LEGAL BULLETIN 1.1

Federal Civil Actions

(Set: Litigation - Bulletin 1.1)

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Introduction

This Legal Bulletin will provide information about how to litigate a civil case in federal court. The Federal Rules of Civil Procedure govern how to conduct most of the litigation. However, each United States District Court has important Local Rules specifying important differences from the general Federal Rules as applicable to that particular District. The District Court often sends a copy of its most important procedural Local Rules to you after you file your Complaint, regarding numbers of copies, page limits, and so forth. Please review the Local Rules before filing subsequent motions or briefs.

The Complaint

The first step in preparing a civil action involves preparation of a draft complaint. A complaint is the initial pleading filed with the court. A complaint gives notice to the opposing parties that a legal action against them has been filed. A complaint should be simple and direct. It must identify the parties (people or institutions) involved; all relevant facts; the legal theories (causes of action) that you are proceeding under; and a statement of the relief / remedy that you want the Court to award you.

A complaint should tell the story in an understandable form, so that someone who has no prior knowledge of the events and people involved would be able to tell what happened and why you believe that entitles you to relief. Therefore, you should test your draft complaint by having a friend, relative, or legal representative review your complaint for clarity and completeness. The complaint should focus on the issues that must be considered to decide whether the relief sought is justifiable under the law.

Most district courts prefer inmates to use the district court *pro se* (i.e. acting as your own lawyer) prisoner civil rights and habeas corpus forms, usually available for free. Write to the Clerk's Office at the U.S. District Court where you want to file the complaint and ask the Clerk to send you a free set of civil rights, *in forma pauperis* [IFP], or habeas corpus forms. These forms should alleviate many of your concerns as to how to file a complaint since they include lines and spaces for you to complete the information.

Keep in mind that IFP status does NOT permit you to file a civil rights complaint free of charge. Rather, such status merely permits you to proceed without prepayment of

the filing fee. Instead, the Inmate Accounts/ Business Office Manager at your prison periodically will deduct the fee in installments from your inmate account.

Suing the correct parties:

It is your responsibility as the plaintiff to name the proper parties that legally must be included in the complaint. At first glance, it may seem a simple matter to decide the defendants in a lawsuit. However, sometimes it is a bit more complicated. For example, certain causes of action can only be brought against particular defendants. A claim under the Federal Tort Claims Act [FTCA] can only be brought against the United States as a named defendant, not against individual officers or agencies of the federal government (See Legal Bulletin on Federal Tort Claims Act).

Certain types of relief can only be requested from particular defendants. For example, a writ of mandamus only issues against an agency or officer of the United States in federal actions (See 28 USC §1361). A writ of mandamus, if granted by the court, compels an individual, not the United States itself, to perform a required duty. Similarly, an injunction (a court order prohibiting someone from continuing a course of action) may only issue against the conduct of individual government officials, not directly against the government. This distinction may seem academic if the same result is achieved; however, the courts have specific requirements. The pleading must be correct to have the court consider your claims. See Larson v. Domestic and Foreign Commerce Corp., 337 US 682, 69 S.Ct 1457, 93 L.Ed 1628 (1949).

Sometimes when the wrong parties have been named as defendants, you may be required to amend your complaint (reissue it with the necessary corrections). Sometimes these corrections will mean other parties are joined in the action or that parties are removed from the case. Remember, if change is needed, the entire complaint must reflect the revisions that the court demands.

Under the Civil Rights Act, you only can name individuals as defendants in such actions. The Act does not permit you to name the prison, the BOP, or the DOC as defendants. The reason is Section 1983 of the Act reads in relevant part, "Every person ... shall be liable to the party injured[.]"

The common law often permits people to sue the employers of tortfeasors and other such wrongdoers in state court for the misdeeds of their employees. That is not the case in federal civil rights law. The agency head, warden, or other such employer is an inappropriate defendant if that person did not know what his employee was doing when the employee was doing it. The only exception is if the official can be proven to have been "deliberately indifferent" to the aggrieved situation or other such similar past situations.

Similarly, the Discipline Hearing Officer [DHO], Hearing Examiner, Program Review Committee, and the like often are inappropriate defendants. Many times, such administrative arbiters act as credibility factfinders only. As such, they merely choose

which persons to believe at disciplinary hearings. We know they usually rule for the officers and against the inmates concerning credibility issues. Nevertheless, courts usually rule such arbiters are not liable for causation of the civil rights violation which led up to the administrative hearing or misconduct charge in the first place. Therefore, we advise you to think twice before naming such hearing officials as defendants.

Subject matter jurisdiction:

"Subject matter" jurisdiction means a court has the authority to decide particular questions concerning certain facts. For instance, a federal bankruptcy court would not have subject matter jurisdiction in a case about medical malpractice. An action against the United States, its agencies, institutions, officers or employees only can proceed if there has been a specific grant of jurisdiction to do so or if sovereign immunity is waived.

"Sovereign immunity" means the government cannot be made a defendant in a lawsuit. The barrier of sovereign immunity does not prevent actions against government officials. However, officials exercising discretion within the scope of their official duties are entitled to absolute immunity from liability for common law torts. Sovereign immunity often is associated with the bar against suing state and county government officials in state and county courts. We will not discuss this concept much since this Legal Bulletin is intended to address federal, not state, court actions. Check the index of your state statutes for the state court sovereign immunity law and exceptions if you intend to file a state court action. In Pennsylvania, those statutes can be found beginning at 42 Pa. C.S.A. §8521, et seq.

Most government officials have only "qualified (sometimes called "good faith") immunity," in suits for money damages. Under the qualified immunity defense, officials may be held liable only if they "knew or should have known" that their action or inaction violated a "clearly established constitutional or statutory right." See Harlow v. Fitzgerald, 102 S.Ct. 2727 (1982). The courts might not order defendants to pay you if no court in your regional circuit court of appeals ever has ruled on your kind of issue.

Exhausting administrative remedies:

"Administrative remedies" are found in the grievance process located in the inmate handbook that you should have received at intake and classification. "Exhaustion" means you must follow the policies of the institution and department for grievances and other remedial requests or complaints through the entire process to the highest level.

