PRISONER CIVIL RIGHTS LITIGATION: THE MEDICAL CLAIM

U.S. District Court, Southern District of Indiana

INTRODUCTION

How the seminar is conducted-interactive: "We all have a piece of the truth"

You-the participant-may start asking questions, making comments starting NOW. **So we expect you to share your knowledge and experience.**

We may or may not follow this agenda or reach all of it.

The law is not difficult; rather, how do I get from A to B, how do I identify proper parties defendant and garner the facts with a client kept in his cell almost all day are the challenges.

Contact Chapman if you need citations

Why a seminar devoted entirely to prisoner medical claims?

The most numerous type of claim-esp. failure to treat or delay in treatment

The most challenging for appointed attorneys:

Many appointed attorneys have no experience in medical issues and sometimes little experience with Federal Procedure.

The concept of reckless disregard, proximate cause, etc., can be "slippery."

The client is almost always in prison, not easily available for examination, preparation;

There may be the necessity of expert medical testimony.

How do we obtain on a limited budget or **avoid**?

WHAT RESOURCES ARE AVAILABLE TO YOU?

"Recruited Counsel's Handbook for Prisoner Litigation" (http://www.insd.uscourts.gov/sites/insd/files/RCPLHandbook.pdf)

"Anatomy of a Prisoner Civil Rights Case" Good introduction to this type of litigation. Write Chapman for a copy if you do not have.

"The Prison Litigation Reform Act" by John Boston

http://www.illinoislegaladvocate.org/uploads/8032theplra0312.pdf

Don't print-very long.

A pleading/research/deposition bank

Not yet a ListServ; but Chapman has it.

Contact J. Chapman 312/593-6998; e-mail: JamesPChapman@aol.com

Feel free to contact Jim at any time (and more than once)

LET'S START AT THE BEGINNING:

1. THE CLERK HAS JUST INFORMED YOU THAT YOU HAVE BEEN APPOINTED TO REPRESENT A PRISONER IN A *PRO SE* ACTION: WHAT DO I DO?!!!

a) Some deep breathing;

b) Read the appointment letter carefully

-name and number of case

-help that is available to you.

c) Obtain:

a) the *pro se* complaint;

b) the docket sheet (what has happened, what is going to happen-the next date);

c) any critical orders and adversary pleadings, if any.

d) the Court's 28 U.S.C. § 1915A order, if any.

d) Read the § 1915A order (see sample, Appendix 1 attached)

The statute states in part:

> "a) Screening.— 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."

-what the order *may* contain:

-that a cause(s) of action has been properly alleged;

-might be helpful to defeat a subsequent motion to dismiss under FRCP 12(b)(6).

-what *causes of action* or *parties* have been dismissed;

-whether the complaint has been dismissed, but not the action; and that appointed counsel has __ days to do FRCP 11 due diligence and file an amended complaint if that is appropriate;

-arrangement of narrative *pro se* allegations into counts;

-service of summons is stayed.

-appointment of counsel.

2. REVIEW THE *PRO SE* COMPLAINT

-isolate the allegations regarding medical treatment or a lack thereof.

-determine if the medical claim:

a) Involves improper treatment;

b) Involves delay in treatment;

This is by far the most typical claim and the one we will consider in detail in this seminar;

c) Or both;

d). Failure to treat at all;

Will **injunctive relief** be required to obtain treatment.

-if necessary to early understanding of medical claim, do basic research on the Internet or medical text or dictionary.

The Internet has often more than you want to know

3. NEXT ESTABLISH A SOUND, TRUSTING RELATIONSHIP WITH THE PRISONER-CLIENT--OBTAIN MEDICAL AND GRIEVANCE DOCUMENTS HE HAS.

a. Determine where your client is located-prisoners are often transferred without notice.

-if in a prison operated by the Indiana Department of Correction (IDOC), check the IDOC's web-site (http://www.in.gov/apps/indcorrection/ofs/ofs); using the "Offender Search" page, you can search by your client's name or prisoner number

-if a county jail, call that jail to verify client is still there.

b. Write to your client as soon as possible

The client may already have received a court notification of your appointment and will be wondering when he will hear from you.

In your letter:

Introduce yourself;

That you are reviewing his complaint, doing other investigation, etc.

That you will travel to see him on or about X date

That he should bring all medical and grievance records with him on the visit.

c. Determine how your envelope should be addressed (so your mail will not be returned)

-double check on the IDOC web-site or with the county jail that your client is where you think he is and what his *registration number* is.

