam
4th Floor, U.S. Courthouse
520 West Soledad Avenue
Hagåtña, Guam 96910

HAWAII (9TH CIR.)

District of Hawaii
U.S. Courthouse
300 Ala Moana Blvd., Room C 338
Honolulu, HI 96850

IDAHO (9TH CIR.)

District of Idaho
U.S. Courthouse
550 W. Fort St.
Boise, ID 83724

ILLINOIS (7TH CIR.)

Northern District of Illinois
Everett McKinley Dirksen Building
20th Floor
219 South Dearborn Street
Chicago, IL 60604
(Counties: Boone, Carroll, Cook, De Kalb, Du Page, Grundy, Jo Daviess, Kane, Kendall, La Salle, Lake, Lee, McHenry, Ogle, Stephenson, Whiteside, Will, Winnebago)

Central District of Illinois
151 U.S. Courthouse
600 E. Monroe Street
Springfield, IL 62701
(Counties: Adams, Brown, Bureau, Cass, Champaign, Christian, Coles, De Witt, Douglas, Edgar, Ford, Fulton, Greene, Hancock, Henderson, Henry, Iroquois, Kankakee, Knox, Livingston, Logan, McDonough, McLean, Macoupin, Macon, Marshall, Mason, Menard, Mercer, Montgomery, Morgan, Moultrie, Peoria, Piatt, Pike, Putnam, Rock Island, Sangamon, Schuyler, Scott, Shelby, Stark,

Tazewell, Vermilion, Warren, Woodford)

Southern District of Illinois
750 Missouri Avenue
East St. Louis, IL 62201
(Counties: Alexander, Bond, Calhoun, Clark, Clay, Clinton, Crawford, Cumberland, Edwards, Effingham, Fayette, Franklin, Gallatin, Hamilton, Hardin, Jackson, Jasper, Jefferson, Jersey, Johnson, Lawrence, Madison, Marion, Massac, Monroe, Perry, Pope, Pulaski, Randolph, Richland, St. Clair, Saline, Union, Wabash, Washington, Wayne, White, Williamson)

INDIANA (7TH CIR.)

Northern District of Indiana
204 S. Main St Room 102
South Bend, IN 46601
(Counties: Adams, Allen, Benton, Blackford, Carroll, Cass, DeKalb, Elkhart, Fulton, Grant, Huntington, Jasper, Jay, Kosciusko, La Porte, Lagrange, Lake, Marshall, Miami, Newton, Noble, Porter, Pulaski, St. Joseph, Starke, Steuben, Tippecanoe, Wabash, Warren, Wells, White, Whitley)

Southern District of Indiana
105 U.S. Courthouse
46 East Ohio Street
Indianapolis, IN 46204
(Counties: Bartholomew, Boone, Brown, Clark, Clay, Clinton, Crawford, Davies, Dearborn, Decatur, Delaware, Dubois, Fayette, Floyd, Fountain, Franklin, Gibson, Greene, Hamilton, Hancock, Harrison, Hendricks, Henry, Howard, Jackson, Jefferson, Jennings, Johnson, Knox, Lawrence, Madison, Marion, Martin, Monroe, Montgomery, Morgan, Ohio, Orange, Owen, Parke, Perry, Pike, Posey, Putnam, Randolph, Ripley, Rush, Scott, Shelby, Spencer, Sullivan, Switzerland, Tipton, Union, Vanderburgh, Vermilion, Vigo, Warrick, Washington, Wayne)

IOWA (8TH CIR.)

Northern District of Iowa
4200 C Street SW
Cedar Rapids, IA 52404
(Counties: Allamakee, Benton, Black Hawk, Bremer, Buchanan, Buena Vista, Butler, Calhoun, Carroll, Cedar, Cerro Gordo, Cherokee, Chickasaw, Clay, Clayton, Crawford, Delaware, Dickinson, Dubuque, Emmet, Fayette, Floyd, Franklin, Grundy, Hamilton, Hancock, Hardin, Howard, Humboldt, Ida, Iowa, Jackson, Jones, Kossuth, Linn, Lyon, Mitchell, Monona, O'Brien, Osceola, Palo Alto, Plymouth, Pocahontas, Sac, Sioux, Tama, Webster, Winnebago, Winneshiek, Woodbury, Worth, Wright)

Southern District of Iowa
123 E. Walnut St.
Room 300
P. O. Box 9344
Des Moines, IA 50306-9344
(Counties: Adair, Adams, Appanoose, Audubon, Boone, Cass, Clarke, Clinton, Dallas, Davis, Decatur, Des Moines, Fremont, Greene, Guthrie, Harrison, Henry, Jasper, Jefferson, Johnson, Keokuk, Lee, Louisa, Lucas, Madison, Mahaska, Marion, Marshall, Mills, Monroe, Montgomery, Muscatine, Page, Polk, Pottawattamie, Poweshiek, Ringgold, Scott, Shelby, Story, Taylor, Union, Van Buren, Wapello, Warren, Washington, Wayne)

KANSAS (10TH CIR.)

