ANATOMY OF A PRISONER CIVIL RIGHTS CASE
An effective, efficient and economical approach

Sources: "Federal Court Prison Litigation Handbook"; www.ilnd.courts.gov
Lectures of J. Chapman: www.illinoislegaladvocate.org
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12:30 Proposed Local Rule 87
Kristine Seufert, Staff Attorney and Pro Bono Coordinator, S.D. of Indiana

12:45 Initial Action & First Steps - You've been appointed to represent a prisoner in a pro se action. What next?

- Read the Order of Appointment carefully
  - Note name of prisoner and case number
  - Scope of representation
- Obtain:
  - The pro se Complaint
  - The docket sheet
  - Any critical orders and adversary pleadings, if any;
  - The Court's 28 U.S.C. § 1915A (screening) order, if any.
- 28 USC § 1915A - The Court's mechanism for review of pro se complaints.
  - The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

    (b)GROUNDS FOR DISMISSAL.—On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint—

    (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or

    (2) seeks monetary relief from a defendant who is immune from such relief.
  - The 1915A Order: (See samples, Appendix 1, attached)
    - § May contain:
      - That a cause of action has been properly alleged;
      - What causes of action or parties have been dismissed;
      - Whether the complaint has been dismissed, but not the action; and that appointed counsel has a set period of time to do FRCP 11 due diligence and file an amended complaint if appropriate;
      - Arrangement of narrative pro se allegations into counts;

Establishing a Sound Relationship with the Client

- Determine where your client is located
  - If in prison operated by Indiana Department of Corrections, check the IN DOC's website – www.in.gov/idoc
  - If in federal custody, check BOP website – www.bop.gov
  - County Jails typically searchable by County website or Sheriff's Office website
- Write to client immediately
  - Inform him you are reviewing his complaint, doing other/additional investigation, and plan to see him on ___ date, 2016.
  - Double check the applicable website to determine client's registration number.
  - Envelope should include:
    - Client's correct name and IDOC/BOP identification number;
    - The prison's address for inmate mail;
    - "Confidential attorney-client communication"
    - Your name as it is stated on the Roll of Attorneys website. The prison will check your registration
  - Consider a client retention letter (Appendix 2)
    - The form attached raises, among other matters, the following points:
      - The scope of your services;
      - How long your services will continue
      - Other associates in the firm may assist, but you remain in charge
      - Your responsibilities as the appointed lawyer
      - You will obtain the client's approval for important decisions
      - You will keep client informed of case progress;
      - Policy on telephone calls;
      - Client's responsibilities;
      - Fee agreement if appropriate. Keep track of time; court approval required. (No attorney fees may be sought if the appointment is for the limited purpose of assisting with settlement).
- Other Considerations:
  - Keep in mind the client is imprisoned; lack of resources, lack of access, and difficult to communicate with you
  - Get client's materials and thoughts on the matter
  - Be affirmative in analyses and recommendations, keeping in mind the client has the last word (within ethical bounds)
  - Pay attention – The S.D. of Indiana is not aware of any pro bono attorney recruited by the court to represent a prisoner in a civil case that has faced a disciplinary or malpractice action. That said, prisoners know how to complain to disciplinary commission.

- Visit the client as soon as possible
    - Determine where the client is (again) – prisoners are transferred frequently
    - Contact the prison or jail's legal liaison or coordinator
        - When can you visit
        - What must you submit, if anything, in order to visit
        - What can you bring with you
        - Do not bring laptop, cell phone
    - Write your client and inform him/her you're coming
        - Advise client what documents to bring to visit, esp. grievances (see section on Exhaustion of Administrative Remedies below), and all other documents
    - Determine if client is in segregation; alters nature of visit
    - Bring state ID and bar card
    - If client in prison 150 miles or more from home or office, consider travel time
        - Inquire as to how early you may visit
        - Inquire about possible video conference with client as alternative to in person visit
    - Telephone call to client
        - Discuss procedure with legal liaison
        - Make sure call is secure

2:00 Break

2:15 Exhaustion of Administrative Remedies – Deal with First!!!!