-on the **envelope**, write carefully:

i) your client's correct name and registration number;

ii) the prison's address for inmate mail;

iii) "Confidential attorney-client communication" or words to that effect.

iv) For the return address on the envelope use your personal name as it is stated on the Indiana Roll of Attorneys with the Indiana Supreme Court, not your firm's name; the prison will check your registration. For example:

James P. Chapman, Esq.
Attorney at Law
6953 Old Highway 13 (*where my office is*)
Carbondale, IL 62901

d. Consider a client retention letter (Court web-site). 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 me, but I will 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. See your appointment letter; check Southern District LR 87 for details. Keep at least rough track of time.

e. Other considerations in developing a sound attorney-client relationship:

-Cut the client a little slack--look where he's imprisoned (think: "Shawshank Redemption")
-Treating your client as you would a fee paying commercial client.
-The power of "NO"
-Good communication--get client's materials and thoughts
-Fear

-Ethics require that we be affirmative in our analyses and recommendations--we are not "potted plants;" but the client has the last word unless we are requested to do something improper.

-pay attention!!!

f. Visit the client as soon as possible

-there is detailed information about visiting your client in the Recruited Counsel's Handbook for Prisoner Litigation on the Court's website

-determine where the client is (again)-prisoners are transferred all the time

-contact the prison or jail legal liaison or coordinator

-what must you submit, if anything, to visit

-what can you bring with you like legal materials, etc.

-don't even think about bringing your laptop, cell phone;

-write your client that you are coming.

-advise him what documents to bring to visit, esp. medical records, grievances (see section on Exhaustion of Administrative Remedies below), and all other documents;

-determine if client is in *segregation*; alters nature of visit.

-bring your state identification (driver's license) and Attorney card;

-if client in a prison 150 miles or more from your home or office, consider driving to town near prison the night before; so you can get into prison early.

-ask how early you can get in.

g. Telephone calls to prisoner

-discuss procedure with legal liaison; make sure call is secure.

4. UNDERSTAND THE STRUCTURE OF PRISON HEALTH CARE PROVIDER SYSTEM FOR INDIANA PRISONS AND COUNTY JAILS

Why is it important? Discovery!

Who administers medical care in prisons and some jails besides facility employees?

-Corizon Health and other contract providers

-hospitals outside of prisons and jails

a. The Indiana Department of Correction
Security Staff (cases workers (medical technicians, etc.)
may have two components: 1) assault by officers or officers' failure to protect against assault and 2) officers' refusal to summon medical care.

b**.** Corizon Health (or other independent contractor that provides medical care to prisoners)
Various Higher Level Decisionmakers
Doctors
Pharmacist (off-site)
Nurses
Nurse Practitioner
Other medical staff.

c. Consulting doctors
Who are they, how are they utilized?
How could they be helpful to our case.?

d. Outside Providers (*e.g.*, IU Health, Eskenazi, etc.)
Again: how are they utilized; how could they be helpful to our case?

e. Procedures when prisoners are examined and for prisoners to obtain:
treatment
Intake
Transfers
Annual Physicals
Prisoner Initiated

Sick Call slip (one problem per visit rule)
Appointment with nurse
Referral to doctor (co-pay)
Chronic Clinic
"SOAP" medical record (see Appendix 8)
Pharmaceuticals--ordered from outside
Pharmaceuticals--ordered from outside
Delivery of Meds
Follow-up with Doctor/Nurses (new "SOAP" record created)

f. Outside Consultation
Utilization Reviews
Second opinions
Transmittal of orders
Who pays (IDOC/Corizon contract)

g. Review and supervision (Wexford in Illinois does these activities, Corizon likely has similar procedures)
Quarterly Meetings w/ IDOC Medical Director (privilege issue)
Monthly "Continuous Quality Improvement" Reviews (privilege issue)
Monthly "reconciliations" reports to IDOC Medical Director
All denials of outside consult/treatment received by prison Health Care Administrator with copy to IDOC Medical Director.

h. Grievances: reviewed by Health Care Administrator; not a quality of medical care review. *See section at agenda's conclusion for grievance procedure.*

i. County Jails

5. WHAT ARE TYPICAL MEDICAL CARE SYSTEM BREAKDOWNS

Intake Screening-cursory; no good follow-up; prison extremely overcrowded.
Delay in scheduling sick calls.
Failure to review "whole person" and develop meaningful treatment plan.
Lack of continuity of care-treat each contact as new "SOAP."
Delay in outside referrals.
Delay in "second opinions."
Economic incentive to avoid expensive care–particularly outside (*e.g.*, Hep C., cancer, AIDS [paid for by IDOC] transplants)
Failure to follow orders/recommendation of outside hospital staff and other outside providers.
Lack of follow-up (*e.g.*, physical therapy, monitoring serum levels, etc.)
Lack of coordination within the IDOC or jail.
-housing/job assignment issues
-diet issues

6. NOW LET'S REVIEW THE LAW ON PRISONER MEDICAL CLAIMS

Why are we in the Federal Court?

a. Basis of jurisdiction is 42 U.S.C. § 1983:

"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 . . ."