District of Kansas
500 State Avenue
259 U.S. Courthouse
Kansas City, KS 66101

KENTUCKY (6TH CIR.)

Eastern District of Kentucky
101 Barr St.

Room 206
P.O. Drawer 3074
Lexington, KY 40588-3074
(Counties: Anderson, Bath, Bell, Boone, Bourbon, Boyd, Boyle, Bracken, Breathitt, Campbell, Carroll, Carter, Clark, Clay, Elliott, Estill, Fayette, Fleming, Floyd, Franklin, Gallatin, Garrard, Grant, Greenup, Harlan, Harrison, Henry, Jackson, Jessamine, Johnson, Kenton, Knott, Knox, Laurel, Lawrence, Lee, Leslie, Letcher, Lewis, Lincoln, McCreary, Madison, Magoffin, Martin, Mason, Menifee, Mercer, Montgomery, Morgan, Nicholas, Owen, Owsley, Pendleton, Perry, Pike, Powell, Pulaski, Robertson, Rockcastle, Rowan, Scott, Shelby, Trimble, Wayne, Whitley, Wolfe, Woodford)

Western District of Kentucky
601 W. Broadway
Rm. 106
Gene Snyder Courthouse
Louisville, KY 40202
(Counties: Adair, Allen, Ballard, Barren, Breckenridge, Bullitt, Butler, Caldwell, Calloway, Carlisle, Casey, Christian, Clinton, Crittenden, Cumberland, Daviess, Edmonson, Fulton, Graves, Grayson, Green, Hancock, Hardin, Hart, Henderson, Hickman, Hopkins, Jefferson, Larue, Livingston, Logan, Lyon, McCracken, McLean, Marion, Marshall, Meade, Metcalfe, Monroe, Muhlenberg, Nelson, Ohio, Oldham, Russell, Simpson, Spencer, Taylor, Todd, Trigg, Union, Warren, Washington, Webster)

LOUISIANA (5TH CIR.)

Eastern District of Louisiana
500 Poydras Street
Rm. C-151
New Orleans, LA 70130
(Parishes: Assumption, Jefferson, Lafourche, Orleans, Plaquemines, Saint Bernard, Saint Charles, Saint James, Saint John the Baptist, Saint Tammany, Tangipahoa, Terrebonne, Washington)

Middle District of Louisiana
777 Florida Street
Suite 139
Baton Rouge, LA 70821
(Parishes: Ascension, East Baton Rouge, East Feliciana, Iberville, Livingston, Pointe Coupee, Saint Helena, West Baton Rouge, West Feliciana)

Western District of Louisiana
300 Fannin Street
Suite 1167
Shreveport, LA 71101
(Parishes: Acadia, Allen, Avoyelles, Beauregard, Bienville, Bossier, Caddo, Calcasieu, Caldwell, Cameron, Catahoula, Claiborne, Concordia, Jefferson Davis, De Soto, East Carroll, Evangeline, Franklin, Grant, Iberia, Jackson, Lafayette, La Salle, Lincoln, Madison, Morehouse, Natchitoches, Ouachita, Rapides, Red River, Richland, Sabine, Saint Landry, Saint Martin, Saint Mary, Tensas, Union, Vermilion, Vernon, Webster, West Carroll, Winn)

MAINE (1ST CIR.)

District of Maine
156 Federal Street
Portland, ME 04101

MARYLAND (4TH CIR.)

District of Maryland
101 W. Lombard St.
Baltimore, MD 21201

MASSACHUSETTS (1ST CIR.)

District of Massachusetts
U.S. Courthouse
1 Courthouse Way
Boston, MA 02210

MICHIGAN (6TH CIR.)