- The Prison Litigation Reform Act (PLRA) 42 U.S.C. § 1997e:
    - (a) Applicability of administrative remedies. No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.
- Administrative regulations regarding grievance procedure:
    - BOP – 28 C.F.R. § 542.10; et seq.
    - IN DOC – Ind. Code § 11-11-1 (Commissioner shall implement a departmental procedure).
- PLRA means what it says: ***See Pavey v. Conley*, 544 F.3d 739 (7th Cir. 2008)**
    - Applies even if administrative process cannot give relief prisoner seeks ($)
    - Affirmative defense that can be waived
    - Exhaustion must occur **before** suit is filed, cannot occur after
    - If no exhaustion or excuse for no exhaustion, then court must dismiss without prejudice (unless no way exhaustion could ever occur)
    - There is "wiggle room" despite prisoner's lack of strict compliance
        - Note: for excellent analysis and unlimited citations, see "The Prison Litigation Reform Act" by John Boston

        - § www.illinoislegaladvocate.org/uploads/8032theplra0312.pdf
            - Do NOT print – very long
    - Court must resolve exhaustion issue, if raised, before any other aspect of case proceeds;
        - § Hearing before the trial judge, not a jury
- In the S.D. of Indiana
    - The defendant must raise this affirmative defense in Answer.
    - When this happens, the court sets a schedule to resolve this defense through summary judgment.
    - If there is a material fact in dispute the judge will hold a hearing.
    - Counsel is often sought for the limited purpose of resolving this affirmative defense.
    - In defending against such a claim:
        - § Although failure to exhaust is an affirmative defense, start preparing immediately
        - § See if pro se complaint contains grievance materials as exhibits or if client has made allegations about his attempts to grieve
        - § Obtain from client all materials on grievances/exhaustion
        - § If defendant's answer raises failure to exhaust, ask opposing counsel if definitely pursuing; if not, ask that defense be withdrawn, esp. when documents indicate exhaustion has occurred
        - **§** If defendant does pursue this defense, the court will likely sua sponte stay all other proceedings until the exhaustion issue is resolved.

The Amended Complaint

- Once 1915A order is issued and exhaustion issue examined, determine whether an Amended Complaint should be filed.
- Considerations:
    - **o** The pro se complaint is verbose, disorganized, difficult to follow;
    - **o** The trial judge has directed you to file an amended complaint
        - **§** (after performing FRCP 11 due diligence and concluding claim is viable);
    - **o** The trial judge in the 29 U.S.C. § 1915A order has dismissed certain pro se claims and you agree with the dismissal;
    - **o** Your investigation has unearthed causes of action not present in the pro se complaint;
    - **o** The pro se complaint names improper parties or parties you have determined are not responsible under applicable civil rights provisions
- What claims should I include in the Amended Complaint? Keep it simple!
    - **o** Causes of action are based on the U.S. Constitution, its amendments, and applicable federal statues (like the ADA), not U.S.C. § 1983

        - 42 U.S.C. § 1983 is the basis of federal court jurisdiction, not a cause of action:
            - "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity…"
        - See also 42 U.S.C. § 1331: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution . . . of the United States."
    - Supplemental jurisdiction allows claims that could not have entered federal court on their own to be heard by a federal court if they are part of a case over which the court has subject matter jurisdiction. For example, if a correctional officer assaults a prisoner, this conduct could violate the Eighth Amendment and in state law (battery) which the federal court would normally have no jurisdiction to hear.
    - Consider statutes like the ADA and the Rehabilitation Act

    - <u>Eighth Amendment</u>:
        - Excessive bail shall not be required, nor excessive fines imposed, …nor cruel and unusual punishments inflicted; i.e. assaults, medical claims
            - Available *after* client has been sentenced
    - <u>Fourteenth Amendment</u>:
        - No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the US; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
            - A jail (county or city), that is, *pre-trial* detainees (assaults, medical, access to law claims), same substantive rules as 8th amendment claims
            - Penitentiary and jail: access to law, improper hearings, etc.
    - <u>First Amendment</u>:
        - Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
            - Penitentiary – religion, retaliation, speech, etc.
- Remember:

- Requirement of physical injury to recover money damages for emotional pain or suffering is necessary under the PLRA.
    - Broken bones, bleeding not always necessary. See recent cases. (Seek expert testimony)
- The Statute of Limitations – Move quickly!!!
    - Two years, no relation back;
    - See discovery rule (state law) in medical cases;
    - Case might be considered mailed (filed) when given to prison officer. *Jones v. Bertrand*, 171 F.3d 499, 501 (7th Cir.)(the mail box rule applies to time of filings grievances, etc.)
    - When applying Illinois law, the statute of limitations is tolled while an administrative appeal is pending. *Johnson v. Rivera*, 272 F3d 519 (7th Cir. 2001). There is no similar provision under Indiana law.