Note: this statute is **not** a cause of action itself.

b. On which right, privilege or immunity secured by the Constitution and laws shall I proceed?

Penitentiary prisoner after conviction: The source of duty for a penitentiary prisoner's medical claim is normally found in the *Eighth Amendment* to the U.S. Constitution which provides in part:

Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*

Pretrial detainee: For a *county* or *city* jail prisoner awaiting trial, the *Fourteenth* Amendment applies.

Is there a difference in substance between proceedings under the Eighth and the Fourteenth Amendments?

For our medical claim purposes, there is may be a key difference in principle between the two Amendments. Until recently, in other words the required proof will be virtually identical for a prisoner in a penitentiary or in a jail (awaiting trial).

But see *Kingsley v. Hendrickson*, 14-6368, June 20, 2015, where the U.S. Supreme Court held that in an *excessive force claim* by a pretrial detainee, an objective standard based on reasonableness would apply, not the subjective intent standard of the Eighth Amendment and 14th as historically interpreted.

The key question: will the Court apply this new standard to medical claims by pretrial detainees?

What about Federal statutes like Americans with Disabilities Act?

What are the advantages if available. Research this issue. It's easy.

7. WHAT ARE THE ELEMENTS OF MEDICAL PROVIDER CONDUCT THAT WILL CONSTITUTE A CONSTITUTIONAL VIOLATION?

Here is the basic principle:

The Eighth Amendment prohibits cruel and unusual punishment; that guarantee encompasses a prisoner's right to medical care [see 14th Amendment for pre-trial detainees in jails]. "Deliberate

> indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

Let the Seventh Circuit model instructions [see Court's web-site] be your guide for your likely amended complaint and proof development:

Instruction #7.12: Failure to provide medical attention

To succeed on his claim of failure to provide medical attention, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. Plaintiff had a **serious medical** need;
2. Defendant was **deliberately indifferent** to Plaintiff's serious medical need;
3. Defendant's conduct **caused** harm to Plaintiff;

[4. Defendant acted under color of law]."

Instruction #7.13 Definition of a 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 it 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.

Instruction #7.14 Definition of "deliberately indifferent"

When I use the term "deliberately indifferent," I mean that Defendant **actually knew** of a substantial risk of [[serious harm] or [*describe specific*

harm to Plaintiff's health or safety]], and that Defendant **consciously disregarded** this risk by failing to take reasonable measures to deal with it. [In deciding whether Defendant failed to take reasonable measures, you may consider whether it was practical for him to take corrective action.]
[If Defendant took reasonable measures to respond to a risk, then he was not deliberately indifferent, even if Plaintiff was ultimately harmed.]

Note that the above statement represents different elements of proof: one is **objective** [serious medical need]; one is **subjective** [deliberate indifference]; the last: basic proximate cause.

8. GENERAL PRINCIPLES OF LIABILITY AND DAMAGES

For virtually any individual: correctional officer to a doctor, a nurse, medical technician, Medical Director, the Warden, the IDOC director:

Must be personal involvement through a sin of commission or omission-

This is a constant principle in almost all cases

-conduct may be affirmative act or a failure to act

-No *respondeat superior* liability

Municipal corporations and corporations like Corizon

Liability of a County or City for the acts of its agents and employees.
Must show that defendant municipal corporation had a policy or practice of maltreatment that caused the prisoner-plaintiff's harm. *Monell v. New York City*, 436 U.S. 658, 694 (1978); see *Los Angeles County v. Humphries*, 131 S.Ct. 447 (2010) for detailed explanation.

But see *Shields v. IDOC*, 746 F.3d 782 (7th Cir. 2014) for very extensive dictum challenging this principle. Suggests that Wexford (Illinois equivalent

of Corizon) should be sued directly in an alternative count. *See also Daniel v. Cook County*, No. 15-2832 (7th Cir. Aug. 12, 2016)

Should I plead an alternative count directly against Corizon based on this dictum?