Eastern District of Michigan
U.S. Courthouse, Room 564
231 W. Lafayette Blvd.
Detroit, MI 48226
(Counties: Alcona, Alpena, Arenac, Bay, Cheboygan, Clare, Crawford, Genesee, Gladwin, Gratiot, Huron, Iosco, Isabella, Jackson, Lapeer, Lenawee, Livingston, Macomb, Midland, Monroe, Montmorency, Oakland, Ogemaw, Oscoda, Otsego, Presque Isle, Roscommon, Saginaw, Saint Clair, Sanilac, Shiawassee, Tuscola, Washtenaw, Wayne)

Western District of Michigan
399 Federal Building
110 Michigan St., N.W.
Grand Rapids, MI 49503
(Counties: Alger, Allegan, Antrim, Baraga, Barry, Benzie, Berrien, Branch, Calhoun, Cass, Charlevoix, Chippewa, Clinton, Delta, Dickinson, Eaton, Emmet, Gogebic, Grand Traverse, Hillsdale, Houghton, Ingham, Ionia, Iron, Kalamazoo, Kalkaska, Kent, Keweenaw, Lake, Leelanau, Luce, Mackinac, Manistee, Marquette, Mason, Mecosta, Menominee, Missaukee, Montcalm, Muskegon, Newaygo, Oceana, Ontonagon, Osceola, Ottawa, Saint Joseph, Schoolcraft, Van Buren, Wexford)

MINNESOTA (8TH CIR.)

District of Minnesota
202 U.S. Courthouse
300 South 4th Street
Minneapolis, MN 55415

MISSISSIPPI (5TH CIR.)

Northern District of Mississippi
Room 369 Federal Building
911 Jackson Avenue
Oxford, MS 38655
(Counties: Alcorn, Attala, Benton, Bolivar, Calhoun, Carroll, Chickasaw, Choctaw, Clay, Coahoma, De Soto, Grenada, Humphreys, Itawamba, Lafayette, Lee, Leflore, Lowndes, Marshall, Monroe, Montgomery, Oktibbeha, Panola, Pontotoc, Prentiss, Quitman, Sunflower, Tallahatchie, Tate, Tippah, Tishomingo, Tunica, Union, Washington, Webster, Winston, Yalobusha)

Southern District of Mississippi
245 E. Capitol Street
Suite 316
Jackson, MS 39201
(Counties: Adams, Amite, Claiborne, Clarke, Copiah, Covington, Forrest, Franklin, George, Greene, Hancock, Harrison, Hinds, Holmes, Issaquena, Jackson, Jasper, Jefferson, Jefferson Davis, Jones, Kemper, Lamar, Lauderdale, Lawrence, Leake, Lincoln, Madison, Marion, Neshoba, Newton, Noxubee, Pearl River, Perry, Pike, Rankin, Scott, Sharkey, Simpson, Smith, Stone, Walthall, Warren, Wayne, Wilkinson, Yazoo)

MISSOURI (8TH CIR.)

Eastern District of Missouri
111 South 10th Street
Suite 3.300
St. Louis, MO 63102
(Counties: Adair, Audrain, Bollinger, Butler, Cape Girardeau, Carter, Chariton, Clark, Crawford, Dent, Dunklin, Franklin, Gasconade, Iron, Jefferson, Knox, Lewis, Lincoln, Linn, Macon, Madison, Maries, Marion, Mississippi, Monroe, Montgomery, New Madrid, Pemiscot, Perry, Phelps, Pike, Ralls, Randolph, Reynolds, Ripley, Saint Genevieve, Saint Charles, Saint Louis, Saint Francois, Schuyler, Scotland, Scott, Shannon, Shelby, Stoddard, Warren, Washington, Wayne, City of St. Louis)

Western District of Missouri
Charles Evans Whittaker Courthouse
400 East Ninth Street

Room 1510
Kansas City, MO 64106
(Counties: Andrew, Atchison, Barry, Barton, Bates, Benton, Boone, Buchanan, Caldwell, Callaway, Camden, Carroll, Cass, Cedar, Christian, Clay, Clinton, Cole, Cooper, Dade, Dallas, Daviess, DeKalb, Douglas, Gentry, Greene, Grundy, Harrison, Henry, Hickory, Holt, Howard, Howell, Jackson, Jasper, Johnson, Laciede, Lafayette, Lawrence, Livingston, McDonald, Mercer, Miller, Moniteau, Morgan, Newton, Nodaway, Oregon, Osage, Ozark, Pettis, Platte, Polk, Pulaski, Putnam, Ray, Saint Clair, Saline, Stone, Sullivan, Taney, Texas, Vernon, Webster, Worth, Wright)

MONTANA (9TH CIR.)

District of Montana
U.S. Courthouse
201 East Broadway
Missoula, MT 59801

NEBRASKA (8TH CIR.)

District of Nebraska
111 South 18th Plaza, Suite 1152
Omaha, NE 68102

NEVADA (9TH CIR.)