- **Proper Parties in Amended Complaint**
    - Improper Parties (most of the time)
        - The State of Indiana
        - The Indiana DOC
        - Correctional centers
        - County jails
        - Hospitals in jails
        - Director of the IN DOC
        - Superintendent (warden) of jail
        - Warden of prison
        - A county
    - Whether a defendant can be sued is a question of *State*, not federal law
        - The State of Indiana is immune from suit
        - Judicial immunity – possibly exists for members of Prisoner Review Board, grievance, discipline hearing officials
            - *See Trotter v. Klincar*, 778 F.2d 1177, 1180 (7th Cir. 1984)
    - Should I name prison staff in their official v. individual capacities, or both?
        - Claim against an *official* is a claim against the entity that employs him. *Kentucky v. Graham*, 473 U.S. 159, 165 (1985)
            - Money damages: individual capacity
            - Injunctive relief: official capacity
        - If sue private individuals, consider whether public employee or private service provider; consider including a county or city as nominal party defendant for collection purposes
- Can I and do I want to sue a county, a municipal corporation, or a city or town that operated the jail where plaintiff was harmed in addition to their own employees?
    - Remember: these entities normally not liable for acts of employees.

- **o** The *Monell* doctrine – *Monell v. New York City*, 436 U.S. 658, 694 (1978); See *Los Angeles County v. Humphries*, 131 U.S. 447 (2010) for detailed explanation and Seventh Circuit civil instructions
  - **§** Required proof is much broader: the existence of a policy or practice that was the proximate cause of plaintiff's injuries

- What about private providers under contract to the IDOC in addition to their employees? Ex. Medical providers and food
  - **o** Same proof requirement as cities and counties. *But see Shields v. Illinois Department of Correction*, 746 F.3d 782, 790 (7th Cir. 2014) (finding "substantial grounds to question the extension of the *Monell* holding for municipalities to private corporations").
  - **o** Be sure to track Court's 1915A order if upholds pro se complaint as stating a cause of action. These instructions also are a guide to the proof you will require to sustain your cause of action.
  - o Requirements for Liability of Individual Defendants:
    - **§** Must have personal involvement – *a constant principle*
    - ***§*** May be sin of either commission (i.e. an assault) or omission (i.e. a **knowing** failure to intervene when wrongful conduct by officer or other prisoner observed or **knowing** failure to provide medical care where prisoner's serious medical condition observed)
    - **§** No *respondeat superior* liability
- How to determine who is a proper party
  - **o** Keep in mind, prisoners have difficulty identifying correct names of correctional personnel and other prisoners
    - **§** Example: the *Dorn* case; 15-359? WD Mich
    - **§** Rule 15: adding a party after statute has run is very difficult
    - **§** Prisoners often have nicknames; real names unknown
  - **o** Sources to determine who should be defendants
    - **§** Disciplinary Report – See Appendix 3
    - **§** Offenders Grievance – See Appendix 4
    - **§** Incident reports
    - **§** Internal Affairs Investigation
    - **§** Sign-in logs
    - **§** Medical Records
      - The Indiana Department of Corrections
      - Marion County Jail
      - Private hospitals where prison or jail sends prisoner for treatment (Regional in Terre Haute)
      - Private health providers – i.e., Corizon
    - **§** Other providers – Aramark (provides Kosher meals)
    - **§** Daily logs or print-outs of prison or jail – show where prisoners are celled and personnel assigned

- Pictures of personnel
- Deposition of key personnel – esp. pursuant to FRCP30(b)(6)