The BOP refers to the grievance levels as BP-8, BP-9, BP-10, and BP 11. The Federal Tort Claim Act requires delivery of a Form 95 Federal Tort Claim to your BOP Regional Office.

Your obligation to pursue a remedy must go through the prescribed channels first. A lawsuit in court cannot proceed at the same time as the grievance process. You must have a final answer from the administrative process before filing your complaint in court

unless you establish that officials ignored your grievance or delayed in response without explanation.

You may feel like the grievance system is worthless. Nevertheless, the court will not consider your complaint unless you have first exhausted all administrative remedies. You are required to try to obtain a remedy from the institution by following its grievance policy all the way to the top. (Note: Try to keep copies of everything you submit and all answers you receive).

If you get a favorable result from the prison, you may no longer need to proceed any further. However, if the remedy provided is inadequate, you may want to pursue the matter further.

Using the correct form of action:

There are a number of federal statutes that establish causes of action to remedy wrongs, constitutional violations, or other deprivations of civil rights against persons. You must select the proper cause of action for the wrong done and the remedy sought.

In federal courts, there is an established practice for federal judges and magistrates to review prisoner *pro se* complaints in a liberal way. This means little errors or formal mistakes will sometimes be overlooked or allowed because there is recognition that *pro se* petitioners are not formally educated in the law and legal procedure. You still should make every effort to get it right.

SELECTING THE CORRECT CIVIL ACTION

The four legal actions most commonly used by prisoners are:

(1) Petition for Writ of Habeas Corpus.
(2) Section 1983 Civil Rights complaint.
(3) General Federal Question Action (*Bivens* action §1331).
(4) Federal Tort Claims Act.

(1) Petition for Writ of Habeas Corpus: A writ of habeas corpus is an action which claims a prisoner's conviction (§2241), state sentence (§2254), or federal sentence (§2255) is unlawful. A habeas corpus action is not used for seeking money damages. The purpose of a writ of habeas corpus is to assert the conviction and sentence were obtained in violation of the U.S. Constitution or federal law. If the court agrees with you, it may throw out the conviction. Release from incarceration on the dismissed charge is the remedy for habeas corpus actions.

Before you can get habeas corpus relief from a court, you must prove you are in custody or under an active sentence in some other form (i.e. on probation or parole). This requirement should present no problem for prisoners, but you must state it in your

petition. We suggest you make copies of your sentencing orders and attach them as exhibits to your petition.

After satisfying the custody requirement, your habeas petition must show you have exhausted all of your available remedies. For federal prisoners, the exhaustion of remedies means appealing your federal conviction or sentence all the way through the federal court system. For state prisoners, this means you must have appealed the issues in your present habeas petition all the way up and the state's supreme court has ruled on them. The courts will deny your habeas petition if you have not exhausted your remedies by appealing them as far as you can. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977); U.S. v. Addonizio, 442 U.S. 178, 190, 99 S.Ct. 2236 (1979). To preserve the issues for habeas review, they must be included in all the appeals leading up to the habeas petition. There are exceptions, such as newly discovered evidence of actual innocence. However, there still may be time limits and other procedural requirements that may affect the willingness of the court to hear such issues.

Sometimes state prisoners must appeal **twice** through the state court system before the federal court will entertain a habeas petition. For example, Pennsylvania state prisoners must file a petition for a post-conviction petition for collateral relief ["PCRA"] with their trial court after the Supreme Court of Pennsylvania denies their direct appeal if the prisoners want to raise new issues before filing a federal habeas.

Checklist for filing a federal habeas petition:

1. File under the correct section of the law.
2. State the reasons for your petition, showing how your sentence and / or incarceration were the result of a violation of the federal constitution.
3. Explain your custody status.
4. Provide specific information of how you have exhausted your remedies through the appeals process.
5. Reference the issues in your habeas petition to their dispositions throughout the appeals process.

Habeas corpus issues are addressed in more detail in our bulletin *Post Conviction Remedies* 9-1. Also, forms usually are available for free upon request from the District Court where you were sentenced.

(2) Civil Rights Action under 42 USC §1983 (state and county prisoners): If your rights under the federal Constitution have been violated, you may file a complaint with the court. If you are a federal prisoner, you may file it as a *Bivens* action for damages pursuant to 28 U.S.C. §1331, the general "federal question" jurisdictional statute explained later. If you are a state prisoner, you may file under § 1983.

Examples of constitutional violations include (but are not limited to):

First Amendment: Unlawful restriction of speech, religion.
Fifth Amendment: Due process violations.
Sixth Amendment: Interference with right to legal counsel.

Eighth Amendment: Cruel and unusual punishment.
Fourteenth Amendment: Due process and equal protection violations.

State prisoners have the right under 42 U.S.C. § 1983 to sue any city, county, or state prison official who is acting under the authority of local or state law. States and their agencies are immune from suit, even under §1983, because of the Eleventh Amendment to the U.S. Constitution. Thus, civil rights actions under section 1983 are equivalent to general federal question actions (under 28 U.S.C. § 1331) except they are used by municipal and state prisoners against local and state officials.

The elements of a *prima facie* case under section 1983 are:

1. Illegal conduct
2. committed by a state prison official who is using or abusing his power, which he possesses "by virtue of state law and made possible only because the official is clothed with the authority of state law." Monroe v. Pape, 365 U.S. 167, 184, 81 S.Ct. 473 (1961) and Evans v. United States, 504 U.S. 255, 119 L.Ed 2d 57 , 112 S. Ct. 1881 (1992), and
3. the prison official's conduct deprived the inmate of rights, privileges or immunities guaranteed by the Constitution and the laws of the United States.

Generally, a §1983 complaint must state that the defendants are prison officials of local / county governments, that their authority is derived from state law, and that they were personally involved in causing the violation of legal and constitutional rights. Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 1913 n.3 (1981); Taylor v. Sgt. Cox (SCIG) et al., 912 F. Supp. 140 (E.D. Pa. 1995).