District of Nevada
U.S. Courthouse
333 S. Las Vegas Blvd.
Las Vegas, NV 89101

NEW HAMPSHIRE (1ST CIR.)

District of New Hampshire
Federal Building
55 Pleasant Street, Room 110
Concord, NH 03301

NEW JERSEY (3D CIR.)

District of New Jersey
Martin Luther King U.S. Courthouse
50 Walnut Street
Room 4015
Newark, NJ 07101

NEW MEXICO (10TH CIR.)

District of New Mexico
333 Lomas N.W.
Albuquerque, NM 87102

NEW YORK (2D CIR.)

Northern District of New York
James T. Foley – U.S. Courthouse
445 Broadway
Room 222
Albany, NY 12207-2924
(Counties: Albany, Broome, Cayuga, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Herkimer, Jefferson, Lewis, Madison, Montgomery, Oneida, Onondaga, Oswego, Otsego, Rensselaer, Saint Lawrence, Saratoga, Schenectady, Schoharie, Tioga, Tompkins, Ulster, Warren, Washington)

Southern District of New York
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, NY 10007-1312
(Counties: Bronx, Dutchess, New York, Orange, Putnam, Rockland, Sullivan, Westchester)

Eastern District of New York
U.S. Courthouse
225 Cadman Plaza East
Brooklyn, NY 11201
(Counties: Kings, Nassau, Queens, Richmond, Suffolk)

Western District of New York
304 U.S. Courthouse

68 Court Street
Buffalo, NY 14202
(Counties: Allegany, Cattaraugus, Chautauqua, Chemung, Erie, Genesee, Livingston, Monroe, Niagara, Ontario, Orleans, Schuyler, Seneca, Steuben, Wayne, Wyoming, Yates)

NORTH CAROLINA (4TH CIR.)

Eastern District of North Carolina
Terry Sanford Federal Bldg. & Courthouse
310 New Bern Avenue
Raleigh, NC 27601
(Counties: Beaufort, Bertie, Bladen, Brunswick, Camden, Carteret, Chowan, Columbus, Craven, Cumberland, Currituck, Dare, Duplin, Edgecombe, Franklin, Gates, Granville, Greene, Halifax, Harnett, Hertford, Hyde, Johnston, Jones, Lenoir, Martin, Nash, New Hanover, Northampton, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Pitt, Robeson, Sampson, Tyrrell, Vance, Wake, Warren, Washington, Wayne, Wilson, and the Federal Correctional Institution at Butner)

Middle District of North Carolina
L. Richardson Preyer Building
324 W. Market Street
Suite 401
Greensboro, NC 27401
(Counties: Alamance, Cabarrus, Caswell, Chatham, Davidson, Davie, Durham (but not the Federal Correctional Institution at Butner), Forsythe, Guilford, Hoke, Lee, Montgomery, Moore, Orange, Person, Randolph, Richmond, Rockingham, Rowan, Scotland, Stanly, Stokes, Surry, Yadkin)

Western District of North Carolina
401 W. Trade Street, Room 212
Charlotte, NC 28202
(Counties: Alexander, Alleghany, Anson, Ashe, Avery, Buncombe, Burke, Caldwell, Catawba, Cherokee, Clay, Cleveland, Gaston, Graham, Haywood, Henderson, Iredell, Jackson, Lincoln, McDowell, Macon, Madison, Mecklenburg, Mitchell, Polk, Rutherford, Swain, Transylvania, Union, Watauga, Wilkes, Yancey)

NORTH DAKOTA (8TH CIR.)

District of North Dakota
220 East Rosser Avenue
P.O. Box 1193
Bismarck, ND 58502

NORTH MARIANA ISLANDS (9TH CIR.)

District for the North Mariana Islands
2nd Floor, Horiguchi Building
GarapanP.O. Box 500687
Saipan, MP 96950

OHIO (6TH CIR.)