- Procedural methods to learn identity of proper parties
  - Opposing counsel (occasionally)
    - If substantial difficulty, especially where plaintiff has named only very high ranking officers, move the Court for leave to do discovery prior to filing the amended complaint, naming the warden, for example, as a nominal party plaintiff for purposes of discovery
  - Formal discovery
    - Distinction between IDOC and individual officers; in most instances IDOC and County (jail) are not a party. Attorney General appears for individuals, not prison or jail.
    - Same is true for hospitals; insurance attorneys appear for individual medical staff, not hospital itself
    - FOIA requests and written consents very slow and often unsatisfactory
  - FRCP 34: requests for production of documents (to parties only)
  - FRCP 45: subpoena for persons and documents and access to premises (same scope as R. 34, run to non-parties)
  - Rule 30(b)(6): notice of deposition; requires party to produce individual(s) and documents that relate to stated subject matter. See App. 9. Rule states:
    - *Notice or Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or corp, a partnership, an assoc., a government agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph does not preclude a deposition by any other procedure allowed by these rules.
    - FRCP 45 subpoena requires a *non-party* to do the same.
      - Great time and expense saver – puts burden of identification on prison, jail, hospital, etc. The rule can be used to identify additional defendants, names on medical records where unreadable; who in

organization has knowledge of facts – i.e. policies and practices.
        - Qualified professional – especially to help read medical records, identify individual providers mentioned in records
- Form and Content of Amended Complaint
    - Torts 101: duty, breach of duty, proximate cause, damages. The source of duty is normally found in Amendments (Bill of Rights) to the U.S. Constitution and Federal statutes.
    - Factual specificity – enhanced U.S. Supreme Court requirements
        - Must allege enough facts to show likelihood of ability to prove cause of action. Read *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007)
        - Use the seventh circuit pattern instructions, if available, to determine the necessary allegations for your amended complaint, but be careful. For example:
        - Seventh Circuit Pattern Instruction #7.11 failure to protect:
            - (1) Describe who the attackers were and what they did e.g., hit, kicked, or struck the plaintiff; (2) defendant was deliberately indifferent to the substantial risk of that such an attack; (3) defendant's conduct caused harm to plaintiff; (4) defendant acted under color of law.
        - Suggestion – while para. 1, if completed, is factually sufficient as an allegation, para. 2 is not; allege facts which demonstrate how defendant knew there was a substantial risk of an attack on plaintiff

3:30 Break

3:45 Serving the Defendants

- Determine status of service when you are appointed.
- The S.D. of Indiana takes seriously its obligation under Rule 4(c)(3) of the Federal Rules of Civil Procedure to assist plaintiffs authorized to proceed in forma pauperis with effecting service on the defendants. The Court regularly relies on the Federal Rule 4(d) waiver of service provisions.
- It would be unusual in the S.D. of Indiana for counsel to be appointed prior to at least one defendant appearing in the case and filing an answer to the complaint.
- If after you are appointed you determine that an individual has not been served (that should have been served – i.e., they were not dismissed at screening) you should notify the court.

Starting discovery

- Sequence
- Talking to inmate witnesses
- Fed. Rule 26: oral depositions – how format might differ from our private cases

    - All officers or other witnesses noted in records or on defendant's witness lists?
    - Use your judgment – witness may already be committed in report, etc.
    - Video conferencing to save travel
    - Telephone depositions
    - Do I need a transcript of every deposition?
- Documents
- Interrogatories
- Visiting the scene: Fed. Rules 34, 45
- Requests to admit

Additional Causes of Action:

- Excessive Force
    - Post conviction: plaintiff must prove the following by a preponderance:
        - (1)Defendant used force on plaintiff;
        - (2)Defendant intentionally used extreme or excessive cruelty toward plaintiff for the purpose of harming him, and not in a good faith effort to maintain or restore security or discipline;
        - (3)Defendant's conduct caused harm to plaintiff;
        - (4)Defendant acted under color of law
            - In deciding whether plaintiff has proved that defendant intentionally used extreme or excessive cruelty toward plaintiff, you may consider such factors as:
                - The need to use force
                - The relationship between the need to use force and the amount of force used;
                - The extent of plaintiff's injury;
                - Whether defendant reasonably believed there was a threat to the safety of staff or prisoners;
                - Any efforts made by defendant to limit the amount of force used.
    - Arrestee or pretrial detainee
        - *Kingsley v. Hendrickson*, 135 U.S. 1039 (2015)
            - The appropriate standard is objective, not subjective, for plaintiff pretrial detainee to prove that an officer used excessive force. The appropriate analysis focuses on "the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight." The objective inquiry must also take full consideration of the jail's need for "internal order and discipline."