Advantages and disadvantages in making Corizon or County or City a party defendant.

Broadened scope of discovery and difficult nature of proof since policy or practice, often involving other incidents, must be established

Helpful if no individuals can be identified-that is, a possible last resort.

How is policy/practice established?

May actually be contained in a Corizon protocol, etc.

Should I include a State medical malpractice claim against professional care providers?

Supplemental jurisdiction allows claims that could not have entertained by a 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.

The real question do you really want to bring a State law malpractice claim?

Indiana Code § 34–18–8–4 provides in relevant part that "an action against a health care provider may not be commenced in a court in Indiana before: (1) the claimant's proposed complaint has been presented to a medical review panel ... and (2) an opinion is given by the panel."

In addition, unless the negligence is obvious to a lay person, a plaintiff must present expert testimony to establish the applicable standard of care and to show whether the defendant's conduct falls below the standard of care. *Musser v. Gentiva Health Svcs.*, 356 F.3d 751, 760 (7th Cir. 2004) (citing *Narducci v. Tedrow*, 736 N.E.2d 1288, 1292 (Ind. Ct. App. 2000)).

Advantage: negligence is standard.

But first: Requirement of a Physical Injury (PLRA)-***always an issue***.

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

What is a "physical injury" is a source of dispute. "[Y]ou cannot file a lawsuit for mental or emotional injury unless you can also show physical injury. The requirement of physical injury only applies to money damages, it does not apply to claims for injunctive and declaratory relief. Some courts have suggested the possible availability of nominal and punitive damages even when compensatory damages are barred by the requirement of physical injury. The courts are split on whether a claim for violation of constitutional rights is intrinsically a claim for mental or emotional injury in the absence of an allegation of a resulting physical injury (or injury to property). Not surprisingly, the courts differ in their evaluation of what constitutes sufficient harm to qualify as a physical injry." *www.aclu.org/files/assets/knowyourrights.*

-Broken bones, bleeding, etc. not necessary. See John Boston PLRA treatise.

-But even if no "physical injury," consider nominal and punitive damages. See *Allah v. Al-Hafeez*, 226 F.3d 247 (3d Cir. 2000) (claims for nominal damages and punitive damages may go forward); *Searles v. Van Bebber*, 251 F.3d 869 (11th Cir. 2001) (PLRA does not bar punitive and nominal damages for violation of prisoner's rights).

9. DISCOVERY: NOW LET'S IDENTIFY THE PROPER DEFENDANTS (AND QUICKLY! THAT OLD DEVIL STATUTE OF LIMITATIONS).

For obtaining documents generally FRCP 34 (production of documents) applies only to a *party defendant*. Since the IDOC and its prisons and Corizon and private hospitals are usually not parties, use FRCP 45 subpoena duces tecum with notice to your adversary.

If no party has yet appeared and you have been directed to file an amended complaint, move the Court for leave to do discovery before filing the

amended complaint, attaching proposed subpoenas, so you can determine proper parties.

Do not rely on client for records; subpoena may be more effective than release

For the care giver defendants: (*e.g.*, doctors, nurses, medical technicians etc)

Medical records

-IDOC prison treatment records

These records follow the prisoner if he is transferred to another facility;

Written request to the prison medical records department

Call prison legal liaison for proper forms to be signed by client

Rule 34 request or Rule 45 subpoena duces tecum for prison to produce

-Corizon: See earlier discussion for documents they may have. Same approach as IDOC or jail.

-Private hospitals if prison administration transfers prisoner there for treatment. Call records librarian for acceptable request format or use Rule 45 subpoena duces tecum for hospital to produce records.

For correctional officers and other prison personnel

Consider the following typical prison (and sometimes jail) documents. They may contain pertinent information about the case, injuries suffered, witnesses:

1. Disciplinary reports;
2 Prisoner grievances;
3. Incident reports;
4. Internal Affairs investigation;
5. Sign-in logs);
6. Daily computer printouts. Where prisoners/personnel located on a given day.

Dealing with likely difficulty in reading medical records, esp. to determine parties defendant

Discuss with adversary attorney

Engage a medical consultant (intern, resident, nurse) to review.

OR

Make the IDOC or Corizon or other institution tell you who was involved in the treatment of your client. Consider:

FRCP 30(b)(6) Notice of a Subpoena Directed to an Organization:
"In its notice or subpoena, a party may name as the deponent a public or private corporation . . .and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers . . .; and it may set out the matters on which each designated person will testify.