Northern District of Ohio
801 West Superior Ave.
Cleveland, OH 44113-1830
(Counties: Allen, Ashland, Ashtabula, Auglaize, Carroll, Columbiana, Crawford, Cuyahoga, Defiance, Erie, Fulton, Geauga, Hancock, Hardin, Henry, Holmes, Huron, Lake, Lorain, Lucas, Mahoning, Marion, Medina, Mercer, Ottawa, Paulding, Portage, Putnam, Richland, Sandusky, Seneca, Stark, Summit, Trumbull, Tuscarawas, Van Wert, Wayne, Williams, Woods, Wyandot)

Southern District of Ohio
260 U.S. Courthouse
85 Marconi Blvd.
Columbus, OH 43215
(Counties: Adams, Athens, Belmont, Brown, Butler, Champaign, Clark, Clermont, Clinton, Coshocton, Darke, Delaware, Fairfield, Fayette, Franklin, Gallia, Greene, Guernsey, Hamilton, Harrison, Highland, Hocking, Jackson, Jefferson, Knox, Lawrence, Licking, Logan, Madison, Meigs,

Miami, Monroe, Montgomery, Morgan, Morrow, Muskingum, Noble, Perry, Pickaway, Pike, Preble, Ross, Scioto, Shelby, Union, Vinton, Warren, Washington)

OKLAHOMA (10TH CIR.)

Northern District of Oklahoma
411 U.S. Courthouse
333 W. Fourth Street
Tulsa, OK 74103
(Counties: Craig, Creek, Delaware, Mayes, Nowata, Osage, Ottawa, Pawnee, Rogers, Tulsa, Washington)

Eastern District of Oklahoma
101 N. 5th Street, Room 210
P.O. Box 607
Muskogee, OK 74402-0607
(Counties: Adair, Atoka, Bryan, Carter, Cherokee, Choctaw, Coal, Haskell, Hughes, Johnston, Latimer, Le Flore, Love, McCurtain, McIntosh, Marshall, Murray, Muskogee, Okfuskee, Okmulgee, Pittsburg, Pontotoc, Pushmataha, Seminole, Sequoyah, Wagoner)

Western District of Oklahoma
200 N.W. 4th Street
Room 1210
Oklahoma City, OK 73102
(Counties: Alfalfa, Beaver, Beckham, Blaine, Caddo, Canadian, Cimarron, Cleveland, Comanche, Cotton, Custer, Dewey, Ellis, Garfield, Garvin, Grady, Grant, Greer, Harmon, Harper, Jackson, Jefferson, Kay, Kingfisher, Kiowa, Lincoln, Logan, McClain, Major, Noble, Oklahoma, Payne, Pottawatomie, Roger Mills, Stephens, Texas, Tillman, Washita, Woods, Woodward)

OREGON (9TH CIR.)

District of Oregon
Mark O. Hatfield
U.S. Courthouse
1000 S.W. Third Avenue
Portland, OR 97204-2902

PENNSYLVANIA (3D CIR.)

Eastern District of Pennsylvania
U.S. Courthouse
601 Market Street
Room 2609
Philadelphia, PA 19106-1797
(Counties: Berks, Bucks, Chester, Delaware, Lancaster, Lehigh, Montgomery, Northampton, Philadelphia)

Middle District of Pennsylvania
William J. Nealon Federal Bldg. & U.S. Courthouse
235 N. Washington Ave.
P.O. Box 1148
Scranton, PA 18501
(Counties: Adams, Bradford, Cameron, Carbon, Centre, Clinton, Columbia, Cumberland, Dauphin, Franklin, Fulton, Huntingdon, Juniata, Lackawanna, Lebanon, Luzerne, Lycoming, Mifflin, Monroe, Montour, Northumberland, Perry, Pike, Potter, Schuylkill, Snyder, Sullivan, Susquehanna, Tioga, Union, Wayne, Wyoming, York)

Western District of Pennsylvania
U.S. Courthouse
700 Gant Street
Pittsburgh, PA 15219
(Counties: Allegheny, Armstrong, Beaver, Bedford, Blair, Butler, Cambria, Clarion, Clearfield, Crawford, Elk, Erie, Fayette, Forest, Greene, Indiana, Jefferson, Lawrence, McKean, Mercer, Somerset, Venango, Warren, Washington, Westmoreland)

PUERTO RICO (1ST CIR.)

District of Puerto Rico
U.S. Courthouse
150 Carlos Chardon Street
Hato Rey, PR 00918

RHODE ISLAND (1ST CIR.)

District of Rhode Island
One Exchange Terrace
Providence, RI 02903

SOUTH CAROLINA (4TH CIR.)

District of South Carolina
U.S. Courthouse
901 Richland Street
Columbia, SC 29201

SOUTH DAKOTA (8TH CIR.)

District of South Dakota
400 S. Phillips Avenue
Sioux Falls, SD 57104

TENNESSEE (6TH CIR.)