Your §1983 claim can be the official's failure to act, as in Smith v. Ross, 482 F. 2d 33 (6th Cir. 1978). Your best strategy will be to sue every official involved, their superiors, and their superior's superiors, etc. as long as you can do so with some basis in the law and facts. Let these prison officials attempt to argue to the court that they should not be included. It is easier to include someone in your original filing than to have to go back later and try to add him or her to the action.

(3) General Federal Question Action, 28 U.S.C. §1331 (federal prisoners): A suit against federal prison officials may request injunctive relief (where the court orders a party to do something or to refrain from doing something) and/or for money damages. Federal court jurisdiction over these cases is found in 28 U.S.C. §1331 and reference to this statute should be included in your complaint. These actions are similar in many ways to §1983 civil rights actions. The courts provide the same form for filing a §1983 or a §1331 *Bivens* action. You will have to check the appropriate line to indicate under which one you are proceeding. The origin of this type of action was in the case of Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999 (1971). Technically, the law only refers to actions for damages, not injunctions, against federal officials as *Bivens* actions.

A *Bivens* action must state certain elements/allegations:

1. There must be an allegation that rights under the U.S. Constitution or federal laws were violated.
2. Federal officials who hold their authority by virtue of federal law committed the violations.
3. Specific facts forming the basis of your allegations.

When submitting a §1331 claim, it is necessary to state the type of relief you are seeking. If you are filing because of personal injuries, you will be in a position to offer evidence of certain physical injuries that happened to you. Also, you should not state how much money you desire to be awarded to you unless it involves a specific bill or receipt (i.e. your $75 television set, etc.).

In some cases the court may be more inclined to grant injunctive relief which orders prison officials to correct the actions or conditions that violated your rights. Injunctive relief can also be accompanied by some monetary recovery in certain cases.

The Administrative Procedures Act [APA], 5 U.S.C. §701, et seq., is an important tool for federal prisoners. This Act allows federal prisoners to sue the United States and the BOP by name as well as the responsible BOP officials. 5 U.S.C. §§702-03. The APA authorizes the District Courts to review administrative action by the BOP. 5 U.S.C. §706. Generally, the APA requires the Court to set aside BOP action, findings and conclusions found to be unlawfully arbitrary, unconstitutional, excessive, or without observance of BOP program statements and regulations. The APA covers injunctive actions, whereas *Bivens* addresses damages actions.

(1) **Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346 (b)**: The Federal Tort Claims Act (FTCA) allows prisoners to sue the United States for injuries they suffer while incarcerated in federal prisons. A tort is a civil wrong as opposed to a criminal wrong. Some crimes also can give rise to an accompanying tort action. Intentional infliction of injuries (i.e. assault and battery, false arrest and/or imprisonment, malicious prosecution, trespass) are not actionable under the FTCA. The FTCA is not a device for enforcing constitutional rights or for challenging conditions of confinement. Rather, the FTCA gives a federal prisoner the right to sue the United States because prison officials negligently caused or permitted injury to the prisoner. An important consideration in this type of case involves holding employers (like the U.S.government) responsible for the injurious actions of their employees. See: Jackson v. United States, 413 F. Supp. (D.C. Ohio 1976).

Compensation for work-related injuries to a prisoner can only be awarded under the Federal Prison Industries' Inmate Accident Compensation System. Sturgeon v. Federal Prison Industries, 608 F. 2d 1153 (8th Cir.1979). Unintentional injury claims can be made under the FTCA. To establish a right to compensation, an inmate will have to allege and prove that the prison official was negligent and the negligence resulted from a non-discretionary duty. It will also be necessary to show the negligence caused the harm. Like any other legal action by a prisoner, the inmate must exhaust all administrative

remedies before filing a claim in court. The FTCA "tort" claim will serve to exhaust your remedies. If your claim is denied, then you may file in court.

Ask your BOP case manager for the Form 95 "tort claim" form, fill it out and submit it. The Regional Counsel has up to six months to respond. If a negative response is issued, then the inmate may file in federal court.

An important requirement in these cases is establishing personal involvement of officials, "line" staff, and supervisory staff. We will address each of these below.

Establishing Personal Involvement

Prison officials: In cases claiming prison officials have violated your constitutional rights, you will be filing a §1983 suit or a *Bivens* action (if you are a federal prisoner). In these kinds of actions it is essential for you to allege and prove specific individuals were "personally involved" in the violation(s).

If you fail to prove to the court that some official was "personally involved," your case will not be successful. Even if you were badly hurt or suffered a real violation of your rights, your claim will not lead to a court ordered remedy unless you can name and prove some person or persons committed the violation or allowed the violation to happen.

As the moving party (plaintiff) in this type of action you must name a known defendant or defendants who is (or are) personally responsible for the violation of your constitutional rights. In your lawsuit the named defendants might include the officer directly involved, his supervisor, the warden, and even the Commissioner of Corrections or Director of the Bureau of Prisons. The information below will offer some advice about how to collect facts and write your complaint to show the defendants you name were actually "personally involved."

Generally, it is easiest to prove personal involvement of correctional officers where the injury can be seen and felt. (i.e. a beating, inflicted by an officer present at the scene of the violation, that leaves visible scars, bruises or cuts). Another example is the refusal of medical treatment resulting in harm that is verifiable by medical examination.

When you prepare your complaint, you must name each and every defendant in the heading (caption). In the "Statement of Claim," you must state in separate numbered paragraphs what each of those named defendants did and how and why each was directly involved. The personal involvement in the example of a beating might include the name of the guard that struck you as well as the name of any correctional officer who stood by and let the abuse happen.