-use this Rule to determine generally who were care givers, their location, etc. **and** what documents they rely upon for testimony.

10. BUILDING YOUR FAILURE TO PROVIDE MEDICAL CARE CLAIM; DO I NEED A MEDICAL EXPERT?

Judge Posner in *Jackson v. Pollion*, 733 F.3d 786, 791 (7th Cir. 2013) has indicated the broad approach that can be taken:

"To determine the effect on the plaintiff's health of a temporary interruption in his medication, the lawyers in the first instance, and if they did their job the judges in the second instance, would have had to make some investment in learning about the condition. *That could have taken the form of a judge's appointing a neutral expert under Fed.R.Evid. 706, or insisting that the plaintiff's lawyer obtain an expert's affidavit, or just consulting a reputable medical treatise. The legal profession must get over its fear and loathing of science.* (emphasis added)."

How do I prove "A serious medical need"-an *objective* standard?

See 7th Circuit Instruction 7.13 above: "[A] condition that a doctor says requires treatment, or something so obvious that even someone who is not a doctor would recognize it as requiring treatment."

-something so obvious that even someone who is not a doctor would recognize it as requiring treatment and wanton infliction of pain. *See, e.g., Sherrod v. Lingle*, 223 F. 3d 605, 611 (7th Cir. 2000).

-Look at the medical records themselves, either from prison or jail or an outside provider. May contain diagnosis or other pertinent matter on the condition.

-do basic medical research on Internet. Places like Mayo Clinic web-site discuss many conditions, their seriousness, consequences if not treated, etc.

-the condition may be so obvious, its seriousness speaks for itself.

-cases under this category can include officers or other prisoners severely beating the plaintiff (failure to protect). A defendant

intended to harm the plaintiff. The typical case here is an unjustified beating by a correctional officer where no apparent harm appears but plaintiff requests medical assistance.

How do I prove "deliberate indifference"?

Again first: *some* basic principles:

-more than negligence: *Estate of Cole v. Fromm* 94 F.3d 254, 261 (7th Cir. 1996)

-circumstantial evidence "Circumstantial evidence can be used to establish subjective awareness and deliberate indifference, *Hayes*, 546 F.3d at 524" *Thomas v. Cook County*, 588 F.3d 445, 452-3 (7th Cir. 2009). -typical defense-"we cared for the plaintiff-what does he want?": Some care does not necessarily defeat claim. *Snipes v. DeTella*, 95 F.3d 586, 592 (7th Cir. 1996). Example: long term and short term medication for treatment of asthma.

-*Cole Estate v. Pardue*, 94 F.3d 254 (7th Cir. 1996) summarized the important U.S. Supreme *Farmer v. Brennan*, 511 U.S. 825, concluding with two key points:

1. Employing "reckless" as defined in the criminal law, the Court stated that recklessness may occur when a person disregards a risk of harm of which he/she is aware or *had* to be aware.

2. Plaintiff may establish subjective awareness of the risk by proof of the risk's obviousness.

3. Pain caused by delay in treatment: Delays (not to mention refusals) in treating a *non-life-threatening but painful condition* may constitute deliberate indifference to a serious medical need. *See, e.g., Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 830 (1994).

4. Standard of care often not an issue. Often care provider will admit proper standard of care and even consequences of failure to provide such care; but will cast blame elsewhere or claim that client refused care or he or she was not on duty, etc.

-<u>Suggestion: start with proof of what a reasonably careful practitioner would have done under similar circumstances as your foundation; and build from there. In other words, that a careful practitioner had to know what was proper to do; and that the practitioner failed to do was proper.</u>

Sources of standards of what is proper treatment that practitioner, at least inferably, knew about and recklessly disregarded. Consider the following

-orders/directions from outside hospitals and consultants that prison/Corizon failed to follow. In other words, the medical records themselves.

-the doctors and other medical providers from outside facilities.

-medical books for lay persons. The Internet

-medical textbooks (local teaching hospital library).

-treatment protocols (both IDOC and Corizon or other independent medical provider).

-standards of care from accrediting authorities (*e.g.*, American Corrections Ass'n; National Commission on Correctional Health Care, 1145 W. Diversey Pkwy., Chicago, IL 60614, 773/880-2424, e-mail: info@ncchc.org, Federal Bureau of Prisons, etc).

-prison logs-*e.g.*, suicide watch logs, prison health care unit logs; OTS housing records; Often care provider will admit proper standard of care and even consequences of failure to provide such care; but will cast blame elsewhere or claim that client refused care or he or she was not on duty, etc. prison/jail admission and discharge logs, etc.