Eastern District of Tennessee
800 Market Street
Suite 130
Knoxville, TN 37902
(Counties: Anderson, Bedford, Bledsoe, Blount, Bradley, Campbell, Carter, Claiborne, Cocke, Coffee, Franklin, Grainger, Greene, Grundy, Hamblen, Hamilton, Hancock, Hawkins, Jefferson, Johnson, Knox, Lincoln, Loudon, Marion, McMinn, Meigs, Monroe, Moore, Morgan, Polk, Rhea, Roane, Scott, Sequatchie, Sevier, Sullivan, Unicoi, Union, Van Buren, Warren, Washington)

Middle District of Tennessee
801 Broadway
Room 800
Nashville, TN 37203
(Counties: Cannon, Cheatham, Clay, Cumberland, Davidson, DeKalb, Dickson, Fentress, Giles, Hickman, Houston, Humphreys, Jackson,Lawrence,Lewis, Macon, Marshall, Maury, Montgomery, Overton, Pickett, Putnam, Robertson, Rutherford, Smith, Stewart, Sumner, Trousdale, Wayne,White, Williamson, Wilson)

Western District of Tennessee
Room 242
Federal Building
167 North Main Street
Memphis, TN 38103
(Counties: Benton, Carroll, Chester, Crockett, Decatur, Dyer, Fayette, Gibson, Hardeman, Hardin, Haywood, Henderson, Henry, Lake, Lauderdale, McNairy, Madison, Obion, Perry, Shelby, Tipton, Weakley)

TEXAS (5TH CIR.)

Northern District of Texas
1100 Commerce Street, Room 1452
Dallas, TX 75242
(Counties: Archer, Armstrong, Bailey, Baylor, Borden, Brisco, Brown, Callahan, Carson, Castro, Childress, Clay, Cochran, Coke, Coleman, Collingsworth, Comanche, Concho, Cottle, Crockett, Crosby, Dallam, Dallas, Dawson, Deaf Smith, Dickens, Donley, Eastland, Ellis, Erath, Fisher, Floyd, Foard, Gaines, Garza, Glasscock, Gray, Hale, Hall, Hansford, Hardeman, Hartley, Haskell, Hemphill, Hockley, Hood, Howard, Hunt, Hutchinson, Irion, Jack, Johnson, Jones, Kaufman, Kent, King, Knox, Lamb, Lipscomb, Lubbock, Lynn, Menard, Mills, Mitchell, Montague, Moore, Motley, Navarro, Nolan, Ochiltree, Oldham, Palo Pinto, Parker, Parmer, Potter, Randall, Reagan, Roberts, Rockwall, Runnels, Schleicher,Scurry, Shackleford, Sherman, Stephens, Sterling, Stonewall, Sutton, Swisher, Tarrant, Taylor, Terry, Throckmorton, Tom Green, Wheeler, Wichita, Wilbarger, Wise, Yoakum, Young)

Eastern District of Texas
211 W. Ferguson, Room 106
Tyler, TX 75702
(Counties: Anderson, Angelina, Bowie, Camp, Cass, Cherokee, Collin, Cook, Delta, Denton, Fannin, Franklin, Grayson, Gregg, Hardin, Harrison, Henderson, Hopkins,

Houston, Jasper, Jefferson, Lamar, Liberty, Marion, Morris, Nacogdoches, Newton, Orange, Panola, Polk, Rains, Red River, Rusk, Sabine, San Augustine, Shelby, Smith, Titus, Trinity, Tyler, Upshur, Van Zandt, Wood)

Southern District of Texas
U.S. Courthouse
515 Rusk Street
Houston, TX 77002
(Counties: Aransas, Austin, Bee, Brazoria, Brazos, Brooks, Calhoun, Cameron, Chambers, Colorado, DeWitt, Duval, Fayette, Fort Bend, Galveston, Goliad, Grimes, Harris, Hidalgo, Jackson, Jim Wells, Jim Hogg, Kenedy, Kleberg, La Salle, Lavaca, Live Oak, Madison, Matagorda., McMullen, Montgomery, Nueces, Refugio, San Jacinto, San Patricio, Starr, Victoria, Walker, Waller, Webb, Wharton, Willacy, Zapata)

Western District of Texas
U.S. Courthouse
655 E. Durango Blvd., Room G65
San Antonio, TX 78206
(Counties: Andrews, Atascosa, Bandera, Bastrop, Bell, Bexar, Blanco, Bosque, Brewster, Burleson, Burnet, Caldwell, Comal, Coryell, Crane, Culberson, Dimmit, Ector, Edwards, El Paso, Falls, Freestone, Frio, Gillespie, Gonzales, Guadalupe, Hamilton, Hays, Hill, Hudspeth, Jeff Davis, Karnes, Kendall, Kerr, Kimble, Kinney, Lampasas, Lee, Leon, Limestone, Llano, Loving, Martin, Mason, Maverick, McCulloch, McLennan, Medina, Midland, Milam, Pecos, Presidio, Real, Reeves, Robertson, San Saba, Somervell, Terrell, Travis, Upton, Uvalde, Val Verde, Ward, Washington, Williamson, Wilson, Winkler, Zavalla)

UTAH (10TH CIR.)