In Byrd v. Brishke et al, , 466 F. 2d 6, 11 (7th Cir. 1972), the Court noted, "We believe it is clear that one who is given the badge of authority of a police officer may not ignore the duty imposed by his office and fail to stop other officers who summarily punish a third person in his presence or otherwise within his knowledge." (Emphasis added) The

Byrd case states the applicable test for personal involvement: Was the violation of civil rights committed (1) by the defendant, (2) in the presence of the defendant, or (3) with the knowledge and acquiescence of the defendant? If the answers to the above are "yes" then personal involvement has been shown. This proof can then be used as a basis for a jury to render a judgment against such defendant(s). If, however, this showing of personal involvement is not proven, a judge or jury would not be allowed to find the defendant(s) liable or to render a verdict against them.

There are many judicial decisions supporting and applying the principles outlined in the Byrd case. These cases can be considered and used when you need to prove or argue issues concerning personal involvement of non-supervisory officials who either participate directly in a civil rights violation or who fail to act when they should to prevent a violation. However, keep in mind that the Court does not want you to list case law in your Complaint. Save it for opposing any pretrial defense dismissal or summary judgment motions.

Considering the importance of learning names and gathering evidence, below are a few suggestions to help out:

1. Keep a journal to record facts. (Names, badge numbers, dates, etc.)
2. Any papers or documents you file, submit or receive, either from the court or in prison, should be copied. Send a copy to family or a trusted friend so you can successfully challenge a claim that such submissions did not exist or said something other than what you know they did.
3. Use a numbering system on all papers you file or submit showing the page number and the total number of pages on each page. For example, if you are submitting a three page document, on page one write "page 1 of 3" and so forth.
4. Date and sign everything. Insist that any disposition of a grievance be in writing. If this request is refused, submit a grievance documenting the refusal.

Establishing Personal Involvement of Supervisory Staff:

Your complaint may name any supervisory staff who allowed a violation to happen. To be able to sue a supervisor, captain, warden, or the commissioner of corrections you must show how each was knowingly responsible for causing or allowing the violation.

Supervisors are not necessarily liable for unlawful acts committed by prison employees. The legal doctrine of *respondeat superior* is not applicable in civil rights cases. *Respondeat superior* means the liability for civil wrongs or violations of duties committed by an employee is extended to cover their employer and supervisors. Therefore, you must be able to show there were acts or failures to act on the part of the supervisory staff which allowed or caused the incident and the resulting harm. The following approaches have had some success:

Knowledge and acquiescence: If supervisory officials (1) know of violations of your rights, (2) are in a position to correct them, and (3) fail to do so, they may be found to have personal involvement and responsibility for the injuries you have suffered. An

obvious example of this situation is where supervisory officers are present at a beating and fail to intervene. Note how such a set of circumstances meets the above three-part standard. See: Cox v. Treadway, 75 F. 3d 230 (6th Cir. 1996), Bruner v. Dunaway, 684 F. 2d 422 (6th Cir, 1982); Harris v. Chanclor, 537 F. 2d 203, 306 (5th Cir. 1976); Curtis v. Everrette, 489 F2d 516, 518 (3rd Cir. 1973), cert. denied 416 U.S. 995 (1974).

Courts on occasion have inferred knowledge and acquiescence to a supervisor in cases where the court found that (1) a higher-ranking official would normally exercise reasonably close supervision over the subordinate directly involved and (2) the subordinate who inflicted the constitutional deprivation did so openly and repeatedly. McClelland v. Facteau, 610 F. 2d 693 (10th Cir. 1979).

Finally, some cases have held that personal knowledge and acquiescence may be established where a "series of incidents" or "practices or events so widespread, frequent, and prevalent as to constitute regular patterns" insure that supervisory officials must have been aware of them. See: Allen v. City of Chicago, 828 F. Supp. 543 (N.D. Ill. 1993); Robert. v. Lane, 530 F. Supp. 930 (N.D. Ill. 1981); Bishop v. Stoneham, 508 F. 2d 1224, 1226 (2nd Cir. 1974). Also see Ramos v.Lamm, 639 F. 2d 559, 573 (10th Cir. 1980)

Official Policy or Practice: Another indicator that an official has "personal responsibility" can sometimes be found by examining the policies. Officials establish policies or write regulations. Thus, they may be liable even if they are not directly involved in enforcing those policies. In Hearn v. Morris, 526 F. Supp. 267 (E.D. Ca. 1981), an official who wrote a rule resulting in improper interference with an inmate's mail was held liable. The rule was unconstitutional because it was unnecessarily broad under a fundamental rights analysis. The other side of this approach can sometimes shield the policymaker from liability if the policy maker has written a policy to protect a right, and a line-officer violated that policy.

It is helpful also to consider the possibility of finding liability because of the absence of a policy. If supervisory officials have failed to establish ways to deal with problems they knew about or should have known about, they may be held liable for the consequences. In this type of situation "personal involvement" is shown by (1) the official's knowledge of the problem or evidence that proves they should have known about the problem and (2) their failure to implement and carry out a definitive policy directing subordinates as to how they should address the problem. In Williams v. Heard, 533 F. Supp. 1153 (S.D. Texas 1982), the sheriff failed to release a prisoner after a grand jury decided not to return an indictment. The evidence in the case showed there was no procedure for insuring orders for a prisoner's release were entered on the prisoner's "jail card." Therefore, the sheriff was held liable based upon his failure to adopt reasonable internal procedures to address this problem, which he either knew about or should have known about.

You should also be aware that, in some situations, there are regulations or statutes imposing an affirmative duty on an official. When an official fails to perform according to the requirements of such regulations or statutes, it may be possible to establish liability

on the part of the official for any harm directly related to his failure. Liability can sometimes be found even if the official claims he was unaware of the constitutional violation that resulted from his failure. On the other hand, statutes may also excuse some classifications of individuals from legal responsibility. See: Clark v. Sierra, 837 F. Supp. 1179 (M.D. Fla. 1993); Polk v. Montgomery Co. Md., 548 F. Supp. 613 (D. Md. 1982)

Failure to Train and Supervise: The failure of supervisory officials to train and supervise their subordinates may also be used to establish liability on the higher official. In O'Connor v. Keller et. al., 510 F. Supp. 1359, 1374 (D. Md. 1981) a cell search confrontation between inmate O'Connor and a guard led to O'Connor being beaten and then held in an isolation cell for forty-eight hours. The court found that O'Connor's detention in the isolation cell where he had no bed, mattress, or blanket and without a working sink or toilet to be a violation of the Eighth Amendment. The court went on to state that Superintendent Keller could not be held liable under a theory of *respondeat superior*, but he could be held accountable for failing to train and supervise officers in the proper use of isolation cells.