Use the Federal Rules of Evidence to establish the standard of care and its disregard They are good short cuts and inexpensive:

1. Adverse examination of defendant. (Rule 611(c));
    Ask leading questions.
    -would the patient's condition be an adequate cause of pain?
    -if untreated, would or could his condition become permanent?
    -do you agree with the following statement [from any kind of article]?
    -would the proper treatment for [condition] be . . . .[describe?]

2. Use of learned treatises; Rule 803(18). These can be established through adverse examination, judicial notice under Rule 201, and expert testimony.
    -note: these materials can be used as *substantive evidence*.

3. Public reports and records; Rule 803(8).

Department of Justice reports on the Jail, consent decrees

Recent report from the IDOC.

Proximate cause (this is still Torts 101): How do I prove that defendant's misconduct caused plaintiff's condition of ill-being? That is, proximate cause

Caution: Read *Williams v. Liefer*, 491 F.3d 710 (7th Cir. 2007) **very carefully**

In cases where prison officials delayed rather that denied medical assistance to an inmate, courts have required the plaintiff to offer 'verifying medical evidence' that the delay (rather than the inmate's underlying condition) caused some degree of harm. [citations omitted]. . . ."

-review discussion above re proof of reckless disregard or indifference

-the medical records themselves While Courts have said that expert testimony could satisfy this requirement, sufficient evidence of causation might appear in the medical records themselves.

For example, orders that were not carried out.

11. IF I REALLY NEED AN EXPERT, HOW DO I FIND ONE?

Look to the sources around you:
-your own doctors, at least for recommendations;
-other members of your Firm;
-your Firm's clients;
-local hospitals
-online
-if really desperate, call Chapman for Nurse Advocates.

<u>Dealing with potential experts</u>

-First, learn about conditions/recommended treatment from medical records and Internet
-Prepare succinct summary of case and compendium of key records for expert.
-Causation-types of questions: give the potential experts some alternatives on causation opinion: Fed. Rules of Evidence (701, 702, 703);"Is"; "Sufficient to cause"; "Adequate cause."

What to do if expert cannot personally examine prisoner-client?
Federal of Evidence Rule 702: "Testimony of Experts." Might give opinion based on medical records, statements/depositions of plaintiff, other medical personnel-matters that professionals in the same field customarily rely upon.

12. SUMMARY JUDGMENT BY THE DEFENDANT(S)
Keep in mind constantly and from the beginning.
-Federal Court's local rules, if any.
-duty of non-movant: must produce admissible evidence. Cannot rely on unverified complaint. *Celotex v. Catrett*, 477 U.S. 317, 322 (1986)
-affidavits-start planning ahead.

13. EXHAUSTION OF ADMINISTRATIVE REMEDIES-DEAL WITH FIRST!!! (There is a separate seminar on this subject-more detail-if necessary ask Jim Chapman for seminar outline)

The Prison Litigation Reform Act (PLRA) 42 U.S.C. § 1997(e):
"(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:
IDOC prisons: Offender Grievance Process: IDOC Policy 00-02-301
A County Jail: Determine if jail has procedure; if so, obtain.
PLRA section really means what is says See -*Pavey v. Conley*, 544 F.3d 739 (7th Cir. 2008)-leading case:

-applies even if administrative process cannot give relief prisoner seeks (esp. $).

-Affirmative defense that can be waived.

-Court must resolve exhaustion issue, if raised, before any other aspect of case proceeds;

-Hearing before the trial judge, not a jury.

-Defendant may raise in answer followed by motion for summary judgment

-Exhaustion must occur before suit is filed, cannot occur after suit filed.

-If no exhaustion or excuse for no exhaustion, then court must dismiss without prejudice (unless no way exhaustion could ever occur).

-Judges conduct hearings in different ways.

For excellent analysis and unlimited citations, see "The Prison Litigation Reform Act" by John Boston

http://www.illinoislegaladvocate.org/uploads/8032theplra0312.pdf

Don't print-very long.

There are many variations on the theme as well as "wiggle room" despite prisoner's lack of strict compliance.

Practice points

-although failure to exhaust in 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 his materials on grievances/exhaustion.

-if a defendant's answer raises failure to exhaust, ask opposing counsel if she or he is really serious; if not, ask that defense be withdrawn, esp. when you can show through documents you have that exhaustion has occurred.

-if serious, then ask for agreement to appear before trial judge to set schedule to resolve the exhaustion issue before work on the substantive case starts with discovery limited to the exhaustion issue.