District of Utah
350 South Main Street
Salt Lake City, UT 84101-2180

VERMONT (2D CIR.)

District of Vermont
P.O. Box 945
Burlington, VT 05402-0945

VIRGIN ISLANDS (3D CIR.)

District of the Virgin Islands
5500 Veteran's Drive, Room 310
St. Thomas, VI 00802-6424

VIRGINIA (4TH CIR.)

Eastern District of Virginia
701 East Broad Street
Richmond, VA 23219
(Counties: Accomac, Amelia, Arlington, Brunswick, Caroline, Charles City, Chesterfield, Dinwiddie, Elizabeth City, Essex, Fairfax, Fauquier, Gloucester, Goochland, Greensville, Hanover, Henrico, Isle of Wight, James City, King and Queen, King George, King William, Lancaster, Loudoun, Lunenberg, Mathews, Mecklenburg, Middlesex, Nansemond, New Kent, Norfolk, Northampton, Northumberland, Nottoway, Powhatan, Prince Edward, Prince George, Prince William, Princess Anne, Richmond, Southampton, Spotsylvania, Stafford, Surry, Sussex, Warwick, Westmoreland, York)

Western District of Virginia
308 U.S. Courthouse
P.O. Box 1234
Roanoke, VA 24006-1234
(Counties: Albemarle, Alleghany, Amherst, Appomattox, Augusta, Bath, Bedford, Bland, Botetourt, Buchanan, Buckingham, Campbell, Carroll, Charlotte, Clarke, Craig, Culpeper, Cumberland, Dickenson, Floyd, Fluvanna, Franklin, Frederick, Giles, Grayson, Greene, Halifax, Henry, Highland, Lee, Louisa, Madison, Montgomery, Nelson,

Orange, Page, Patrick, Pittsylvania, Pulaski, Rappahannock, Roanoke, Rockbridge, Rockingham, Russell, Scott, Shenandoah, Smyth, Tazewell, Warren, Washington, Wise, Wythe)

WASHINGTON (9TH CIR.)

Eastern District of Washington
920 West Riverside
Spokane, WA 99201
(Counties: Adams, Asotin, Benton, Chelan, Columbia, Douglas, Ferry, Franklin, Garfield, Grant, Kittitas, Klickitat, Lincoln, Okanogan, Pend Oreille, Spokane, Stevens, Walla Walla, Whitman, Yakima)

Western District of Washington
U.S. Courthouse
700 Stewart Street
Seattle, WA 98101
(Counties: Clallam, Clark, Cowlitz, Grays, Harbor, Island, Jefferson, King, Kitsap, Lewis, Mason, Pacific, Pierce, San Juan, Skagit, Skamania, Snohomish, Thurston, Wahkiakum, Whatcom)

WEST VIRGINIA (4TH CIR.)

Northern District of West Virginia
300 Third Street
P.O. Box 1518
Elkins, WV 26241
(Counties: Barbour, Berkeley, Braxton, Brooke, Calhoun, Doddridge, Gilmer, Grant, Hampshire, Hancock, Hardy, Harrison, Jefferson, Lewis, Marion, Marshall, Mineral, Monongalia, Morgan, Ohio, Pendleton, Pleasants, Pocahontas, Preston, Randolph, Ritchie, Taylor, Tucker, Tyler, Upshur, Webster, Wetzel)

Southern District of West Virginia
300 Virginia Street East, Suite 2400
Charleston, WV 25301
(Counties: Boone, Cabell, Clay, Fayette, Greenbrier, Jackson, Kanawha, Lincoln, Logan, McDowell, Mason, Mercer, Mingo, Monroe, Nicholas, Putnam, Raleigh, Roane, Summers, Wayne, Wirt, Wood, Wyoming)

WISCONSIN (7TH CIR.)