- Range of non-exhaustive considerations relevant to the objective inquiry, including: "the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting."
- "The Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment" but "in the absence of an expressed intent to punish, a pretrial detainee can nevertheless prevail by showing that the actions are not 'rationally related to a legitimate non-punitive governmental purpose' or that the actions 'appear excessive in relation to that purpose.'" Thus, "a pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose."

§ 7th Circuit Model Instruction 7.08 Fourth Amendment/Fourteenth Amendment – excessive force against arrestee or pretrial detainee –
- Plaintiff must prove by a preponderance of the evidence:
  - Defendant used unreasonable force against Plaintiff;
  - Because of Defendant's unreasonable force, plaintiff was harmed;
  - Defendant acted under color of law.

- Access to Courts
  - 7th Cir. Model Instruction 8.02 Denial of Prisoner's Access to Court
  - To succeed in a claim of denial of access to court, plaintiff must prove each of the following things by a preponderance of the evidence.
    - § Defendant intentionally did at least one of the following things: [describe conduct];
    - § Defendant acted "under color of law" (a person performs, or claims to perform, official duties under any state, county, or municipal law, ordinance, or regulation);
    - § Defendant's conduct hindered plaintiff's efforts to pursue a legal claim;
    - § The case which plaintiff wanted to bring to court was not frivolous. (A claim is frivolous if it is so trivial that there is no chance it would succeed in court or be settled out of court after it was field);
    - § Plaintiff was harmed by defendant's conduct.
      - Committee Comment: Judges should include the parenthetical material concerning whether Plaintiff's claim was frivolous

only if this presents a factual issue in the case. *See Lewis v. Casey*, 518 U.S. 343, 353 (1996); *Thompson v. Washington*, 362 F.3d 969, 970 (7th Cir. 2004)("If your legal papers are confiscated in a doomed proceeding, there is no harm and no basis for a constitutional suit . . . even though there is always a chance that the court would have ruled erroneously in your favor.") *Cf. Walters v. Edgar*, 163 F.3d 430, 433 (7th Cir. 1988)("probabilistic" harm, which is nontrivial, will support standing for prospective injunctive relief).

- First Amendment
  - *See Turner v. Safely*, 472 U.S. 78 (1987). A "reasonableness test" will determine if a prison/jail denied a prisoner First Amendment Rights to published and similar materials. But the 7th Circuit has been increasingly deferential to the decisions of prison officials. In *Unson v. Gaetz*, 673 F.3d 630 (7th Cir. 2012), the court ruled IL prison officials did not violate 1st Am. when they denied an inmate two medical books about drugs. Broad range of deference is given to prison officials in making these types of reading-material decisions.
  - Prisoners have 1st Am. rights, but only those rights which are consistent with the legitimate objectives of prison officials. *Pell v. Procunier*, 417 U.S. 817, 822 (1974)("A prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrective system."). Prisoners have a first amendment right to alert others about a prison official's misconduct, but they must do so in an appropriate way to the appropriate audience. For example, a prisoner has no 1st am right to speak to a prison employee in a "confrontational, disorderly manner." *Watkins v. Kasper*, 599 F3d 791, 797-98 (7th Cir. 2010); *Holleman v. Penfold*, 501 Fed.Appx. 577, 2013 WL 647313 (7th Cir. 2013)(prisoner's confrontational refusal to obey lock up order as a protest to short meal time was not a First Amendment protected activity). A prisoner has no First Amendment right to use insulting, threatening, or false language, even if couched in a prison grievance or letter. See e.g., *Hale v. Scott*, 371 F.3d 917 (7th Cir. 2004)(inmate had no protected 1st Am. right to state libelous rumor in grievance that officer was engaging in sexual misconduct); *Felton v. Huibregtse*, 2013 WL 2249536 (7th Cir. 2013)(inmate's letter to warden outside of grievance process stating "any idiot could see" was not protected speech). A prisoner has no 1st Am right to challenge prison conditions in a manner which creates security risks, such as circulating a petition. See *May v. Libby*, 256 Fed.Appx. 825, 829 (7th Cir. 2007)(banning petitions to maintain control over group activity by prisoners is a reasonable response to a legitimate penological concern).
- Failure to Provide Medical Care (See separate seminar outline on Medical Claims)