Another important consideration in failure to train or supervise cases is the requirement to demonstrate sufficient association between the supervisor's action or failure to act and the subordinate's conduct that was the direct or "proximate" cause of a constitutional deprivation or injury. For example, if you bring an action based upon a violation of your right to counsel under the Sixth Amendment, a failure by the supervisory officials to supervise or train staff about special religious dietary requirements would not meet the burden of proof required. However, if the staff would not allow you to meet with your attorney to prepare your case for trial because their supervisor failed to instruct them or make policy covering this area, this would be an important matter that the court would consider.

Keep in mind that for a court to grant relief on a failure to train or supervise issue the court must deem the failure to be so serious that it constitutes "gross negligence." A case in which a guard left a prisoner's cell unlocked, resulting in someone taking the inmate's trial transcript, did not violate a "fundamental and reasonably well defined" constitutional right, and therefore, higher officials could not be held liable for failure to train or supervise. Mere negligence is not enough to establish liability in failure to train and supervise cases. In hiring and failure to train issues, establishing a case for liability against the supervisory officials requires a showing that there was a "complete failure" to train or the training was in "reckless disregard" of the prisoner's constitutional rights. See: Kibbe v. City of Springfield, 777 F. 2d 801 (1st Cir. 1985) and Leite v. City of Providence, 463 F. Supp. 585 (D. RI. 1978).

Whether an individual is filing a §1983 or *Bivens* action, there must be a showing of "personal involvement" on the part of each named defendant. When a prison official or staff member challenges your claim about his personal involvement, whether by filing a motion to dismiss or a motion for summary judgment, you can respond and explain how the facts you alleged in your complaint come within one of the following six (6) legal theories of liability:

1. Actual presence and/or participation in acts or failures to act that violated constitutional rights.
2. Knowledge of and acquiescence by supervisory officials in constitutional violations by subordinates.
3. There are written policies or support for unwritten policies and practices that resulted in violations of constitutionally established civil rights.
4. Failure to establish policies or procedures for known problems that officials knew or should have known would result in constitutional violations.
5. Failure to perform a statutory or regulatory duty, even where the supervisory official does not know about the resulting constitutional violations.
6. Failure of supervisory officials to train or supervise subordinates.

Filing / In Forma Pauperis / Service of Process

Filing the complaint: Earlier in this bulletin, we reviewed complaints. Once a complaint has been prepared it must be filed with the court. The District Court Clerk's Office of your district provides forms and instruction sheets for filing each type of action discussed in this bulletin (except for a FTCA action, which can be obtained within the institution where the inmate is housed). Write a simple letter to the Clerk's Office in your district describing the forms you need. It is not necessary or advisable to go into detail about the facts of your case in your letter. The Clerk probably does not care. The main address for the Clerk's Office for the U.S. District Court for the Middle District of Pennsylvania is P.O. Box 1148, Scranton, PA 18501.

In Forma Pauperis: Filings with the courts require filing fees. The present filing fee is $350.00 for any lawsuit other than a petition for habeas corpus, (which has a $5.00 filing fee). The only way to avoid paying these fees is to submit a claim to the court that the inmate is indigent (without money). This claim is called a motion to proceed *in forma pauperis* (IFP). If you have enough money in your account, the court will not grant the motion, even if you assert there are other things that you need the money for.

Summons and service of process: After your complaint is filed, it will be necessary to provide all of the named defendants with a copy. This notification process is called "service of process." Unless an inmate can prove a defendant cannot be served, the court will not take any action on the case until service has been accomplished. The basic principle at work here is "notice" (a fundamental right to be informed of any court action where a party is named as a defendant). Rule 4 of the Federal Rules of Civil Procedure governs this process. The Court will direct the U.S. Marshal to mail a copy of your complaint to the administrative office of the prison that employs your defendants after granting your IFP motion.

When someone else makes service, they will need to sign a brief statement (affidavit) affirming he or she served the defendant. All of these signed statements must be forwarded to the court. Remember to make and keep a copy of everything.

Responses to the Complaint

Defendant's Answer and Reply: The defendant(s) is required to answer the allegations of the complaint. The Court could grant judgment in your favor if the defendants default by failing to answer the complaint. Private citizens must answer a complaint within twenty (20) days. Government defendants are given sixty (60) days to respond. The response to the complaint may come in several different forms.

If the response takes the form of an Answer, it is supposed to correspond to each of the allegations in your complaint and either admit or deny the facts set forth in the complaint. The Answer will usually go beyond mere denial and assert defensive claims or their version of the facts about the incidents and issues. These additional responses often take the form of what is known as affirmative defenses. In the same way that the prisoner / plaintiff is required to give notice of the allegations against the defendant(s) in his complaint, the defendant(s) must raise their affirmative defenses or risk a court ruling that will not let them raise it later. Notice works both ways.

Another common form of response to an allegation is one that says, "Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation." The court will treat this response as a denial.

Frequently, defendants will plead inconsistent defenses that are logically or legally incompatible. For example, the defendant may claim a supervisory official was not present when the inmate was beaten. He also can claim reasonable force was used. Pleading inconsistent defenses is permitted under the Federal Rules of Civil Procedure (see Rule 8(e)(2)). Most state rules of procedure also allow this type of pleading.

The Answer may contain counterclaims. Counterclaims usually are not filed in prisoners' cases. If a counterclaim is made, it will be necessary for the inmate to answer the allegations. The name of the pleading used to answer counterclaims is a "Reply."

Motion to Dismiss

The primary focus of the complaint and answer is centered on factual disputes. Rule 8 (a)(2) requires the complaint to have "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" The motion to dismiss focuses upon challenges to the legal basis for the action.