Eastern District of Wisconsin
362 U.S. Courthouse
517 East Wisconsin Avenue
Milwaukee, WI 53202
(Counties: Brown, Calumet, Dodge, Door, Florence, Fond du Lac, Forest, Green Lake, Kenosha, Kewaunee, Langlade, Manitowoc, Marinette, Marquette, Menominee, Milwaukee, Oconto, Outagamie, Ozaukee, Racine, Shawano, Sheboygan, Walworth, Washington, Waukesha, Waupaca, Waushara, Winnebago)

Western District of Wisconsin
120 N. Henry Street, Room 320
P.O. Box 432
Madison, WI 53701-0432
(Counties: Adams, Ashland, Barron, Bayfield, Buffalo, Burnett, Chippewa, Clark, Columbia, Crawford, Dane, Douglas, Dunn, Eau Claire, Grant, Green, Iowa, Iron, Jackson, Jefferson, Juneau, La Crosse, Lafayette, Lincoln, Marathon, Monroe, Oneida, Pepin, Pierce, Polk, Portage, Price, Richland, Rock, Rusk, Saint Croix, Sauk, Sawyer, Taylor, Trempealeau, Vernon, Vilas, Washburn, Wood)

WYOMING (10TH CIR.)

District of Wyoming
2120 Capitol Avenue, Room 2131
Cheyenne, WY 82001

Legal Resources

Inmates can learn more about their rights and the legal system by ordering the following publications:

A Jailhouse Lawyer's Manual: Seventh edition published in 2007. This manual explains the rights of inmates, the Prison Litigation Reform Act, legal research, federal and New York procedural law, and other issues. Inmates may purchase this manual for $25.00. To order, send your name, inmate number, institutional address, and a check or money order (no postage stamps) in the sum of $25 (English edition) and $15 (for Spanish edition) payable to the Columbia Human Rights Law Review.

Columbia Human Rights Law Review
Attn: JLM Order
435 West 116th Street
New York, NY 10027

Georgetown Law Journal Criminal Procedure Project Issue: This annual issue of the Georgetown Law Journal summarizes current law on criminal procedure and inmates' rights. Cost: $15.00 for inmates (payable by check or money order; sales tax required in DC, VA, PA and MD). Contact:

The Georgetown Law Journal
Attn: Monica Phillips
600 New Jersey Avenue, N.W.
Washington, DC 20001

The Law of Sentencing, Corrections, and Prisoners' Rights: Seventh edition published in 2005. Written primarily for lawyers and law students, this is a "nutshell" guide to inmates' rights and related issues. List price is $30.00 plus tax. Credit Card orders only. For ordering information, contact:

West Group Publishing Company
610 Opperman Drive
Eagan, MN 55123

The National Prison Project Journal: This quarterly newsletter is published by a legal organization that represents inmates in civil rights class actions throughout the nation. It features articles, reports, legal analysis, and other developments on inmates' rights. For inmates, an annual subscription costs $2.00. Contact:

ACLU National Prison Project
915 15th Street, NW, 7th Fl.

Washington, DC 20005-2112

Directory of Lawyer Referral Services: This directory lists local and state legal referral services throughout the country. Cost: $15.00, plus $5.95 for postage. Contact:

American Bar Association Orders
P.O. Box 10892
Chicago, IL 60610-0982

Federal Rules of Civil Procedure ($13.00), Federal Rules of Appellate Procedure ($5.50), Federal Rules of Criminal Procedure ($6.50), Federal Rules of Evidence ($3.50): Prices (current as of November 2001) include shipping and handling. Include in order the exact publication title and quantity. Contact:

U.S. Government Printing Office
P.O. Box 979050
St. Louis, MO 63197-9000

Prison Legal News: This is a monthly 56 page prisoners' rights magazine. It features case updates, legal analysis, and "how-to" articles by prisoners' rights lawyers. The annual subscription for prisoners is $18; donations of less than $18 are pro-rated at $1.50 per issue. The subscription cost to lawyers is $60. PLN also distributes legal dictionaries and books on a variety of self help, litigation and criminal justice related topics. Contact:

Prison Legal News
2400 NW 80th Street #148
Seattle, WA 98117
www.prisonlegalnews.org

Prisoner Diabetes Handbook: This is a guide to managing diabetes, for prisoners and written by prisoners. Available free by ordering from Prison Legal News at:

Prison Legal News
2400 NW 80th Street #148
Seattle, WA 98117

Justice Denied: This is a magazine dedicated to exposing wrongful convictions, and how and why they happen. 6 issues: $10 prisoners; $20 all others. $3 for sample issue. Contact:

Justice Denied
P.O. Box 68911
Seattle, WA 98168

FAMM-gram: This is a quarterly magazine of FAMM, that includes information about injustices resulting from mandatory sentencing laws. $10/yr for prisoners. Contact:

FAMM
1612 K Street NW #1400
Washington, D.C. 20006

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