- 7th Circuit Pattern Instruction 7.12 Failure to Provide Medical Attention
  - Plaintiff must prove each of the following things by a preponderance:
    - Plaintiff had a serious medical need;
    - Defendant was deliberately indifferent to Plaintiff's serious medical need;
    - Defendant's conduct caused harm to Plaintiff;
    - Defendant acted under color of law
- Pattern Instruction 7.13 Definition of Serious Medical Need
  - When I use the term serious medical need, I mean a condition that a doctor says requires treatment, or something so obvious that even someone who is not a doctor would recognize as requiring treatment. In deciding whether a medical need is serious, you should consider the following factors:
    - The severity of the condition;
    - The harm [including pain and suffering] that could result from a lack of medical care;
    - Whether providing treatment was feasible; and
    - The actual harm caused by the lack of medical care
- Pattern instruction 7.14 Definition of Deliberately Indifferent
  - Defendant actually knew of a substantial risk of [serious harm] or [describe specific harm to plaintiff's health or safety], and defendant consciously disregarded this risk by failing to take reasonable measures. If defendant took reasonable measures to respond to a risk, then he was not deliberately indifferent, even if plaintiff was ultimately harmed.
- Bad medical care: some care does not necessarily defeat claims *Snipes v. DeTella*, 95 F.3d 586, 592 (7th Cir. 1996)
- More than negligence: *Estate of Cole v. Fromm*, 94 F.3d 254, 261 (7th Cir. 1996)
  - Negligence – failure to provide care that a reasonably careful physician would provide
  - Then build to reckless disregard (8th or 14th Amendment)
  - Circumstantial evidence –can be used to establish subjective awareness and deliberate indifference. *Thomas v. Cook County*, 588 F.3d 445, 452-3 (7th Cir. 2009)
  - Obtain medical records of client
    - Rules 34, 45;
    - IDOC releases – contact prison legal coordinator for current form; separate form for mental health records;
    - Note: there may be private hospitals as well.
- Learn about the medical issues yourself
  - The client – get his records and discuss his situation with him;

        - Hospital/medical records
        - County jail
        - Private hospital
        - Internet
        - Treatises
        - Consultant
    - Necessity of retained expert – do you really need one?
        - How can you develop necessary proof without a retained expert?
        - In many instances defendant medical caregiver or other type of defendant will not deny standard of care or knowledge of the standard. There will be confession and avoidance. For example:
            - I did not see the patient;
            - The patient refused care;
            - The wrong decision was made by another caregiver
        - You can develop the standard of care or conduct in several different ways without a retained expert:
            - Examine the federal rules of evidence for short cuts that are inexpensive
                - Adverse examination of defendant (Rule 611c);
                    - Ask leading questions. For example, would patient's condition be an adequate cause of pain? If untreated, would condition become permanent?
                - Use of learned treatises; Rule 803(18)
                - Public reports and records; Rule 803(8)
                - Judicial notice; Rule 201
            - Hospital records, especially outside of prison or jail often will contain orders, directions that prison/jail does not follow;
            - Policies and protocols of IDOC and hospital
    - If you need one, how do you get one?
        - Look to sources around you:
            - Your own doctors, at least for recommendations;
            - Other members of your firm;
            - You firm's clients
            - Local hospitals
            - Online

Summary Judgment by Defendants

- Keep in mind constantly and from the beginning:
    - Federal Court's local rules,
    - Duty of non-movant: must produce admissible evidence. Cannot rely on unverified complaint. *Celotex . Catrett*, 477 U.S. 317, 322 (1986)

- **o** Affidavits – start planning ahead

Settlement

- Timing
- Nature of defendant (IDOC employee v. private medical or other provider w/insurance v. city or county)
- Amount
- Nature of release – contact Jim Chapman for a form with commentary

Reimbursement of expenses- prepayment

Proposed Local Rule 87 allows counsel to seek reimbursement and prepayment of expenses. This process may be further developed in a General Order.

Current Local Rule 4-6 allows for reimbursement of costs under certain circumstances.