If there is a factual dispute, a motion to dismiss is not the proper procedure to challenge the factual allegations. Motions to dismiss are often filed with an "alternative" motion for summary judgment (see Rule 56 of the Federal Rules of Civil Procedure). It is at this stage that many *pro se* prisoner cases end. Below we will review seven (7) defenses permitted under Rule 12 of the Federal Rules of Civil Procedure:

1. Lack of jurisdiction over the subject matter – An assertion that the kind of claim in the complaint is one that the court does not have authority to decide (e.g. a divorce action in federal court).

2. Lack of jurisdiction over the person – This is sometimes called *in personam* jurisdiction. This is frequently raised when a named defendant contends that there are insufficient contacts between themselves and the people and/or institutions that are a part of the lawsuit to provide the court with authority to exercise judicial power over them.
3. Improper venue – Venue means location. The court may order that a case be transferred to another court if it agrees that the location of the court the case is filed in is improper. For example, if a prisoner housed in the middle district is making a claim about an incident that happened in the prison in the middle district, but he files his complaint in the eastern district, the court would then send the case to the middle district.
4. Insufficiency of process – Challenges the form of process under Rule 4 (b) of the Federal Rules of Civil Procedure.
5. Insufficiency of service of process – Challenges the manner in which legal documents were served upon a party or of failures to provide service.
6. Failure to state a claim upon which relief can be granted – This is known as a "12(b)(6) motion." It is the most frequently employed and successful of the motions to dismiss in prisoner cases.
7. Failure to join a party under Rule 19 –(Compulsory joinder) A claim that some person necessary to the case was not named as a party.

Opposing a motion to dismiss

For a complaint to survive a motion to dismiss challenge, the complaint must state a *prima facie* case averring sufficient facts that, if proven, would entitle the prisoner to relief. The court is required to review the alleged facts "in the light most favorable" to the claimant (plaintiff) and only dismiss the action if it appears inconceivable that the plaintiff could produce reliable evidence justifying relief under any legal theory. Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). The motion to dismiss must be supported with a legal brief. This brief will contain case citations and arguments to the court explaining why the government believes the inmate's case should be dismissed. It is the obligation of the prisoner/plaintiff to respond to this brief with a Brief in Opposition to Defendant's Motion to Dismiss. In your brief, you should cite cases and make arguments as to why you contend that the case should not be dismissed. Remember to argue how the government's attorney is failing to present his argument about the facts "in the light most favorable" to you, as required by law, in every single instance that it applies in his brief.

Begin your brief by researching the cases cited in the government's brief. As you review these cases, you will need to consider the law and the facts. Below are some areas of consideration to keep in mind:

1. Has the government's attorney misrepresented the facts? If so, explain why you think so. Be disciplined in how you do this. It is not advisable to call for sanctions against the government attorney nor is it profitable to call him names or accuse him of fraud or other misdeeds. Simply explain how his interpretation or recitation of the facts is in error.

2. Distinguish the facts in the cases in the opposition's brief from the facts in your case. For instance, let's suppose your case involves you being prohibited from accessing the prison's law library. The government's attorney cites a case where a motion to dismiss was granted and argues that the court should apply that case precedent to your case. Upon review you find the prisoner in that case was not permitted access to a recreation area. You may be able to distinguish your case by pointing out the more significant and constitutional issues involved with being able to use the law library to prepare a case and the less important denial of an opportunity to play a little hoops. You would then argue the difference between the cases means the case the government's attorney cited should not be applied in your situation.

3. Find cases like yours that have survived a motion to dismiss challenge. You may also reasonably assume that if you find a case that ruled favorably on a case similar to yours, the courts have decided similar claims should not be dismissed. Courts give a great deal of weigh to following the decisions that have come before. Such cases are especially useful if they were handed down by the court you are in, a higher court in your circuit, or by the Supreme Court. However, other court decisions may also be cited as having reasonable, legally correct holdings that the court should apply in the case before it, even if the court is not obligated to follow those cases.

Note: Remember it is very important to Shepardize all the cases you read in the government's brief and those you find for your brief. Shepardizing is explained in the Lewisburg Prison Project's bulletin, Legal Research (Bulletin 1.2).

Summary Judgment

"Motions to Dismiss" often are converted into "Motions for Summary Judgment" under Rule 56 of the Federal Rules of Civil Procedure. This conversion is authorized by Rule 12(b). Most courts will consider this motion as a "functional equivalent" of a 12 (b)(6) motion and simply apply the same rules of construction/ interpretation.

The complaint must be construed liberally. This means the facts must be reviewed in the light most favorable to the plaintiff. The court is not supposed to weigh the dismissal issue down the middle. Rather the court is obligated to give the plaintiff's complaint a "sympathetic perusal." Every inference fairly deducible from the well-pled allegations of the complaint should be accepted as true by the court for purposes of ruling on the motion. This standard of review is also applicable to facts alleged "on information and belief." Liberal standards of review are particularly appropriate with *pro se* complaints.

In deciding a motion to dismiss, the court may consider documents which are attached to or submitted with the complaint, O'Brien v. DiGrazia, 544 F. 2d 543 (1st Cir. 1976). The court may also consider legal arguments presented in memoranda and briefs, as well as "matters outside the pleading" when the motion is alternatively styled as a

motion for summary judgment. Frequently they include affidavits, deposition testimony, answers to interrogatories, and admissions.

Other Early Pleadings and Procedures

Amending the complaint: Rule 15 of the Federal Rules of Civil Procedure provides a mechanism for amending the complaint after it has been filed. Rule 15 (a) provides that "[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served[.]" Until an Answer is received (or a motion to dismiss or the alternative summary judgment motion have been granted), an amended complaint may be submitted without waiting for permission from the court or the parties that you are suing. To amend a complaint once a response has been made, there must be permission from the court or written consent from the parties being sued.

The rules concerning amendment of complaints are supposed to be administered liberally. That is, allowing amendment is favored over denying an opportunity to amend. The idea behind this principle is that pleading rules are supposed to facilitate the settlement of disputes by a trial "on the merits." See Reaves v. Sielaff, 382 F. Supp. 472 (E.D. Pa. 1974). Although the policy of the law favors allowing amending complaints, the court may deny permission if it finds undue delay, bad faith, dilatory motive, undue prejudice to the opposing party, or repeated failure to properly amend.

Rule 15 (b) allows a motion to amend the pleadings. This section can be used when issues come up at trial that are not clearly within the scope of the facts alleged in the complaint. The purposes of using this section are generally to "perfect the record" in case there is an appeal and to address an objection that evidence being offered does not relate to matters within the pleadings.

Rule 15 (c) addresses "relation back." A hypothetical use for this rule is shown in the following example:

Assume a prisoner files a *pro se* civil rights complaint twenty (20) months after the incident that violated his rights. Assume also he is in a jurisdiction where the statute of limitations is two years (24 months). Finally assume twenty-five months after the violation the prisoner finds out information that leads him to believe the staff willfully and maliciously (as opposed to carelessly or negligently) violated his rights and two additional staff members were implicated in the incident.

The inmate can ask the court to apply Rule 15 (c) and allow him to amend the complaint to add the other officers names as defendants. He can also seek permission to make a claim for punitive damages that he couldn't ask for before under the negligence claim, based upon the new information about willful and malicious conduct.

The court will consider whether or not the claim or defense a party wants to add arose from the conduct, transaction or occurrence found in the original complaint. If the court finds a sufficient relationship and no undo prejudice, it may allow the "relation back."

There are other requirements also necessary to satisfy Rule 15 (c). Among these other considerations would be a determination of whether the people you wish to add knew, or should have known, they might be subjected to answering to the allegations of the complaint.

Supplemental pleadings and Joinder: Rule 15 (d) permits a party, upon motion, to serve a "supplemental" pleading setting forth facts which have happened since the date of the original pleading. This is useful where there is a "continuing violation." See: United States v. IBM Corp., 66 F.R.D. 223, 228 (S.D.N.Y. 1975). Courts are supposed to favor motions for joinder under a rationale that it saves costs for the parties and reduces crowding of federal court dockets.

Rule 19 (a) deals with parties that must be joined to an action before it can proceed. This type of joinder is called "compulsory joinder." The consideration of whether a party comes under this rule is addressed by answering the following questions: Will their absence mean that complete relief cannot be accomplished among the parties already in the case? Would their absence mean that their interests will be jeopardized or do they pose a threat to those already a party to the action? Rule 19 (b) lists the reasons which a court, using its discretion, may use to implement Rule 19 (a).

Rule 20 allows the "permissive joinder" of plaintiffs if (1) the occurrence of some question of law or fact is common to all parties, and (2) plaintiffs claim a right to relief related to or arising out of the same transaction, occurrence or series of transactions or occurrences. Rule 20 allows the "permissive joinder" of defendants using the same qualifications as set forth above for plaintiffs except that the claims are being asserted against the defendants.

Class actions: Class action cases can be quite complicated and present a difficult challenge even to attorneys that have knowledge and experience in those type of cases. We recommend you find legal counsel if you wish to pursue a class action lawsuit. If you have no private counsel in mind, file a motion for appointment of counsel.

Class action cases are addressed in Rule 23. Class action cases in the federal court must meet all the requirements of Federal Rule of Civil Procedure 23 (a) and at least one of the requirements of Rule 23 (b), before the court will consider a class action suit. To certify a class as acceptable to proceed Rule 23 (a) requires that (1) the class be so numerous that joinder of all the 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 class or defenses of the class, and (4) the representative parties will fairly represent the class. The class you seek to identify must be sufficiently definite so that it can be determined whether or not a particular person can be identified as a member. However, the class does not have to be so precise that every potential member can be identified. See: Carpenter v. Davis, 424 F. 2d 257 (5th Cir. 1970).

Discovery

Discovery is the disclosure by the parties of facts, titles, documents, or other things, which are in the exclusive possession or knowledge of a party opponent. These things must be necessary and relevant to the case to be considered discoverable.

Under Rule 26 (a) Federal Rules of Civil Procedure, "parties" may obtain discovery by one or more of the following methods:

- Depositions upon oral examination.
- Depositions upon written questions.
- Written interrogatories.
- Production of documents or things or permission to enter upon land or other property.
- Physical and mental examinations.
- Requests for admissions.

According to Rule 26(b)(1), the parties may obtain discovery regarding any matter, not privileged (protected by some rule or principle of confidentiality), if the material is relevant to the subject matter of the case or relevant to potential damages. This includes "the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter."

Many inmates make the mistake of filing with the court their requests for discovery or motions seeking permission to start discovery. Save your postage. The court does not want you to file your request for discovery with the court. Instead, send it to the defense attorney, and file it with the court later only as proof where the defendants failed to respond by the deadlines imposed by the Federal Rules of Civil Procedure.

Also, you generally do not need court permission to conduct discovery. You usually should wait until the defense attorney enters his appearance so that you know to whom to send your requests. If the defense attorney has a problem with your requests, then that attorney can file a motion for a protective order.

Depositions and oral examination: Under Rule 30 (a) Federal Rules of Civil Procedure any party may take the testimony of any person, including a party, by deposition upon oral examination after the complaint has been filed and served. However, court permission is required if the plaintiff seeks to take a deposition prior to the expiration of thirty (30) days after service of the summons or complaint upon any defendant. A party desiring to take the deposition of any person is to give reasonable notice, in writing, to every other party to the action. See Rule 30 (b) for the requirements of such notices.

Rule 30 (c) requires the examination of deponents (people being questioned at a deposition) be according to the Federal Rules of Evidence and is to be recorded by a stenographer or by other approved methods. See Rule 30 (b)(4).

Obtaining witness depositions obviously is difficult for inmates. Another difficulty for prisoners is the expense of hiring a stenographer. Stenographers have a basic appearance fee, charge for time, and a per page expense that can make depositions quite costly.

Depositions upon written questions: Rule 31(a) of the Federal Rules of Civil Procedure allows for any party to take the testimony of any person, including a party, by deposition upon written questions. However, deposition of a person confined in prison may only be taken by permission from the court.

The notice regarding written depositions shall state (1) the name and address of the person who is to answer them and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. Depositions upon written examination avoid the custody-related issues of oral depositions but not the expense problem. Also, you or your legal representative is not present so you will not be able to ask follow-up questions if an evasive or non-responsive answer comes back to you.

Interrogatories to parties: Rule 33 of the Federal Rules of Civil Procedure provides that any party may serve upon any other party "written interrogatories" to be answered by the party served. These may be served without leave of court with or after service of the summons and complaint.

Each question is to be answered separately and fully in writing, under oath, and signed by the person answering the questions. Respondents normally have thirty (30) days to respond to both interrogatories and requests for production of documents. An advantage of interrogatories over written depositions is the avoidance of expense for an "officer" (court reporter / stenographer) to ask the questions and record the answers. However, interrogatories may only be served upon parties, not witnesses.

Production of documents: Rule 34 of the Federal Rules of Civil Procedure provides that any party may serve any other party a request to produce for inspection or copying any documents or other information, compilations, or any other "tangible things" that may be tested, sampled or copied.

This is a very useful discovery procedure for prisoners because, (1) it may be served without permission from the court, (2) at any time after service of the complaint and summons, (3) it is not costly for the inmate, (3) it does not raise the custody related problems that oral depositions do, (4) it may be repeated with additional requests as many times as necessary, and (5) Rule 34 (c) allows requests to non-parties for similar productions.

Other discovery rules: When the mental or physical condition of a party is in controversy, the court may order the party to submit to a physical or mental examination by a physician or like professional. Such an order may only be made for good cause.

Rule 36 provides that any party may serve upon any other party a written request for admission to the "truth of any matter" relevant to the action. These requests for

admissions are helpful to narrow the issues that will require evidence to prove. A word of caution, however: be very careful about the wording of such requests because if something is admitted the court may regard the admission as evidence.

United States Magistrates in Prison Litigation: Many prisoners believe that either a judge or judge with jury automatically will hear their case. However, in many jurisdictions and upon consent by all parties, a U.S. magistrate can act as a judicial officer and conduct any and all proceedings in a civil case.

By hearing cases, magistrates help federal judges control their busy court schedules. Keep in mind that a decision by you to allow a Magistrate to hear the case is entirely voluntary. However, even if your case does not go the Magistrate for disposition, expect to receive orders, memoranda, and reports from the Magistrate at various stages in the case. Judges assign certain tasks to the Magistrate even though the Judges retain control over the proceedings. Orders from a Magistrate carry the authority of the court and must be followed. Challenges to their opinions and orders are called "exceptions." The District Judge will consider and rule upon exceptions before the judge rules on any motion before the court.

Trial: Criminal trials and civil trials operate the same in some manners and different in others. The Sixth Amendment only guarantees you a criminal trial by jury. There is no such guarantee in a civil case. There are many cases that are disposed of without the inmate ever appearing before the judge. Additionally, a civil trial by jury requires anywhere between six to twelve jurors in accordance with local court rules. Finally, only judges, not juries, can decide injunction cases.

If your case does merit a trial before a judge, you will need to familiarize yourself with the Federal Rules of Evidence and do some research about trial advocacy.

As the moving party, you bear the burden of proof. In a civil case, this burden is by the preponderance of the evidence. You have met this burden of proof if the proverbial scales of justice tip ever so slightly in your favor as if the score was 51 to 49 for you.

As plaintiff, you will put on your case first. The government's attorney is allowed to cross-examine your witnesses. In your own testimony, you will have an opportunity to tell the court your "story." The government's lawyer can question you.

Each side may call witnesses. The witnesses called by each side may only be asked non-leading questions (a leading question is one that suggests the answer within the question, and generally can be answered yes or no). On cross-examination leading questions are allowed.

There are many possible objections to questions and testimony, including, but not limited to:

- Asked and answered – This objection is used to stop an opponent from repeating an answer to try to emphasize the answer or to get the witness to change the answer.
- Hearsay – Hearsay is the repeating in court of a statement made out of court by someone other than the person testifying offered to prove the truth of the statement. There are many exceptions to the hearsay rule of evidence.
- Objections to foundation – These objections are used when a question assumes facts that have not been offered yet in court. Sometimes a judge will allow such questions provided the necessary information is properly provided later.
- Relevance – The objections on relevance are used to keep out information about matters that do not tend to prove or disprove the allegations of the case.

There are too many objections, procedures and practices that go into conducting a case to attempt to summarize them all here. We suggest you find a book on trial advocacy and evidence and spend some time reviewing the material. Note the rule or case on your trial notes worksheet. Don't try to depend upon your memory.

Different judges have their own preferred method for dealing with objections. Some want you only to say "objection," and they will then ask you for the grounds (rule of evidence) you are relying on, and in some cases, to argue why you believe your objection is proper. It is a good idea to ask the judge, before the taking of testimony begins, how he or she wishes for you to approach objections. This will give you some guidance and express to the court that it is your intention to be respectful and orderly in your conduct of the case. Usually, the judge will hold a pretrial conference where the judge will tell you his or her preferences and answer any questions you might have.

A final word on objections. You must make your objection at the earliest point you become aware a question or answer is not proper. If you wait too long or fail to object, the issue may be deemed waived (meaning you have given up your right to challenge). An appellate court may determine your failure to object meant the issue had not been preserved for review on appeal.

Take time to organize your materials and notes so you can refer to them easily during trial. Prepare a list of questions for each witness you will call or cross-examine. You don't have to follow it strictly if circumstances or information require modification.

Finally, there will be the fact that you are a prisoner with all the prejudice and unfair emotional baggage that comes with it. You also will have to understand that there will be accusations and whispers that your credibility is automatically suspect because you are doing time. If your cause is right, let that be your focus. You will not overcome bigotry with bigotry. Stand with dignity, not resentment.